Volume 14 – Part 1 – 2025 ISSN 2050-9014

LAW AND ECONOMICS YEARLY REVIEW

ISSUES ON FINANCIAL MARKET REGULATION, BUSINESS DEVELOPMENT AND GOVERNMENT'S POLICIES ON GLOBALIZATION

Editors

M. ANDENÆS – F. CAPRIGLIONE – R. M. LASTRA

C. PAULUS – L. REICHLIN

FONDAZIONE CAPRIGLIONE Onlus

in association with

Queen Mary University of London

LAW AND ECONOMICS YEARLY REVIEW

www.laweconomicsyearlyreview.org.uk

Mission

The "Law and Economics Yearly Review" is an academic journal to promote a legal and economic debate. It is published twice annually (Part I and Part II), by the Fondazione Gerardo Capriglione ETS (an organization aimed to promote and develop the research activity on financial regulation) in association with Queen Mary University of London. The journal faces questions about development issues and other several matters related to the international context, originated by globalization. Delays in political actions, limits of certain Government's policies, business development constraints and the "sovereign debt crisis" are some aims of our studies. The global financial and economic crisis is analysed in its controversial perspectives; the same approach qualifies the research of possible remedies to override this period of progressive capitalism's turbulences and to promote a sustainable retrieval.

Address

Fondazione Gerardo Capriglione Onlus/o Centre for Commercial Law Studies Queen Mary, University of London 67-69 Lincoln's Inn Fields London, WC2A 3JB

United Kingdom

Main Contact

Fondazione G. Capriglione ETS - fondazionecapriglione@luiss.it

ISSN 2050-9014

Review Process

The Review adopts a double-blind peer review process to evaluate manuscripts submitted for publication. This approach ensures that the published contributions are of high scientific quality, in line with the principles of research integrity.

Two evaluators review submissions to the Review. The evaluators are selected from regularly updated list of full professors, associate professors, and researchers in legal disciplines. After consulting with the Editor-in-Chief, the Editorial Board assigns the reviewers, ensuring that the Reviewers' areas of expertise align with the subject matter of the manuscript and that there are no conflicts of interest with the author of the submission.

The Editorial Advisory Board sends the submission and an evaluation form to the referees anonymously.

At the end of the review process, the Editorial Advisory Board sends the author an anonymous feedback form through electronic communication. The author receives anonymous feedback if even one evaluator recommends publication based on revisions. If the Editorial Advisory Board receives the revised manuscript from the author who agrees with the feedback, in accordance with the Editorial Board's direction, it can either send the revised submission back to the reviewer or proceed directly to publication. In the case of a positive final evaluation, the manuscript is published; otherwise, the Editorial Board can decide whether to reject the manuscript or to start an additional review phase. In any case, if there are conflicting opinions between the reviewers, the Editorial Boards assumes responsibility for the decision to proceed with publication, after obtaining the opinion of a member of the Scientific Committee selected based on subject matter expertise.

If both reviewers give a negative evaluation, the manuscript is rejected unless the Editor-in Chief authorizes its publication, deeming it to meet the journal's scientific standards.

Please refer to the Ethical Code on the journal's website for additional clarification.

CONTENTS

DEMOGRAPHIC DYNAMICS AND ECONOMIC LAW IN THE LIGHT OF RECENT GEOPOLITICAL TRENDS

Francesco Capriglione[*] - Mads Andenæs[**] - Valerio Lemma[***]

ABSTRACT: *Demographic asymmetries - declining fertility and population ageing in the Global North alongside high fertility, poverty and migration in parts of the Global South - are reshaping financial markets, welfare and fiscal sustainability; economic law is the primary governance interface calibrating efficiency, equity and human dignity. Using a law-and-economics method within an EU-centred comparative frame, the analysis proceeds along two axes: (i) fertility/ageing and family policies that lower the opportunity cost of parenthood; and (ii) migration treated as a structural, not emergency, variable. The inquiry maps the relevant frameworks (e.g. EU acquis (Dublin system, Charter of Fundamental Rights, asylum procedures), ECHR jurisprudence and non-refoulement, and WGAD standards on arbitrary detention) embedded in multi-level governance and Member-State practice, including externalisation. A case study on Italy examines its Mediterranean gateway role, outsourcing arrangements with Libya and Albania, and the Mattei Plan, exposing tensions between sovereignty claims, security narratives and economic needs. Against global uncertainty, including US policy shocks, the article advances an integrated framework aligning social goals with migration law through regulated channels, skills recognition and investment in human capital, operationalising*

[*] Editor in Chief.
[**] Professor of Law at the University of Oslo.
[***] Full Professor of Law and Economics at "Guglielmo Marconi" University of Rome.
This work is the result of joint and shared reflection by the authors. Paragraphs 9 and 10 are attributed to Mads Andenas; paragraphs 1, 6, 7, 8, 9 and 11 to Francesco Capriglione; and paragraphs 2, 3, 4 and 5 to Valerio Lemma.

solidarity and internalising demographic externalities. The policy implications provide evidence-based, legally robust guidance for EU and national regulators to reconcile demographic sustainability with econmic models and fundamental rights.

SUMMARY: 1. Introduction. - 2. Scope of the investigation: the fundamentals of demographic variables. - 3. Well-being, declining birth rates and ageing. - 4. Continued: poverty and population growth. - 5. Demographic dynamics in a reading of law and economics - 6. The problem of migration flows. - 7 Continued: … the rules of governance. - 8. The reception of irregular migrants between moral duty and contemporary political practice. - 9. The phenomenon of migration in Italy. - 10. The Trump unknown: impact on migration dynamics. - 11. Demographic dynamics and human rights. - 12. Conclusions.

1. The 21st century will be judged not only on how it managed the digital and ecological transition, but above all on how it managed the demographic balance between a young and poor South and a rich and ageing North.[1] In order to limit the scope of this investigation to the events that have affected Europe for several decades, it must be said right away that Europe is now forced to face a significant transformation of fundamental demographic variables: the success of longevity is matched by a falling birth rate, which has complex economic consequences, putting at risk - in the not-too-distant future - the stability of countries where this has

[1] This refers to some of the major issues of the 21st century, which are the subject of demographic studies and have raised critical issues due to global inequalities, threats to democracy, the exploitation of certain populations and the distorting effects of technological innovation; see CHOMSKY, MUJICA, ALVÍDREZ, *Surviving the 21st Century*, Milan - Ponte alle Grazie, 2024, *passim.* See also ARNOTT, CHAVES, *Demographic Changes, Financial Markets, and the Economy*, *Financial Analysts Journal*, 2012, which analyses demographic data from over sixty years for a large sample of countries, revealing a significant relationship between demographic transitions, GDP growth and financial market returns; a study that reinforces the thesis that demographic balance is not only a statistical variable but also a structural factor in global economic sustainability.
However, the question remains as to whether political institutions have the regulatory tools and foresight necessary to integrate this evidence into preventive, rather than reactive, demographic policies.

become a structural issue.[2]

It goes without saying that research must also take into account the conditions in the southern areas of the planet, characterised by immense population growth and endemic poverty, despite the fact that these areas are among the richest in raw materials and human potential on the globe; hence the possibility of problems that are the opposite of those found in the 'old continent'.[3]

In view of this reality, in recent times, the analysis of demographic dynamics linked to the variable size of the population has taken on particular importance, hence the special attention devoted to the trilogy of 'birth rate, ageing and migration'.[4] As a result, studies are focused on examining the many issues related to the emergence of innovative forms of inequality and frequent human rights violations, as well as other negative effects of this phenomenon, such as the

---

[2] See EUROPEAN COMMISSION, *The 2024 Ageing Report. Economic & Budgetary Projections for the EU Member States (2022-2070)*, Institutional Paper 279, Brussels, 2024, which analyses the impact of demographic ageing on public finances and the economic sustainability of Member States, emphasising how persistent low birth rates can undermine potential growth and the stability of welfare systems.
The reflections of GOODHART, PRADHAN, *Demographics Will Reverse Three Multi-Decade Global Trends*, BIS Working Paper No. 656, August 2017, according to which the great 'demographic push' that between the 1980s and the early 2000s produced wage stagnation, low inflation, reduced trade union power and other effects is set to reverse with global ageing.

[3] See, *among others*, KHANNA, *The World in Motion. The forces that are uprooting us and will shape the destiny of humanity*, trans. by Motta, Rome, 2021, a work in which the author explores how the coming decades will be characterised by intense migratory flows, induced by complex factors such as demographic imbalances, economic crises, political upheavals, climate change, etc. On this point, the author states that we are heading towards a *third revolution* of humanity – after the agricultural and industrial revolutions – centred on mobility and sustainability.

[4] See UNITED NATIONS, DESA, *World Population Prospects 2022. Summary of Results*, New York, 2022, for a documented analysis of the intertwining of low fertility, ageing and migratory movements in the 1950–2050 projections. See also EUROSTAT, *Demography of Europe – 2024 edition*, Brussels, 2024, with reference to certain comparative EU data on fertility, age structure and net migration; as well as GOERRES, VANHUYSSE, *Mapping the Field: Comparative Generational Politics and Policies in Ageing Democracies*, in *Ageing populations in post-industrial democracies: comparative studies of policies and politics*, 2012, which offers a comparative mapping of generational policies in ageing democracies, highlighting how demographic *dynamics* influence redistribution, electoral choices and the sustainability of welfare systems.

contraction of the workforce and intergenerational imbalances.[5]

Hence, we feel the need to propose a study that, with reference to this demographic reality, assesses both the overall socio-political situation of the countries affected by this phenomenon and the reactive logic that characterises the actions of some states in the face of it.

The research must focus on the reasons why economic law plays a primary role in the context outlined.[6] We are faced with events that need to be regulated so that the law can balance economic needs (labour, taxation, etc.) and fundamental rights (asylum, access, equality, etc.). The objective to be pursued is the achievement of a coherent and rational distribution of resources, so as to avoid dangerous situations of economic instability in some European countries in the future, or to prevent possible damage to the legal positions of those who are forced by hunger and war to leave their countries.[7]

---

[5] Of significant interest is the position of LIVI BACCI, *Storia minima della popolazione del mondo*, Bologna, 2015, esp. chaps. 1–2, where population dynamics are traced back to the trilogy of 'birth rate, mortality/longevity and migration'; similarly, see DE HAAS, CASTLES, MILLER, *The Age of Migration. International Population Movements in the Modern World*, 6th ed., New York–London, 2020, on the centrality of migration in the contemporary demographic regime.

[6] It is worth noting that, following the financial crisis, numerous scholars have focused on the disciplinary scope of the subject at hand, see CAPRIGLIONE, SEPE, *Reflections on economic law. Identity and scope of research,* in *Rivista Trimestrale di Diritto dell'Economia,* 2021, 385 ff., which acknowledges the need to bring the analysis of phenomena debated in the legal sphere back to the fundamentals of economic rationality, and then points to the systemic importance that this confers on investigations carried out *in this field*, ultimately leading to the identification of the 'function of law', which takes on a characterisation that is less *neutral* than in the past.

For a hypothesis of mapping the 'perimeter boundaries' of economic law, see SARTORI, *Il diritto dell'economia nell'epoca neoliberale tra scienza e metodo (Economic law in the neoliberal era between science and method)*, in *Rivista di diritto bancario*, 2022, 309 ff., a work that examines the legal rules governing the functioning of all markets (and not only banking, financial and insurance markets). On this point, see also PASSALACQUA, *Market rules, rules on the market. The question of method,* in *Rivista di diritto bancario*, 2025, a study in which the legal method is traced back to the set of criteria and processes that allow a legal problem to be resolved, in light of the parameter of legitimacy, identifying the solution that best protects and emphasises constitutionally protected values.

[7] It has long been highlighted in the literature that economic integration and the redistribution of resources among Member States are essential tools for reducing the risk of macroeconomic

In the current context of relations between countries it is impossible to avoid dialogue with constitutional, European and international law, as well as with development economics and geopolitics.[8] With regard to the latter, it should be noted that an in-depth examination of the interactions between law, economics and geopolitics allows us to focus on the *rationale* behind phenomena which, like the one we are dealing with here, have a direct impact on the legal and economic architecture of countries affected by migration processes.[9]

imbalances; not only to ensure respect for the fundamental rights of migrants, but also to minimise the negative externalities resulting from uncoordinated migration flows, where public intervention could promote allocative efficiency and, in this way, maximise social welfare; See EUROPEAN INVESTMENT BANK, *Migration and the EU – Challenges, opportunities, the role of EIB*, Luxembourg, 2016.

[8] See CORVAJA, *Foreigners and social assistance benefits: the Constitutional Court takes a step back and a step to the side*, in *Law, Immigration and Citizenship*, 3/2019, pp. 243-263, which, commenting on Constitutional Court ruling no. 50/2019 and order no. 52/2019, highlights how the issue of equality in access to social benefits for foreigners cannot be avoided and requires constant dialogue between constitutional law, European Union law and international sources.

For the purposes of this investigation, it is therefore necessary to consider the move towards a pluralistic legal system that requires lawyers to reconcile constitutional justice, obligations under EU law (Directive 2011/98/EU) and conventional principles (Article 14 of the ECHR), in the knowledge that comparison between legal systems has become essential to ensure an adequate level of protection of social rights.

In this regard, it seems useful to frame the phenomenon of population ageing as a challenge of financial sustainability and intergenerational cohesion. In fact, it prompts a variety of reflections which, using the typical tools of economic law, can start from the reflections of ROSPI, *Active ageing of the population within social cohesion between generations: the instruments of 'multilevel governance' for new welfare systems*, in *Rivista AIC*, 3/2018, 22 ff., according to which there is a need for public intervention based on *'multilevel* governance', capable of coordinating EU instruments (Regulation 1303/2013; EU Regulation 22/2014; EU Decision 940/2011) and national legislation (Law 208/2015, Art. 1, para. 538), in order to prevent conflicts between generations and promote a model of active ageing that respects human dignity and fundamental rights (Arts. 1, 2, 3 and 117, para. 2, letter m) Const.; Art. 21 Charter of Nice). The question remains open as to whether the legal system will be able to guarantee truly inclusive welfare, avoiding territorial imbalances and inequalities in access to services.

[9] See AMATO, *Immigration: European selfishness*, 2020, interview with the President of the Italian Encyclopaedia Institute, available at *www.treccani.it*, in which the author points out how, over time, the question has arisen in Europe of the capacity of individual countries to absorb migration and, therefore, of the measures to be taken to deal with excessive immigration. Thus, today, Europe's

In this context, economic law demonstrates its intrinsic ability to clarify the events that intervene in the dynamics of power relations between states. This is because the demographic variable identifies one of those political problems which, although originating from territorial issues, present a fundamental investigative profile (for economic law) in order to grasp the transformations taking place in the overall order of the planet.[10] Hence, the significant consequence that disciplinary complexes usually intended to regulate currency, finance, markets, competition, etc. appear decisive in the assessment of both certain particular events that have recently been disrupting global society and the political choices of the states that intend to address them.

2. In light of the above premise, demographic dynamics must be taken as geopolitical and legal-economic variables, so that it is possible to understand the reasons behind them, which are usually referrable to the cultural diversity of the populations of the North and South of the planet.

However, there is more. These dynamics are associated with a different level of well-being enjoyed by the inhabitants of the mentioned geographical areas, identifying the possible directions and methods that public intervention *in this matter* should take.

In an era marked by growing asymmetries – not only economic, but also sociological – among different areas of the globe, the relationship between the size of the population, its structural/qualitative character and the forthcoming

position is balanced between recognising the rights of those who arrive and combating illegal immigration.

[10] See JUSELIUS, TAKÁTS, *Can Demography Affect Inflation and Monetary Policy?*, BIS Working Paper No. 485, 2015, which demonstrates how demographic variables (age of cohorts, ratio of young/elderly dependents to working-age population) play a structural role in macroeconomic dynamics and power relations between states, influencing monetary policies, inflation rates and the stability of supranational economic equilibria.

development is anything but neutral. Demographic dynamics are not simply the product of spontaneous numerical evolution; they are rooted in profoundly heterogeneous cultural, economic and legal contexts, which in turn contribute to determining patterns of demographic growth, stagnation or decline.[11]

As already mentioned, there are opposing phenomena at play: on the one hand, high standards of living (characteristic of Europe) and, on the other, a lack of well-being (particularly evident in sub-Saharan Africa and parts of Latin America and Asia).[12] However, while the former becomes an impediment to demographic development, the latter – together with a backward cultural approach (which affects levels of responsibility in determining birth rates) – leads to an increase in births, which has been considered an obstacle to the socio-economic progress of certain countries.

The above considerations provide further support for the thesis that economic law cannot remain indifferent to the path these variables;[13] on the contrary, it is called upon to question the role it should play in accompanying, regulating and, in some cases, correcting the effects of demographic trajectories on productive structures, markets, social security systems and, more generally, on the

[11] The conclusions of PELTZMAN, *The Socio Political Demography of Happiness*, George J. Stigler Centre for the Study of the Economy & the State, Working Paper No. 331, University of Chicago Booth School of Business, 12 July 2023, which highlight how income is a significant determinant of happiness when comparing the rich and poor at a given moment in time, but not over time in relation to overall economic growth. The demographic dimension – in particular marriage and social capital – therefore appears to be central to the analysis of subjective well-being.

[12] See GALEANO, *Le vene aperte dell'America Latina,* Segrate (MI), 2017.

[13] See also the address of the Holy Father Leo XIV to the participants in *the* Third *World Meeting on Human Fraternity*, Sala Clementina, Friday, 12 September 2025, in which he urges the identification of local and international paths that develop new forms of social charity, alliances between knowledge and solidarity between generations, referring to the passage from Pope Francis' Encyclical *Fratelli tutti* in which he states: 'There is a basic, essential recognition to be made in order to move towards social friendship and universal fraternity: realising how much a human being is worth, how much a person is worth, always and in all circumstances' (n. 106).

distribution of wealth and opportunities.[14]

For this reason, we propose a study that, starting from an analysis of the very foundations of the demographic phenomenon, identifies some of its root causes – often underestimated by scholars – relating to the uneven distribution of wealth and cultural diversity that distinguishes the populations of the North and South of the world.[15] These two factors, when observed carefully, show how high levels of well-being can paradoxically become a brake on population growth, while its absence – in combination with different cultural and social models – can instead represent an incentive to have children, with often destabilising effects on the economic development of entire regions.[16]

---

[14] See, prior to the considerations made in the text, the conclusions of *the European Commission*, *The 2024 Ageing Report. Economic and Budgetary Projections for the EU Member States (2022-2070)*, *Institutional Paper* No. 279, Brussels, April 2024, which shows how demographic projections (fertility rate, life expectancy, migration) significantly influence the future cost of pensions, healthcare and long-term care in EU countries; see also *ECB Occasional Paper Series No 296 – The macroeconomic and fiscal impact of population ageing in the euro area* (December 2022), which highlights increasing fiscal pressure and a reduction in growth potential as a result of population ageing and demographic decline.

[15] On this point, reference should be made, first, to SEN, *Development as Freedom*, Oxford University Press, Oxford–New York, 1999, which introduces the so-called *capability approach*, emphasising not so much the level of disposable income as the real ability of individuals to choose and realise their life plans. Secondly, see ATKINSON, *Inequality: What Can Be Done?*, Harvard University Press, Cambridge MA, London, 2015, which offers a systematic analysis of how to measure economic inequalities and the redistributive policies suitable for reducing their scope. Finally, reference is made to PIKETTY, *Le capital au XXIe siècle*, Éditions du Seuil, Paris, 2013 (English translation: Capital in the Twenty-First Century, Bompiani, Milan, 2014), which highlights, through an impressive empirical basis, the historical dynamics of wealth concentration and the structural reasons for the persistence of inequalities.

[16] In the past, NOTESTEIN, *Population – The Long View*, in SCHULTZ (ed.), *Food for the World*, University of Chicago Press, Chicago, 1945, had already outlined the theory of demographic transition, highlighting how economic development and improved living conditions lead to a progressive reduction in birth rates, compared to persistently high fertility rates in less developed societies.

This contribution is accompanied by many others, including the analysis by BECKER, *A Theory of Fertility*, in *Demographic and Economic Change in Developed Countries*, Princeton University Press, Princeton, 1960, pp. 209-240; as well as A *Treatise on the Family*, Harvard University Press, Cambridge MA, 1981, which interpreted fertility as an economic choice, arguing that as income and the opportunity cost of children increase, families tend to reduce their number.

The relationship between demographic dynamics and economic law is one of the most significant – and at the same time most neglected – challenges in scientific and institutional debate today. This study therefore aims to address this complex issue, proposing a reflection based on the fundamental fact mentioned above: the current global demographic situation requires us to reconcile migration, reception and development in a context that is not merely ethical in nature, but is an essential component of our legal system. Hence the need to structure the study in two main sections, the first dedicated to *birth* rates[17] and *ageing*[18] *and* the second to *migration*,[19] in order to highlight the paradox between the North and the

[17] See STOPLER, A *Feminist Perspective on Natality Policies in Multicultural Societies*, in *Journal of Law and Ethics of Human Rights*, 2008, II, which critically analyses natality policies as a tool for governing demographic composition, questioning their legitimacy with respect to fundamental rights, in particular the rights of women and minorities.
Assuming that public intervention is not only legitimate but necessary to alleviate forms of female oppression, provided that the chosen instruments respect human rights, it seems appropriate to take into account the reflection of MORIKAWA, *Hannah Arendt's Concept of 'Natality' and the Political Solidarity as an On-Going Process*, Western Political Science Association Annual Meeting Paper, 2010, in which the author reconstructs the concept of natality as an ontological condition of human plurality and as a temporal structure that makes possible political solidarity understood not as a static state of order and continuity, but as an ongoing process, consisting of actual and potential encounters between people, in which bonds of friendship and social cohesion are continually actualised. This perspective makes it possible to overcome the traditional dichotomies between past and future, between order and change, restoring a dynamic and constructive value to natality, including for long-term public policies.
[18] See CASCIONE, *Il lato grigio del diritto*, Turin, 2022, which clearly indicates that one line of research could involve a constant comparison of the solutions offered by different legal systems, in order to assess whether and how Western legal systems have put in place appropriate tools and safeguards to cope with the ageing of the population; See also FILÌ, *L'invecchiamento da esclusione ad inclusione (Ageing from exclusion to inclusion)*, in *ADL – Argomenti di diritto del lavoro (Labour Law Topics)*, 2020, II, 1, pp. 369-385.
[19] It is useful to recall the approach proposed at the beginning of the millennium by PALIDDA, *Dieci spunti su immigrazione, politica e diritto (Ten ideas on immigration, politics and law)*, in *Quest. giust.*, 2001, IV, pp. 672-681, which offers a critical reading of interpretations of the phenomenon of migration, highlighting the distortion inherent in the production and use of statistical data and proposing an interpretation capable of connecting migration dynamics with economic and social changes, the paradigm of prohibitionism and the spread of liberalism. Recently on this subject, see SICCARDI, *'The Right Not to Stay' from a constitutional law perspective*, in *Notizie di Politeia*, 2024, no. 154, pp. 177-181, which criticises the view of migration as a unidirectional and permanent

South.[20] The element that we wanted to place at the centre of the study is the structural link between well-being, culture and sustainable growth; with a view to rethinking tools, policies and principles of intervention, including in a logic of international cooperation that takes into account the current changes in the geopolitical order of the planet.[21] The research also proposed some reflections concerning, first and foremost, the need to implement forms of more intense integration between economic and demographic policies, with obvious repercussions on the regulation governing these processes and with reference to the adoption of possible preventive measures.[22]

It goes without saying that the analysis attempted to identify, in such a context, the legal instruments suitable for addressing - in a differentiated but coordinated manner - the challenges posed by demographic dynamics with a view to finding solutions that can rebalance the imbalances that still exist at the global

phenomenon, proposing the notion of the 'right not to stay' as a combination of the right to temporary residence in the destination country and the right to a planned and guaranteed return to the country of origin, an analysis conducted on the basis of constitutional principles (Constitution, Articles 3, 10, 13, 16 and 35; Constitutional Court 31 July 2020, no. 186). On the issue of systemic inequalities, see DI ROSA, TUMMINELLI, *isabilità e migrazioni: la "tripla barriera" della disuguaglianza,* in *Riv. trim. sc. amm.*, 2025, I, 11 ff.

[20] We will therefore proceed to identify the causes that, on the one hand, influence procreation and, on the other, influence the course of life, both of which are associated in opposite ways with wealth and poverty; hence there is an interest in the dual endias of declining birth rates and ageing populations and birth rates and migration.

[21] On this point, see STIGLITZ, SEN, FITOUSSI, *Mismeasuring Our Lives: Why GDP Doesn't Add Up*, The New Press, New York, 2010, 48 ff., who propose a revision of the instruments for measuring economic and social progress to include environmental sustainability and cultural cohesion. From a geopolitical perspective, see WORLD BANK, *World Development Report 2023: Migrants, Refugees, and Societies*, Washington D.C., 2023, which highlights how international cooperation must take into account demographic changes and global tensions in order to avoid short-sighted or conflictual development policies.

[22] On this point, the reflection by STAJANO, *Preface* to BOBBIO, *Il futuro della democrazia*, Padua, 2010, 6, is interesting, as he emphasises that Bobbio, in identifying the criteria for organising civil society, focuses on the need for the latter to set itself the essential objective 'of ensuring that all states ... are democratic'.

level.[23] However, the temptation to fall into 'disciplinary particularisms' that are considered to be linked to certain issues typically specific to economic law has been avoided; this temptation responds to the desire to broaden the field of investigation.[24] Such an approach would, in fact, fail to take into account the fact that these particularities are not sufficiently relevant to the topics identified in a study that aims to explore the relationship between economic law and demographic dynamics.

Conversely, it is believed that a thorough reflection *on this subject* must address the role of national and supranational institutions responsible for the economic and financial sector, which have been assigned the responsibility of correlating the action to be taken with the dynamics of power relations between states and the presence of transnational actors.[25] Specifically, we refer to the promotion of new forms of public intervention which, taking into account the

[23] See KOKOTT, *La Corte di Giustizia dell'Unione europea come motore dell'integrazione,* in *Il Diritto dell'Unione Europea*, 3/2024, pp. 427-454, a work which examines the increasingly central role of the CJEU as the guarantor of the values of the Union and the promoter of multi-level *governance*, capable of compensating for the inertia of Member States and implementing the principle of non-regression of fundamental values (Article 19 TEU; Article 47 CDFEU).

[24] This is obviously not the place to address the migration of legal persons, where the transfer of company headquarters to jurisdictions considered more favourable (such as the Netherlands) raises questions about a different set of issues, starting with the acceptability of public phenomena of regulatory competition to the downside; on this subject, see ENRIQUES, *Concorrenza tra ordinamenti e migrazioni opportunistiche: che fare?*, in *Riv. soc.*, 2024, IV, pp. 596-609, ANDENAS, WOOLDRIDGE *European Comparative Company Law*, Cambridge 2008, 7-51 and ANDENAS *et al.* 'Free Movement of Capital and National Company Law', (2005), 16, *European Business Law Review*, 757-786,

[25] The ECB, *Economic Bulletin 8/2024*, recognising the effect of ageing on the equilibrium interest rate, suggests the need for a policy framework integrated with migration dynamics. Also relevant on this point are the EIOPA publications, *Final Report on the Prudential Treatment of Sustainability Risks in Insurers*, 7 November 2024, and *Report on Biodiversity Risk Management by (Re)Insurers*, 30 June 2025, which (albeit marginally) include demographic factors in risk mapping. More advanced are the reflections of the FSB in its *Global Monitoring Reports on Non-Bank Financial Intermediation* (2023-2024), which call for a 'holistic' approach to systemic risk, as well as those of the EIB and the World Bank (*World Development Report 2023: Migrants, Refugees, and Societies)*, which link migration, investment and social cohesion.

demographic factor, assess its essence as a structural variable of economic policies and no longer as a mere neutral element.

3. In accordance with the systemic framework outlined above, demographic dynamics in the northern hemisphere point to a scenario of persistent decline in birth rates, resulting in a progressive ageing of the population,[26] characterised by a situation of well-being that defines the *status* of the population. It is no coincidence that birth rates and declining birth rates are taken into consideration in *law and economics* studies*,* either with regard to the achievement and/or preservation of this *status* of well-being, which is often the basis for the individual choice to have (or not to have) children,[27] or by considering the future effects of the decline in births on the economic sustainability of a country characterised by a reduction/downsizing of its productive capacity.[28]

---

[26] Reference may be made to the empirical evidence provided by Eurostat, *Ageing Europe – Looking at the Lives of Older People in the EU*, Luxembourg, 2020, according to which 30% of the European Union's population will be over 65 by 2050. In this regard, see JACKSON, *Post-Fordism and Population Ageing*, in *International Review of Applied Economics*, vol. 20, no. 4, 2006, pp. 449 ff., which links the transition to post-Fordism, with the downsizing of the welfare state and the flexibilisation of labour, to progressive demographic ageing, with critical consequences for pension and welfare systems.

[27] See, *among others*, BECKER, *A Treatise on the Family*, Harvard University Press, 1981, in which the author reformulates the economic theory of fertility by applying the cost-benefit analysis paradigm to reproductive choices, showing how the decision to have (or not to have) children is influenced by income, human capital and the allocation of family time. In our opinion, this analysis can fuel *law and economics* studies on the subject, allowing us to link birth and death rates to the maximization of individual well-being and the intergenerational redistribution of wealth.

[28] See the recommendations of VV.AA., *A First-Principles Look at Historically Low U.S. Fertility and Its Macroeconomic Implications*, White House Council of Economic Advisers, 23 May 2024, which highlights how the combination of very low birth rates and an ageing population represents a structural challenge for US economic growth, with a slowdown in productive potential and increasing fiscal pressures expected.

For a comparative analysis in Europe, see VILLANI-LUBELLI, *Cittadinanza e denatalità: le sfide della politica. Una comparazione tra Germania e Italia*, in *Dir. pubbl. comp. eur.*, 2024, I, 127 ff., a work which analyses the German reform of the 1999 citizenship law and subsequent simplification measures, highlighting their effects on declining birth rates and emphasizing the diversity of the

From another perspective, it has been observed in the literature that, in advanced economies, parenthood is in itself a cause of a temporary contraction in the couple's production function; this is because the time and resources that, in the absence of children, are mainly devoted to active participation in the labour market, are partly reallocated to the care and upbringing of children when they are present.[29]

Certainly, the generalised lack of social openness that ensures high standards of living in cases where the family is growing in size has a significant impact on the process of reducing births. In such a situation, certain concerns (which sometimes translate into psychological distress) that interact positively on the individual's inner sphere disappear, favouring the affirmation of logics that privilege individualistic interests.[30]

It remains clear, therefore, that the commitments undertaken for children (relocation, services, taxation) jointly influence fertility, longevity and growth, affecting both human capital and the propensity to save. In this regard, it is significant to consider that the birth of a child also implies a considerable psychological burden, deriving from parental responsibility, which can cause

Italian system, which is characterized by procedural rigidity and a lower capacity for demographic compensation.

[29] See BECKER, *Fertility and the Economy*, in *Journal of Population Economics*, 1992, 3 ff., which demonstrates that the decision to have children involves a readjustment of the allocation of family resources, resulting in a temporary reduction in the productive function of parents and a measurable impact on disposable family income.
See also ARNOTT, CHAVES, *Demographic Changes, Financial Markets, and the Economy*, cit., which, based on a large sample of countries, shows the correlation between changes in the age composition of the population, GDP growth and financial market returns, confirming that parenthood and demographic cycles have a systemic impact on the parameters of production and capital accumulation.

[30] See MARGALIT, *Redefining Parenthood – From Genetic Essentialism to Intentional Parenthood*, in *Columbia University Journal of Bioethics*, 2012, 3 ff., according to which the transformation of parenting models accentuates the centrality of individual autonomy, favouring logics that privilege private interests at the expense of the collective dimension of the family.

stressful situations that affect work capacity, productivity and the stability of personal relationships. We are faced with a reality whose outcomes are relevant to economic law; suffice it to say that family *welfare* are regulatory levers that correct demographic externalities and guide us towards the path to follow in order to achieve adequate development.[31]

On closer inspection, it is possible to envisage that such subjective reasons, which are responsible for the disincentive to increase the birth rate, are reinforced by the particular importance that, in the context of modern civil society, is assigned to individual fulfilment and professional success, which are considered to be of particular value.[32] Consequently, parenthood, while not rejected a priori, is nevertheless postponed or limited so that it can be increasingly compatible with career and other personal ambitions. It is clear that, in this sense, the substantial planning of a hypothetical increase in family size identifies not only a material change, but also a symbolic one, involving the very identity of parents, who are less and less bound to reproductive roles and increasingly protagonists in the public sphere.[33]

The result is a reality in which the decline in birth rates is not a contingent emergency, but rather the structural outcome of a profound transition in civil

[31] See GIDDENS, *Modernity and Self-Identity. Self and Society in the Late Modern Age*, Stanford University Press, Stanford, 1991, 54 ff., a work that provides insights into the correlation between family choices and emotional or cultural dimensions, thereby ruling out economic factors as the sole determinant of reproductive dynamics.

[32] It should be borne in mind that among the many causes contributing to the decline in births in northern countries, the socio-cultural transformation of women plays a central role. Access to higher education, economic autonomy and the growing participation of women in the labour market have contributed to redefining individual and collective priorities, often shifting the horizon of personal fulfilment beyond the traditional family dimension. see KOSTORIS, *Policies for women in the Italian labour market,* in *Industrial Relations Law*, 2/2008, pp. 479-490.

[33] It is no coincidence that ESPING, ANDERSEN, *The Incomplete Revolution: Adapting Welfare States to Women's New Roles*, Polity Press, Cambridge, 2009, 45 ff., observes that 'the silent revolution of women has radically changed the balance of family choices, rendering obsolete models based on gender complementarity'.

society, which is still ongoing. Thus, in many cases, the decision to procreate is no longer solely a matter of family continuity, nor is it considered a private goal of *work-life balance*;[34] in other words, it has become one of the elements that give substance to the planning of adult life, to be evaluated together with personal aspirations and well-being.

That said, it should not be overlooked that the reasons behind the decline in birth rates mentioned above should not be evaluated too favourably within a linear model, since, as indicated above, the decline in births does not *in itself* imply a factor of well-being for the generation in question (i.e. the one responsible for the decline in births). Indeed, when the effects of birth rates are measured from an intergenerational perspective, it can be seen that, although they reduce productivity in the short term, they constitute a factor of rebalancing and sustainability in the medium to long term, as they guarantee the continuity of the social security and tax systems, as well as the transmission of tangible and intangible capital.[35]

Ultimately, these findings raise the issue of work-life balance and how it can be managed in ways that encourage childbirth while preserving parents' productivity.[36] It goes without saying that, moving from the specific to the general,

---

[34] See ESPING, ANDERSEN, op. cit.

[35] See BLOOM, CANNING, *Demographic Challenges*, *Fiscal Sustainability and Economic Growth*, PGDA Working Paper No. 0806, Harvard School of Public Health, 2006, esp. 5 ff.
See also IMF, *The Debate over Falling Fertility*, 2025, which warns that persistently low fertility rates could compromise the sustainability of social security systems and reduce productive capacity.
MCKINSEY GLOBAL INSTITUTE, *Confronting the Consequences of a New Demographic Reality*, 2025, which quantifies the negative impact of declining births on growth potential and hours worked per person.
In terms of long-term policies, see WU et al., *The Impact of Low Fertility Rates on Labour Demand and Economic Structure*, in China CDC Wkly, 2023, 599 ff., which concludes that structural interventions are needed to preserve productive capacity and rebalance tax and social security systems.

[36] See OECD, *Family Database*, 2023, which reports data showing that work-life balance policies are crucial for encouraging birth rates and supporting parents' productivity. Similarly, EUROPEAN

the issue becomes an overall component of the country's system and therefore raises the further problem of finding a solution that allows adequate levels of production to be maintained and thus ensures the sustainability of social security mechanisms and, more generally, the country's GDP.[37]

Viewed from an economic law perspective, these dynamics lead us to reflect on the need to resort to interventionist policies to prevent the danger of social and productive desertification, and to promote legal mechanisms that encourage young people to put down roots in certain areas, not only in terms of housing, but also in terms of education, work and family. Appropriately, doctrine considers 'generational change' as a factor that directly affects economic growth and the stability of social security systems[38], whereas, from a legal point of view, family policies and tax incentives are assessed as regulatory instruments aimed at recognising birth rates as an 'asset' worthy of protection, on a par with other strategic resources.[39]

This enhances human capital, hence the need to promote training and innovation policies, which have an immediate impact on the definitions of economic law. In light of the above, public intervention to reduce the opportunity cost of parenthood is also considered possible.[40] In this case, the regulatory solution must

INSTITUTE FOR GENDER EQUALITY (EIGE), *Work-life Balance Index*, Vilnius (Lithuania), 2022, shows that paid leave and accessible *childcare* services are correlated with higher fertility rates and female participation in the labour market.

[37] See ROSINA, *Crisi demografica. Politiche per un Paese che ha smesso di crescere (Demographic crisis. Policies for a country that has stopped growing)*, Vita e Pensiero, Milan, 2023, 42 ff., which emphasises how the declining birth rate, if not addressed with structural policies, directly affects national productive capacity and the sustainability of social security systems.

[38] See, in this regard, the reflection by BLANGIARDO, *Meno non è meglio. Perché e come dobbiamo tornare giovani*, in *Limes*, 2019, no. 2, which addresses the issue of the collapse of fertility in Italy and Europe.

[39] See BLANGIARDO, op. cit., loc. cit.

[40] See ISTAT, *Annual Report 2023. La situazione del Paese*, Rome, 2023, 157 ff., which highlights how the high opportunity cost of parenthood is one of the main deterrents to the birth rate in Italy. The report points out, in particular, the need for targeted public interventions – from paid parental

include a wide range of operational solutions, from paid parental leave to flexible working hours, from *smart working* to *childcare* services;[41] this, of course, in addition to tax incentives or other forms of monetary support.[42]

Hence, a dual task for regulators in advanced economies,[43] who can use economic law instruments - first and foremost - to regulate a compensatory dynamic that can help redistribute the private cost of children through collective mechanisms, so as to prevent the well-being of the family from depending exclusively on its ability to limit the reduction in productivity and the increase in costs caused by supporting children. Secondly, promotional tasks *in this area* are being considered, creating an institutional environment that recognises birth rates as an investment in human capital and encourages their achievement through regulatory measures on gender equality and labour inclusion.

For some time now, the above issues have been the subject of specific provisions which, in Europe, have marked a significant step forward in relation to the above objective, recognising minimum rights to protect working women during maternity (Directive 92/85/EEC), improving the family and professional life of

---

leave to *childcare* services – aimed at rebalancing the relationship between work and care time, reducing the penalising effects that the choice to have children has on careers and participation in the labour market, especially for women.

[41] See EUROPEAN COMMISSION, *Work-Life Balance Initiative*, 2019, which sets out a comprehensive set of measures – paid parental leave, flexible working hours, smart working and *childcare* services – to reduce the opportunity cost of parenthood, promote gender equality and improve labour market participation, in line with economic sustainability objectives.

[42] See the study by OLIVETTI, PETRONGOLO, *Gender Gaps across Countries and Skills: Supply, Demand and the Industry Structure*, IZA Discussion Paper No. 5755, 2011, which highlights how tax incentives and cash transfers can be crucial tools for reducing the gender gap in the labour market by supporting female participation and birth rates.

[43] See EUROPEAN COMMISSION, *Gender Equality Strategy 2020–2025*, Brussels, 2020, esp. 12 ff., which identifies the promotion of gender equality and support for parenthood as essential tools for promoting labour market inclusion and birth rate growth, considered as an investment in human capital. In the literature, see CANAL, GUALTIERI, *Genitorialità e work-life balance. Una lettura multidimensionale delle politiche di conciliazione*, INAPP, Rome, 2017, 25 ff., which emphasise how the collective redistribution of the private cost of children represents a lever for rebalancing economic productivity and family well-being.

parents (Directive (EU) 2019/1158), who are protected from *the* so-called *parenthood penalty* in the world of work (Directive 2006/54/EC; see also CJEU, C-333/97 *Lewen v Denda* and C-512/11 *Terveys)*. Looking ahead, despite the progress made in legislation, there are economic grounds for further action based on integrated demographic policies,[44] which are able to consider economic models, legal instruments and psychological effects in a unified manner, with the aim of encouraging birth rates, which can also be instrumental in increasing collective well-being.

4. A different view of the family and procreation can be found in most areas of the southern hemisphere, where high levels of poverty and an endemic scarcity of economic opportunities are the basis for a behavioural pattern that is the opposite of that described above with regard to many European countries.[45] This is because, in these areas, economic need acts as a catalyst in determining a pro-natalist orientation of the population, characterised by a significant reliance on birth rates, which are often considered a form of economic *security*.[46]

Specifically, it is important to highlight the reasons why, in low-income

[44] In other words, the considerations set out in this paragraph converge with the conclusions reached by the EUROPEAN COMMISSION, EUROPEAN CARE STRATEGY, COM (2022) 440 *final*, Brussels, 7 September 2022, which proposes an integrated approach to care policies, aimed at combining economic, legal and social instruments in order to strengthen childcare and elderly care services. The Commission emphasises that such measures, in addition to reducing barriers to women's participation in the labour market, can encourage birth rates and contribute directly to the growth of collective well-being, thus forming part of a broader European demographic strategy.

[45] See MBOSHU KONGO, *Famiglia come ambiente naturale (The Family as a Natural Environment)*, published by the Pontificium Consilium Pro Familia, 2016, according to which, in order to understand the nuances of the concept of the African family, it is first necessary to analyse the conception of the human person in Africa, as described therein.

[46] See the considerations of CALDWELL, *The Cultural Context of High Fertility in Sub-Saharan Africa*, in *Population and Development Review*, 13(3), 1987, 409, which takes into account prenatalism, parental networks, religion and social prestige, arguing how these elements support the extended family, hindering rapid reductions in fertility over time in the contexts indicated in the text.

countries, the relationship between an increase in births and production capacity takes on different and, in part, opposite characteristics to those observed in advanced economies.[47]

In this regard, the thesis put forward in the literature seems acceptable, according to which having many children can be the goal of a life project aimed at personal fulfilment; a goal based on the belief, in low-income and culturally backward societies, that children can be an economic resource, a source of family labour and a potential guarantee of security for their parents in old age.[48] On closer inspection, however, from an economic point of view, a high birth rate inevitably leads to rapid population growth, which puts strong pressure on available resources and, therefore, substantially reduces investment in human capital for each child.[49]

Careful consideration of demographic dynamics, carried out in the light of economic law, allows us to understand that quantitative/qualitative changes in the population - linked to the varied situations that affect its growth or decline[50] - must be considered structural variables that directly affect the socio-economic balance of the countries concerned and, consequently, on legal regulatory choices. In an attempt to develop adequate systemic interpretations of this phenomenon, legal doctrine has highlighted the prevailing geopolitical nature of demographic transformations, as they redraw the balance of power between states and regions, modifying value chains, labour markets and *welfare* instruments, all of which interact with demographic externalities, guiding the choice of paths to follow for

[47] It is useful to refer to the classic work by GOODE, *World Revolution and Family Patterns*, Free Press of Glencoe, New York, 1963, in which the author explains transformations in family models with industrialisation; he anticipates convergences, but underestimates cultural resilience in the global South and divergences.

[48] See DAS GUPTA, *Fertility Decline and Its Determinants*, 1993.

[49] See WORLD BANK, *World Development Report 2023.*

[50] See CALDWELL, *Theory of Fertility Decline*, Academic Press, London–New York, 1982, for one of the first theories on intergenerational wealth flows; in poor countries, children support their parents, explaining persistent high fertility in the absence of *welfare.*

development purposes.[51]

In view of this reality, jurists understand that economic law must take into account not only the quantity of available labour, but also the quality of its skills;[52] this is in order to ensure the success of the redistributive mechanisms that govern the inclusion of new subjects in production processes.[53] It follows that the accumulation of human capital *alone* is not sufficient to ensure economic development; unless accompanied *by education (*which provides the knowledge necessary to achieve high levels of professionalism), it does not allow the widening of the demographic window to translate into growth.

Once education has been established as a regulatory priority, the achievement of a high level of skills becomes a condition that makes it possible to achieve an inclusive and sustainable economic dynamic.[54] This outlines a perspective in which economic law and public policies are able to promote adequate family planning geared towards the real factors of wealth multiplication; hence the need to promote access to education (especially for women),[55] which is

[51] See FANTI, GORI, *Endogenous fertility, endogenous lifetime and economic growth: the role of child policies*, in *Journal of Population* Economics, 2014, 27(2), pp. 529–564.

[52] See COLI, *Human capital is the basis of superpower status*, in *Limes*, 2020, no. 12.

[53] See HANUSHEK, WOESSMANN, *The Knowledge Capital of Nations: Education and the Economics of Growth*, MIT Press, Cambridge (MA), 2015, which demonstrates that the quality of cognitive skills can promote growth and inclusion by ensuring that human capital is better equipped to meet contemporary challenges.

[54] See the conclusions of FORBES, BARKER, TURNER, *The Effects of Education and Health on Wages and Productivity*, Productivity Commission, Staff Working Paper, 18 March 2010, which shows – on a micro/econometric basis – that higher levels of education and better health are associated with higher wages (*a proxy* for productivity), corroborating the idea that the quality of human capital enables inclusive and sustainable economic dynamics.

[55] See KULKA, NIKOLKA, POUTVAARA, S. UEBELMESSER, *International Applicability of Education and Migration Aspirations*, CESifo Working Paper No. 10395, 2023, available on SSRN (abstract No. 4431386), which highlight how, at the international level, the lessons learned from education predict migration aspirations and commitment, with significant disciplinary differences, especially in students' rights.

essential for the proper exercise of professional activities and, in particular, to disseminate *financial* education that oversees savings accumulation systems, while ensuring social security and welfare.[56]

It is therefore clear that the urgent demographic challenges – caused by endemic poverty and continuous population growth in many areas of the southern hemisphere – cannot be effectively addressed with fragmented solutions entrusted to charitable initiatives at international level. Instead, there is a need to promote a regulatory and institutional vision that harmonises economic development with respect for human dignity and legal logic: this objective can be pursued through the creation of a new geopolitical order based on systematic cooperation, binding commitments and fair conditions of access to knowledge and technology resources.

Hence, the hypothesis put forward by some scholars regarding the need to create a new 'order' regulated not so much by traditional state power as by a balance between power and regulatory cohesion established within a global information system.[57] Therefore, public intervention is called for to overcome the emergency approach implemented to date by some states, on the assumption that only the development of stable legal rules, based on models of economic, social security and health integration, will make it possible to verify that the growth of populations in underdeveloped areas is not only necessary for demographic cohesion, but also because it identifies a strategic element of the economic and

See also HAAPANEN, BÖCKERMAN, *Does Higher Education Enhance Migration?*, in IZA Discussion Paper No. 7754, (last rev. 9 May 2025), which emphasises that tertiary education can be a driver of human capital reallocation and a possible amplifier of regional disparities.

[56] See CLELAND et al., *Family Planning: The Unfinished Agenda*, *The Lancet*, 2006.

[57] See SAVONA, VANORIO, *Geopolitica dell'infosfera. L'eterna disputa tra Stato e mercato/individuo nel Nuovo Ordine Mondiale Digitale*, Rubbettino, 2023, *passim*, where the authors hypothesise a fourth industrial revolution dominated by the digitisation of information, which surpasses globalisation, in which structural tensions emerge between the old order of states and the power of the market, pervaded by global information systems, geopolitical confrontations and social conflicts.

social sustainability of the planet.[58]

We are fully aware that, at a legal and economic level, this 'order' is difficult to achieve as it requires the adoption of binding multilateral treaties on matters such as education, health and vocational training, which should be regulated uniformly in the countries that adhere to them. Hence the need to provide for: an international regime that allows for technology transfer, in which affordable licences are issued for social purposes; global redistributive fiscal policies; adequate forms of regulation of migration regimes, governed for the mutual benefit of the participating countries.

Such multilateral agreements should oblige the countries of the North to finance aid programmes subject to specific conditions (education and specialist technical training for the populations of developing countries). Obviously, the supranational context suggests that states should hopefully avail themselves – in the dissemination of educational, agricultural and health technologies – of the assistance of supranational organisations to address demographic variables and, therefore, for these purposes, of the World Trade Organisation (WTO), which could provide for a 'right of access' to programmes for social purposes (*health, education)*.[59]

In this context, it becomes possible to envisage forms of regulated migration. This would involve, among other things, bilateral or multilateral agreements, legal mechanisms providing for the recognition of professional qualifications acquired in poor countries, and rules to guarantee the right to health in the countries of

[58] See ZANFRINI, *Il contributo dell'immigrazione nel contrasto all'inverno demografico italiano,* in *Italianieuropei*, 2023, no. 4, which observes how Italian demographics are marked by a rapid transition towards ageing (with a significant percentage of over-65s in the next two decades), making the role of immigration crucial as a structural response to the demographic crisis.

[59] It goes without saying that fiscal policies could provide for specific financing mechanisms in poor countries for the growth of businesses operating in those countries, while preventing them from making net profits without contributing to local development.

destination (including access to consent-based population control methods).

It is clear that in order to reverse the deplorable conditions that characterise the southern areas of the planet, legal and economic reform is needed on a global scale, guided by structured cooperation between states and international organisations.[60] In this regard, we believe that governments should consider giving a specific mandate to institutions such as the World Bank, the IMF, UNESCO and UNICEF to promote human and social development.

We realise, however, that in a spirit of *wishful thinking,* we have outlined a programme that presupposes a geopolitical reality different from that which we find at this moment in history. It should be noted, however, that the reformist plan outlined above involves the adoption of measures designed to bring mutual benefits to all states that adhere to the new 'order' based on global cooperation.

It is worth emphasising that, for the countries of the northern hemisphere, these measures are not purely altruistic: they play an essential role in preserving international stability, expanding markets and mitigating climate change.[61] From this perspective, cooperation becomes a rational and strategic gamble: it is in the interest of these countries that the human capital, skills and aspirations of entire populations find freedom of expression, real opportunities and concrete rights.[62]

---

[60] See MASON, *Six Ways Population Change Will Affect the Global* Economy in *Population and Development Review*, 2022, 48(1), pp. 51–73, which systematises six channels of transmission between demography and the economy (age dependencies, savings/wealth, productivity, public finance, etc.), resulting in the need for 'demography-sensitive' budgetary and *welfare* rules capable of internalising population trends in allocation choices.

[61] See the hypothesis of the correlation between demography and economic variables proposed by JUSELIUS, TAKÁTS, *Can Demography Affect Inflation and Monetary Policy?*, BIS Working Paper No. 485, February 2015, available on SSRN (abstract no. 2562443), according to which - based on panel data from 22 countries (1955-2010) - a higher proportion of employees (young and old) is associated with higher inflation, while varied working-age proportions are correlated with lower inflation.

[62] See MARGIOTTA, *Migrazioni*, *diritti*, *cittadinanza*, Padua, 2012, p. 91 ff. See also RENTERÍA, SOUTO, MEJÍA, GUEVARA, PATXOT, *The Effect of Education on the Demographic Dividend*, in *Development Review*, 2016, 42(4), pp. 651–671, which demonstrates that the demographic

This is the path to follow in order to overcome the paradigm of emergency aid (which often ties interventions in favour of the southern hemisphere to superficial results and creates dependency) and give rise to lasting, fair and structured cooperation.

Economic law has the opportunity to play a leading role in the transition to a new geopolitical order that recognises the sovereignty and active role of the peoples of the southern hemisphere. Scholars of this discipline must take responsibility for engineering this change, promoting obligations that can reduce inequalities and ensure equity. They must respond to the need, felt by many, to prevent the planet's wealth from belonging only to a few and not to all in the future.

5. In light of the above, interpreting demographic dynamics through the lens of *law-and-economics* is particularly useful for understanding the various components of the phenomena associated with them, as it allows us to analyse both the policies of the countries receiving migratory flows and the reasons behind them (i.*e.* rational choices made by individuals motivated by particular circumstances that encourage migration processes).

Specifically, it should be noted that this approach helps to understand how those who are willing to emigrate do not act on the basis of abstract assessments, but also on the basis of a marginal utility calculation that takes into account numerous factors: employment opportunities, income expectations, access to essential services, protection of fundamental rights and, last but not least, the legality of residence in the destination country. It is clear that, in this context, the law is not a neutral element, but rather an essential factor in a logical assessment

dividend depends on the accumulation of human capital: without education, the demographic window does not translate into growth; thus, the regulatory priority given to education and skills emerges as a condition for making economic dynamics inclusive and sustainable.

that helps to shape migratory behaviour: it acts both as a selective mechanism (e.g. through reference to generalised admission criteria or mechanisms based on 'quota systems') and as an incentive or disincentive (through tax regimes, welfare policies, citizenship rights, etc.), as mentioned above.

From a systemic point of view, the rules governing migration produce redistributive effects, generate externalities and influence the qualitative composition of human capital entering destination countries. In the presence of such a reality - as we have tried to highlight in the preceding pages - the phenomenon of migration becomes a point of intersection - and a moment of synthesis between legal requirements and economic needs, as it significantly interacts with the outcomes of demographic dynamics, where the latter are the result of individual reasoning, but - at least in part - predictable, subject to the logic of allocative efficiency and distributive equity.

It is therefore clear why, in order to ensure balance in the flow of migration, it is necessary to frame the latter as a case attributable to the rational dynamics that are determined within a regulatory system, following the disciplinary criteria established for this purpose. In this context, it is clear that economic law must indicate the path to follow, allowing not only for a thorough assessment of the social and economic impacts of human mobility, but also for a more informed design of the most effective public policy s that the top authorities of the destination countries must implement *in this area.*

From another perspective, it is immediately apparent that our continent meets the conditions under which – as outlined in the reconstruction plan presented in the survey – demographic dynamics are channelled into circuits that justify the distinctive criteria between a North of the planet, characterised by prosperity but marked by an ageing population, and a South that is characterised by the opposite situation. It is also clear that demography has a direct impact on economic and *welfare* policies*,* with obvious implications for the identification of

the (differentiated) legal instruments to be used and the role of national and international institutions called upon to implement appropriate methods of integrating economic and demographic policies.[63]

In this context, the role played by economic law in the organisation of societies characterised by high levels of development and well-being must be considered essential. Significant in this regard are the assessments relating to the testing of regulatory policies aimed at countering the decline in birth rates;[64] these, in fact, make it possible to verify the possibility of combining the improvement of parenting conditions (and, therefore, a recovery in the quantitative level of births) with openness towards reception policies (and, therefore, with the inclusion of foreigners in the calculation of the national population).[65]

It follows that economic law is also helpful in terms of projecting the disciplinary system towards the management of the ongoing *demographic transition*,[66] as the regulator could take into account the main factors that reduce

[63] On the link between demographic dynamics and economic policies, see SARTOR, *L'invecchiamento della popolazione e i riflessi sull'economia e sulla finanza pubblica,* Bologna, 2010, which highlights how the evolution of the age structure directly affects the sustainability of *welfare* and public finances. Similarly, see BRUGGIAVINI - WEBER, *Dinamiche demografiche e politiche pubbliche (Demographic dynamics and public policies)*, in VV.AA., *Evoluzione e riforma dell'intervento pubblico. Scritti in onore di Gilberto Muraro (Evolution and reform of public intervention. Writings in honour of Gilberto Muraro)*, Padua, Cedam, 2013, 85 ff., a work which emphasises the need for greater integration between economic and demographic policies to ensure long-term balance and adequate social protection.

[64] See BILLARI - TOMASSINI, *Rapporto sulla popolazione. L'Italia e le sfide della demografia,* Bologna, 2021, p. 147 ff.

[65] See AMBROSINI, *Sociologia delle migrazioni*, Bologna, 2020, p. 265 ff.

[66] See LESTHAEGHE, *The second demographic transition: a concise overview of its development*, in *Proceedings of the National Academy of Sciences*, 2014, 111(51), 18112 ff.; ID., *The second demographic transition, 1986–2020: sub-replacement fertility and rising cohabitation – a global update*, in *Genus*, 2020. The trajectory highlighted by Lesthaeghe confirms that the decline in fertility is largely attributable to institutional and socio-economic factors (job and housing insecurity, transition to adulthood, childcare costs, work-family compatibility) mediated by changes in values; This points to the need for an integrated regulatory assessment – within the scope of economic law – aimed at improving life prospects at both the individual and social levels.

the propensity to parenthood, so as to assess whether, in order to improve its stability, it is necessary to modify the regulatory framework of reference.[67] It goes without saying that this type of intervention has a favourable impact on the configuration of the welfare system in advanced economies, allowing for the possibility of developing public instruments to correct *the demographic decline* of recent years,[68] capable of balancing social rights and the sustainability of public finances.[69] This approach makes it possible to bring demographic dynamics back into the set of social facts to be considered as institutional variables, as it highlights the need for a regulatory system that combines migration policies with strategies for the development of internal human capital.[70]

In this logical framework, therefore, demographic changes do not act as factors of rebalancing (or imbalance) of constitutional structures, but are presented as the results of human behaviour that is influenced by market dynamics, finance and public authorities.[71] Therefore, *policy makers* are called upon to record

[67] See BOSERUP, *The Conditions of Agricultural Growth. The Economics of Agrarian Change under Population Pressure*, London, 1965; ID., *Population and Technological Change: A Study of Long-Term Trends*, The University of Chicago Press, Chicago–London, 1981. See also MARGIOTTA, *Migrazioni, diritti, cittadinanza*, Padua, 2012, pp. 91-119.

[68] It is worth noting the results of a study that looked at Italy and internal migration processes; see ROSINA, *L'implosione demografica del Sud,* in *Italianieuropei*, 2015, no. 1; also noteworthy in this regard is the study by BONIFAZI - CONTI, *Migrazioni, giovani e dinamiche demografiche in Italia*, in *Sinappsi. Journal of labour policy studies and research*, 2025, no. 1, which explored the intertwining of declining birth rates, population ageing and the role of migration flows.

[69] The issue of the sustainability of population growth has already been considered, with regard to cases where material well-being is insufficient to sustain a high birth rate, so that population growth becomes an obstacle to social development.

[70] See ROSINA, *All'Italia servono persone prima che braccia,* in *Limes*, 2016, no. 7, which emphasises that the demographic issue cannot be reduced to a quantitative assessment of the workforce, but requires a qualitative interpretation in terms of human capital.

[71] See FANTI, GORI, *Endogenous fertility, endogenous lifetime and economic growth: the role of child policies*, in *Journal of Population Economics*, 2014, 27(2), pp. 529–564, where child policies (transfers, services, taxation) jointly influence fertility, longevity and growth, affecting human capital and savings. The outcome is relevant to economic law: family *welfare* instruments are regulatory levers that correct demographic externalities and guide the path of development.

population changes in a timely manner and, subsequently, to promote governance tools that can ensure systemic consistency in the actions of the state in the face of events that are only partially anchored to the reality of the national territory.

In this regard, geopolitical factors highlighted by some scholars come into play, who have emphasised that demographic pressures from the southern hemisphere are now the main disruptive force capable of affecting the global order and local coexistence.[72] These interpretations, which attribute particular importance to migration in the formulation of macroeconomic reference models, propose an interpretation of global value chains that also takes into account the relationship between declining birth rates, migration and economic sustainability.[73] Hence the further consideration regarding the appropriateness of multi-level public intervention, suitable for regulating interdependent demographic phenomena, given that migration flows and economic needs have an immediate impact on a transnational scale.[74]

In light of the above, the usefulness of a global regulatory centre (which, at present, does not exist, except on a continental basis)[75] should be recognised, equipped with authoritative powers and capable of bringing the management of

[72] See KHANNA, *op. cit.*, pp. 113-141.

[73] On child migration, which requires the state to reconcile principles of protection with financial sustainability requirements, see D'AGOSTINO, *The case of unaccompanied migrant minors in Italy*, in *Rivista Italiana di Economia Demografia e Statistica*, 2024, Vol. LXXVIII, no. 1, which analyses the presence of unaccompanied foreign minors and the relevant national regulatory framework (Law 47/2017), highlighting certain critical issues in reception policies and their economic implications.

[74] See LIVI BACCI, A *Concise History of World Population*, 6th ed., Wiley-Blackwell, 2024, pp. 257-283.

[75] See CARACCIOLO, *Una nuova strategia per i flussi migratori*, in *Limes*, 2023, no. 5, according to which migration policies – understood as decisive actions for the economic and social sustainability of Europe – deal with a phenomenon (i.e. migration) that should not be considered an emergency, but a structural constant. This gives rise, on a legal level, to the need for a unified *body* of legislation at European level, capable of overcoming the fragmentation of national policies and strengthening the coherence of the European project.

demographic variables back under the executive branch.[76] However, it cannot be ignored that, at present, European states do not seem inclined to cede sovereignty in the supranational sphere; in fact, there is still no general political orientation aimed at addressing demographic dynamics as variables capable of affecting government structures, hence the need for international coordination to adjust fiscal, social security and labour policies.[77]

On the political front, there is varied resistance from certain interest groups, perhaps motivated by fears that demographic dynamics could lead to a redistribution of global power, wealth or opportunities, with the consequence that migration could undermine the sustainability of power and the lifestyle of the richest countries.[78] Unfortunately, neither the ethical basis underlying reception and integration nor the widespread belief that the legal and economic regulation of migration flows can combine principles of efficiency and fairness with the protection of human dignity, recognising integration as a principle of civil coexistence and economic *governance*, seems likely to overcome this resistance.[79]

---

[76] See DI GASPARE, *Diritto dell'economia e dinamiche istituzionali (Economic Law and Institutional Dynamics)*, Padua, 2017, pp. 115-144.

[77] See SARTORI, *Pluralismo, multiculturalismo e estranei*, Milan, 2000, pp. 45-67; see also RUIU, *Gender Equality Attitudes of Muslim Migrants in Italy*, in *Rivista Italiana di Economia Demografia e Statistica*, 2021, Vol. LXXV, no. 3, which investigates gender attitudes within the Islamic migrant population in Italy. Although the empirical survey is socio-statistical in nature, it raises important regulatory issues regarding citizenship rights and economic integration.

[78] See DELLA ZUANNA, *Come curare il trauma demografico*, in *Limes*, 2021, no. 4, which proposes remedies to combat the Italian demographic crisis, including family support policies and welfare reforms. From a legal point of view, these measures imply a rethinking of the allocation of public resources and, therefore, a redefinition of regulatory priorities between current expenditure and social investment.

[79] Given that demography cannot be considered a neutral phenomenon, given its nature as a regulatory and political variable of primary importance, the tools of economic law can be used as a discipline to address the challenges posed by ageing, migration and global population redistribution, calling for regulatory interventions that can promote a balance between economic sustainability, social justice and geopolitical stability; see in this regard ALPA, *Solidarietà. Un'utopia necessaria,* Bari, 2015, pp. 101-125.

6. Following the above-mentioned perspective, the analysis of demographic dynamics must therefore focus on the phenomenon of migration, which is considered (in many destination countries) to be an emergency, whereas - as has been accurately described by an astute scholar - it should be regarded as a 'structural constant' of the planet's geopolitical reality.[80] Hence the need, as expressed in the literature, for a legal reflection that - with balance and fairness, as only the reasonableness of the law allows - offers the possibility of interpreting this phenomenon in a unified manner, i.e. overcoming the fragmented reading given to it by national policies, in order to reach some positive conclusion on the issue at hand.[81]

In other words, it is necessary to verify whether it is possible to decisively address the macro-trends of global society (*i.e.* poverty and immigration on the one hand, and population ageing on the other), identifying the interventions that are capable of giving substance to an internationally promoted political project aimed at introducing uniform rules on the issue of migration.[82]

For the reasons outlined in the previous paragraphs, economic law is now one of the main instruments through which demographic dynamics can be

[80] See CARRACCIOLO, *Una nuova strategia per i flussi migratori*, cit.

[81] See MORETTI, *Addressing the Complexity of Regional Migration Regimes through a Mixed Migration Approach*, paper presented at the 'Asylum & Migration Symposium', University of Geneva, 10–11 October 2016, which argues that a *mixed migration* approach can simplify the *governance* of the phenomenon by focusing on multi-level operational and accountable coordination of national authorities.

[82] See CARLING, GALLAGHER, HORWOOD, *Beyond Definitions: Global Migration and the Smuggling-Trafficking Nexus*, Regional Mixed Migration Secretariat, 2015, which clarifies how the traditional approach fails to grasp the complexity of *mixed migrations*, hence the criticism of the security-based 'war' approach to traffickers, highlighting its increasing costs and lack of effectiveness in relation to demographic dynamics, with negative repercussions on rights and *asylum space*. See also COTTIER, SIEBER-GASSER, *Labour Migration, Trade and Investment: From Fragmentation to Coherence*, in The Palgrave Handbook of International Labour Migration, Palgrave Macmillan, 2015, where the authors propose a more coherent architecture between trade, investment and migration, bridging the multi-level regulatory fragmentation and enhancing inter-institutional coordination.

articulated in a disciplinary context. This is because the rules governing the matters typically covered by this branch of law, having also become geopolitical instruments, contribute comprehensively to the definition of the phenomenon under consideration.

Moreover, in order to assess the relevance of migration flows to economic law, one need only consider their impact on certain economic and legal realities: the labour market, the demand for public goods, and the international mobility of production factors. it is clear that migration phenomena influence the composition of the labour supply and the competitiveness of economic systems, and therefore require regulations that strike a balance between the needs of efficiency and inclusion. In addition, public and private investment in integration, training and infrastructure, when directed towards immigrants, must comply with principles of equity and solidarity.

At European level, the *governance* of migration flows raises specific questions regarding the responsibilities of Member States, making this phenomenon a key issue in European economic law.[83] This issue is largely linked to the insufficiency – or inadequacy – of European rules on redistribution. Starting with the limitations of the *Dublin Regulation,* which will be discussed below, the absence of a binding redistribution system – linked to attempts at non-binding reforms (which left states free to adhere to them or not, resulting in imbalances and internal friction within the EU) and the different political and cultural approaches to

[83] It is useful to refer to C. SICCARDI, *"The Right Not to Stay" nella prospettiva del diritto costituzionale*, in *Notizie di Politeia*, 2024, no. 154, pp. 177-181, which offers an interpretation of the phenomenon of migration not as a unidirectional movement, but as a complex process in which rights related to temporary residence and planned return to the country of origin also play an important role. This perspective, based on constitutional parameters (Constitution, Articles 3, 10, 13, 16 and 35; Constitutional Court 31 July 2020, no. 186), allows for a critical assessment of European migration governance and an interpretation of the difficulties linked to the absence of a binding system for the redistribution of asylum seekers and to friction between Member States, especially in light of the structural limitations of the Dublin Regulation and failed attempts at reform.

immigration (between countries in Eastern, Northern and Southern Europe), there are a number of causes that have prevented the adoption of common rules, making it difficult to manage the phenomenon in a unified manner.[84]

On closer reflection, however, it is clear that the main cause of this imbalance in relations between Member States is the absence of a shared political will; This has resulted in the failure to establish efficient *governance*, which has led some states to resort independently to instruments for externalising the problem (such as special agreements with Turkey, Libya and, more recently, Albania), which have only shifted the issue of internal responsibility without resolving it.

We are faced with a situation which, as mentioned above, reflects the coexistence of different cultural approaches to the management of migrants. This is sometimes linked to religious beliefs and behavioural patterns that characterise certain areas of the southern hemisphere, ultimately conflicting with the more common values of European populations. Hence the particular aversion of the latter towards individuals who come from countries which, due to their backwardness, have levels of economic development that are insufficient to support the basic needs of local communities.

This leads to an initial assessment of the difficulties that migrants, often irregular, are forced to face in many European countries, regardless of the situation of need that forced them to flee their countries of origin. The conduct of the political authorities in the destination countries may appear, in the opinion of many,

[84] See EUROPEAN COMMISSION, *Pact on Migration and Asylum* (*policy page)*, 2020–2024, which illustrates the need for a comprehensive framework with pre-entry *screening*, accelerated border procedures, strengthening *of Eurodac*, monitoring of rights and 'flexible solidarity'; On this subject, see FAVILLI, L*a solidarietà flessibile e l'inflessibile centralità del sistema Dublino,* in *Human Rights and International Law*, 2021, p. 85 ff.
On this point, see also EUROPEAN COMMISSION, *Taking stock of EU migration and asylum achievements* (Factsheet), March 2024, ISBN 978-92-68-13753-6, doi:10.2792/363616 (CC BY 4.0), which confirms the two-pronged approach: reform of the framework (fast-track *asylum/return* procedures, solidarity) and targeted operational actions to support Member States.

to be unjustifiable, as it shows a clear opposition to welcoming migrants. This attitude, as will be explained below, is often linked to decisions that reflect the *wishes* of part of the electorate.[85] On closer inspection, this logic not only disregards respect for human rights, but also reflects a backward-looking mentality that is unwilling to consider that, from a forward-looking perspective, the outcomes of the current migration policies of many European states must be considered inconsistent with the structural dynamics that characterise the continent's mature economies.[86]

The refusal to adopt inclusive measures towards migrants – often justified on the basis of security or financial sustainability requirements – fails to take into

[85] See HATHAWAY, *The Emerging Politics of Non-Entrée*, in *International Journal of Refugee Law*, 4(4), 1992; GAMMELTOFT - HANSEN, *Access to Asylum. International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, 2011; ANDERSON, *Us and Them? The Dangerous Politics of Immigration Control*, Oxford University Press, 2013; KRIESI, GRANDE, LACHAT, DOLEZAL, BORNSCHIER, FREY, *West European Politics in the Age of Globalisation*, Cambridge University Press, 2008. These authors address European policies of non-entrée and externalisation of control, pointing out that in this way governments aim to avoid asylum obligations while remaining within the conventional regime.

[86] The considerations set out in the text are in line with constitutional case law, according to which respect for the fundamental rights of migrants, including irregular migrants, constitutes an insurmountable limit on the actions of the legislature and the administration. Emblematic in this sense is the ruling of the Constitutional Court of 31 July 2020, No. 186, which declared the prohibition on registering asylum seekers in the registry to be unlawful, noting that it produced unreasonable unequal treatment and hindered access to essential services, affecting the right to integration and human dignity (Articles 2 and 3 of the Constitution).
These principles are also of systemic importance at European level: EU law, through the Charter of Fundamental Rights (Articles 1, 18 and 21) and the ECHR (Articles 3 and 8), requires Member States to ensure adequate reception conditions, even in situations of migratory pressure, and to avoid policies which, although expressing electoral consensus, compromise the core of human rights. It follows that a purely security-based approach, while legitimate if aimed at controlling flows, cannot take precedence over the minimum requirements for the protection of individuals, otherwise it would violate the principles of proportionality and reasonableness that permeate European economic law and its objectives of social cohesion and sustainable development.
The Court of Justice of the European Union and the European Court of Human Rights play a central role in restraining national policies, Most recently the effective cooperation between Italian courts and the CJEU safeguarded the right to judicial review of decisions on safe country of origin and its application by asylum seekers taken by Italian authorties to a detention centre in Albania, see *Alace and Canpelli* (joined cases C-758/24 and C-759/24, 1.8.2025).

account that the chronic demographic decline afflicting many EU Member States compromises the economic system's ability to regenerate itself in the medium to long term.

We must therefore ask ourselves whether politics can ignore the consequences of a systematic misalignment of the action taken by the complex of legal rules governing production, distribution and allocation processes in the general interest.[87] In particular, serious doubts arise about the efficiency of government action that does not adequately assess the fact that structural decline in birth rates and the progressive ageing of the population have a negative impact on the composition of the workforce, the sustainability of social security systems and, more generally, the stability of the 'social contract' on which the universalist market economy is based.

7. At European level, confirmation of the advisability of integrating the population through migration flows comes from certain European countries, such as Sweden, which, although not affected by declining birth rates, are seeing the beneficial effects of policies accepting immigration flows.[88] Of course, we cannot

[87] See PAUL, *The Comparative Politics of Migration Governance in Europe*, in ANGHEL, JONES (eds.), *Developments in European Politics III*, Bloomsbury, London, 2022, pp. 137–150, for a comparative summary of the conditions that guide openness (or its restrictive alternative) with regard to migration policies.
Allow us to make a classic reference to studies on the alignment between policy objectives and efficiency points, see MAJONE, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, in *Journal of Public Policy*, 17(2), 1997, 139–167; ID., *The Regulatory State and its Legitimacy Problems*, IHS Working Paper, 1998, on the risk of a disconnect between delegated regulation, credibility and the general interest; OECD, *Policy Coherence for Sustainable Development*, 2019, and *Driving Policy Coherence for Sustainable Development*, 2023 - on the need for cross-sectoral coherence to avoid counterproductive effects; HALL, *Varieties of Capitalism and Institutional Complementarities in the Macroeconomy*, MPIfG Discussion Paper 04/5, 2004, on institutional complementarities and the damage caused by regulatory misalignment.
[88] See ANDERSSON, WADENSJÖ, *Labour Migrants from Non-EEA Countries Moving from Sweden*, IZA Discussion Paper No. 17765, 2025 (last rev. 7 May 2025), as this study, while

ignore the fact that these are special cases, whose historical roots and current economic conditions – although similar to those of other European countries – facilitate an openness to reception that does not appear to be in line with the *modus operandi* of the 'old continent'.

However, the EU legislator seems to have realised this and has intervened with numerous regulatory measures governing the reception and protection of migrants, including those in an irregular situation. Specifically, we note the provisions contained in *the Dublin Convention* (EU Regulation No. 604 of 2013), which establish the criteria and mechanisms that can be used to determine which EU Member State is responsible for examining an application for international protection.[89] This Convention requires that the country of first entry must take responsibility for the migrant, a provision that has placed disproportionate pressure on border states (Italy, Greece, Spain), without at the same time introducing an automatic mechanism of solidarity or fair redistribution.

The principle of 'non-refoulement' is not introduced here, but it is assumed that it will be respected and applied.[90] This has meant that the application of this criterion has given rise to controversial cases where the Member State responsible does not provide adequate reception conditions and transfers applicants to States where they are at risk of persecution or ill-treatment, in clear violation of

highlighting the contribution of immigration to rebalancing the working-age population, shows selectivity in terms of permanence (a greater propensity to leave Sweden among the most educated and those with higher incomes), with implications for integration and talent *retention* policies. See also ECO, *Migration and Intolerance*, Milan, 2019.

[89] Chapter III of this regulation sets out the criteria for determining the Member State responsible, based on family ties, possession of a residence permit or visa, and, as a last resort, the State of first entry into the EU, which is the most frequent case for those arriving by sea. In this regard, see BAULOZ, *La compatibilité d'une double procédure d'asile avec le droit de l'Union européenne: commentaire de l'arrêt H.N. de la Cour de justice de l'Union européenne,* in *Asyl*, 3/14, 2014, pp. 31–32, for a critical analysis of the preliminary ruling and the compatibility of the Irish dual track (refugee *status/subsidiary* protection*)*.

[90] 'Non-refoulement' is a peremptory and non-derogable rule of international law (*ius cogens*).

international obligations.[91]

Similarly, certain provisions of the Charter of Fundamental Rights of the European Union, the so-called Charter of Nice, which is fully binding on European institutions and Member States, address the issue in question. Specifically, particular consideration is given to certain articles which enshrine 'the right of every person to respect for their dignity' (Art. 1), the 'prohibition of torture and inhuman or degrading treatment' and the 'right to asylum' (Article 18), guaranteed in accordance with the rules laid down in the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to *the status* of refugees.

It is clear that we are dealing with a complex set of rules that has the particular significance of providing general guidelines, making the principles governing reception in Europe unequivocal; consequently, any form of unjustified refusal of access to migrants' countries of first destination can be interpreted as a violation of the above criteria, also in view of the fact that irregular entry into the European Union does not justify treatment that could compromise fundamental human rights.[92] European legislation also provides for other regulatory measures which reaffirm the criterion that failure to provide reception violates the right to asylum. Significant in this regard are: a) Directive 2013/32/EU on the 'asylum procedure', which expressly includes among the rights of asylum seekers the possibility of not being returned to countries where their life or freedom is threatened; b) EU Regulation No 1030 of 2002 on the creation of a 'uniform

[91] On this point, see PINTO DE ALBUQUERQUE, '*Figli di un dio minore': migranti e rifugiati nel quadro della Convenzione europea dei diritti dell'uomo,* in *Human Rights and International Law*, 2/2021, 25 ff.; FERRI, *Nel nome della fiducia reciproca!». La Corte di giustizia si pronuncia sul rischio di «refoulement» indiretto nei trasferimenti Dublino: l'unica (e sempre più restrittiva) eccezione delle carenze sistemiche e le (limitate) prerogative del giudice nazionale*, in *Eurojus*, 1, 2024, pp. 40-80.

[92] See CAGGIANO, *Alla ricerca di un nuovo equilibrio istituzionale per la gestione degli esodi di massa: dinamiche intergovernative, condivisione delle responsabilità fra gli Stati membri e tutela dei diritti degli individui*, in *Studies on European Integration*, 2015, 459 ff.

residence permit', which reiterates that entry into another Member State on humanitarian grounds is subject to adequate protection.[93]

In this context, it is also worth noting the prohibition enshrined in Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture and inhuman or degrading treatment. This prohibition has been deemed applicable also to cases of forced expulsion of migrants, whereby an unjustified refusal to grant asylum could entail a risk of violation of this article, especially if it involves repatriation to countries where migrants risk persecution or inhuman treatment.[94]

Reference has been made above to the provisions of the 1951 Geneva Convention. It should be reiterated here that, in the context of international law *on this matter,* is particularly important because it associates the principle of non-refoulement of irregular migrants with the specific configuration *of* 'refugee status', which prohibits States from expelling or returning refugees to territories that are unsafe for them for various reasons (race, religion, nationality, membership of particular social groups, etc.); This principle also applies to irregular migrants who could be exposed to serious risks in the event of refusal. The Additional Protocol to the 1967 Geneva Convention, which has broadened the concept of 'refugee', extending the protection provided for them to anyone in danger of persecution, is

[93] On this point, see KOKOTT, *La Corte di Giustizia dell'Unione europea come motore dell'integrazione,* in *Il Diritto dell'Unione Europea,* 3/2024, pp. 427 ff., in which she emphasises how the case law of the Court, particularly in the area of the rule of law and fundamental rights, has strengthened the principle of non-regression and consolidated the role of the Union as the guarantor of common constitutional values. This suggests, ultimately, that European legislation on asylum and humanitarian protection – from Directive 2013/32/EU to Regulation No 1030/2002 – can be read as an expression of an integrated system aimed at preventing failure to provide reception from resulting in a violation of the right to asylum.

[94] See, among others, Strasbourg Court Hirsi Jamaa and Others v. Italy, 2012, application No. 27765/09; Khlaifia and Others v. Italy, 2016, application No. 16483/12. The probition agains torture is another peremptory and non-derogable rule of international law (*ius cogens*), see ANDENAS, WEATHERALL *Questions relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012*, (2013) 62 International and Comparative Law Quarterly 753–69.

expressly covers this situation.[95]

Finally, in our opinion, there is a close correlation with the aim of protecting persons outside their own country in the provisions of Article 13 of the International Covenant on Civil and Political Rights (ICCPR), which states that 'a foreigner lawfully in the territory of a State Party to the Covenant shall not be expelled except in accordance with a decision taken in accordance with law'. There is no doubt that this provision implies the right of every person not to be expelled from a State if such expulsion does not comply with the procedural guarantees provided for by international law.

Significant case law from the Court of Justice of the European Union reaffirms compliance with international law on asylum and the protection of migrants. The principles underlying these decisions highlight the Court's conviction that even persons who have entered 'illegally' are not deprived of the right to apply for international protection.[96] Irregularity cannot be a ground for expulsion without individual examination, and even in emergency situations, Member States cannot arbitrarily suspend fundamental EU rights, such as the right to access international

[95] On the principle of non-refoulement, enshrined in Article 33 of the Geneva Convention of 28 July 1951 and subsequently extended by the Additional Protocol of 1967, see COLACINO, *La Corte di giustizia UE afferma l'irrevocabilità della qualità di rifugiato e il carattere assoluto del divieto di respingimento. Quali indicazioni per il giudice nazionale?*, in *Freedom, Security & Justice: European Legal Studies,* 3/2019, pp. 83 ff., which, starting from the CJEU judgment of 14 May 2019, traces the prohibition of *refoulement* back to the nature of the refugee's perfect and inalienable subjective right, intended to bind not only States but also national courts in the interpretation of domestic law.

[96] For a review of the case law, see FERNÁNDEZ SANCHEZ, *Immigrazione irregolare e diritti umani: la prospettiva della Corte EDU e della Corte UE*, in *Freedom, Security & Justice: European Legal Studies,* 1/2020, pp. 52 ff., which highlights how both the European Court of Human Rights and the Court of Justice of the European Union have clarified that it is impossible to deprive irregular foreigners of the right to seek international protection. European case law now generally holds that violation of laws at the time of entry into a country cannot in itself justify automatic expulsion, requiring Member States to examine applications on a case-by-case basis, in accordance with international obligations and respect for the fundamental rights of the Union.

protection.[97]

In addition, the designation of 'safe third countries' or 'safe countries of origin' must comply with objective and transparent criteria, and be subject to judicial review. It follows that the Court considers that a mere legislative designation is not sufficient to guarantee the protection of migrants if the possibility of appeal is not adequately guaranteed, subjecting the application for protection to adequate scrutiny; hence the obligation not to return them to countries where they risk inhuman treatment or where they are prevented from benefiting from an effective protection system.[98]

On the basis of the above, it is possible to draw some concluding remarks. European regulation – long subject to criticism that has highlighted the need for a process of in-depth revision of the Union's decision-making guidelines – shows, on the contrary, that it has achieved significant results in the area we are concerned with here. in fact, there is a clear tendency among its top institutions to promote

[97] On this point, see MASERA, *La "crimmigration" del Governo Meloni e la fuga dalla giurisdizione*, in *Diritto penale e processo*, 11/2024, pp. 1403 ff., which denounces the risk of arbitrary curtailment of the fundamental rights of irregular migrants through agreements to externalise procedures and internal containment measures, with a consequent reduction in judicial guarantees. The author draws attention to the fact that even in emergency situations, Member States cannot escape their obligation to ensure individual examination and effective access to international protection, in accordance with the principles of EU law.

[98] Recent studies review the case law on the subject, as highlighted by FRIGO, *I Paesi sicuri alla prova del diritto internazionale (Safe countries put to the test of international law)*, in *Questione Giustizia*, 1/2020, pp. 155 ff., according to which judges now agree that the mere legislative designation of a State as a 'safe country' is not sufficient to guarantee compliance with the principle of *non-refoulement* in the absence of adequate judicial remedies.

In case law, see ECHR Section I judgment of 26 June 2019 with notes by PITEA, *La Corte EDU compie un piccolo passo in avanti sui Paesi terzi "sicuri" e un preoccupante salto all'indietro sulla detenzione di migranti al confine. A margine della sentenza della Grande Camera sul caso "Ilias e Ahmed c. Ungheria"*, *Immigration and Citizenship*, 3/2020, pp. 193 ff. (on the obligation for national authorities to carry out a concrete and individual assessment of the conditions in third countries designated as 'safe') and by FAZZINI, *Il caso "S.S. and Others v. Italy" nel quadro dell'esternalizzazione delle frontiere in Libia,* in *Law, Immigration and Citizenship*, 2/2020, pp. 87 ff. (on the risks of circumventing conventional obligations through agreements with unsafe states).

regulations designed to respect ‘human dignity’, in line with the high level of legal culture and civic education that characterises most EU Member States.

Unfortunately, this is not matched in some countries by a similar willingness to welcome refugees, hence – as will be emphasised below – the adoption of a course of action which, first and foremost, raises doubts about the willingness of the politicians who advocate it to comply with it. More precisely, in the face of such events, it becomes difficult for the observer to understand the reasons for such an attitude, which in some ways is contrary to the teachings of the ‘social doctrine of the Catholic Church’, which this policy seems to want to embrace by invoking the axiom ‘God, country and family’.

From another perspective, it should be noted that the adoption of a restrictive migration policy - as emerges from the context outlined above, which views migrants arriving in Europe (after a very dangerous 'journey of hope') with substantial aversion - ends up acting in contrast to the needs of the economic system, considering, as previously emphasised, that the refusal to recognise the structural dimension of the migration phenomenon and its potential balancing function can produce serious distorting effects. In our opinion, faced with this reality, we must acknowledge the need to introduce innovative legal mechanisms for the integration and regularisation of the phenomenon in question, so that they produce beneficial effects both in terms of economic efficiency (by addressing the shortage of labour in strategic sectors) and in terms of equity (and market competitiveness), preventing the proliferation of pockets of informal work, exploitation and social marginalisation.

Economic law is also helpful in this context; in fact, it can promote a functional reinterpretation of migration policies. In this way, it becomes possible to reconcile public order requirements (which often lead government authorities to take intransigent positions) with the equally compelling requirements of economic and demographic sustainability. This reinterpretation should make it possible to

identify new regulatory frameworks that promote (through the provision of appropriate regulatory instruments) the inclusion of migrants in productive circuits and social protection systems, creating suitable opportunities for their active participation in economic development processes.

We are aware of the difficulties involved in implementing a proposal that changes the established position of the political authorities in many EU countries; however, we believe that a useful dialogue between economic law and the political reality of reference will make it possible to understand the new paths to be followed, presumably through legally certain and economically rational regularisation processes. Only in this way will it be possible to address the important challenge posed by demographic change in a systematic manner, without falling into the increasingly evident contradiction between the closure of institutions to the reception of irregular migrants and the structural need for a new active population. This must be done with the desire to pursue a complete balance between individual freedoms and economic needs.

8. From the above, it is clear that among the most complex issues that economic law is called upon to address today*, the reception of migrants* plays a key role. a term that refers to the way in which states interpret their responsibility/duty to deal with migration flows, which are often perceived as an 'invasion' destined, among other things, to upset the employment balance in the destination countries.[99]

Consequently, irregular migrants, who – at the end of a long journey in which they have faced various dangers, often risking death – arrive in a Europe that soon

[99] On this topic, see FERZETTI, LANNUTTI, *La prevenzione delle forme di ostilità e di radicalismo. Politiche migratorie e percorsi di inclusione giovanile in Europa e in Italia negli ultimi vent'anni*, in *Rivista trimestrale di scienza dell'amministrazione*, 4/2021, 9 ff., which, with a socio-legal approach, analyse European and national integration policies, emphasising their function not only in managing migration flows but also in preventing hostility and radicalisation.

disappoints their expectations, proving to be unwelcoming and adopting an attitude towards them that, to say the least, can be described as punitive.

Hence the specificity attributable to this form of reception which, on closer inspection, lies at the crossroads between public ethics, economic sustainability, regulatory constraints and cultural tensions. In fact, it brings together the personal needs of migrants, who are usually socially and economically marginalised, with the individualism and selfishness of those who (often through hard work and sacrifice) have achieved high levels of well-being and are unwilling to share it with others.

It is clear that in such a reality there is a strong connection between ethics and economics, proposing an issue whose solution appears instrumental to the affirmation of human freedom and Christian values.[100] We refer to the configurability of the unique legal and value-based challenge that demographic dynamics give rise *to in this matter,* the basis of which is the difficult objective of reconciling the needs of human dignity, solidarity and social justice with the (often rigid) positions of national political authorities in protecting established situations of well-being (which are considered to be under threat), sometimes identified with the 'safeguarding of state borders'.[101]

In this scenario, reception policies take on controversial contours. On the one

[100] Consideration is given to the observations of TOMASI, *Non sono numeri, sono persone. Le migrazioni: la sfida del confronto,* in *Iustitia,* 1/2017, pp. 21 ff., a report presented at the conference *'Lo spazio* dell'altro' (The space of the other), Gazzada, 4-6 October 2016, where the author – starting from a Christian perspective – emphasises the need to view the phenomenon of migration not in purely statistical terms, but as an issue that challenges the ethical conscience of communities and the construction of a 'common home'. The theological-pastoral approach proposed reveals how Christian values, understood as instruments of coexistence and solidarity, are inextricably linked to economic and social structures.

[101] On this point, it suffices to recall the most recent statements by Matteo Salvini, for whom the *'safeguarding of borders'* coincides with the defence of a model of identity and national well-being, as recently reiterated in Pontida on 21 September 2025; see ANSA of 21/09/2025: *'Salvini closes Pontida:* "*Italians will never go to* war"' article in which it is reported that Salvini 'shouts his no to war and to foreigners who do not integrate' from Pontida. Therefore, 'the goal is to return to sealing off Italy's borders' in the name of defending the West.

hand, the teachings of the Church's social doctrine strongly emphasise the duty to welcome foreigners, recognising their inviolable dignity and their right to humane and safe living conditions.[102] On the other hand, the choices made by the government bodies of many states, which usually move in the opposite direction for a variety of reasons, to be assessed not only in a political context but also taking into account economic, legal and cultural factors, some of which have been referred to in the preceding pages (e.g. competition in the labour market and cultural and identity-related motivations); hence the tightening of controls, the restriction of access and, in particular, the use of other instruments such as the bilateral agreements mentioned with third countries to keep the flow of migrants within their borders.

In this context, it is necessary to ask whether an acceptable solution to the problem in question can be found, in which adequate space is given to both the legal-economic and ethical-value perspectives. A thorough reflection on the subject requires abandoning any ideological approach and instead looking at the complexity of the migration phenomenon as a reality to be governed with legal rationality, political prudence and ethical awareness.

On a logical and systemic level, the starting point for any reflection is the consideration that it is not possible to proceed with indiscriminate closures of migration flows or unlimited reception. Therefore, any analysis that envisages achieving one of these objectives must be considered unrealistic, whereas reasonableness suggests the search for a sustainable solution that can only be achieved by adopting a middle way; which must, on the one hand, comply with the

[102] See CODINI, *Governo dell'immigrazione*, in *Dizionario di dottrina sociale della Chiesa*, issue 4 of 2021 (October–December), which reconstructs the framework of social doctrine according to which foreigners must be recognised as having inviolable dignity and a human right to migrate, based on the common ownership of the earth's resources; a right to be exercised in a balance oriented towards the common good of the entire human family, which requires orderly and inclusive reception policies that cannot be reduced to the mere defensive logic of states.

need to protect the individual in their existential values, including, first and foremost, the 'social promotion of the individual's rights, such as the right to non-discrimination'[103] and, on the other hand, be consistent with the principle of state sovereignty and the constraints deriving from international law (in particular with regard to human rights and the protection of refugees), a hypothesis that can be achieved through the adoption of integrated policies based on legality, solidarity and economic realism.

Hence the need to take into account, first and foremost, the general principles of the Church's social doctrine on migration, which are set out in important documents centred on the affirmation of the inviolability *of* human *dignity* and, therefore, also of migrants, whatever their status (refugee, displaced person, economic migrant or irregular migrant).[104]

Among the many important positions taken by the Church, the following are therefore worth considering: a) the Apostolic Constitution on the 'Spiritual Care of Emigrants' *Exul Familia*, promulgated by Pius XII in August 1952, which specifies that in the absence of dignified conditions, the right of the person to migrate in search of a better life elsewhere must be recognised; b) the Pastoral Constitution *Gaudium et spes*, promulgated by Pope Paul VI in December 1965, which affirms the concept of universal human brotherhood, linked to feelings of solidarity and subsidiarity and, therefore, to the moral obligations of welcome and support in order to accept migrants in a sustainable manner; c) Pope John Paul II's encyclicals dedicated to social issues *Laborem exercens* (1981), *Sollicitudo rei socialis* (1987), *Centesimus*

[103] BIANCA, *Giovanni Paolo II e il diritto all'accoglienza*, in VV.AA., *Giovanni Paolo II e le vie della Giustizia*, edited by Loiodice and Vari, Rome, 2003, 516.

[104] Cf. *Compendium of the Social Doctrine of the Church*, n. 297, drawn up, according to the mandate of Pope John Paul II, to present in a concise but comprehensive manner the social teaching of the Church, Rome, 2005, which states that "Every migrant is a human person and as such possesses fundamental rights that cannot be taken away" including the right to migrate and to be welcomed in dignified conditions, and the recommendation to States to adopt fair and inclusive migration policies and to promote integration.

annus (1991), which affirm the right to work and the centrality of man in the economy, hence the relationship between work, mobility and global economic justice in the context of migration, which led to *John Paul II* being called *'the Pope of welcome*'.[105]

The social doctrine of the Church, while not entering into the technical legal merits of regulations favourable to hospitality, indicates the founding principles so that it can be linked to the model of development of a social market economy (as envisaged in Article 3, paragraph 3, TEU) oriented towards the common good. Significant in this regard is Pope Francis' reference to the passage in the Gospel in which Jesus says: 'I was a stranger and you welcomed me',[106] words that mark a strong appeal for the welcome, protection, promotion and integration of migrants.

The Church invokes the human right to migration in the awareness that global economic inequality is the structural cause of migratory flows and recognises solidarity as the prerequisite for access that avoids exploitation and promotes the dignity of work.[107]

This is a message of peace that refers to the values of *social morality* that the constitutions of some EU Member States, such as Italy, require to be respected in the exercise of entrepreneurial activity;[108] it involves not only political authorities but also all those who are 'personally called to respond to the challenge of development'.[109]

The election of Pope Leo XIV suggests a renewed impetus on the part of the

[105] This is the title of a work by CORASANITI published in VV.AA., *Giovanni Paolo II e il diritto all'accoglienza,* in AA.VV., *Giovanni Paolo II e le vie della Giustizia,* cit., 521 ff., which recalls the pontiff's commitment to "welcoming and assisting exiles, refugees and immigrants in general, keeping a watchful eye on problems, tragedies and prospects of the highest human value".

[106] See Pope Francis' Encyclical *Fratelli tutti*, paragraph 84, 2020.

[107] See Paul VI's Encyclical *Populorum Progressio* of 1967.

[108] See OPPO, *Diritto dell'impresa e morale sociale,* in *Principles and Problems of Private Law*, VI, Padua, 2000, 259 ff.

[109] LENER, *Economic Initiative and Solidarity in a 'Free Market'*, in VV.AA., *John Paul II and the Right to Hospitality*, in VV.A.A., *John Paul II and the Ways of Justice,* cit., 534.

Church in interpreting the dramatic problems afflicting humanity. The name chosen by the Pontiff, which refers to Leo XIII, who was the first to address these issues in a systematic and comprehensive manner at the end of the 19th century, points in this direction.

The desirable overcoming of the totalitarianism of certain current ideologies and the search for a more balanced relationship between the North and South of the world, towards which Pope Leo XIV seems to be directing his pontificate, finds authoritative confirmation in the "Homily" he delivered in St. Peter's Square on 5 October 2025 on the occasion of the "Jubilee of Migrants". Indeed, the words of the Holy Father are particularly significant, recalling the "history of so many of our migrant brothers and sisters, the drama of their flight from violence, the suffering that accompanies them, the fear of not making it, the risk of dangerous crossings along the coasts of the sea, their cry of pain and despair". They are an implicit invitation to welcome our *brothers* and *sisters* 'who hope to see a safe harbour where they can stop ... who are looking for dry land to land on ... (and) ... cannot and must not find the coldness of indifference or the stigma of discrimination!'[110]

Although the issue of migration flows has been addressed by the Church's social doctrine in a manner that considers the underlying social, cultural and political problems, it has not yet been possible to find concrete solutions in line with the Church's guidelines. The analysis has already referred to certain economic and financial factors (sustainability of *the welfare state,* competition in the labour market, cultural factors, etc.) that are obstacles to full openness to reception on the part of national political authorities. Other reasons must be added to these: from the low professional profiles of migrants who are unwelcome in highly specialised economies to a generalised tendency to perceive the current regulatory framework

[110] See Jubilee of the Missionary World and Jubilee of Migrants, Holy Mass, Homily of His Holiness Pope Leo XIV, St. Peter's Square, 27th Sunday in Ordinary Time, 5 October 2025.

mentioned above (i.*e. the Geneva Convention,* EU legislation on the right to asylum) as unbalanced to the detriment of some states, which therefore call for it to be reformed in a more restrictive manner.[111]

From another perspective, in recent times, the intention to safeguard national identity has become increasingly important, limiting access to migratory flows perceived as a threat to cultural and religious cohesion. Certainly, past experiences of urban ghettoisation, episodes of crime and ongoing religious aversion have fuelled political and social mistrust.

There is, therefore, a climate of substantial opposition to the policy of welcoming migrants, which is accentuated by the rise of right-wing populism. This is because the governing forces that characterise them, while aware of the need for demographic integration for economic reasons, use the narrative of rejecting migrants as an electoral propaganda tool to gain consensus.

Underlying this is a reluctance to accept a universalist conception of human rights, such as that indicated by the social doctrine of the Church, which is considered contrary to the centrality of state sovereignty. This position, however, can be justified not so much by the declared need to pursue security objectives, but

[111] Although many government positions speak of 'reform' of the Geneva Convention, in practical terms this often involves promoting restrictive reinterpretations or outsourcing procedures rather than formally amending the treaty (which would require a complex multilateral process) and, in Europe, a debate on the modification of secondary legislation; on this point, see UK Government, *Safety of Rwanda (Asylum and Immigration) Act 2024. Factsheet*, London, 2024, and see *UNHCR statement on UK Home Secretary's speech on reform of the Refugee Convention*, 26 September 2023 (criticising S. Braverman's statement about the inadequacy of the 1951 Geneva Convention).
For the European Union, see COUNCIL OF THE EUROPEAN UNION, *Migration and asylum: Council and Parliament reach agreement on the Pact*, 14 May 2024, as well as EUROPEAN COMMISSION, *New Pact on Migration and Asylum – Factsheet*, Brussels, 2024. For an analysis of the externalisation policies promoted by the governments of Hungary, Slovakia and Serbia, see COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *Report on the externalisation of migration policies in Europe*, Strasbourg, September 2025. The Italian government has promoted instruments for the externalisation of procedures (e.g. Italy-Albania Protocol, ratification law no. 14/2024), which are currently the subject of litigation and scrutiny for compatibility with EU law.

rather by the intrinsic difficulty of finding a balanced solution to a problem that, in recent years, has taken on unusual dimensions, precisely because of the population growth in the southern areas of the planet.

Perhaps, once again, the desire to achieve some positive outcome on this long-standing issue is doomed to fail, a 'mirage' that can only be realised in the future, when humanity has achieved a degree of overall maturity that will enable it to give concrete form to the message formulated by John Paul II in the encyclical *Centesimus annus,* issued to celebrate the centenary of Pope Leo XIII's *Rerum novarum*.

This refers to John Paul II's definition of *the economy* as 'a sector of multifaceted human activity ... (in which), ... as in every other field, the right to freedom applies, as does the duty to make responsible use of it'.[112] As has been authoritatively emphasised, this refers to the 'promotion of the human person in his multifaceted capacity to build for himself and for others the pursuit of the common good in which ... freedom and responsibility are combined';[113] we are in the presence of a vision *of* economic *action* in which the factors indispensable for a process of growth from which all individuals can benefit without discrimination and inequality converge into a unity. It is clear, then, that we are unfortunately still a long way from this happy moment!

9. Over time, migration to Italy has taken on particular characteristics that differentiate it from the situation in other countries on the 'old continent'. Italy's peninsular geographical position in the centre of the Mediterranean Sea gives it the role of 'gateway to Europe', with the result that it is usually chosen as the preferred

[112] See John Paul II, *Centesimus annus*, para. 32.

[113] See QUADRIO CURZIO, *Conoscenza, lavoro, impresa: l'economia come libertà e responsabilità*, in VV.AA., *Giovanni Paolo II e il diritto all'accoglienza*, in VV.AA., *John Paul II and the ways of Justice*, cit., 573.

destination for migratory flows from Africa. I preconditions can be identified that allow us to frame the phenomenon in question as *structural,* with constant periodicity and variations in scale that appear to be closely linked to the ways in which the Italian state manages it, albeit amid numerous conflicts.[114]

Contradictions characterise migration policies, arising from the intersection of conflicting orientations. on the one hand, there is the universalistic (welcoming) Catholic cultural background, and on the other, there is a gradual shift towards a paradigm of closure, which, as we have previously emphasised, has become particularly prevalent following the rise of right-wing populism in government. In order to identify the logical basis for this disparity in orientations, it is worth remembering that the Catholic Church in Italy plays a very important social role, confirmed by the influence of the principles of the Church's social doctrine highlighted above, whereas right-wing sovereignty has made the fight against migration its banner since its inception.[115]

That said, the problem of the 'migration emergency' has become entrenched in Italy through a tightening of political intervention, which has manifested itself both at the regulatory level with the enactment of security decrees and specific border police provisions,[116] and at the administrative level with the strengthening

[114] On the structural nature of migration, see ALGOSTINO, *L'immigrazione come dato strutturale e non come emergenza. Brevi note intorno al volume di Michele Colucci, "Storia dell'immigrazione straniera in Italia. Dal 1945 ai nostri giorni",* in *Law, Immigration and Citizenship*, 1/2019, 14 ff., a work which, starting from the historical events of immigration in Italy, refutes the interpretation of the phenomenon as an emergency, confirming the persistence of recurring dynamics of political and regulatory management, oscillating between security needs and labour exploitation, to the detriment of full protection of rights.

[115] See the editorial entitled *Salvini torna al passato: «Basta immigrati, difenderò i confini» (Salvini returns to the past: 'No more immigrants, I will defend the borders')*, published in *il manifesto* on 22 September 2025.

[116] On the tightening of Italian regulatory and administrative measures, see CAVALIERE, *Punire per ottenere 'sicurezza': corsi e ricorsi di un'illusione repressiva e prospettive alternative*, in *La Legislazione penale*, 4/2021; in systematic terms, see SCICCHITANO, *La disciplina dell'immigrazione in Italia: tra revisione dei Decreti sicurezza ed intervento della Corte*

of controls and the outsourcing of related procedures, delegating them to third countries with which political and economic agreements or partnerships have been established, as mentioned above.

This strategic approach fails to take into account that the issue of migration is closely linked to demographic dynamics, meaning that closed, deterrence-oriented policies risk amplifying Italy's demographic decline rather than managing it, and raise questions about the role of economic law as a tool for mediating between security needs, the labour market and fundamental rights. As a result, the reduction of migration flows (including irregular ones) cannot be assessed separately from demographic ageing and the need for labour, which is particularly evident in certain sectors, such as agriculture, care and construction; otherwise, it is bound to generate tensions with the national economic interest.

On the basis of this consideration, an authoritative doctrine has argued that migration is not an emergency: it is a fact and, as such, must be addressed and governed with a realistic attitude.[117] Hence the need to analyse the phenomenon in order to find viable and sustainable solutions to the many problems it poses: from the definition of specific policies on access to border control, from the management of regular immigration flows to the containment of irregular ones, from the introduction of appropriate citizenship rules to the adoption of integration policies. It is a programme that presents a challenge to be addressed in the knowledge that its outcomes will affect the country's economic and social stability. This position is echoed by other scholars who invite us to reflect, on the basis of objective data, on

costituzionale, in *dirittifondamentali.it*, 2/2021, p. 350 ff. As for the practices of externalisation and the strengthening of border controls, see AMBROSELLI, *From security decrees to the immigration decree: insights on the 'Sea Watch' case*, in *Diritto Pubblico Europeo – Online Review*, 1/2021, p. 219 ff.

[117] See ALLIEVI, *Governare le migrazioni, Si deve, si può*, Bari, 2023, which emphasises that the problem of declining birth rates must be addressed through a global vision that makes us understand the importance and necessity of pursuing forms of progressive integration.

complex issues (including: the response to irregular immigration, the treatment of refugees, overcoming cultural and religious differences, combating racism, etc.) in order to allow for forms of openness and integration of new arrivals.[118]

The complexity of the situation outlined above is clearly evident when we consider the 'brain drain' that deprives our country of promising young people and a balanced generational turnover, as well as the significant 'labour drain' of many industrial and construction workers who are forced to seek work in other European countries.[119] It is also clear that, over the last few decades, the phenomenon in question has undergone profound changes, which have been met with 'increasing rhetorical attention, but which has often been matched, in inverse proportion, by disordered attention and a lack of planning' with regard to the real needs of social governance.[120]

However, given the need to address the phenomenon of migration, taking into account the regulatory, political and social changes it has undergone over the last century, the search for possible remedies to find an adequate solution to the problem in question has not always been approached in a pragmatic and realistic manner. Consequently, the paradigm for managing migration flows has not been changed and, as Stefano Allievi recently pointed out, no concrete answers have been given to the many questions that can be raised on the subject, from the

[118] See, *among others*, AMBROSINI, CAMPOMORI, *Le politiche migratorie*, Bologna, 2024; FONDAZIONE MIGRANTES, Organismo della Conferenza episcopale italiana, *Rapporto Italiani nel Mondo 2024: l'Italia delle migrazioni plurime che cercano cittadinanza attiva (Report on Italians in the World 2024: Italy of multiple migrations seeking active citizenship)*, in which Monsignor Perego, president of the Foundation, vigorously reiterates that 'politics must recognise and interpret the changes taking place in the polis'.

[119] See PUGLIESE, *Quelli che se ne vanno. La nuova emigrazione italiana*, Bologna, 2018, a work in which the authors clear the field of stereotypes and prejudices to outline the contours of a composite reality destined to have an increasing impact on all aspects of our economic and social life.

[120] See SCIORTINO, VITTORIA, *L'evoluzione delle politiche immigratorie in Italia*, in *la Rivista delle Politiche Sociali*, 2023, no. 1,19.

unjustified restriction of regular immigrants to the provision of different forms of entry with increasing numbers of guaranteed jobs.[121]

Conversely, as mentioned above, politicians have exploited the migration issue, building their electoral identity on it, fuelling fears and equating 'border control' with closing borders to regular access.[122] Added to this are the agreements with third countries, already mentioned (Libya, Albania), based on a logic of *outsourcing* that aims to transfer the problem outside the national territory, but which is legally vulnerable and politically questionable.

Indeed, the cooperation agreement between Italy and Libya – dating back to a *Memorandum of Understanding* signed by the Italian government in February 2017 – for the latter's containment of migrant flows must be considered objectively controversial due to the critical issues in this country, characterised by fragile institutions and a lack of respect for human rights. so much so that it has prompted an appeal from leading humanitarian organisations to 'modify the terms of cooperation', which, as stated in the note from, makes 'Italy... jointly responsible for the violations and abuses committed in Libya'.[123]

Certainly less controversial, but equally subject to numerous criticisms, is the recent agreement between Italy and Albania of 6 November 2023, which has led to the creation of special centres in the latter (located in Shengjin and Gjader, facilities

[121] See the editorial entitled *Dieci anni fa, Aylan Kurdi. Le cose sono cambiate? Sì: in peggio*. ALLIEVI, *"Canali regolari e istruzione unica via all'integrazione"*, available at *https://stefanoallievi.it/category/interviste.*

[122] Significant in this regard is the editorial entitled *Pontida, Salvini torna alla carica sull'immigrazione: «Blindiamo i confini». Vannacci: «Lo straniero stupra e ruba»,* available at *https://www.open.online/2025/09/21/pontida-festa-lega-2025-vannacci-salvini-zaia-video.*

[123] See the editorial entitled *Italy-Libya: "No ad accordi che calpestano i diritti umani", il richiamo delle organizzazioni umanitarie al Parlamento italiano,* available at *https://www repubblica.it/solidarieta/diritti-umani/2021/07/08/news/italia-libia-309463888*, which refers to the appeal presented by ActionAid, Amnesty International, Médecins Sans Frontières and Human Rights Watch to the joint foreign affairs and defence committees of the Chamber of Deputies and the Senate.

located on Albanian soil but under Italian and European jurisdiction) where people awaiting expulsion or repatriation will be held.

The criticisms are numerous and varied, ranging from doubts about the constitutionality of the agreement raised by the Massimario della Cassazione (Supreme Court of Cassation)[124] to its compatibility with European Union law, in particular with the principle of designating a 'safe country'. In this regard, it is worth noting the position of the Court of Justice of the European Union, which ruled on 1 August 2025 that a Member State may designate a third country as a 'safe country of origin' by means of a legislative act, but that such designation must be subject to effective judicial review;[125] hence the need for the legal sources on which such designation is based to be clear, in order to ensure that such control is guaranteed.

This is the context for the so-called Mattei Plan for Africa, an Italian policy initiative presented as a tool for development cooperation, consisting of a form of equal partnership and certain investments in African countries (to be implemented in a number of macro-sectors, including education, health, agriculture, etc.); the plan is characterised by the presence of a significant amount of resources and an initial selection of pilot countries.[126] The initiative in question seems destined to mark a 'change of pace' in Italian policy in terms of structured investment, as it takes

[124] See the editorial entitled *Cassazione, dubbi costituzionalità intesa Italia-Albania: criticità anche con diritto internazionale (Court of Cassation, doubts about the constitutionality of the Italy-Albania agreement: critical issues also with international law)*, available at *www.rainews.it/articoli/2025/06/cassazione-dubbi-costituzionalita-intesa-italia-albania-criticita-anche-con-diritto-internazionale-fb47ae53 -b397-42ac-b1c8-7e0c51ed9ff8.html.*

[125] See Joined Cases C-758/24 [Alace] and C-759/24 [Canpelli], available at *https:/www. eurojusitalia.eu/?id=690.* This is also followed by the European Court of Human Rights, see for example *S.H. v. Malta* (37241/21, 20.12.2022), which is another striking illustration of why an individual review may be called for in cases on safe country status.

[126] See the editorial entitled *Il Piano Mattei e le politiche italiane sull'Africa (The Mattei Plan and Italian policies on Africa)*, available at *https://www.ispionline.it/it/ pubblicazione/il-piano-mattei-e-le-politiche-italiane-sullafrica-1948 22*, an article which highlights that this plan was presented to numerous African leaders and international organisations at the Italy-Africa summit held in Rome on 28 and 29 January 2024.

advantage of the possibility of implementing a synergistic relationship with African countries through particularly large multilateral projects.

However, this project risks becoming a paradigmatic example of a hybrid approach over time if timely remedies are not found for certain aspects of its uncertainty, which highlight limitations in terms of *governance*, transparency and *partnership*.[127] In this regard, some criticisms aimed at highlighting the underlying objective of the Mattei Plan, which can be traced back to the tacit intention of using aid to stop migration from Africa to Europe, appear significant.[128] On closer inspection, as has been correctly pointed out, the use of such an instrument to achieve this goal must be considered misguided, as the Plan would be decidedly inadequate given the massive scale of the migration phenomenon.

10. The subject of this investigation seems destined to suffer the negative repercussions of certain events that are unfolding following the election of Donald Trump as President of the United States of America, a country in which, just a few months after the inauguration of the new administration, profound changes are taking place in the democratic system, which, in our opinion, are causing serious upheaval not only domestically but also internationally.

Indeed, the advent of the presidency is forcing the US to take on a substantially illiberal face, which translates into forms of continuous violation of the 'rule of law' and a failure to respect the dialectic of decision-making, which excludes 'the absolutism of the majority' and 'the force of power' as a rule of government.

[127] See MOSES UYANG, *Pragmatically Advancing The Rule of Law and Security in Africa, Paramount for The Successful Implementation of Italy's Piano Mattei (Mattei Plan) on the Continent*, in *International Journal of Geopolitics and Governance*, 2025, vol. 4, no. 1.

[128] See AMBROSINI, *Piano Mattei: bene gli aiuti, ma non è l'alternativa all'emigrazione,* available at *https:www.avvenire.it/attualita/pagine/bene-gli-aiuti-ma-non-questa-lalternativa-allemigrazione.*

We are witnessing events whose scope is not yet clear, so much so that they are being analysed from many quarters because one thing is already clear to everyone: their effects are destined to change the geopolitical order of the planet.[129]

Obviously, this is not the place to examine the ways in which the American head of the executive, through a series of measures adopted following his inauguration, is transforming the existing order in order to realise a plan of political and economic domination destined to subvert the legal logic that had prevailed until the moment of his appointment. It may be necessary to emphasise, however, that these measures are characterised by the imposing (and sometimes even violent) manner in which the American presidency asserts its will; the tone and approach that characterise Donald Trump's actions (often marred by arrogance and disrespect for the dignity of others) reveal a complex personality, reflecting a cultural background that needs to be analysed and understood in its true essence.[130]

It follows that in this factual context there is a precipitous 'decline of democracy' characterised by a failure to respect the well-known criterion of *checks and balances* (the traditional system of 'weights and counterweights' which in democracies serves to balance the actions of the government), dangerous expressions of 'power' (referring to the well-known imposition of tariffs on countries that trade with the United States) and episodes of human rights violations (think, for example, of the deportation of illegal immigrants in chains), an issue that

[129] See, among others, the editorial by FERRARA entitled *L'egocrazia democratica di Mr. Donald Trump, del 21 gennaio 2025*, available at *https://www.ilfoglio.it/esteri/2025/01/21/news/l-egocrazia-democratica-di-mr-donald-trump-7348112*; QUARANTA, *Donald Trump e la nuova politica energetica degli Stati Uniti: cosa sta accadendo?*, dated 22 January 2025, available at *https://www.teknoring.com/news/modelli-e-strategie/politiche-energetiche-donald-trump-stati-uniti-aspettative-conseguenze*; PASSARELLI, *Gli Stati Uniti. Donald Trump e i checks and Balances*, in *federalismi.it*, 2020, no. 29.

[130] For further information, see CAPRIGLIONE, *Il declino delle democrazie liberali. Diritto economia geopolitica*, Milan, 2025.

is of particular interest with regard to the subject of our investigation.

Assessing this situation, it is clear to the observer that while the United States is certainly the first country to suffer the storms of the Trump presidency, ending up in a situation of predictable *chaos,* it is equally clear that it will be difficult for all other countries on the planet to escape the storm planned by the new American president in order to restore the US budget. Specifically, we are referring to the application of high 'tariffs' on goods exported to America, a move that risks triggering a 'trade war' and, more generally, has aspects that are likely to disrupt the geopolitical order of the world.

Added to this is the *contagion* effect that the US executive's behaviour may have in many countries where autocratic tendencies are gradually taking hold, which, in practical terms, are manifested in a 'regime change' achieved through the electoral mechanism;[131] This effect can already be seen in the approach taken by some states – such as Italy, which is particularly willing to assume a subordinate position with respect to the US – in declaring their intention to tackle the problem of regulating 'migration flows'. Significant in this regard is the method by which they intend to proceed, which is fully summarised in the word 're-immigration'.[132]

If we wish to focus here on the new US president's declared aversion to immigrants, it seems necessary to seek the underlying reasons that lead the American leadership to see this line of conduct as the winning political and cultural option. To this end, it is necessary to consider the logic underlying 'Trumpism',

[131] See BOVERO, *Autocrazia elettiva*, in *Costituzionalismo.it*, 2015, issue 2.

[132] Recent events clearly show the political use of the term 're-immigration/remigration' in Italy, as in other EU Member States and beyond, as in the United Kingdom in which leaving the European Human Rights Convention now is discussed as a next step after BREXIT. It is no coincidence that the Accademia della Crusca refers to its semantic meaning as a euphemism for 'forced expulsion/mass deportation' in https://accademiadellacrusca.it/it/parole-nuove/remigrazione/24579; a usage confirmed by Treccani, *Neologismi. remigrazione*, 28 January 2025, which clarifies its meaning as a euphemism for forced return, with examples of its use in the press; see CAMILLI, ACCARDO, *La parola remigrzione nasconde una teoria del complotto*, in *Internazionale.it*, 8 September 2025.

which expresses an intent to conquer, does not disdain openness to business transactions and seeks to derive economic benefit from any type of relationship initiated by politics. In other words, it is based on a *rationale* that interprets the choices made in terms of *economic and legal exploitation*.[133]

That said, it is clear that opposition to immigration cannot be reduced to the mere argument that it taps into the widespread fear, present in large sections of the electorate, of downward competition from migrants in low-skilled sectors; indeed, it has a number of complementary dimensions that are worth highlighting.

Firstly, it is important to note that Trump's anti-immigrant rhetoric is intertwined with cultural and identity-based motivations, rooted in the fear of demographic 'replacement'. In this context, the racial element is implicit, so that the aversion is not directed at immigration *tout court,* but at immigration from Latin America, Africa and the Middle East; similarly, the aim is to safeguard *white supremacy* and, in particular, to defend a Christian, white and rural America, which is contrasted with an urban, cosmopolitan and multi-ethnic America.

The assumptions referred to in the studies of authoritative scholars to clarify the causes that weaken democracies and favour the rise of autocratic systems recur. In fact, these analyses highlight that democracies can collapse when political elites leverage ethnic and racial divisions to strengthen their consensus.[134]

From another perspective, the fight against immigration is linked to the principle *of border security*, whereby border control is presented as a means of protecting 'national sovereignty' against the risks of globalisation, becoming a symbol of the fight against unfair international trade and the relocation of

[133] See CAPRIGLIONE, *Il declino delle democrazie liberali. Diritto economia geopolitica*, cit., p. 49 ff. and p. 76 ff.

[134] This refers above all to the classic works by CARTER HETT, *La morte della democrazia. L'ascesa di Hitler e il crollo della Repubblica di Weimar,* Turin, 2019; as well as LEVITSKY and ZIBLATT, *How Democracies Die*, translated and published in Italy under the title *Come muoiono le democrazie*, Bari, 2018.

production. Thus, immigration is portrayed as *an* effective *scapegoat,* useful for shifting attention away from the structural causes of social and occupational inequalities – including the loss of bargaining power of organised labour – towards an external, immediately visible enemy.[135]

It is also clear that the systemic framework outlined above has a particular institutional focus, given the importance of the relationship between presidentialism, military power and political repression. Indeed, with immigration being presented not only as a social problem but as a real threat to national security, the executive branch considers itself justified in applying *the Insurrection Act* of 1807[136] and deploying Marines and the National Guard in the event of social unrest, such as the widespread rebellion against the deportation of immigrants that raged in many American cities in early June 2025.[137] It follows that interventions against citizen protests become, in this logic, instruments of political pressure against Democratic governors (giving them and local administrations a 'show of force') and a vehicle for the progressive normalisation of the 'state of exception'.[138]

To conclude on this subject, it can be said that, in the name of defending the labour market and border sovereignty, an authoritarian strategy is being implemented that alters the balance between constitutional powers and creates

---

[135] See FRASER, *The Old is Dying and the New Cannot be Born. From Progressive Neoliberalism to Trump and Beyond*, London, 2019.

[136] See the editorial entitled *Trump minaccia l'Insurrection Act, cos'è e come funziona (Trump threatens the Insurrection Act: what it is and how it works)*, available at *https://www.lastampa.it/esteri/2025/06/10/news/trump_minaccia_insurrection_act_cos_e_come_funziona-15185349.*

[137] This refers, in particular, to events that saw the populations of large cities, such as Los Angeles and San Francisco, oppose, even with forms of urban guerrilla warfare, the uncivilised methods Donald Trump used to keep one of the most significant promises he made during his election campaign. see the editorial entitled *Proteste contro le retate di deportazione si moltiplicano nelle città USA*, available at *https://it.euronews.com/video/2025/06/11/aumentano-le-manifestazioni-contro-i-raid-di-deportazione-nelle-citta-degli-stati-uniti.*

[138] See WILSON, *'Red Caesarism' is right-wing code – and some Republicans are listening*, in www.theguardian.com, 1 October 2023.

the conditions for a market economy that interacts with an increasingly unstable institutional reality. In this context, Donald Trump's hard line on immigration – which, as previously mentioned, is becoming an interventionist priority and a unifying factor in right-wing sovereigntism – appears instrumental in dividing public opinion and forcing Democrats to take a difficult stance.

11. This analysis raises a significant question regarding the protection of fundamental human rights in the face of the challenges posed by birth rates (or rather, declining birth rates), ageing and migration, taking into account the correlation between the legal situations that arise at a personal level and the set of human rights that the international community generally recognises and seeks to defend.[139] This is because public intervention in the management of the demographic dynamics cannot compromise their essence or hinder people who opt for choices aimed at ensuring better and more complete living conditions.

It should be borne in mind that, in a forward-looking view of human rights protection, demographic variables are not limited to a series of statistical figures to be governed by economic policy instruments. Instead, we are dealing with complex cases that affect the concrete content of guarantees and judicial protection mechanisms. In the European context outlined above (characterised by structural decline in birth rates, ageing and migratory pressures), human rights therefore act as an organising principle that constrains public action and, at the same time, serves as an institutional mechanism for correcting the imbalances that the continent's

[139] See ALSTON, *International Human Rights*, New York, 2025, for a useful overview of the relationship between levels of protection, through a comparative analysis of regional systems and current challenges; see also BURGORGUE-LARSEN, *The 3 Regional Human Rights Courts in Context. Justice That Cannot Be Taken for Granted*, Oxford University Press, Oxford, 2024, on the three jurisdictional pillars (ECHR, Inter-American Court of Human Rights, African Court), for a reflection on the effectiveness, structural limitations and prospects for reform of the *enforcement* system.

economy exhibits in cycles of demographic crisis.

Based on experience of the most egregious and painful violations affecting human beings in recent times, it can be said that the analysis must address the firm moral imperative that public intervention must always ensure the protection of individual existence and, therefore, take into account the many ways in which it can be violated (killing, mutilation, torture, deprivation of liberty, etc.).[140] The same applies when referring to the security of essential needs and the equality of all (i.e. avoiding discrimination on the basis of race, sex, language, religion, political opinion, social conditions, etc.), as well as the protection of political rights (effective participation of individuals in the government of their country, periodic, free and secret elections, etc.).

The assumption underlying any form of governance of demographic variables is twofold: on the one hand, to bear in mind the orientation of international law on human rights and the ECHR, which define minimum *standards* that cannot be reduced beyond a threshold that reflects the need to respect human dignity; on the other hand, to remember that these *standards* permeate the structures of economic law, affecting allocation choices and forms of regulation of labour markets, essential services and *welfare* (in line with the economic and institutional implications outlined above).[141]

With particular reference to migration, attention must be paid to the demographic pressure coming from the southern hemisphere (to be classified as a structural variable and not as a mere emergency), as this translates into an increase

[140] See HABERMAS, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Suhrkamp, FrankfurtM., 1992, on the ‚system of rights' as a condition for free and equal coexistence and on guarantees of personal integrity and living conditions.

[141] See SHUE, *Basic Rights. Subsistence, Affluence, and U.S. Foreign Policy*, 2nd ed., Princeton University Press, Princeton, 1996, on the recognition of 'basic rights' relating to security and subsistence as preconditions for the enforceability of other rights, which correspond to positive and negative institutional obligations on the part of public authorities.

in situations of deprivation of liberty, given border controls, administrative detention, possible rejections or transfers (with an obvious impact on the dialectic between moral duty and political practice). In this perspective, the relevance of the case law found in the application of the ECHR is clear, as it makes it mandatory to observe a course of action that cannot be circumvented by political emergencies or electoral cycles. This refers, in particular, to the application of *the Basic Principles and Guidelines* of the Working Group on Arbitrary Detention (WGAD), which affirm the 'non-derogable' nature of the right to access a court, clarifying the content, timing, costs and remedies of effective judicial protection.[142]

In this context, attention should be paid to *Deliberation* No. 9 of the WGAD, which places the prohibition of arbitrary detention in customary law, based on specific content requirements that include legality, proportionality, non-discrimination and independent judicial review.[143]

Obviously, from a perspective that is more attentive to the European reality, it should be noted that the Community legal system confirms these constraints. In this regard, the role of the ECHR is significant in relation to the emergence of *tensions* produced by 'demographic cycles' and 'security policies'. Indeed, it must be recognised that the Court itself has experienced a period of 'institutional contestation'; nevertheless, its authority has not been eroded, but rather

[142] In other words, recourse to the courts is a functional safeguard of the entire system, because it converts administrative exceptionality into controlled and guaranteed legality; see UN *Human Rights Council*, *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, A/HRC/30/37, 6 July 2015.

[143] It is useful to refer to UN *Working Group on Arbitrary Detention*, *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, A/HRC/22/44, 2013; see also *Report of the Working Group on Arbitrary Detention*, A/HRC/27/48, 30 June 2014, as these parameters have repercussions on economic law: the management of flows cannot be structured as a mere outsourcing of social costs to vulnerable individuals, but must incorporate the necessary cost of procedural guarantees and remedies (consistent with the critical issues of governing the phenomenon already highlighted in the preceding paragraphs).

recalibrated through procedural and remedial techniques that preserve its supervisory function in critical phases of the relationship between vulnerable individuals and public authorities.[144]

In systemic terms, the ECHR's approach is conditioned by the dialectic on admissibility (of issues) and remedies (at its disposal): both act as a valve to regulate the caseload and, together, as a tool to enforce rights that, without a coherent remedial architecture, would remain mere declarations of intent. For this reason, too, the external effects of ECHR decisions are crucial and, in some ways, go beyond *res judicata:* they guide governments and, therefore, affect budget lines, organisational models and frontier practices.[145]

That said, it should be noted that, at present, a particularly important issue is raised by the extraterritorial application of fundamental guarantees when European states exercise effective control outside their own territory. As a result, naval operations, advanced 'hotspots', waiting areas and cooperation with third countries raise new types of issues that require a series of responses from the Court. These responses clarify the actual content of human rights with respect to the aspirations for improvement inherent in human nature and, at the same time, denounce the different convictions of certain governments, which are sometimes committed to defending territorial particularities rather than protecting human beings.

It seems clear, however, that in operations abroad or at the borders, the

[144] See STONE SWEET, SANDHOLTZ, ANDENAS, *The Failure to Destroy the Authority of the European Court of Human Rights: 2010–2018*, in *The Law and Practice of International Courts and Tribunals*, 21(2), 2022.

[145] Admissibility selects the cases in which Strasbourg's scrutiny is necessary for the stability of the system; remedies (*equitable satisfaction*, individual and general measures) transform judicial *dictum* into institutional change, with an impact on public policy (in line with the need for structural measures referred to in other parts of this paper); See GERARDS, BUYSE, ANDENAS (eds.), Special Issue *"'Heads and Tails': Admissibility and Remedies at the European Court of Human* Rights", in *European Convention on Human Rights Law Review*, 5(3), 2024.

weak link is not the abstract enunciation of rights, but the delimitation of state jurisdiction and responsibilities.[146] Indeed, once control (including functional control) has been established, Articles 3, 5 and 13 of the ECHR apply and, as a result, there is an absolute prohibition on collective expulsions and a requirement for individual examination, as the Court has reiterated in paradigmatic cases concerning the Mediterranean and the Dublin system.[147] This leads to the conclusion that *policy* choices on the management of flows cannot rely on legal grey areas; thus, in this interpretative context, outsourcing does not extinguish the responsibility of an *outsourcer* but, on the contrary, imposes additional procedural diligence and remedial guarantees.

From another perspective, it should be noted that demographic changes also affect the scope of social rights and the related positive obligations of states. Declining birth rates and ageing, already interpreted in terms of *welfare* sustainability, call for a rethinking of state duties in terms of access to essential services, substantive equality and indirect non-discrimination towards vulnerable groups (minors, the elderly, *caregivers)*.[148] In other words, in the field of demography, the *justiciability* of social rights does not stop at economic and financial discretion, but is rather prompted by public reasons, especially when long-

[146] See ANDENAS, BJORGE, *Human Rights and Acts by Troops Abroad: Rights and Jurisdictional Restrictions*, in *European Public Law*, 18(3), 2012; see also ECHR, *Al-Skeini and Others v. United Kingdom*, 7 July 2011; *Al-Jedda v. United Kingdom*, 7 July 2011.

[147] See ECHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012; M.*S.S. v. Belgium and Greece*, 21 January 2011.

[148] The dimension of remedies, which recent reflection has brought back to the centre of attention, is linked here to the causal chains that link public conduct (or omissions) to outcomes that infringe rights. Causal analysis – a topic on which a systematic literature is being consolidated – constitutes the technical bridge between *standards* of protection and institutional reforms, including the redistribution of resources to mitigate the regressive effects of demographic *trends* (consistent with the need for integration between economic and demographic policies already established above); see, from a systemic perspective, the editorial project on causality and positive obligations under the ECHR: STOYANOVA, ANDENAS (eds.), *The Role of the Causal Inquiry under the European Convention on Human Rights* (forthcoming, Cambridge University Press).

term policies affect the effectiveness of protection (particularly in the areas of local healthcare, educational services and social inclusion).

Therefore, a sort of reflection of the variables in question (and the related forms of government, *status* and protection) on the evolution of rights within changing societies is taken into consideration, where cultural transitions (and, in particular, those related to the structure and forms of the family) raise new types of protection needs (related to the increase in single-parent families, the dispersion of families across multiple cities and other situations that require greater efforts to resolve everyday problems and lead a comfortable life). This is an evolutionary process which, in some legal systems, has led to the recognition of new family forms or the expansion of spheres of personal autonomy; this, according to a method anchored in dialogue between social dynamics and legal guarantees, with case law and doctrine acting as a link between social change and the stability of the legal system.[149]

In this context, the interaction between human rights and public intervention produces effects that can influence the behaviour of governments. Indeed, first and foremost, public finance choices and flow management strategies must incorporate the costs of procedural and substantive guarantees, because these costs are constitutionalised by international and conventional law. Added to this is the consideration that the design of regulatory instruments (i.*e.* work permits, legal channels, integration services) is not neutral, as it creates courses of action that are more or less compatible with *standards* of legality, preventing negative externalities (informal work, exploitation, marginalisation) that the market alone cannot correct. The remedial structure must be configured in such a way as

[149] *Mutatis mutandis*, the same architecture can be used to address the distributional effects of ageing and declining birth rates, preventing the revision of social rights from resulting in a decline in the protection of the most vulnerable; See WINTEMUTE, ANDENAS (eds.), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, Hart, 2001.

to guide the public administration towards interventions that do not generate litigation before the ECHR.

Ultimately, interpreting demographic changes in the light of human rights does not diminish the efficiency of the law with regard to sociality: on the contrary, it increases its selective capacity, directing scarce resources towards structures that preserve common well-being, social cohesion and intergenerational sustainability.

Therefore, it seems possible to conclude that case law requires governments to make a fundamental choice: to adopt a *public rationality* in which human rights constitute a parameter and a method; a parameter, because they mark the boundaries of what is non-negotiable, and a method, because they impose an *evidence-based* argumentation of demographic and economic policies, verifiable in court and compatible with a European order which, despite friction and difficulties, has demonstrated the resilience of its protection mechanisms.

12. The complexity of the issue does not allow us to immediately arrive at solutions that provide satisfactory answers to the many questions that demographic dynamics pose to those who seek to explore its contents. Indeed, in constructing an argumentative framework that encompasses the various issues that can be raised on the subject, the interpreter must refer to different areas of knowledge, taking into account the possible interactions between economic law and the issue of social justice, creating a bridge between demographic reality and global economic reality.

The contrast between North and South, although rooted in historical factors, can be resolved if we begin to view irregular migration not as a problem to be contained, but as an opportunity to be managed, with an emphasis on integration and solidarity between states. In this context, reference to the Social Doctrine of the Church certainly identifies a fundamental criterion to be followed; the guidance that this doctrine gives to ‘men of good will’ opens up *the hope* of a better world in

which - in the face of a gradual overcoming of individualism and entrenched positions centred on the protection of the selfish interests of a few - a universalistic vision prevails that opens up to acceptance and welcomes the idea of the possible integration of immigrants.

This is perhaps the path to be taken in order to reach a positive conclusion in the search for concrete proposals that will eliminate the significant socio-economic disparity that exists in many European countries *in this* area. We refer to the situation of high welfare and modernity that has established itself in these countries, factors which, rather than encouraging the birth rate, reduce it by virtue of growing individual autonomy, gender equality and the transformation of family models.

At the same time, it is possible to envisage that widespread *support* for immigrant access will act as a catalyst in resolving the long-standing reality of many countries in sub-Saharan Africa, the Middle East and South Asia. In these countries, poverty and lack of *empowerment,* combined with traditional cultural systems, fuel high birth rates which, rather than being a sign of vitality, constitute a structural obstacle to economic development.

At present, however, the serious difficulties highlighted in the survey remain, preventing the finding of concrete solutions to the problem of regulating migration flows in line with the Catholic Church's guidelines, which, as mentioned above, are based on a spirit of universalism and hospitality. Perhaps we will have to wait for better times, when human selfishness will be mitigated throughout the world and it will become possible to achieve goals that today can only be attained through desire and imagination.

What we have attempted to demonstrate here is the legitimacy of such an expectation: it cannot and must not be considered *a utopia* because the obstacles that exist today can be rationally calculated and, therefore, overcome by resorting to appropriate measures which, following the prescriptions of economic law, allow

us to reconcile the various contradictory aspects that characterise the phenomenon in question.

This conviction is reinforced by this criterion that identifies *solidarity* as one of the cornerstones of civil coexistence, as its legal, as well as ethical, characterisation gives it particular significance. Solidarity, as it relates to the issue at hand, allows us to indicate to governments the behavioural standards that should guide their concrete actions and, therefore, the regulatory framework of the countries of destination for migrants. It is worth remembering that we are dealing with a criterion for 'organising relations between individuals and between individuals and the state', as the late Guido Alpa pointed out in one of his famous books.[150]

It follows that, in the governance of demographic dynamics, solidarity is capable of expressing the synthesis between the indications of 'moral law' and those of economic/legal rationality. In other words, the traditional composition of the principles underlying civil society - represented by the trilogy of ethics, law and economics - is enlivened by the expressive force that solidarity is able to confer in matters such as the one under consideration; namely by supporting the logic of hospitality which, in our opinion, 'is coloured by different experiences: from charity to altruism, from charity to social activity... to economic activity'; operational forms which, , are characterised by the profound sense of responsibility that derives from the application of the principle in question.[151]

On the basis of the above, it is possible to identify - despite the concerns

[150] See ALPA, *Solidarietà*, Bologna, 2022.

[151] CAPRIGLIONE, *La 'solidarietà' nella ricostruzione di Guido Alpa,* in *Riv. Trim. Dir. Econ.*, Supp. to no. 1 of 2023, 12. See also DYSON, ANDENAS *Professor Guido Alpa (1947-2025): A Tribute - Faculty of Law* 2025 at https://www.law.ox.ac.uk/institute-of-european-and-comparative-law/professor-guido-alpa-1947-2025-tribute, CONTE, *In Memory of Guido Alpa* 2025 *European Business Law Review* 831), ANDENAS, CHIU, *Editorial Tribute: Guido Alpa (1947-2025)* 2025 *European Business Law Review* 339.

expressed at the beginning of these conclusions - guidelines to enable us to arrive at a systemic design of the relationship between economic law and demographic dynamics.

Indeed, the recommendations formulated in this study highlight that, in any case, it is conceivable (possible although difficult to imagine) to manage and regulate these variables, and this possibility could be envisaged whether the socio-economic transformations induced by them will be implemented by governments with a view to respecting the principles of efficiency, equity and social cohesion. From a more general perspective, it can be said that these principles strengthen the interaction between the theoretical basis and empirical results of the public intervention over the demographic dynamics: from public health to multi-level *governance*, from economic rationality to critical analysis of global structures.

TARIFFS, GLOBAL FRAGMENTATION, AND THE LIBERAL ORDER UNDER TRUMP'S SECOND TERM

Mariateresa Maggiolino*

ABSTRACT: *This article analyses the tariff strategy of Donald Trump's second administration, situating it within the broader transformation of U.S. economic governance and its international spillovers. The paper advances three claims. First, tariffs have become the most visible expression of a deliberate turn to unilateralism, both domestically - through an expansive and arguably ultra vires reliance on emergency powers - and internationally - through measures that openly disregard World Trade Organization (WTO) disciplines. Second, Trump's tariffs embody the "anti-Tinbergen principle": instead of treating economic instruments as functionally specific, the administration deploys tariffs simultaneously to pursue fiscal, industrial, social, and geopolitical objectives. This multi-purpose use of trade policy blurs boundaries across domains, extending to issues as diverse as migration control, fentanyl flows, and energy deals. Third, and most importantly, tariffs are not merely economic tools. They have become instruments of political reordering that accelerate the fragmentation of the global marketplace and erode the very liberal-democratic principles on which the postwar economic order was built. By weaponizing trade in this way, the United States risks weakening both its own constitutional balance and its long-standing role as architect of the multilateral trading system. Far from delivering the promised revival of American industry and fiscal sustainability, tariffs may produce the opposite outcome: higher costs, weaker alliances, and diminished U.S. leadership in a multipolar trade*

* Full Professor of Law and Economics at "Bocconi" University of Milan.

world.

SUMMARY: 1. Introduction. - 2. A Turbulent Rebirth of Protectionism. - 3. The Fragile Legal Foundations of Trump's Tariffs. - 3.1 Domestic legality. - 3.2 International legality and trade relations. - 4. Tariffs as Multi-Purpose Instruments: The Anti-Tinbergen Agenda. - 5. Economic Skepticism: Why Tariffs Rarely Deliver. - 6. International Reactions and Trade Fragmentation. - 7. Tariff Policy and the Changing Fate of Liberal Democracies.

1. The second Trump administration has proved to be strikingly active in the opening months of its mandate. A series of initiatives, spanning distinct policy domains yet reflecting a common pattern, illustrates the breadth of this activism.

To begin with, on January 20, 2025 - the very first day in office - President Trump created the Department of Government Efficiency (DOGE) with the stated goal of streamlining the federal bureaucracy. Simultaneously, he abolished diversity, equity, and inclusion initiatives and offices across federal agencies.[1] In addition, between February and April 2025, the President issued a broad array of executive actions curtailing the authority of independent agencies,[2] including the Federal Reserve

[1] Four executive orders issued on January 20–21, 2025, demonstrate the administration's early efforts to restructure the federal bureaucracy and eliminate diversity-based programs and infrastructures. Executive Order 14,158, *"Establishing and Implementing the President's 'Department of Government Efficiency",* created the DOGE, reframing the U.S. Digital Service and charging it with modernizing federal technology and streamlining operations. Executive Order 14,151, *"Ending Radical and Wasteful Government DEI Programs and Preferencing",* directed agencies to terminate all federal DEI (diversity, equity, inclusion, and accessibility) offices, mandates, and activities. This measure was reinforced by Executive Order 14.148, which revoked a series of prior executive orders—including several issued under the Biden administration—related to DEI, and by Executive Order 14173, which rescinded President Lyndon Johnson's *Executive Order 11246* (1965) on affirmative actions in federal contracting.

[2] Namely, Executive Order 14,215 requires agencies to establish White House liaisons, appoint regulatory policy officers, and submit draft rules for White House review and approval—effectively giving the Office of Management and Budget (OMB) a veto over agency rulemaking. The Order further declares that the President's views on questions of law "are controlling on all employees", prohibiting agencies from advancing contrary legal interpretations unless specifically authorized. Building on this, three further Executive Orders issued on 9 April (14,264, 14,267, and 14,270) set new procedures for

(FED),[3] and narrowing the jurisdiction of financial regulators such as the Consumer Financial Protection Bureau (CFPB), thereby reducing supervisory oversight in areas such as banking compliance and consumer lending.[4] Acknowledging that these

rescinding existing rules of both independent and executive agencies, while Interim Guidance 2025 extends OMB review to any regulatory action published in the *Federal Register*. At the same time, the President has claimed the power to remove officials at will, notwithstanding statutory protections. Examples include removals of members of the National Labor Relations Board (NLRB), Merit Systems Protection Board (MSPB), Federal Trade Commission (FTC), and Consumer Product Safety Commission (CPSC) - decisions at odds with the Supreme Court's unanimous decision in *Humphrey's Executor v. United States* (1935) (holding that held that the President cannot freely remove commissioners of the FTC, since they do not perform purely executive functions but also legislative and quasi-judicial ones. In doing so, the Court set a limit on the President's removal power in order to safeguard the independence of regulatory agencies). Through Executive Order 14,171 and related actions of the Office of Personnel Management (OPM), the administration has also sought to reclassify over 200,000 civil servants as "policy-influencing" employees, thereby stripping them of career protections. These measures directly challenge the constitutional foundations of the modern civil service, established by the *Pendleton Act* (1883) and the creation of the bipartisan Civil Service Commission, today's Merit Systems Protection Board.

[3] To be sure, Executive Order 14,215 formally applies to the Federal Reserve only with respect to its supervisory and regulatory functions, not its conduct of monetary policy. Yet the line between bank regulation and monetary policy is porous: capital requirements, leverage ratios, and reserve rules directly affect the supply of money and credit. Other core tools - such as interest on reserves, discount lending, and international swap lines - may likewise be classified as "regulation" and thus subject to presidential review, even though they have significant effects on U.S. monetary policy. This concern is particularly meaningful in light of the conflict between President Trump and Chair Jerome Powell as to interest rates. Trump had argued that lower rates would stimulate economic growth and support financial markets. Powell, by contrast, has taken a cautious, data-driven approach, insisting that it would be premature to act given ongoing inflationary risks and the economic uncertainty created in part by Trump's trade policies. Therefore, Trump has publicly criticized Powell for being too slow to cut interest rates, attacked him over the costs of the FED's headquarters renovation, and even suggested that he is "grossly incompetent". Against this backdrop, the already mentioned administration's disregard for *Humphrey's Executor v. United States* (1935) in removing members of other independent agencies raises concern that President Trump could attempt to dismiss Powell before the end of his term and without statutory cause—an outcome that would fuel fears that political influence might un-anchor inflation expectations, increase the cost of capital, and erode confidence in the Fed's independence.

[4] In addition to Executive Order 14,215, there have also been direct administrative actions that curtailed the CFPB's supervisory and enforcement reach. In February 2025, relying on the authority of the *Federal Vacancies Reform Act* (1998) and acting under the broader framework created by Executive Order 14,215, the White House installed new leadership at the CFPB and ordered it to suspend nearly all of its activities, including initiating new investigations and promulgating new rules, and even closed its Washington, D.C. headquarters temporarily. In April 2025, pursuant to the discretion granted to the CFPB under the *Dodd–Frank Wall Street Reform and Consumer Protection Act* (2010), the Bureau's

measures are also pragmatically intended to reduce federal spending,[5] taken together they point toward a deliberate centralization of power in the executive branch and raise significant concerns about the administration's commitment to the rule of law. In other words, they foreshadow a governing style increasingly at odds with the checks and balances that define liberal democracies.[6]

In parallel, the administration sought to redefine the United States' security posture - both domestically and internationally. On the home front, it reshaped immigration policy from the outset through an executive proclamation that reinstated a state of emergency at the southern border, expanded expedited removals, and suspended humanitarian admission programs.[7] Coupled with a heavy reliance on xenophobic rhetoric, President Trump portrayed these measures as necessary to safeguard opportunities for American workers.[8] Internationally, the administration

leadership issued an internal memorandum announcing that it would cut in half the number of supervisory examinations and rescinded dozens of existing regulatory guidance documents, thereby narrowing its compliance oversight.

[5] See *infra* ft. 17.

[6] See, e.g., MILLER, *The dead end of checks and balances*, 50 *Boston Review* 25 (2025); KRAMER, *Judicial Declarations of Independence: Checking an Elected Monarch* (April 17, 2025), available at SSRN: https://ssrn.com/abstract=5221633; DRIESEN, *Donald Trump's Unitary Executive: Overcoming the Constitution* (August 20, 2025); in Constitutional Law Studies, Volume 11, no. 2 (December 2025), available at SSRN: https://ssrn.com/abstract=5398833; DRIESEN, *Donald Trump and The Collapse of Checks And Balances*, 77 SMU Law Review 199 (2024).

[7] On January 20, 2025, President Trump issued Proclamation 10,785, "*Declaring a National Emergency at the Southern Border of the United States*." The proclamation reinstated the national emergency originally declared in 2019, authorizing the diversion of military resources to border security operations and permitting emergency contracting for construction and detention facilities. It further expanded the use of expedited removals under § 235(b)(1) of the *Immigration and Nationality Act* (1952), extending summary deportation procedures to a broader category of recent entrants. The proclamation also suspended several humanitarian admission programs created under the Biden administration, including parole initiatives for nationals of Cuba, Haiti, Nicaragua, and Venezuela, as well as certain refugee resettlement pathways. In combination, these measures marked a fundamental shift in immigration policy at the outset of the second Trump administration, replacing a framework centered on humanitarian relief with one emphasizing rapid exclusion and enforcement.

[8] MAYDA & PERI, *Immigration and Border Policies*, in *The Economic Consequences of the Second Trump Administration: A Preliminary Assessment* 95 (GENSLER, JOHNSON, PANIZZA & WEDER DI MAURO eds., CEPR Press 2025).

withdrew from both the *World Health Organization* (WHO) and the *Paris Climate Accord*,[9] while also launching a six-month review to evaluate potential withdrawal from additional international organizations, conventions, and treaties.[10] In the spring of 2025, President Trump further cast doubt on the durability of the U.S. commitment to NATO, suggesting that substantially higher allied financial contributions would be required as a condition for continued American support.[11] At the same time, White House officials and State Department memoranda openly questioned the sovereignty of Greenland, Panama, and even Canada, asserting possible U.S. claims over these territories and their strategic resources.[12] In short, in defining the U.S. political posture - and, as will become clear below, also its economic posture - toward the rest of the world, the administration advanced the narrative that the United States needed revenge, as other countries had long been free-riding on the investments it had made to establish and maintain the global order.

More recently, on July 4, 2025, the President signed the *One Big, Beautiful Bill*, the administration's flagship tax package, thereby marking a major shift in U.S. fiscal policy. Among other provisions, the reform made permanent the individual tax reductions first introduced under the *Tax Cuts and Jobs Act* of 2017.[13] At the same

[9] See Executive Order 14,145, *"Ending United States Participation in the World Health Organization",* directed the Secretary of State to transmit notice of withdrawal from the WHO to the United Nations and to reallocate assessed contributions to other international health initiatives; and Executive Order 14,146, *"Ending United States Participation in the Paris Climate Accord",* ordered the Secretary of State to notify the depositary of the United States' withdrawal and directed federal agencies to cease all implementation of Paris-related commitments.

[10] See Executive Order 14,147, *"Review of United States Participation in International Organizations, Conventions, and Treaties",* directing the Secretary of State, in consultation with the National Security Council, to conduct a six-month review of all U.S. memberships in multilateral organizations and adherence to international conventions or treaties, and to recommend possible withdrawals.

[11] See, e.g, the news available at https://www.cbsnews.com/news/trump-nato-article-5-collective-defense-europe-doubt-us-treaty-commitment/.

[12] See, e.g., the news available at https://news.northeastern.edu/2025/01/10/trump-greenland-panama-canada-comments/.

[13] GALE, HOOPES & POMERLEAU, *Sweeping Changes and an Uncertain Legacy: The Tax Cuts and Jobs Act of 2017*, 38 *J. Econ. Persp.* 3 (2024).

time, the domestic economic agenda recalibrated fiscal incentives by cutting clean-energy credits while extending targeted support to sectors deemed strategic, such as semiconductors and steel.[14] In the administration's view, these extensive tax cuts would not undermine the sustainability of U.S. public debt,[15] as they would stimulate higher economic growth,[16] be accompanied by offsetting reductions in federal spending achieved through the DOGE and other administrative reforms,[17] and generate increased revenues from tariffs on imported products.

Indeed, any catalogue of initiatives undertaken by the second Trump administration would be incomplete without reference to its tariff policy. Duties emerge as the connecting thread between domestic priorities and the broader geopolitical objectives outlined above. A closer examination shows that tariffs were

[14] BOOTH-TOBIN, *By curtailing clean economy incentives, President Trump puts his own affordability and jobs goals at risk*, CERES, July 4, 2025.

[15] GENSLER, MENAND & YOUNGER, *The Financial Sector and Global Dollar System*, in *The Economic Consequences of the Second Trump Administration: A Preliminary Assessment* 111 (GENSLER, JOHNSON, PANIZZA & WEDER DI MAURO eds., CEPR Press 2025).

[16] To stabilize the debt without further adjustment, real growth of roughly 4% per year would be required - a scenario that could be deem unrealistic. The IMF's forecasts for 2025 and 2026 have, moreover, been revised downward, to 1.9% and 1.7% respectively. Indeed, more restrictive immigration policies could reduce labor force participation and further weaken growth potential. Furthermore, When, during President Trump's first term, Congress enacted the Tax Cuts and Jobs Act (TCJA), it implemented a substantial reduction in the corporate tax rate (from 35% to 21%) and temporary cuts to individual income taxes, scheduled to expire at the end of 2025. Proponents of the TCJA similarly argued that the tax reductions would spur growth and thereby expand the tax base (higher GDP translating into higher revenues). Growth did occur, but not at a level sufficient to offset the revenue loss; the net fiscal effect was therefore negative.

[17] The DOGE initiative is presented as a means of reducing costs and streamlining bureaucracy. In practice, however, the projected savings appear far smaller than official claims - perhaps on the order of only 0.2–0.3% of GDP annually. More specifically, approximately 73% of federal expenditures are mandatory (Social Security, Medicare, Medicaid, and interest on the debt). Social Security and Medicare, moreover, have been explicitly excluded from the proposed cuts. The remaining 27% of "discretionary" spending is already heavily constrained, with roughly one-half devoted to defense, which the administration has pledged to increase. Savings from reductions in the federal workforce are also limited. Civilian federal salaries amount to approximately $250 billion per year; thus, even a drastic 25% cut in civilian personnel would yield only about $60 billion annually - roughly 0.24% of GDP. Finally, although eliminating programs related to diversity, climate, or research may generate high political visibility, their budgetary weight is comparatively negligible.

expected to advance a wide spectrum of purposes. On the domestic front, they were meant to shield U.S. manufacturing from foreign competition, encourage the reshoring of strategic industries, expand employment, narrow bilateral trade deficits, and generate revenue to sustain public debt. At the same time, they were conceived as instruments of international strategy - weakening the dollar to bolster exports and strengthening Washington's leverage in global negotiations. In this way, tariffs were elevated to the rank of a multipurpose device, even though this runs counter to the well-established "Tinbergen principle" which links the effectiveness of any policy instrument to its dedication to a single objective.

Yet the implications of tariffs extend well beyond the above set of aims the administration sought to realize. Operating at the crossroads of trade and competition, they reshape supply chains, reconfigure comparative advantages, and influence the dynamics of entire industries far beyond the bilateral relationships they ostensibly target. In this respect, the administration's reliance on tariffs represents more than a tactical or defensive trade move: it signals a structural challenge to the very foundations of the liberal trade order. This order - defined by the progressive dismantling of barriers to commerce and by the institutionalization of multilateral disciplines - was largely built and championed by the United States itself in the aftermath of the Second World War. By adopting an inward-looking trade posture, Washington undermines both the credibility of its long-standing commitments and the stability of a system it once promoted as the cornerstone of global prosperity. Tariffs thereby emerge not only as a means of shielding the domestic economy or enhancing bargaining power abroad, but also as a lever of geopolitical influence, blurring the line between economic and foreign policy, accelerating the fragmentation of global trade, and eroding the multilateral framework the United States itself helped design.

Given the far-reaching implications of the United States' decision to reshape the global economic order through tariffs, the remainder of this paper examines the issue

in detail. After reviewing the administration's recent tariff initiatives (Section 2), it addresses four main questions: what their legal foundations are (Section 3); why the administration has embraced tariffs (Section 4); what economic consequences they are likely to produce (Section 5); and what broader implications they carry for global trade and competition (Section 6). In answering these questions, the paper argues that tariffs - far from 'making America great again' - risk having the opposite effect: higher costs for U.S. firms and consumers, weaker economic and political alliances, and the erosion of the liberal-democratic order that underpinned postwar globalization.

2. It is not easy to capture in a systematic way the tariff policy adopted by President Trump during the opening months of his second administration. Announcements, official decisions, and subsequent reversals followed one another in rapid succession, often blurring the line between declaratory politics and legally binding measures. In extreme synthesis, however, the trajectory of these developments may be summarized as follows.

In his second inaugural address on January 20, 2025, President Trump pledged to «immediately begin the overhaul of our trade system to protect American workers and families».[18] On the same day, he issued Executive Order 14,157, declaring a national emergency under Section 1701 of the *International Emergency Economic Powers Act* of 1977 (IEEPA)[19] to address the threats posed by international cartels, designated as foreign terrorist organizations and global terrorists, and Proclamation 10,886, declaring a separate emergency at the southern border linked to criminal

[18] The White House, *The Inaugural Address*, Executive Office of the President, January 20, 2025.

[19] The IEEPA grants the President broad authority to respond to national emergencies in the economic sphere. It empowers the executive to investigate, regulate, or prohibit a wide range of financial and commercial transactions involving foreign states or their nationals, including banking operations, transfers of funds, imports and exports of currency or securities, as well as dealings in property connected to foreign interests. These powers, however, may be exercised only in the presence of an «unusual and extraordinary threat» that has been formally declared as a national emergency under the *National Emergencies Act* (1976).

gangs, traffickers, and illicit narcotics. Shortly thereafter, on February 1, he expanded these emergencies to cover both the public health crisis of fentanyl use and the failure of Canada and China to curb trafficking organizations and precursor suppliers. On this basis, he imposed 25% tariffs on most goods from Mexico and Canada - subject to a lower 10% rate for Canadian energy - and a 10% tariff on imports from China.[20] Following a temporary suspension, the tariffs on Mexican and Canadian products entered into force on March 4. By contrast, the duties on Chinese imports had already taken effect on February 4, and were subsequently raised to 20% on March 3.[21] Subsequent executive orders no. 14,231 and 14,232 further modified these measures, reducing the duty on potash (a soluble source of potassium and is primarily used as an agricultural fertilizer) from Canada and Mexico to 10% and withdrawing duty-free treatment for low-value Chinese imports. At present, these "*trafficking tariffs*" remain in place, set at 25% for Mexican and Canadian products, 10% for Canadian energy, and 20% for Chinese products.

On April 2 - designated by Trump as "Liberation Day" - the President declared a national emergency, framing the United States' large and persistent goods trade deficit as an «unusual and extraordinary threat» to national security and to the U.S. economy. According to the administration, these deficits were rooted in a lack of reciprocity in bilateral trade relationships, disparate tariff rates and non-tariff barriers, as well as economic policies of key trading partners that suppressed wages and consumption, thereby distorting the global trading system. On that basis, and relying on Section 1702 of the IEEPA, Trump announced a 10% baseline tariff on nearly all imports, effective April 5, together with higher, country-specific reciprocal tariffs[22] -

[20] HORSLEY, *Trump imposes new tariffs on imports from Mexico, Canada and China in new phase of trade war*, NPR, February 1, 2025.

[21] BREUNINGER, *Trump says Mexico, Canada tariffs will start March 4, plus additional 10% on China*, CNBC, February 27, 2025.

[22] So-called 'reciprocal tariffs' are designed to mirror the duties that other countries impose on U.S. exports: if a trading partner applies a 20% tariff on American goods, the United States responds with a

covering approximately 57 countries - ranging from 11% to 50% and set to take effect on April 9.[23] These measures, he argued, marked a decisive step toward remedying non-reciprocal trade arrangements and restoring fairness in global trade.

At the same time, though, the announcements of these very same measures triggered extreme volatility across global markets. On April 3, 2025, Wall Street suffered its steepest one-day decline since the pandemic crash of 2020: the S&P 500 fell 4.9%, wiping out more than $2.5 trillion in market value, while the Nasdaq Composite plunged 5.9%, dragged down by a sharp sell-off in technology stocks. The rout deepened over the following days: on April 4, the S&P 500 closed down 6% and the Nasdaq another 5.8%, formally entering bear-market territory. At the same time, the Russell 2000 small-cap index became the first major U.S. benchmark to enter a bear market as investors rushed to unwind risk positions. By April 7, markets were described as a «roller coaster ride», with intraday swings of hundreds of points reflecting shifting expectations about possible tariff suspensions.[24]

Hence, shortly thereafter, the implementation of country-specific reciprocal tariffs was delayed - first from April 9 to July 8, then further postponed until August 7.[25] Meanwhile, the U.S. administration sought to temper the disruptive impact of its

---

20% tariff on that country's products. Unlike the flat 10% baseline tariff, these measures are country-specific, reflecting the level of foreign protectionism, and have been widely criticized for their legal uncertainty and their potential to fuel escalating trade conflicts.

[23] PALMER, DESROCHERS, *Trump imposes 10 percent universal tariff, higher for top trade partners*, Politico, April 2, 2025; and PICHEE, *Trump reveals these 2 new types of tariffs on what he calls "Liberation Day*, CBS News, April 2, 2025.

[24] LIVINGSTONE, WEARDEN, *Donald Trump's sweeping tariffs trigger biggest one-day Wall Street fall since 2020 – as it happened*, The Guardian, April 3, 2025; Sean Conlon, *Small-cap benchmark Russell 2000 becomes first major U.S. stock measure to enter bear market*, CNBC, April 3, 2025; Stephen Wisnefski, *Dow Drops 2,200 Points, S&P Plunges 6%, Nasdaq Enters Bear Market as Tariff Turmoil Rocks Stock Market*, Investopedia, April 4, 2025; and EGAN, TOWFIGHI, GOLDMAN, *Extreme volatility sends US stocks on a roller coaster ride as Wall Street is rattled by tariffs*, CNN, April 7, 2025.

[25] SEAL, *Trump Authorizes 90-Day Pause on Reciprocal Tariffs*, The Wall Street Journal, April 9, 2025; LAWFORD, *How Trump was forced to bow to reality of markets meltdown*, The Telegraph, April

sweeping tariff regime through a series of ad hoc bilateral side-deals.

The first was struck with the United Kingdom in early April 2025. Rather than applying the full 10% baseline tariff and the looming reciprocal duties, Washington agreed to confine the surcharge on British goods to 10% and to exempt a wide range of sensitive sectors, including steel, automobiles, semiconductors, energy, and pharmaceuticals. Although informal and short of a treaty framework, this arrangement effectively constituted a bilateral accommodation designed to shield key industries from the broader tariff shock.[26]

A second, more targeted concession was reached with China in May 2025, when the White House scaled back the punitive tariff on low-value e-commerce shipments from platforms such as Shein and Temu. Duties on these packages were temporarily reduced from the extraordinary level of 145% to about 30% for a 90-day period, in recognition of their consumer sensitivity and potential inflationary impact.[27]

Finally, at the end of July, the United States announced a provisional agreement with the European Union. This established a 15% minimum tariff on EU exports - well above the previous average of 4.8% but below the threatened 30% blanket rate. Trump further claimed that the EU had pledged to purchase $750 billion in U.S. energy and to invest an additional $600 billion in the American economy. European officials, however, emphasized that these commitments were aspirational and not legally binding, since they depended on private sector decisions. In any case, the EU postponed its planned retaliatory tariffs for six months, leaving open the possibility of further negotiations but underscoring the tentative character of these side-deals.[28]

9, 2025; and ZAKRZEWSKI, ALLISON, MARIMOW, HAX, WILL, STEIN, *Trump combats TACO reputation as White House extends tariff deadline*, The Washington Post, July 9, 2025.

[26] See the information available at https://www.business.gov.uk/export-from-uk/markets/united-states/us-trade-tariffs/

[27] LALLJEE, BROWN, *China trade deal: White House partially cuts tariffs on Shein, Temu packages*, Axios, May 12, 2025.

[28] MATTHIJS, *U.S.-EU Trade Deal Avoids a Tariff War, but Deepens European Dependence*, Council on Foreign Relations, available at www.cfr.org; *EU admits it can't guarantee $600B promise to Trump*,

More generally, as of this writing, the structure of country-specific reciprocal tariffs can be reconstructed from datasets maintained by specialized trade data centers[29] and reported in leading media outlets,[30] bearing in mind that these must be supplemented by the additional duties imposed under Section 232 of the *Trade Expansion Act* (1962).[31] These cover steel and aluminum, copper, autos and auto parts, trucks, commercial aircraft and jet engines, timber and lumber, pharmaceuticals, semiconductors, and processed Critical Minerals.[32]

Now, against this background of fast-moving and sometimes fickle measures, two issues merit closer scrutiny.

Trump's attachment to tariffs is neither recent nor incidental. He openly expressed support for protectionist instruments well before entering politics;[33] he relied on tariffs systematically throughout his first term;[34] and he explicitly promised their renewed use during the 2024 electoral campaign.[35] It would therefore be reductive to portray his re-election as disconnected from, or in spite of, his trade policy preferences. On the contrary, tariffs form part of the political mandate that voters

---

Politico, July 28, 2025; *EU-US tariff deal not finished yet, say Europeans unhappy with Trump's terms*, July 31, 2025, available at www.bbc.com; and DOHERTY, *EU will delay planned U.S. tariffs for six months to allow for trade talks*, CNBC, August 4, 2025.

[29] https://www.tradecomplianceresourcehub.com/2025/08/15/trump-2-0-tariff-tracker/.

[30] https://www.bbc.com/news/articles/c5ypxnnyg7jo.

[31] Section 232 permits the President to impose tariffs based on a recommendation by the U.S. secretary of commerce if «an article is being imported into the United States in such quantities or under such circumstances as to threaten or impair the national security». This section was used only in 1979 and 1982, and had not been invoked since the creation of the WTO in 1995, until President Trump cited it on March 8, 2018, to impose tariffs on steel and aluminum. The reliance on this provision requires formal investigations and recommendations, making it far less agile than the IEEPA.

[32] O'NEIL, HUESA, PAZ-SOLDAN, *A Guide to Trump's Section 232 Tariffs, in Nine Maps*, Greenberg Center for Geoeconomic Studies, July 10, 2025.

[33] TADDONIO, *Trump's Tariff Strategy Can Be Traced Back to the 1980s*, PBS, May 6, 2019.

[34] RADU, RADU, *America First: Assessing The Economic Impact Of The First Trump Administration*, *Challenges of the Knowledge Society* (2025) 612.

[35] COLLINSON, *Trump floats ending the federal income tax. Here's what that would mean*, CNN, October 26, 2024.

knowingly endorsed, even though the measures implemented by the second Trump administration may be *ultra vires* and contrary to international law.[36]

Equally, uncertainty is a constant feature of Trump's economic governance and stems from multiple sources. Consider, for example, the abrupt changes in tone and substance - sometimes occurring within days - that have generated instability in global markets and complicated the planning of both private actors and institutional counterparts. Added to this are sharp departures from the policies of the previous administration, which themselves created significant unpredictability. Moreover, President Trump has displayed a greater willingness to embrace risk than many of his predecessors. His long-standing reputation as a deal-maker underscores a readiness to escalate negotiations through confrontational public messaging, thereby placing himself at the center of political and media attention. This posture has led business leaders, investors, and foreign governments alike to question the conditions under which agreements might be reached, particularly given that policy objectives often shift in the midst of highly public bargaining. Whether by design or by consequence, such a style has introduced yet another layer of uncertainty into the broader economic and political environment. Finally, as the next section shows, ongoing legal challenges to the President's power to impose tariffs further obscure the policy landscape, further deepening unpredictability.

3. The tariff policy of the second Trump administration, although rooted in a clear and deliberate political mandate, clashed not only with constitutional and statutory limits domestically, but also with multilateral disciplines internationally.

3.1. Trump imposed tariffs not only through established mechanisms - such as Section 232 of the *Trade Expansion Act* (1962), which requires the involvement of

[36] In this regard, see next Section n. 4.

specialized offices and the operation of formal procedures precisely to limit the President's authority[37] - but also through the unprecedented recourse to the IEEPA, a much more immediate and flexible instrument.

Not surprisingly, hence, in May 2025, in two joint cases - *V.O.S. Selections, Inc. v. Trump* and *Oregon v. Department of Homeland Security* - the U.S. Court of International Trade (hereinafter, "the Court") struck down tariffs imposed under the IEAPP.

In its opinion, the Court begins by reconstructing the genesis and underlying rationale of the IEEPA. At the foundation lies the Constitution itself: Article I, Section 8 of the U.S. Constitution vests Congress with the exclusive power to levy duties and regulate commerce with foreign nations. Against this background, any delegation of tariff authority to the executive must be interpreted narrowly, lest it disrupt the constitutional balance between the legislative and executive branches. The Court then traces the history of statutory delegations in the field of emergency economic powers. The *Trading with the Enemy Act* of 1917 ("TWEA"), originally enacted in a wartime context, was expanded in 1933 to encompass peacetime emergencies, thereby granting the President sweeping discretion to regulate international economic transactions. The breadth of this authority soon became apparent in practice. In the early 1970s, President Nixon invoked TWEA to impose a 10% import surcharge in

[37] See *above* ft. 31. The President could have also invoked Section 301 of the *Trade Act* (1974). This last operates through a structured and time-consuming procedure, involving investigations by the United States Trade Representative (USTR) and public consultations before any measure can be adopted. Section 301 authorizes the President to take all appropriate action, including tariff-based and non-tariff-based retaliation, to obtain the removal of any act, policy, or practice of a foreign government that violates an international trade agreement or is unjustified, unreasonable, or discriminatory, and that burdens or restricts U.S. commerce. Section 301 was extensively used by President Trump during his first term to impose sweeping tariff measures, in particular against China, in response to unfair trade practices such as forced technology transfers and intellectual property violations. By contrast, in his second term the provision has not yet been employed to impose new tariffs. Nonetheless, the office of the USTR has been instructed to initiate investigations that could, in due course, serve as the foundation for further action under Section 301.

response to balance-of-payments difficulties. This measure was challenged in the so-called *Yoshida litigation*. In 1974, the Customs Court struck down the surcharge,[38] but the next year the appellate court reversed in *Yoshida II*,[39] holding that TWEA's delegation was sufficiently broad to encompass import surcharges. Even while sustaining Nixon's action, however, the appellate court warned that unlimited tariff authority would raise grave constitutional concerns: «[t]he mere incantation of 'national emergency' cannot, of course, sound the death-knell of the Constitution».[40]

It is against this backdrop - the Court proceeded - that Congress, in the mid-1970s, decided to reform presidential emergency powers. As the House of Representatives put it in the report accompanying the new legislation, TWEA amounted to «essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review».[41] The IEEPA was thus designed not to replicate TWEA's sweeping delegation, but to cabin and discipline it through substantive and procedural limits in peacetime. Not surprisingly, the IEEPA was also complemented by contemporaneous legislation that channeled routine trade matters into non-emergency statutes. Consider, for example, the already mentioned Section 232 of TEA, which authorized presidential action to adjust imports only after an investigation by the Secretary of Commerce and a finding that national security was threatened. Furthermore, consider Sections 122 and 301 of the *Trade Act* of 1974 that, respectively, permitted temporary import surcharges or quotas in response to balance-of-payments deficits, but capped them at 15% and 150 days and addressed unfair foreign trade practices through a structured investigatory process.[42] In

[38] *Yoshida Int'l, Inc. v. United States*, 378 F. Supp. 1155 (Cust. Ct. 1974).
[39] *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560 (C.C.P.A. 1975).
[40] 526 F.2d at 583.
[41] H.R. Rep. No. 95-459, at 7 (1977).
[42] See *above* ft. 31.

substance, by enacting these provisions, Congress made clear that foreseeable and recurring economic issues were to be governed by targeted statutory frameworks, not by open-ended emergency powers. On this reading, the Court concludes that IEEPA must be interpreted as a statute of limitation, not expansion. Congress's intent was to preserve its own constitutional prerogatives over tariffs and commerce, while allowing the President narrowly tailored authority to confront only «unusual and extraordinary threats» of foreign origin. Any construction that would allow the President to impose unlimited duties under IEEPA would, in the Court's words, «strike a blow to our Constitution» by effectively transferring core legislative functions to the executive.[43]

Having clarified this, the Court applies its reasoning to the "Trafficking Tariffs", imposed on imports from Canada, Mexico, and China, under Section 1701 of IEEPA[44] and to the "Worldwide and Retaliatory Tariffs", imposed as a general surcharge on all imports and as country-specific increases under Section 1702 of IEEPA.[45]

In relation to the former, the Court held that under Section 1701, IEEPA powers may be exercised only to «deal with» an unusual and extraordinary threat of foreign origin. The Court stressed the operative words «deal with»: the measures must address the threat itself, not serve as an instrument of leverage to induce other sovereigns to act. Yet the trafficking tariffs were explicitly justified as a means of pressuring foreign governments to strengthen enforcement against drug cartels and trafficking organizations. Customs duties on lawful imports, however, bear no direct relation to the apprehension of traffickers or the seizure of illicit substances. As the Court explained, the orders did not «deal with» the threats they identified, but rather sought to create bargaining power in the hope that foreign governments would

[43] See *Slip Op.* 25-66, at 25–36 (Ct. Int'l Trade May 28, 2025) (discussing Section 232 of the Trade Expansion Act of 1962, Section 122 of the Trade Act of 1974, and Section 301 of the Trade Act of 1974 as evidence that Congress channeled recurring trade matters into non-emergency statutes); id. at 30–31 (warning that "an unlimited power … would be to strike a blow to our Constitution").

[44] See *Slip Op.* 25-66, at 36-47.

[45] See *Slip Op.* 25-66, at 25-36.

address them. This indirect strategy was, in the Court's judgment, inconsistent with the statutory scheme. Congress had made clear in § 1701(b) that IEEPA authorities «may not be exercised for any other purpose» than to confront the specified threat. To accept the government's argument that tariffs can always serve as «pressure» would render the limitation meaningless: virtually any economic measure could be defended as leverage in pursuit of unrelated goals. The Court thus held that the trafficking tariffs represented a «clear misconstruction» of IEEPA and an action «outside delegated authority».

In relation to the latter kind of tariffs, the Court observed that Section1702 of the IEEPA authorizes the President to «regulate … importation», but - in the Court's view - that language cannot be stretched to sustain an unbounded authority to impose duties at will. Unlike the surcharge in *Yoshida II*, which was expressly temporary and tied to statutory tariff schedules, the worldwide duties lacked any limiting principle in either scope or duration. As such, they fell into precisely the constitutional danger zone that both Yoshida and Congress had warned against. In short, they constituted an ultra vires exercise of power: an assertion of tariff-making authority unmoored from statutory constraints.

The Court also underscored that even if one accepted that Section 1702 could, in principle, authorize certain tariffs, the "Worldwide and Retaliatory Tariffs" were in reality aimed at addressing persistent trade deficits. That type of balance-of-payments problem, however, was explicitly entrusted to Section 122 of the Trade Act of 1974, which carefully circumscribes the President's authority by capping surcharges at fifteen percent and limiting them to 150 days. By resorting to IEEPA to impose sweeping duties without regard to these statutory ceilings, the President bypassed the very legislative channels Congress had established for such scenarios. The Court therefore concluded that the worldwide tariffs were unlawful not only because they lacked a statutory foundation in IEEPA, but also because they directly contravened the

more specific limits enacted in the Trade Act.

Overall, the Court's central message is that the IEEPA must be construed narrowly to preserve Congress's constitutional prerogatives. The statute authorizes targeted and proportionate measures in the face of extraordinary foreign threats, not a general presidential power to refashion U.S. tariff schedules. Both the worldwide and the trafficking tariffs failed to satisfy that test, and were therefore set aside as *ultra vires*.

This line of reasoning was echoed one day later - on May 29, 2025 - by the District Court for the District of Columbia in *Learning Resources, Inc. v. Trump*.[46] While addressing a narrower request for preliminary relief, that court likewise held that IEEPA is not a statute «providing for tariffs» and that the President lacks any authority under it to impose duties. The District Court therefore enjoined the enforcement of the challenged executive orders against the plaintiffs, further confirming that IEEPA must be construed restrictively.

At present, both judgments - *V.O.S. Selections, Inc. v. Trump and Oregon v. Department of Homeland Security* first, and *Learning Resources, Inc. v. Trump*, second - remain stayed pending appeal, leaving the duties in place for now. Yet, on the domestic front, the ongoing litigation highlights a double vulnerability: on the one hand, the fragility of the legal foundation on which the President sought to build his tariff strategy; on the other, the administration's determination to sideline Congress and test the resilience of checks and balances, treating constitutional safeguards as dispensable obstacles rather than binding constraints.

3.2. Also on the international front, Trump's tariff measures raise equally significant questions, because their consistency with World Trade Organization (WTO)

[46] *Learning Res., Inc. v. Trump*, No. 25-1248 (RC), 2025 WL (D.D.C. May 29, 2025) (granting preliminary injunction and holding that IEEPA does not authorize the imposition of tariffs).

law[47] appears highly problematic.[48] In detail, WTO members are bound by the so-called "bound tariff commitments" established in Article II of the GATT 1994.[49] This provision requires each member not to impose duties exceeding the maximum rates negotiated and inscribed in its schedule of concessions. By applying the above mentioned *ad valorem* surcharges of 10, 25, or even 125% on various categories of imports, the United States clearly exceeded its own bound rates, thereby breaching a core obligation under Article II.

In addition, there is the most-favored-nation (MFN) principle laid down in Article I:1 of the GATT 1994. According to this rule, any advantage, favour, privilege or immunity granted to a product originating in or destined for one WTO member must be accorded immediately and unconditionally to the like product of all other members. Trump's "reciprocal" tariffs, designed to differentiate between trading partners, and the reliance on ad hoc bilateral side-deals, run directly counter to this principle of non-discrimination. By singling out certain countries for higher or lower duties, the United States undermined one of the pillars of the multilateral trading system.[50]

---

[47] See BETHLEHEM et al. eds., *The Oxford Handbook of International Trade Law*, Oxford: Oxford Univ. Press (2023).

[48] TOWER, WILLETT, GILBERT, *Mr. Trump's Tariff War* (July 14, 2025), available at SSRN: https://ssrn.com/abstract=5351653.

[49] The General Agreement on Tariffs and Trade (GATT) was originally concluded in 1947 as a provisional framework to liberalize trade through tariff reductions. It was not conceived as a full-fledged international organization, but rather as a treaty-based regime that was also meant to provide a forum for negotiations. The Uruguay Round negotiations (1986–1994) represented the most ambitious trade negotiations ever conducted under the GATT and culminated in the establishment of the WTO in 1995. The WTO emerged as a permanent international institution endowed with broader competences and encompassing a wider set of agreements, including those on services (GATS), intellectual property (TRIPS), and dispute settlement. As part of this institutional reform, the original GATT 1947 was incorporated and updated as the GATT 1994, which now forms Annex 1A of the WTO Agreement. The GATT 1994 thus preserves the substantive disciplines of the original text, while placing them within the legal and institutional framework of the WTO. In contemporary practice, references to the GATT normally concern the GATT 1994 as administered within the WTO system.

[50] O'ROURKE, *From MFN to "Reciprocal Tariffs"*, in *The Economic Consequences of the Second Trump Administration: A Preliminary Assessment* 233 (GENSLER, JOHNSON, PANIZZA & WEDER DI MAURO eds., CEPR Press 2025).

To be sure, the Trump administration has invoked the national security exception, under Article XXI of the GATT 1994, as the legal basis of its tariffs. It has maintained that the United States has been unfairly exploited by its trading partners. Given that this narrative obscures the historical reality that Washington sustained the costs of an open, rule-based system precisely because those costs secured U.S. hegemony and global influence, Article XXI of the GATT 1994 allows members to adopt measures they consider necessary to protect their essential security interests «taken in time of war or other emergency in international relations». Differently, the tariffs imposed under IEEPA were not adopted in the context of armed conflict or acute international crisis, but rather to address persistent trade deficits and transnational criminal activities. WTO jurisprudence - most prominently the Panel in *Russia - Traffic in Transit*[51] - has clarified that an «emergency in international relations» refers to situations of grave international tension, comparable to war or similar crises, and not to economic policy concerns of a more general nature. On this interpretation, Trump's reliance on Article XXI may be manifestly overbroad.

In substance, therefore, also under international law the tariffs imposed by the second Trump administration rest on a legally fragile foundation. They violated the United States' tariff bindings, contradicted the MFN principle, and could not be justified under the national security exception as interpreted in recent WTO case law. However, it is also true that these substantive concerns unfold against a broader institutional backdrop, which has become more and more fragile:[52] since 2019, the United States has paralyzed the WTO Appellate Body, and as of March 2025 it has even

[51] Panel Report, Russia – Measures Concerning Traffic in Transit, WTO Doc. WT/DS512/R (circulated Apr. 5, 2019, adopted Apr. 26, 2019), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm.

[52] Petros C. Mavroidis, *No Way Out? The WTO in the Whirlwind of Trump II Trade Policy*, 59 Journal of World Trade 725 (2025).

suspended its financial contributions.[53]

4. Reading President Trump's own statements - some of which are cited above - as well as the writings of his closest advisers, such as Peter Navarro (Senior Counselor for Trade and Manufacturing) and Stephen Miran (Chair of the Council of Economic Advisers), it becomes apparent that the second Trump administration envisions tariffs not as single-purpose tools but as multi-objective instruments in line with the "anti-Tinbergen principle". In other words, the Trump administration embraces the idea that a single instrument - tariffs - can be deployed simultaneously to pursue a wide array of goals, from fiscal revenue to industrial revival and geopolitical leverage.

From an industrial standpoint, tariffs are primarily intended to shield domestic producers from foreign competition. By artificially inflating the price of imported goods, they provide U.S. firms with a protective buffer that secures higher margins and creates financial room for renewed investment and innovation in American manufacturing. In addition, once foreign production becomes more costly due to tariffs on imported inputs and final goods, both U.S. and foreign firms will be incentivized to relocate production to the United States, whether by reopening facilities or establishing new plants. Together, these dynamics - greater protection of domestic producers and the reshoring of manufacturing - are expected to expand U.S. industrial capacity. This industrial strengthening, in turn, should translate into increased demand for labor, especially in manufacturing and related industries. Therefore, for the second Trump administration, tariffs are seen as delivering benefits also on the social front: the boost in U.S. manufacturing, combined with restrictive immigration policies, should trigger a rise in employment opportunities that most directly benefit American workers - particularly among constituencies most adversely

[53] *A Reset of the World Trade Organization's Appellate Body*, Council on Foreign Relations, www.cfr.org; and FARGE, *Exclusive: US pauses financial contributions to WTO, trade sources say*, Reuters, March 27, 2025.

affected by globalization.

In addition, tariffs are meant to eliminate, or at least significantly reduce, bilateral trade deficits, particularly with key partners such as Mexico and Canada. By artificially raising the cost of imported goods from these and other countries, the administration aims to tilt the balance of trade in favor of American producers, thereby addressing what it perceives as persistent asymmetries in cross-border exchanges. In turn, narrowing the trade deficit is expected to ease upward pressure on the dollar, which President Trump considers significantly overvalued due to its role as the world's reserve currency. More specifically, by discouraging imports, the administration assumes that foreign demand for dollar-denominated assets will decline, leading to a depreciation of the dollar and thereby enhancing the competitiveness of U.S. exports. At the same time, tariffs are explicitly framed as a potential source of fiscal revenue. They are viewed not only as a regulatory but also as a budgetary instrument, generating funds for the federal government without the political pushback typically associated with raising income or corporate taxes. In doing so, they provide the fiscal room needed to accommodate and render tax cuts sustainable.

Finally, within a broader transactional approach, tariffs are conceived as bargaining chips in international negotiations, allowing the administration to extract concrete concessions not only on trade-related matters but also on extraneous issues such as migration management, the control of fentanyl flows, or specific export conditions. In this sense, tariffs have been weaponized: they are no longer deployed in a strictly technical manner to pursue defined trade policy objectives, but rather used as a flexible instrument to secure advantages across a wide range of policy domains.

That said, many economists remain skeptical as to the effects of these tariffs, arguing that their imposition is unlikely to deliver the desired outcomes and may instead generate distortions, inefficiencies, and unintended consequences that undermine the very objectives they are meant to achieve.

5. Many of the bets placed by the Trump administration on tariffs may ultimately prove misguided. The protective, fiscal, and geopolitical gains it anticipates are far from guaranteed - and, in many cases, run counter to established economic evidence. Nor can the effects of tariffs be assessed in isolation: they interact materially with the administration's broader policy mix - most notably restrictive immigration measures and sweeping tax reductions - to shape both their distributional and macroeconomic consequences. Accordingly, the following analysis proceeds step by step, examining in turn the industrial and innovation incentives, the prospects for reshoring and the attendant cost pass-through to firms and consumers, labor-market and distributional effects, implications for the trade balance, the dollar's international role, the fiscal arithmetic, and the use of tariffs as bargaining chips.

From an industrial perspective, the claim that shielding firms from foreign competition will generate reinvestment in innovation is highly questionable. Historical evidence suggests that companies protected from competitive pressure seldom devote surplus profits to improving quality or efficiency. More often, they translate these profits into rents and engage in defensive strategies to preserve existing market positions, thereby fostering inertia rather than dynamism. Equally fragile is the expectation that tariffs will trigger large-scale reshoring of production to U.S. territory. Global supply chains exist for good reason: they reflect the advantages of international specialization, allowing countries and firms to allocate resources to their most efficient uses. Even if tariffs do influence location choices, reshoring is a slow process that would unfold well beyond a single presidential term. In the meantime, the immediate effects are unambiguously negative: U.S. firms relying on imported inputs face higher costs, while consumers encounter reduced purchasing power through rising prices (i.e. inflation) for both imported and domestically produced goods incorporating foreign components.

If tariffs fail to increase production, it follows that they also fail to realize their social purpose: they cannot generate the surge in labor demand anticipated by the administration. This means that the promise of revitalized employment opportunities for American workers - particularly those most affected by globalization - is unlikely to materialize. Indeed, evidence from President Trump's first term demonstrates that whatever modest job gains resulted from import protection were more than offset by higher input costs and retaliatory measures. The net effect was a contraction in manufacturing employment, with particularly adverse consequences for lower-skilled workers.

Turning to the goal of reducing trade deficits, it is essential to recall that the trade balance is determined by the macroeconomic relationship between national savings and investment. Because the United States consistently invests more than it saves, a trade deficit necessarily results - and tariffs do little to alter this fundamental equilibrium. Thus, reducing the trade deficit through tariffs alone is highly unrealistic in the absence of broader structural adjustments.

In addition, many economists argue that the President is misguided in portraying the trade deficit as a problem in need of correction. First, the trade deficit provides American consumers with access to a wider variety of goods at lower cost, while allowing U.S. firms to specialize in activities where they are most productive. Second, persistent deficits allow foreign governments and investors to accumulate dollars, which are then reinvested not only in American goods and services but also - more importantly - in Treasury securities. This recycling of dollars is what sustains the federal government's ability to finance its debt at relatively low cost. If tariffs were to shrink the deficit, the global supply of dollars would contract, reducing demand for both the currency and U.S. debt instruments. The result would be a cheaper dollar - here the administration is correct - but also higher borrowing costs, diminished fiscal flexibility, and a weakening of monetary policy as a tool of international influence. Far

from bolstering U.S. economic power, tariff-induced deficit reduction could thus erode the very foundations of America's financial supremacy.

The risks that a weaker dollar poses for debt sustainability are further compounded by the fiscal consequences of tariffs, particularly when considered alongside the administration's sweeping tax cuts. While higher import prices may temporarily increase customs revenues, these gains are quickly eroded if import volumes fall - as the administration itself explicitly pursues - or if slower industrial activity depresses federal revenues through reduced corporate profits and diminished labor income. At any rate, tariff receipts remain too limited to offset the losses generated by major tax cuts. Thus, in reality, tariffs create the illusion of fiscal space while exacerbating underlying budgetary imbalances.

Finally, the use of tariffs as bargaining levers vis-à-vis foreign governments may deliver tactical concessions - such as reinforced border controls by Mexico or greater purchases of U.S. energy and defense equipment by European partners - but these outcomes are short-lived and come at the cost of undermining diplomatic trust, inviting retaliation, and encouraging diversification away from U.S. influence. Far from strengthening America's international standing, hence, this approach risks eroding its long-term strategic position.

In sum, tariffs risk generating outcomes misaligned with the administration's stated objectives: higher costs, weaker growth, fragile alliances, and ultimately the erosion of U.S. influence. Strikingly, these measures are pursued in open defiance of both economic scholarship and empirical evidence, reinforcing a broader pattern in which expertise is discounted whenever it conflicts with political expediency. Moreover, these limitations are compounded once foreign reactions are taken into account, as partners may retaliate or diversify away from U.S. trade, further weakening global integration.

6. At the time of writing, the international landscape remains highly volatile, with tariff levels, exemptions, and retaliatory measures still subject to rapid change. The following assessment therefore reflects the situation as it currently stands, recognizing that subsequent developments may alter the balance described below. Still, the international reverberations of Trump's tariff strategy are already apparent in the differentiated responses of America's major trading partners. Tariffs may be presented as levers of economic sovereignty, but their extraterritorial consequences accelerate the erosion of global integration and undermine the multilateral trading order.

Indeed, In Europe, the agreement with the United States capped tariffs at 15% - a considerable relief compared to the threatened 30%, but still a threefold increase from the previous 4.8% average.[54] Analysts estimate a 0.5% contraction in EU GDP as a result.[55] Sectoral exposure is uneven: Germany's auto industry, with exports worth €34 billion to the US, faces billions in additional costs; Italy's agriculture, pharmaceuticals, and automotive sectors could see a 0.2% GDP loss; and Ireland, heavily reliant on pharmaceutical exports, braces for a substantial hit.[56] The pharmaceutical sector, initially threatened with a 250% duty, secured a 15% rate - still a disappointment to an industry accustomed to tariff-free access.[57]

Political divisions within the EU have sharpened. French Prime Minister François Bayrou called it "a dark day," while Hungarian Prime Minister Viktor Orbán said Trump "ate von der Leyen for breakfast." President Emmanuel Macron welcomed predictability but lamented that Europe had not been "feared enough" in negotiations.

---

[54] WENDLING, *Shock and Relief – Businesses Worldwide React to New Trump Tariffs*, BBC News, Aug. 1, 2025.
[55] FITZGERALD & GEOGHEGAN, *Who Are the Winners and Losers in US-EU Trade Deal?*, BBC News, Aug. 21, 2025.
[56] GOZZI, *EU-US Tariff Deal Not Finished Yet, Say Europeans Unhappy with Trump's Terms*, BBC News, July 31, 2025.
[57] See *supra* ft. 69.

Beyond rhetoric, discrepancies remain: Washington claims the EU "will" purchase $750 billion in US energy and invest $600 billion in America, while Brussels insists these are non-binding "intentions" dependent on private firms. Such divergences underscore the fragility of what has been described as the "largest trade deal in history".[58]

Across North America, Canada faces a general tariff rate of 35%, with steel and aluminum at 50%, though many products remain exempt under USMCA. Canadian firms nevertheless report cost spillovers: aerospace suppliers, for instance, expect a blanket 10% rise in vendor prices due to higher US steel and aluminum costs. Mexico obtained a 90-day reprieve on new tariffs, averting immediate disruption to its export-oriented agricultural sector. Yet importers warn that without a durable settlement, many farmers would "stop farming for the export market" altogether. At the same time, the use of tariffs alongside leverage on migration and fentanyl epitomizes the cross-domain "weaponization" of trade policy, amplifying the spillovers into other policy fields.[59]

In Asia and Latin America, partners are experiencing divergent fates. Thailand, initially facing a 36% levy, negotiated a reduction to 19%, which business leaders now liken to a VAT passed on to US consumers. By contrast, Laos has been hit with a 40% duty, endangering up to 60,000 jobs in its small export sectors. India faces a 25% tariff, with the added threat of penalties tied to its oil trade with Russia. China has paired tactical concessions on e-commerce shipments with readiness to escalate in strategic sectors like semiconductors and renewables, reinforcing the trajectory of decoupling. Meanwhile, Al Jazeera has reported signs of a tentative India–China "bonhomie" which could rewire Asian trade alignments and dilute US influence in the region. Brazil, initially set at 10%, now faces a punitive 50% rate after Trump accused President Lula

[58] See *supra* ft. 69 and 70.

[59] See *supra* ft. 69; Al Jazeera English, *How Are Countries and Markets Reacting to Trump Tariffs*, Aug. 1, 2025; and NPR, *This Is How the World Is Reacting to Trump's Latest Tariffs*, Aug. 2, 2025.

of targeting US tech companies - an escalation widely perceived as political retaliation. Cecafé, the coffee exporters' council, warned that roasters and exporters will be "significantly" affected and that US consumers should brace for price hikes.[60]

Taken together, these reactions illustrate how the anti-Tinbergen use of tariffs - pursuing multiple goals simultaneously - generates a multiplier of instability abroad. Far from reinforcing American influence, the measures invite retaliation, encourage diversification away from US trade, and accelerate a broader shift toward a fragmented, multilateral trade order.

7. The analysis conducted in this article shows that tariff policy is not an isolated anomaly, but rather part of a broader constellation of measures adopted by the second Trump administration in its first months. Like the reorganization of federal agencies, the weakening of independent regulators, and the unilateral reshaping of immigration and security policy, tariffs embody the same governing style: a preference for executive dominance, a disregard for institutional constraints, and a narrative of national emergency that legitimizes concentration of power in the presidency. In other words, it seems that the underlying assumption guiding the administration is that the political mandate - undeniably real and legitimately obtained at the ballot box - suffices to override the system of checks and balances that lies at the core of liberal democracies.

Indeed, from a constitutional perspective, tariffs erode the rule of law by relying on the IEEPA well beyond its intended scope. By treating structural trade imbalances and transnational crime as "extraordinary threats" the administration sidesteps statutory limits and reduces Congress to a marginal role. In this sense, tariff policy mirrors the administration's broader attempts to test the resilience of checks and

[60] See *supra* ft. 73 and Al Jazeera, *Can the New India-China Bonhomie Reshape Trade and Hurt the US in Asia?*, Aug. 23, 2025.

balances, as if constitutional safeguards were mere procedural obstacles to be dispensed with in the name of efficiency and strength.

On the international plane, tariffs undermine the multilateral trading system. By openly breaching bound commitments under Article II GATT and by weaponizing reciprocity in defiance of the most-favored-nation principle, the United States has embraced the narrative that it is being exploited by its trading partners. Yet this narrative conceals a different historical reality: Washington sustained the costs of maintaining an open and rule-based system not out of altruism but because those costs secured the very hegemony from which the United States benefited for decades. The refusal to acknowledge this logic transforms leadership into grievance and erodes the credibility of U.S. commitments to multilateral cooperation.

Equally troubling is the administration's dismissal of economic knowledge and empirical evidence. A wide body of scholarship and historical evidence demonstrates that several of the assumptions invoked by the Trump administration to legitimize the use of tariffs - especially in public discourse - are unfounded. The decline in manufacturing employment, for instance, is more accurately explained by technological advances than by globalization; nor is it true that tariffs can generate effects such as higher productivity among U.S. firms or their large-scale reshoring. Even when tariffs do produce certain outcomes, such as a depreciation of the dollar, the implications are not necessarily positive once examined from another perspective, particularly that of the public debt. By imposing tariffs despite this evidence, the administration not only weakens international trade but also normalizes a style of policymaking that treats expertise as irrelevant when it conflicts with political imperatives, however legitimate they are.

Taken together, these elements suggest that tariff policy has become a test case for the changing fate of liberal democracies. It exemplifies how institutional checks can be hollowed out, how international law can be disregarded, and how evidence-based

policymaking can be sacrificed to political expediency. Far from reviving American industry or restoring fairness to global trade, tariffs accelerate the fragmentation of the economic order and contribute to the erosion of the liberal-democratic foundations that sustained postwar globalization, even though the United States was the very power that first brought it into being.

FROM PUBLIC ACCOUNTABILITY TO MARKET GOVERNANCE: VALUE FOR MONEY BETWEEN SOFT LAW AND LEGAL PRINCIPLE IN EU FINANCIAL AND INSURANCE REGULATION

Caroline Van Schoubroeck[*] - Pierpaolo Marano[**]

ABSTRACT: *Value for Money (VfM), originally developed as a public sector financial accountability tool, is increasingly evoked as a supervisory reference point in EU financial and insurance law. In general terms, it refers to the assessment of whether the overall benefits reasonably expected from a product or service are proportionate to the total costs borne by the client. This paper traces the doctrinal and institutional development of VfM, charting its migration from the sphere of public management to that of private regulation through instruments such as MiFID II, PRIIPS, and the IDD. It demonstrates how VfM has been reflected primarily through supervisory practices and soft law instruments related to product governance, with the aim of promoting proportionality, consumer protection, and market fairness. In doing so, the paper also argues that VfM can be anchored to the broader and more established principle of fairness, thereby reinforcing its normative foundations and interpretative coherence across sectors. Particular attention is paid to the conceptual ambiguity and regulatory fragmentation inherent in its current implementation, including divergent interpretations advanced by EIOPA, with it substantive and outcome-oriented approach, and by ESMA, with its procedural and disclosure-based stance, the use of product intervention powers by the European Supervisory Authorities, and current discussions on legally binding VfM benchmarks under the Retail Investment Strategy.*

[*] Full Professor of Insurance Law at "KU" of Leuven.
[**] Associate Professor of Law and Economics at "Catholic University of the Sacred Heart" of Milan.

The paper also examines the legal and theoretical implications of extending VfM into private law, where it might function as a standard of care, a benchmark for civil liability, and a tool for judicial interpretation. Given its predominantly soft law origins, the analysis considers the challenges of making VfM justiciable within national private law frameworks. By situating VfM within broader frameworks of procedural justice, market fairness, and functional regulation, the analysis highlights its integrative potential and conceptual limitations. It concludes by assessing the role that digitalisation, sustainability, and cross-border litigation are likely to play in shaping the future scope of VfM in a more integrated and consumer -centric EU financial market.

1. The concept of Value for Money (VfM) has traditionally been associated with financial governance in the public sector, serving as a managerial tool for evaluating the efficiency, economy, and effectiveness of resource allocation. Originating within the framework of New Public Management, VfM was initially conceived as a performance-measurement instrument aimed at ensuring accountability in public spending. In recent years, however, VfM has been increasingly invoked in EU financial

and insurance regulation. Although it is not defined as a legal concept, it is increasingly recognised as an interpretive principle applied by regulatory authorities to various frameworks, including Directive 2014/65/EU (MiFID II), Regulation (EU) 1286/2014 (PRIIPs), Directive 2016/97 (IDD), and Directive 2009/138/EC (Solvency II), with a comparative reference to the UK Financial Conduct Authority “fair value” framework.

However, despite this proliferation, the legal status of VfM in EU law remains far from settled. Whether it functions as a binding legal principle, a supervisory expectation, or merely a policy heuristic is still unclear. This study addresses that ambiguity by critically examining the migration of VfM from the domain of public management into financial and insurance regulatory frameworks. It explores whether this transposition has been accompanied by explicit legal codification or whether the concept remains largely aspirational, subject to soft law and open to discretionary interpretation.

By tracing the conceptual evolution of VfM and its diffusion across sectoral instruments, the paper argues that the current regulatory usage of VfM risks overstating its legal authority. While VfM may function as a compliance indicator or supervisory benchmark, its legal enforceability, particularly in civil liability and contract law, remains tenuous. The absence of a harmonised legal definition, the divergent implementation across Member States, and the conflicting imperatives of market innovation and consumer protection raise fundamental questions about its conceptual clarity, legitimacy, and enforceability. To this end, the study situates VfM within broader normative and regulatory frameworks, such as procedural justice, market fairness, and functional regulation, and explores potential legal bases in existing EU conduct-of-business rules that could anchor VfM. In this regard, the paper provisionally considers whether a possible normative foundation for VfM might be found in the open-textured standard of acting “honestly, fairly, and professionally in accordance with the best interest of clients”, which underpins the conduct-of-business

provisions of MiFID II (Article 24(1) and the IDD (Article 17(1).

It examines whether it can evolve into a cross-sectoral legal principle or whether its current usage risks undermining legal certainty and regulatory consistency. In this context, the essay pays particular attention to the challenges arising from digitalisation, sustainability demands, and cross-border product governance, while also highlighting the potential for VfM to act as a bridge between public supervision and private enforcement, with a prospective role in shaping cross-sectoral regulatory standards. In doing so, the paper seeks to contribute to ongoing academic discussions by clarifying its normative foundations, assessing legal consequences, and warning against its uncritical expansion, underlining the potential benefits and risks associated with its application.

The paper is structured as follows: Section 2 reconstructs the historical and doctrinal foundations of the VfM. Section 3 traces its transposition into EU financial and insurance regulation, emphasising the functional migration from public management and the divergent institutional approaches of the European authorities, with a comparative reference to the UK “fair value” regime. Section 4 analyses the legal and regulatory challenges surrounding VfM’s application, including its definitional ambiguity and supervisory divergence, and the lack of judicial engagement and doctrinal elaboration, as well as the possibility of anchoring VfM in the open-textured fairness standards. Section 5 examines the conceptual and normative limits to VfM’s extension, considers the role of digitalisation and sustainability as drivers of its transformation, and explores its potential migration into private law, including the implications for cross-border litigation. Finally, Section 6 offers concluding reflections on VfM’s potential consolidation as a normative standard.

2. Understanding the evolving legal significance of VfM in EU financial and insurance regulation requires a reconstruction its historical and conceptual

foundations. VfM first emerged in public sector financial management, particularly in the United Kingdom during the second half of the 20th century. A pivotal moment was the 1968 Fulton Report, which called for modernising the British civil service through performance-based accountability.[1] Although it did not explicitly use the term "value for money", it introduced the core ideas that would later shape the concept.[2] It paved the way for its formal articulation in UK public governance,[3] where VfM audits sought

[1] The origins of the *Value for Money* (VfM) in the UK public administration context are often traced back to the *Fulton Report* (Report of the Committee on the Civil Service, Cmnd. 3638, 1968). See. HUGHES, *Public Management and Administration. An Introduction*[3], Palgrave McMillan, 2003, pp. 48 ss.; HORTON, *The Public Service Ethos in the British Civil Service: An Historical Institutional Analysis*, in *Public Policy and Administration*, 2006, p. 37; CASTELLANI, *The Rise of Managerial Bureaucracy. Reforming the British Civil Service*, Palgrave McMillan, 2018, pp. 13 ff.

[2] The 1968 *Fulton Report* called for modernising the British civil service by introducing performance-based accountability. It emphasised the need for administrative efficiency, a results-oriented public service, and improved resource management—core tenets that would later underpin the *VfM* framework, including performance-based evaluation, rational resource allocation, and outcome-focused governance. See also MAGUIRE, *The Eleventh Report from the Expenditure Committee: The Civil Service*, *Modern Law Review*, 1978, 41(1), pp. 51, 54-56 who noted that the Committee focused on "effectiveness and efficiency," considered that "expenditure and efficiency were two sides of the one coin," and called for "regular surveys" and for measuring "output… against costs and other criteria", which together reflect an early articulation of what would later be framed as *value for money.*

[3] The articulation of VfM in UK public governance emerged gradually from the late 1970s through a sequence of governmental initiatives. The Efficiency Scrutiny Programme, launched in 1979 by the Prime Minister's Efficiency Unit, introduced internal departmental reviews aimed at identifying cost savings and enhancing operational effectiveness. This laid the groundwork for the Financial Management Initi**ative**, introduced in 1982 by the Cabinet Office and HM Treasury, which called for improved financial planning, greater managerial accountability, and a shift towards performance-based controls in central government (see Cabinet Office / HM Treasury, *Financial Management in Government Departments: The Next Steps*, 1982). The HM Treasury provided a more explicit consolidation of the concept with the publication of *Regularity, Propriety and Value for Money: A Handbook for Accounting Officers* (HM Treasury, 1983), which clarified the responsibilities of Accounting Officers in ensuring not only legal and proper use of public funds, but also their economical and effective deployment. These institutional milestones were further analysed and contextualised in subsequent academic work. See POWER, *The Audit Explosion*, Demos, 1994, pp. 9 ff.; HOOD, *The Tools of Government*, Macmillan, 1983, pp. 106 ff, which trace the intellectual and administrative evolution of VfM as a core principle of public financial stewardship.

not only cost reduction but measurable outcomes consistent with policy objectives.[4]

This approach marked a shift from input-oriented budgeting to outcome-based governance**,** emphasising the legitimacy of public expenditure in terms of its social return.[5] Over time, VfM developed from a managerial tool into a normative principle reflecting broader values of transparency, proportionality, and accountability in public administration.[6]

In the European Union (EU), VfM gained prominence from the 1990s onwards, especially in the management of structural and cohesion funds. Its conceptual basis was shaped by the 1997 Charter of Principles of Public Management and reinforced through the performance audit standards of the European Court of Auditors.[7] The legal foundation lies in Article 317 TFEU, which requires that the EU budget be implemented in accordance with sound financial management.[8]

---

[4] See National Audit Office, *Good practice guidance. Evaluating government spending: an audit framework*, 2022, at p. 3, which identifies three different types of evaluation, namely process, impact, and economic (or value-for-money) evaluation. Process evaluation examines how an intervention was implemented and what can be learned from its delivery; impact evaluation assesses the changes in outcomes directly attributable to the intervention and their distribution across different groups; and economic, or value-for-money, evaluation compares the benefits and costs of an intervention to determine whether it represented a good use of resources. The document is available at https://www.nao.org.uk/wp-content/uploads/2022/04/Evaluating-government-spending-an-audit-framework.pdf.

[5] See TREASURY, *Value for Money Assessment Guidance*, 2006, available at https://webarchive.nationalarchives.gov.uk/ukgwa/20130102211853/http://www.hmtreasury.gov.uk/infrastructure_ppp_vfm.htm (last accessed 10 August 2025).

[6] See HARLOW and RAWLINGS, *Law and Administration*[3], Cambridge University Press, 2009, pp. 311 ff.

[7] See European Court of Auditors, *Guide to our methodology*, 2022, p. 18, which states: "*Our performance audits are independent, objective and reliable examination of whether operations and programmes are operating in accordance with the principles of economy, efficiency and effectiveness*". The document is available at https://www.eca.europa.eu/Lists/ECADocuments/ECA_methodology_guide/ECA_methodology_guide-EN.pdf (last accessed on 10 August 2025).

[8] For a legal analysis of Article 317 TFEU, which governs the execution of the EU budget by the European Commission in accordance with the principle of sound financial management, see KILLMANN, *Article 317*, in KELLERBAUER, KLAMERT and TOMKIN (eds), *EU Treaties and the Charter of Fundamental Rights: A commentary*, Springer, 2019, p. 1988 ff.

This has been operationalised in successive iterations of the Financial Regulation, most recently in Regulation (EU, Euratom) 2024/2509, which codifies *economy* (minimising input costs without sacrificing quality), *efficiency* (maximising output per unit of input), and *effectiveness* (achieving declared policy objectives) as guiding principles.[9]

These developments in public financial governance prepared the ground for VfM's regulatory migration. In particular, the rise of performance-based supervision and outcome-oriented accountability created conditions for its extension to liberalised sectors, most notably utilities and, later, financial services.

3. Building on its public law foundations, the concept of VfM has been gradually invoked in supervisory and regulatory discourse as gradually migrating from the governance of public expenditure to the regulation of private markets. Historically rooted in public financial management and accountability, it is now referred to by regulators as a potential benchmark for shaping EU rules, supervisory priorities, and product governance in the financial and insurance sectors. Such references, however, remain at the level of soft law and supervisory expectations rather than amounting to a consolidate legal principle. This unsettled status requires treating VfM in this study as a hypothetical analytical category rather than an established rule of law. This section

[9] Art. 33, para 1, Regulation (EU, Euratom) 2024/2509 of 22 September 2024 on the financial rules applicable to the general budget of the Union provides <<Appropriations shall be used in accordance with the principle of sound financial management, and thus be implemented respecting the following principles:

(a)the principle of economy which requires that the resources used by the Union institution concerned in the pursuit of its activities shall be made available in due time, in appropriate quantity and quality, and at the best price;

(b)the principle of efficiency which concerns the best relationship between the resources employed, the activities undertaken and the achievement of objectives;

(c)the principle of effectiveness which concerns the extent to which the objectives pursued are achieved through the activities undertaken>>.

examines the main ways in which VfM appears to have been incorporated into regulatory practices, focusing on its sector-specific operationalisation, the divergent interpretations adopted by EU supervisory authorities, and the emergence of comparative models such as the UK's "fair value" regime.

3.1. Following its conceptual consolidation in public financial governance, VfM has been increasingly portrayed in regulatory discourse as evolving into a potential instrument applicable to liberalised markets, including financial services. This subsection examines how the logic of VfM, first used to assess public sector performance, has been tentatively adapted in supervisory practices to address risks of market failure, consumer vulnerability, and information asymmetries in private-sector domains. The analysis focuses on the regulatory rationales for this transition and the instruments through which VfM related standards have begun to be introduced, mainly through soft law and supervisory expectations, rather than fully codified rules, in EU financial and insurance regulation.

The progressive migration of the VfM concept from public administration to private markets represents a significant shift in its normative function. Initially developed within the public sector as a managerial criterion to evaluate the efficiency and accountability of public spending, VfM later intersected with the rise of new public management theories in the late twentieth century. These theories, which advocated the application of private-sector metrics, such as performance measurement, consumer satisfaction, and cost-effectiveness, to public services,[10] contributed to the transformation and extension of VfM into liberalised yet publicly regulated sectors

[10] See HOOD, *The "New Public Management" in the 1980s: Variations on a Theme*, in *Accounting, Organizations and Society*, 1991. vol. 16 (3), p. 93 ff.

such as energy, water, and telecommunications.[11] They also inspired a broader reconfiguration of public sector governance around principles of managerialism and efficiency, often through the importation of tools and practices from the corporate world.[12]

This functional adaptability laid the groundwork for a broader regulatory use of VfM logics.[13] As the State's role evolved from direct provider to market regulator, VfM ceased to be limited to the stewardship of public funds and became a benchmark for regulatory accountability in liberalised sectors.[14] In such industries, VfM served as guiding parameter for price controls, infrastructure investment, and service quality,[15] particularly where market failures or limited consumer choice justified regulatory intervention.[16] These developments offer a functional analogy with financial services

[11] See OECD, *Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money*, OECD Publishing, 2008, available at https://www.oecd.org/en/publications/2008/05/public-private-partnerships_g1gh8c7d.html (last accessed on 10 August 2025).

[12] C. Pollitt and G. Bouckaert, *Public Management Reform: A Comparative Analysis – Into the Age of Austerity*[4], Oxford University Press, 2017; FERLIE, ASHBURNER, FITZGERALD and PETTIGREW, *The New Public Management in Action*, Oxford University Press, 1996 (and online 2011); OSBORNE and GAEBLER, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*, Addison-Wesley, 1992.

[13] See BAKER, DROSS, SHAH, POLASTRO, AB, *How to Define and Measure Value for Money in the Humanitarian Sector*, September, 2013, available at https://www.researchgate.net/profile/Riccardo-Polastro/publication/267212175_How_to_define_and_measure_value_for_money_in_the_humanitarian_sector/links/5447f3b10cf2f14fb8141b8f/How-to-define-and-measure-value-for-money-in-the-humanitarian-sector.pdf (last accessed on 10 August 2025).

[14] On the shift from the state as a direct provider to a market regulator and the corresponding transformation of *VfM* into a tool of regulatory accountability, see MAJONE, *Regulating Europe*, Routledge, 1996, pp. 24 ff., where the emergence of the European regulatory state is traced through the institutionalization of independent agencies tasked with overseeing liberalised sectors. See also BALDWIN, CAVE and LODGE, *Understanding Regulation: Theory, Strategy and Practice*[2], Oxford University Press, 2012, pp. 388 ff. regarding the EU regulatory state.

[15] COOPER, *Control, accounting and value-for-money implications of utility regulation: a literature review*, *Managerial Auditing Journal*, 1998, vol. 13(2), 117 ff.; GLENDINNING, *The Concept of Value for Money*, *International Journal of Public Sector Management*, 1988, vol. 1(1), p. 42 ff.

[16] See PROSSER, *The Regulatory Enterprise: Government, Regulation, and Legitimacy*, Oxford University Press, 2010, p. 183 ff.; ARMSTRONG, COWAN and VICKERS, *Regulatory Reform: Economic Analysis and British Experience*, MIT Press, 1994, pp. 97 ff, discussing price regulation and

regulation, where similar dynamics of market power, complexity, and consumer vulnerability call for public oversight.[17]

This analogy laid the foundation for incorporating VfM-inspired mechanisms into EU financial and insurance regulation.

While the concept of "value for money" does not appear as an autonomous legal principle in EU law, its logic has been progressively reflected in specific regulatory requirements and supervisory practices, such as product oversight and governance (POG) under the Directive 2016/97/EU on insurance distribution (IDD), cost and performance disclosure under the Regulation (EU) No 1286/2014 on packaged retail and insurance-based investment products (PRIIPs Regulation), and suitability requirements in Directive 2014/65/EU (MiFID II).

This is especially true in relation to retail financial products, where complexity, long-term commitments, and information asymmetries have prompted closer scrutiny of product governance, pricing, and suitability.[18]

In the financial services industry, particularly for retail clients,[19] many products

service quality monitoring in liberalised network industries, which can be read as an antecedent framework to later VfM debates.

[17] See ARMOUR, AWREY, DAVIES, ENRIQUES, GORDON, MAYER and PANE, *Principles of Financial Regulation*, Oxford University Press, 2016, pp. 205 ff.

[18] For an analysis of regulatory challenges in liberalised sectors and what could be seen as analogies to financial markets regulations, see M-Armstrong, S. Cowan, and J. Vickers, *Regulatory Reform: Economic Analysis and British Experience*, *ibid*., particularly in the theoretical framework sections and in the chapters on British utilities.

[19] In EU financial regulation, the notion of *retail client* refers to the category of investor or customer granted the highest level of regulatory protection, due to their presumed lack of experience, knowledge, or financial capacity to fully assess investment risks. The classification originates in Directive 2014/65/EU (MiFID II), where Article 4(1)(11) defines a *retail client* as "a client who is not a professional client", and Annex II sets out the criteria for identifying *professional clients* and *eligible counterparties*, thereby establishing a tripartite client categorisation. Other sector-specific frameworks adopt similar but not identical distinctions. The PRIIPs Regulation (EU) No 1286/2014, in Article 4(6), defines *retail investor* by reference to the notion of *retail client* under MiFID II, thereby incorporating its retail/professional distinction. The Insurance Distribution Directive (IDD) 2016/97/EU, while not explicitly defining the term *retail client*, refers in Recital 44 and Article 30(1) to MiFID II standards when insurance-based investment products are sold with advice, and requires enhanced conduct-of-

have been found to involve hidden costs, uncertain outcomes, and opaque structures, as highlighted by both academic literature[20] and regulatory assessments.[21] These features echo those observed in liberalised public utilities, where consumers face complex tariffs, limited switching capacity, and dependence on essential services.[22] In both cases, the combination of market powers, information asymmetries, and behavioural biases weakens the effectiveness of competition and justify regulatory safeguards. This functional similarity helps explaining why VfM-related considerations have surfaced in supervisory discourse, often a way to frame existing requirements of fairness, transparency, and proportionality in product design and distribution, rather

business and disclosure obligations when such products are offered to non-professional customers - a category functionally aligned with retail clients under MiFID. These classifications reflect the EU's broader objective of calibrating regulatory obligations - particularly in terms of disclosure, product governance, and suitability-according to the level of protection appropriate for different types of clients.

[20] Cf. STOIMENOV and WILKENS**,** *Are structured products 'fairly' priced? An analysis of the German market for equity-linked instruments*, in *Journal of Banking & Finance*, 29(12), 2005, pp. 2971–2993; NAVONE and NOCERA, *Unbundling the Expense Ratio: Hidden Distribution Costs in European Mutual Fund Markets*, in *European Financial Management*, 22(4), 2016, pp. 640–666.

[21] Cf. EIOPA, *Cost and Past Performance Report*, April 2025, p. 7 ff. available at https://www.eiopa.europa.eu/document/download/06bbb472-dd90-4246-825a-f79783b7011a_en?filename=EIOPA-BoS%2025-123%20-%20Costs%20and%20Past%20Peformance%20Report%20-%202025.pdf (last accessed on 10 August 2025). ESMA, *Market Report on Costs and Performance of EU Retail Investment Products 2024*, January 2025, p. 6 ff. available at https://www.esma.europa.eu/sites/default/files/2025-01/ESMA50-524821-3525_ESMA_Market_Report_-_Costs_and_Performance_of_EU_Retail_Investment_Products.pdf?utm_source=chatgpt.com (last accessed on 10 August 2025).

[22] See European Union Agency for the Cooperation of Energy Regulators and Council of European Energy Regulators - ACER/CEER, *Energy retail – Active consumer participation is key to driving the energy transition: how can it happen?*, 30 September 2024, available at https://www.ceer.eu/wp-content/uploads/2024/09/ACER-CEER_2024_MMR_Retail-1.pdf (last accessed on 10 August 2025); Body of European Regulators for Electronic Communications - BEREC, *Report on Terminating Contracts and Switching Provider*, 7 March 2019, available at https://www.berec.europa.eu/sites/default/files/files/document_register_store/2019/3/BoR_%2819%29_27_BEREC_Report_on_Terminating_Contracts_and_Switching_Provider_final.pdf (last accessed on 10 August 2025)

than an additional autonomous standard.[23]

MiFID II and PRIIPs Regulation provide important examples of this trend. MiFID II and Delegated Directive (EU) 2017/593 require investment firms to design and distribute products in accordance with the characteristics and needs of their target markets. This includes an implicit proportionality assessment regarding costs and expected benefits. The PRIIPs Regulation complements this by mandating the use of a Key Information Document (KID), which allows retail investors to compare products in terms of costs, risks, and performance, thus promoting transparency and informed choice.[24]

A parallel development occurred in the insurance sector, particularly for Insurance-Based Investment Products (IBIPs).[25] Under the IDD and Delegated Regulation (EU) 2017/2358 concerning the product oversight and governance requirements for insurance undertakings and insurance intermediaries, these entities must ensure that products are compatible with the target market's needs and deliver economically appropriate outcomes.[26]

Taken together, these instruments illustrate a growing regulatory focus on aligning product characteristics with consumer interests, particularly in terms of economic value. Although the term “value for money” is not explicitly mentioned in the relevant legislative texts, the functional proximity is evident, as they incorporate principles of fairness, proportionality, and cost-benefit alignment that are central to VfM logic.

---

[23] On the other hand, see P. J. May, *Performance-Based Regulation and Regulatory Regimes: The Saga of Leaky Buildings*, *Law & Policy*, 25(4), 2003, p. 397 ff., who argues that performance-based regulation exposes its Achilles’ heel by granting flexibility without ensuring adequate accountability.

[24] See Article 24(2) and (9) of MiFID II, and Delegated Directive (EU) 2017/593.

[25] See Articles 5-7 and Annexes of PRIIPs Regulation.

[26] Cf. PETROSINO, *Product Oversight and Governance’s Actual Trends and Value for Money Provisions Within the IDD Framework*, in *Global Jurists*, 2024, p. 17 ff.

3.2. The integration of VfM into EU financial and insurance regulation has been neither uniform nor codified. Its meaning and scope have instead been shaped by divergent institutional interpretations and supervisory practices. This subsection examines how the European Supervisory Authorities (ESAs), in particular the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities Markets Authority (ESMA), have developed different operational understanding of VfM. It considers how these interpretations are reflected in soft law instruments, delegated acts, and national transpositions, revealing deeper tensions between costumer protection and market efficiency, and between substance and disclosure.

In this context, the ESAs, and especially EIOPA, have played a key interpretative and operational role. EIOPA has taken a proactive stance, setting out supervisory expectations that incorporate VfM logics, particularly through its methodology for identifying outlier products in terms of cost and performance, embedded within the broader Product Oversight and Governance (POG) framework. By contrast, ESMA has adopted a more descriptive and disclosure-oriented approach. While it addresses cost-efficiency and risk-return considerations, particularly within the framework for UCITS and PRIIPs, its intervention is primarily data-driven and centred on transparency. It does not integrate these elements into a cohesive VfM rationale or use VfM as a supervisory benchmark.[27] This divergence reflects the different supervisory priorities and institutional cultures of the two authorities: although both operate under formally similar conduct-of-business framework, EIOPA treats product value as an explicit regulatory objective, whereas ESMA focuses on market functioning and investor information.[28]

[27] See ESMA's *Market Reports on Costs and Performance of EU Retail Investment Products*, published annually since 2021 and covering data retrospectively from 2010.

[28] The divergent approaches to VfM developed by ESMA and EIOPA appear to run counter to the aspiration and the advantages of a cross-sectoral financial regulation duty of care, encompassing the obligation to act "honestly, fairly and professionally", which is instead the perspective developed by COLAERT and PEETERS, *Is there a Case for a Cross-Sectoral Duty of Care for the Financial Sector*?,

These institutional differences are also reflected in the delegated acts. Although neither Delegated Regulation (EU) 2017/2358 under the IDD nor Delegated Regulation (EU) 2017/565 under MiFID II explicitly refer to VfM, their application reveals diverging supervisory approaches. EIOPA reads the POG framework under the IDD as encompassing VfM-related supervisory standards, whereas ESMA has taken a more neutral and disclosure-oriented stance.

As a result, while the underlying logic of the regulatory frameworks for retail investment products and IBIPs is broadly aligned, the two authorities' approach approaches reveal clear differences, reflecting distinct supervisory philosophies.

Consistent with its institutional orientation, EIOPA has formalised VfM as a supervisory benchmark. This is particularly evident in the context of unit-linked and other IBIPs, where it applies a dedicated methodological framework to identify outliers and embed VfM within the product oversight and governance regime.[29] Delegated Regulation (EU) 2017/2358, adopted under the IDD, does not expressly refer to VfM. However, its requirements, such as aligning product design with the characteristics and needs of the target market and conducting ongoing reviews, create a structure that substantively supports VfM objectives.[30] EIOPA reinforces this interpretation by

in COLAERT, BUSCH, INCALZA (eds), *European Financial Regulation. Levelling the Cross-Sectoral Playing Field*, Bloomsbury Publishing, 2019, p. 329 ff.

[29] EIOPA, *Methodology on Value for Money Benchmarks*, 27 August 2024, available at https://www.eiopa.europa.eu/document/download/76e6a517-04e1-4f20-8e1e-712f0e2dd16b_en?filename=EIOPA-BoS-24-332%20-%20Methodology%20on%20Value%20for%20Money%20Benchmarks.pdf.; Id., *Methodology to assess value for money in the Unit-Linked Market*, 31 October 2022, available at https://www.eiopa.europa.eu/publications/methodology-assess-The value-money-unit-linked-market_en (last accessed on 10 August 2025); Id, *Supervisory Statement On assessment of value for money of unit-linked insurance products under product oversight and governance*, 30 November 2021, available at https://www.eiopa.europa.eu/publications/supervisory-statement-assessment-value-money-unit-linked-insurance-products-under-product-oversight_en (last accessed on 10 August 2025).

[30] Cf. Art. 4 and Art. 5 of Delegated Regulation (EU) 2017/2358: the former requires insurance undertakings to ensure that products are designed for and aligned with a specified target market; the latter mandates a regular review of products to assess their continued consistency with the needs and characteristics of that market.

incorporating VfM considerations into the POG framework and its supervisory expectations.[31]

Conversely, Delegated Regulation (EU) 2017/565, adopted under MiFID II, though similarly silent on VfM, does not impose a corresponding requirement to ensure demonstrable value. ESMA has instead relied on tools such as thematic reviews and common supervisory actions to enhance product oversight, without unifying these efforts under a VfM rationale.[32]

National transpositions add another layer of complexity. In jurisdictions such as Italy, for instance, the conduct rules under MiFID II are applied to the distribution of IBIPs by banks beyond the minimum required by EU law. Under this framework, the oversight of such distribution activities falls within the remit of the national financial

[31] See EIOPA, *Supervisory Statement on Assessment*, cit., p. 3 f: <<The analysis of the responses to the public consultation showed that it is widely understood that aspects related to value for money are already embedded in the IDD, albeit implicitly. In particular, Article 25 of the IDD and the POG Delegated Regulation require manufacturers to test whether products are aligned with the target market's needs, objectives and characteristics. In fact, value for money aspects are included in what EIOPA already defined as 'fairness testing' when outlining its approach to the supervision of product oversight and governance>>. Therefore, reference is made to *EIOPA's approach to the supervision of product oversight and governance*, cit., p. 13, where EIOPA pointed out that << Overall, POG supervision, looking into product testing, also aims at ensuring that manufacturers assess the fairness of their products when testing whether they meet the target market's needs, objectives, and characteristics>>.

[32] ESMA has not formally integrated the concept of value for money into its supervisory or regulatory framework under MiFID II. However, it has undertaken related initiatives aimed at enhancing investor protection, particularly in the areas of cost transparency and product suitability. For example, the 2022 Common Supervisory Action (CSA) on MiFID II cost and charges disclosures - conducted jointly with national competent authorities - assessed firms' compliance with rules requiring clear, accurate, and timely information about costs provided to retail clients. See: ESMA, *Public Statement on the 2022 CSA and Mystery Shopping Exercise on MiFID II Cost and Charges Disclosure Rules*, 6 July 2023, available at: https://www.esma.europa.eu/sites/default/files/2023-07/ESMA35-43-2725_-_Public_Statement_on_2022_CSA_and_MSE.pdf. (last accessed on 10 August 2025).
In parallel, ESMA's guidelines on the MiFID II suitability requirements (updated in 2022) emphasise the need to align investment products with clients' sustainability preferences, financial objectives, and risk profiles, further reinforcing client-centric conduct. Nonetheless, neither initiative frames these obligations in terms of VfM. See: ESMA, *Final Report – Guidelines on certain aspects of the MiFID II suitability requirements*, 23 September 2022, available at: https://www.esma.europa.eu/document/final-report-guidelines-certain-aspects-mifid-ii-suitability-requirements. (last accessed on 10 August 2025).

markets and security authority (CONSOB) rather than insurance supervisor (IVASS). This regulatory allocation results in a of MiFID-based compliance obligations and supervisory approaches, with only limited incorporation of the VfM logic as developed by EIOPA for insurance distribution.[33]

3.3. This final subsection examines how the UK's post-Brexit regulatory framework has formalised the concept of "fair value". It provides a binding standard with concrete enforcement tools. Against the backdrop of a fragmented and evolving EU landscape, the United Kingdom offers an instructive external comparator. Following its regulatory divergence from the EU, the UK has developed a more explicit and enforceable framework aligned with VfM objectives.

In the UK regulatory context, the concept of "fair value" has been formalised within the product governance framework by the Financial Conduct Authority (FCA).[34] This notion, while functionally similar to VfM, carries a stronger normative character and forms part of binding regulatory expectations. Following a series of mis-selling scandals, the FCA adopted rules requiring firms to assess whether products provide

[33] In Italy, the regulatory and supervisory treatment of IBIPs distributed through bank networks is characterised by a dual-track approach. While the IDD and Delegated Regulation (EU) 2017/2358 formally apply, IBIPs distributed by banks are also subject to MiFID II conduct of business rules - particularly concerning suitability, cost disclosures, and product governance - as implemented through Italian national law (notably, Legislative Decree No. 58/1998, the Consolidated Law on Finance). In practice, the Italian financial markets authority (CONSOB) is responsible for supervising compliance with MiFID II rules by banks distributing IBIPs, while IVASS oversees the insurance dimension. This results in a hybrid oversight structure where MiFID II obligations take precedence in the distribution phase, but without the VfM-oriented supervisory perspective that EIOPA has developed under the IDD framework.

[34] Financial Services Authority (FSA), *Treating Customers Fairly: Towards Fair Outcomes for Consumers*, July 2006, available at https://www.fca.org.uk/publication/archive/fsa-tcf-towards.pdf. (last accessed on 10 August 2025). See also GEORGOSOULI, *The FSA's "Traiting Customers Fairly" (TCF) Initiative: What is So Good About It and Why It May Not Work*, in *Journal of Law and Society*, vol. 38(3), 2011, p. 405 ff.

benefits commensurate with their costs and risks.[35] Firms must justify pricing, document governance processes, and ensure that distribution strategies do not erode the product's economic utility.

This comparison highlights not only the divergent regulatory trajectories but also the potential for VfM to evolve from an interpretative tool into a binding legal obligation. In contrast, within the EU, VfM continues to operate as a fragmented and evolving concept - more of a regulatory logic than a codified obligation. While not established as a formal principle of EU law, VfM functions as an emerging regulatory logic, variably integrated into supervisory expectations, product governance standards, and disclosure frameworks.

This functional expansion of the VfM notion into financial and insurance regulation marks a turning point in its legal evolution. From a managerial concept rooted in public administration, it has become an instrument of regulatory accountability, progressively embedded in product governance, disclosure duties, and supervisory methodologies.

This transition, however, also lays the groundwork for legal and operational challenges. Although the EU regulatory framework provides a basis for harmonisation, the application of VfM remains insufficiently clarified, detailed, and commonly interpreted. As a result, differences in supervisory expectations and enforcement practices persist, particularly in the context of increasingly complex and cross-border financial products.

Nonetheless, VfM expansion has laid the groundwork for a shift from formal compliance to outcome-based supervision, where products are expected to deliver

[35] Financial Conduct Authority (FCA), PS21/5 *General insurance pricing practices market study*, May 2021; Od., FG22/5 *Final non-Handbook Guidance for firms on the Consumer Duty*, July 2022. See also FCA, *Consumer Duty: Findings from our review of fair value frameworks*, 17 November 2023, available at https://www.fca.org.uk/publications/good-and-poor-practice/consumer-duty-findings-our-review-fair-value-frameworks (last accessed on 10 August 2025).

demonstrable and proportionate value in light of customer needs and market complexity. In this evolving framework, financial institutions are increasingly required to document their product governance processes, justify pricing decisions, and demonstrate that distribution strategies do not erode the economic utility of their offerings. Therefore, VfM can be seen as tending towards a hybrid notion, functioning partly as a supervisory benchmark and partly as a reference to reasonableness and economic proportionality. Under this reading, the expectation is that the costs borne by customers should be proportionated to the product's expected benefits and risk profile, which is an idea that illustrates why VfM begun to attract regulatory attention in EU financial services.[36]

4. Having outlined the evolution of VfM into a hybrid concept, both supervisory benchmark and standard of economic proportionality, this section turns to the legal and regulatory tensions arising from its increasing operationalisation within EU law.

The progressive integration of VfM into the EU's financial and insurance regulatory frameworks signals a substantial normative and supervisory shift. It reflects a departure from a regulatory model centred on transparency, informed choice, and reactive enforcement, where market discipline and individual responsibility were expected to deliver outcomes perceived as fair in practice, with fairness operating as a general binding conduct standard rather than as a forward-looking supervisory benchmark linked to product value assessment.[37] However, this evolution also exposes

[36] For a comprehensive legal and economic framework underpinning such regulatory duties, including discussions on product suitability, pricing fairness, and the economic utility of financial offerings - though not using the explicit term "Value for Money" - see ARMOUR, AWREY, DAVIES, ENRIQUES, GORDON, MAYER and PAYNE, *Principles of Financial Regulation*, Oxford University Press, 2016, pp. 205 ff.

[37] Cf. European Commission, *Retail Investment Strategy* – Proposal for a Directive amending the MiFID II and IDD frameworks, COM(2023) 279 final, 24.5.2023, in particular Recital 11 and the new Article 16d IDD, which would introduce an obligation for insurance undertakings and intermediaries to ensure that insurance-based investment products offer value for money. Similarly, Recital 5 and the

unresolved legal and institutional tensions, particularly regarding the conceptual coherence of VfM, its operational implementation, and its compatibility with core principles of EU law.

This section examines four critical areas where legal and regulatory challenges associated with VfM are most evident. First, it considers the definitional ambiguity of VfM and the resulting fragmentation in supervisory practices across Member States, which undermines legal certainty and distorts the level playing field (sub-section 4.1). Second, it addresses the evolving scope and legal boundaries of VfM-based supervision, focusing on the tension between its enforcement and the principle preventing supervisory authorities from requiring prior notification or approval of policy conditions, scales of premiums, and technical bases set forth under the Solvency II Directive, as well as the growing extension of VfM logic to non-life insurance products through EIOPA guidance and national practices (sub-section 4.2). Third, it explores the limited judicial interpretation and the still underdeveloped doctrinal theorisation of VfM, proposing an analytical framework grounded in procedural justice, market fairness, and functional regulation, and suggesting its possible incorporation into the overarching conduct-of-business duty to act fairly (sub-section 4.3).

Taken together, these subsections show that while VfM offers significant potential to improve product quality and customer outcomes, its long-term legitimacy and effectiveness depend on greater conceptual precision, regulatory coordination, and legal integration within the EU's financial and insurance architecture.

---

proposed amendment to Article 24(9) MiFID II would extend an equivalent obligation to investment firms in respect of financial instruments. The European Supervisory Authorities (EIOPA and ESMA) would be empowered to develop benchmarks and methodologies to assess value for money and could issue guidelines or opinions to support consistent supervisory practice. These instruments are intended to facilitate scrutiny and, where needed, intervention in cases of excessive costs, unjustified product features, or insufficient alignment with the interests of retail investors across both insurance and financial sectors. The Proposal is available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023PC0279 (last accessed on 10 August 2025).

4.1. The rise of VfM as a supervisory benchmark in EU financial and insurance regulation has brought to the forefront unresolved conceptual and operational challenges to the fore. Foremost among them is the lack of a clear and legally enforceable definition of what constitutes "value" in the context of financial and insurance products. Although legislative instruments such as MiFID II, the PRIIPs Regulation, and the IDD incorporate VfM-related expectations, most notably in the form of POG obligations, cost disclosures, and duty-of-care provisions, none provides a concrete legal threshold or evaluative standard for assessing compliance. This ambiguity raises foundational questions concerning the scope, justiciability, and enforceability of VfM.

The absence of a standardised definition leaves considerable discretion to both manufacturers and national supervisors. Thus, some competent authorities may interpret VfM using quantitative indicators such as cost-to-return ratios, claims ratios, or net performance benchmarks. Others may adopt broader qualitative assessments, considering product features, customer needs, behavioural profiles, and the influence of distribution incentives.[38] This divergence is particularly evident in the insurance sector, where EIOPA has provided a flexible methodology and encouraged active supervisory engagement with VfM criteria.[39] By contrast, in the financial sector, ESMA

[38] See EIOPA, *Methodology to assess value for money in the Unit-Linked Market*, cit., p. 3, where it states: <<This methodology is a common basis for all NCAs and EIOPA welcomes and encourages approaches which, taking into account market specificities and supervisory experiences and practices, develop further indicators to ensure value for money risks are sufficiently addressed in their markets, taking into account also emerging risks such the raising inflationary trends>>.

[39] EIOPA, *Methodology to assess value for money in the Unit-Linked Market*, cit., p. 8 provides that the tools presented are indicative in nature and should be adapted by NCAs to reflect national specificities. As such, they form part of a broader methodology aimed at enabling more precise and refined monitoring. For instance, the following enhancements could be envisaged: (*i*) Screening products based on cost and profitability characteristics, while also considering their relative market significance -such as gross written premiums (GWP) or number of contracts - in order to capture the potential systemic impact of poor value for money; (*ii*) Refining the analysis by risk group, risk-holding period (RHP),

has adopted a more neutral and disclosure-oriented stance, which results in more limited supervisory articulation of VfM standards. Such asymmetry risks producing uneven regulatory expectations across sectors and Member States, hindering supervisory convergence and cross-border activity, and legal certainty.

For firms, the lack of clarity undermines the ex-ante assessment of whether product designs, pricing structures, and distribution strategies meet supervisory expectations. Without codified safe harbours or risk-based tolerances, manufacturers must navigate a regulatory environment where retrospective supervisory assessments may not align with their original risk–benefit logic.[40] For customers and their representatives, the undefined nature of the standard complicates legal challenges to potentially unfair products, particularly in the absence of explicit ex post enforcement mechanisms or judicial precedent.

On the other hand, the codification of VfM raises concerns about excessive formalism. Rigid value metrics or fixed cost caps may inadvertently inhibit innovation, reduce product differentiation, and discourage firms from developing tailored offerings for specific customer segments.[41] This is particularly relevant in insurance

---

and/or product category (e.g. distinguishing between pure unit-linked and hybrid products), as different product features influence both cost structures and expected returns. In addition, supervisory authorities may opt to apply one of the proposed tools individually or combine several of them, depending on their supervisory approach and market context.

[40] EIOPA, *Methodology to assess value for money*, *cit.*, *p. 4 provides that*, while the methodology is primarily intended to support the work of NCAs, the methodology also seeks to provide greater clarity to insurance manufacturers and distributors regarding the supervisory approach to addressing value for money risks in the context of POG requirements. However, the document emphasises that the three-layer approach - particularly Layer III - is not intended to replace the manufacturers' own assessment of value for money. Rather, it serves to evaluate whether manufacturers have sufficiently and appropriately tested whether their products deliver value to the identified target market.

[41] EIOPA, *Feedback Statement on the Methodology on Value for Money Benchmarks*, 27 August 2024 p. 6 has acknowledged that rigid value metrics or fixed cost caps may inadvertently limit product innovation, reduce differentiation, and deter firms from designing tailored solutions for specific consumer needs. Thus, EIOPA has stated that <<cost caps may limit product innovation and/or lead to a 'race-to-the-bottom' in terms of price which may be detrimental to consumers>>. To avoid benchmarks being perceived as hard thresholds or de facto price controls, EIOPA emphasises the

markets, where added-value features, such as biometric risk coverage, optional riders, or dynamic asset allocation strategies, may involve higher costs while delivering meaningful benefits to policyholders.[42] However, similar concerns arise in financial product markets, where rigid benchmarks may fail to account for complex cost-performance trade-offs, product structuring choices, or advisory models that are designed to meet diverse investor profiles and long-term objectives.

The Retail Investment Strategy (RIS), put forward by the European Commission in May 2023 has the potential to reignite the legal and policy debate on the balance between flexibility and formalism in the implementation of VfM. One of the most contested elements contained in the proposed Article 25a, para 8, amending IDD and Article 16a, para. 9 to revising MiFID II would be the introduction of legally binding VfM benchmarks, defined as reference cost indicators for assessing whether investment products and IBIPs offer appropriate value to retail clients.[43] Although ESMA and EIOPA

importance of supervisory discretion. It affirms that NCAs will retain the ability to exercise judgment when determining whether a product offers value for money, regardless of whether it falls within or outside the benchmark perimeter. To reinforce this flexible and principle-based approach, EIOPA provided that the revised methodology: (i) avoids establishing a hierarchy between essential and additional clustering features, instead proposing a minimum set of clusters while allowing further qualitative factors to be considered; (ii) introduces the concept of "caution areas" for products that exceed or fall below the benchmark range, clarifying that non-monetary features may justify deviations where appropriately documented (see Section 7). Ultimately, this approach reflects EIOPA's attempt to balance the supervisory need for comparability and market monitoring with the imperative to preserve innovation, consumer choice, and proportionality in regulatory intervention. The document is available at https://www.eiopa.europa.eu/consultations/consultation-methodology-value-money-benchmarks_en (last accessed on 10 August 2025).

[42] EIOPA, *Supervisory Statement on Value for Money in Unit-Linked and Hybrid Products*, cit., p. 7 f. provides that <<The pricing process should evidence that each product feature delivers value for money in line with the needs, objectives and characteristics of the target market. This includes all underlying funds, levels of capital guarantees, available biometric risk covers, etc. For example, a product which offers high value because of the biometric risk cover while offering average returns may bring value to target markets whose objectives is to accumulate capital whilst having adequate biometric coverage. However, such product would not offer value to target markets whose objective is to increase capital by seeking higher returns>>.

[43] Cf. European Commission, *Proposal for a Directive amending Directives 2011/61/EU, 2009/65/EC, 2014/65/EU, and 2016/97 as regards retail investor protection rules* (Retail Investment Strategy), cit.

would be tasked with developing these benchmarks, the European Commission would be empowered to supplement the IDD and MiFID II through delegated acts. These acts could further specify the principles set out in the respective provisions, including the methodology to be followed by ESMA and EIOPA in developing the benchmarks, as well as the criteria for assessing whether costs and charges are justified and proportionate.[44]

The potential rigidity of VfM benchmarks, their possible chilling effects on product innovation, and the risk of normative misalignment with heterogeneous national market structures and supervisory practices have been identified as critical concerns in the ongoing trialogue on the RIS.[45] The eventual outcome of these interinstitutional negotiations will be determinative in clarifying the legal status of such benchmarks, whether they might assume the character of binding regulatory thresholds, operate as non-binding supervisory indicators, or remain aspirational tools of soft law. At stake is a broader regulatory dilemma: reconciling the objective of legal harmonisation, as enshrined in Article 114 of the Treaty on the Functioning of the European Union (TFEU), with the principle of proportionality and the discretion afforded to NCAs under existing Union law.

This dilemma becomes particularly salient when considering the division of competences and the operational overlap between national and supranational supervisory mandates in the enforcement of VfM requirements. Although the implementation and day-to-day supervision of VfM obligations currently lie within the remit of NCAs, the ESAs, most notably ESMA and EIOPA, have been entrusted with exceptional yet direct product intervention powers under Article 42 of Regulation (EU)

[44] On the pricing process that the RIS intends to introduce as part of the regulatory framework on POG, see Recital. 12 of the Omnibus Directive Proposal as well as TROIANO, *The Value for Money Principle in the EU Retail Strategy*, *forthcoming* in this Review.

[45] Summary record on the updates from the interinstitutional trialogue, January–May 2025, are available via EUR-Lex under 2023/0167(COD) available at https://eur-lex.europa.eu/procedure/EN/2023_167 (last accessed on 10 August 2025).

No 600/2014 (MiFIR) and Article 17 of Regulation (EU) No 1286/2014 (PRIIPs), respectively. These provisions empower the ESAs to impose temporary restrictions or prohibitions on the marketing, distribution, or sale of financial instruments and insurance-based investment products that they consider posing a significant threat to investor protection or orderly functioning of the market.[46]

While such interventions are procedurally constrained and substantively exceptional, their very existence underscores the potential for divergent assessments between Union-level and national supervisory authorities concerning the VfM profile of specific products. In the absence of a harmonised and legally binding methodology, these discrepancies may generate uncertainty not only for market participants but also in terms of institutional accountability and legal predictability. Indeed, conflicting views between a European authority and a national supervisor as to whether a product meets VfM expectations raise critical issues regarding the coherence of the Union's multi-level supervisory architecture and the extent to which European decisions may override or condition national enforcement discretion.[47]

Such situations give raise to fundamental legal concerns from the perspective of supervised entities. A financial/insurance undertaking could be subject to restrictive

[46] On the product intervention, see: SKAPOVÁ, *EIOPA, Unit-linked Insurance and Polish Product Intervention: A Silent Regulatory Revolution?*, in *European Business Organization law review*, 2024(9), pp. 571 ff.; KULT - SKRABKA, *European Protection of Retail Investors in Insurance-Based Investment Products: Product Interventions under PRIIPs*, in *International Investment Law Journal*, 2021, pp. 115 ff.; BUSCH, *The Future of the Special Duty of Care in the Financial Sector – Perspectives from the Netherlands*, in *European Business Law Review*, 2021 (3), p. 483 f.; COLAERT, *The MiFIR and PRIIPs Product Intervention Regime: In Need of Intervention?*, *in European Company and Financial Law Review*, 2020(3), pp. 99 ff.; TOMIC, *Product Intervention of Supervisory Authorities in Financial Services*, in GRIMA - MARANO (eds), *Governance and Regulations*, Emeralds, 2018, pp. 229 ff. ; MOLONEY, *The Investor Model Underlying the EU's Investor Protection Regime: Consumers or Investors?*, in *European Business Organization Law Review*, 2012 (13), p. 181 ff.

[47] On the supervisory authorities' liability in the event of failure or delay in exercising their powers arising from POG, see MARANO, *Product Oversight and Governance: Standards and Liabilities*, in MARANO, ROKAS, *Distribution of Insurance-Based Investment Products. The EU Regulation and the Liabilities*, Springer, 2019, p. 94.

measures imposed by a European supervisory authority based on an assessment of insufficient VfM that relies on criteria diverging from those applied by its national competent authority and potentially at odds with previous national supervisory guidance or approvals. This scenario raises pressing questions regarding the legal certainty, procedural fairness, and legitimate expectations of the regulated entity: to what extent must undertakings anticipate and align with alternative supervisory standards not codified at the national level? What safeguards would exist to challenge a Union-level intervention grounded in divergent criteria? How might coherence and predictability be ensured when multiple authorities exercise overlapping but non-identical powers?

While this paper does not purport to offer definitive answers to these questions, it identifies them as central issues for legal debate and suggests that future reforms should clearly delineate the mandates of Union and national authorities, enhance procedural safeguards for cross-level interventions, and promote a transparent and coherent articulation of VfM expectations within the European supervisory framework.

4.2. Integrating VfM into EU insurance supervision raises distinct legal and practical challenges, particularly in light of the sector's internal market freedoms and evolving supervisory expectations. These challenges emerge most clearly in two areas: the tension between VfM enforcement and the constraints imposed by the Solvency II Directive, and the gradual extension of VfM standards to insurance products involving the transfer of risk, including non-life business and pure-life insurance, where the legal basis remains comparatively underdeveloped.

The focus on the insurance sector is justified by the fact that the integration of VfM into insurance supervision presents unique regulatory tensions not mirrored in the financial sector. While financial products are generally subject to more harmonised

conduct rules under MiFID II, particularly regarding cost transparency, suitability, and investor protection, the insurance framework is characterised by a more fragmented and principle-based approach. Such distinctive features warrant a dedicated analysis of the insurance regulatory context.

A key friction point arises from Solvency II Directive. Member States are prohibited from subjecting insurers, also when operating under the freedom to provide services or the freedom of establishment, to any form of prior approval or notification of policy conditions, pricing structures or contractual documents[48]. Only posteriori control, after marketing, is allowed and only non-systematic (except for a systematic control of mandatory non-life insurance and technical bases in life insurance). This provision reflects a foundational objective of the EU regulation since the Third generation of Insurance Non-life and Life Insurance Directives in 1992: to preserve product innovation, pricing autonomy, and commercial freedom within the internal insurance market, subject only to solvency and prudential oversight[49]. Solvency II enshrines the principle that insurance product governance should be conducted ex post, through market discipline and supervisory accountability, not ex ante, through regulatory gatekeeping.[50] The Court of Justice of the EU has repeatedly

[48] See Articles 21, 154, 163, 181 and 182 of Solvency II.

[49] See Recital 20 and Article 39, para 2 Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive); Recital 21 and Article 29 Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive), and Recital 47 Directive 2002/83/EC of 5 November 2022 concerning life assurance; EU Commission Interpretative Communication, Freedom to provide services and the general good in the insurance sector (2000/C 43/03), OJ C43, 16 February 2000, point 3, a, p. 20.

[50] Although the recitals quoted in the previous footnote are not reproduced in Solvency II, they remain relevant since the substantive provisions were carried over into the current framework. See also Recital 16 of Solvency II, which allows supervisory authorities, in the case of private or voluntary health insurance, to "require systematic notification of the general and special policy conditions … in order to verify that such contracts are a partial or complete alternative to the health cover provided by the social security system" while clarifying that "such verification should not be a prior condition for the marketing of the products".

confirmed with regard to non-life insurance cases that the EU insurance regulation "prohibits Member States from introducing a system of prior approval or systematic notification of scales of premiums that an insurance undertaking intends to use in their territory in its dealings with policyholders", and "the Community legislature thus meant to secure the principle of freedom to set rates in the non-life insurance sector".[51]

However, the VfM-focused supervisory approach promoted by EIOPA has introduced legal ambiguities. Although VfM does not formally require pre-approval of product features or pricing, the increasing expectation that insurers justify their cost structures, benefit design, and distribution incentives has led to anticipatory compliance behaviours. Firms may internalise supervisory expectations so rigidly that they effectively restrict their pricing freedom, even in the absence of formal authorisation requirements. These developments give rise to legal uncertainty surrounding the delineation between legitimate ex post supervision and de facto ex ante control.

Supervisory authorities are now equipped to carry out thematic reviews, conduct regular supervisory actions, and issue remedial recommendations that affect product design and pricing indirectly but substantively.[52] While these tools remain formally post-distribution, their influence can have pre-distribution effects, particularly in markets with high reputational risk or supervisory scrutiny. This blurring of boundaries raises questions about legal certainty, regulatory overreach, and the

[51] See CJEU C-577/11, 7 March 2013, DKV Belgium/Association belge des consommateurs Test-Achats, cons. 20-21 with reference to various former cases; CJEU C-59/01, 25 February 2003, Commission/Italian Republic, cons. 25-35.

[52] Cf. EIOPA, *Peer Review on Product Oversight and Governance (POG)*, 20 July 2023, which is the first EIOPA's peer review in supervision of conduct of business and assessed the overall maturity of the supervisory framework on POG developed by NCAs to supervise the application of POG requirements by insurance manufacturers. The Peer Review Report is available at https://www.eiopa.europa.eu/system/files/2023-07/Peer%20Review%20on%20Product%20Oversight%20and%20Governance%20%28POG%29_1.pdf (last accessed on 10 August 2025).

compatibility of VfM enforcement with the freedoms protected under Solvency II. Against this background, EIOPA has advanced an interpretative approach according to which VfM considerations may be subject to supervisory scrutiny both during the ex-ante phase of product development and in the ex-post phase of market monitoring and distribution oversight.[53] While such a reading may appear to stretch the limits of Solvency II, it can also be seen as consistent with its internal logic, insofar as it strengthens internal governance and accountability mechanisms without establishing a system of "systemic" prior administrative approval.

However, this approach is not without controversy. It risks stretching the limits of the Solvency II framework, which explicitly prohibits prior approval of policy conditions, premiums and technical bases, and only allows non-systematic ex post control. The concern is whether an expansive interpretation of POG, framed around VfM, could hollow out these safeguards by enabling de facto prior approval of product features under the guise of supervisory scrutiny. The absence of binding guidance or authoritative CJEU jurisprudence leaves space for interpretative uncertainty and divergent national practices. This risk of hollowing out is closely connected to the institutional dimension of EIOPA's role, since it raises the question of whether and to what extent EIOPA is entitled to reshape the balance struck by the EU legislator between regulatory freedom and supervisory intervention. While EIOPA is entrusted

[53] Cf. EIOPA, *Supervisory Statement on the assessment of Value for Money for unit-linked insurance products under product oversight and governance*, 30 November 2021, which emphasises that VfM considerations are intended to be scrutinised both ex ante (during product design) and ex post (during market monitoring and distribution oversight). According to point 3.24, competent authorities are required to take these elements into account in their supervisory assessment, ensuring, inter alia, that (i) costs and charges are properly identified in the POG documentation, quantified and justified; (ii) adequate and sufficient testing has taken place to verify whether the product offers value for money for the target market throughout its lifetime; (iii) costs and charges, performance, guarantees, coverage and the services offered are regularly reviewed and ad hoc triggers are sufficiently identified; and (iv) adequate systems and controls are in place to prevent products from being mis-sold. The document is available at https://www.eiopa.europa.eu/publications/supervisory-statement-assessment-value-money-unit-linked-insurance-products-under-product-oversight_en (last accessed on 10 August 2025).

under its founding Regulation (EU) No 1094/2010 with powers to issue guidelines, recommendations, and opinions aimed at fostering supervisory convergence, it lacks a general mandate to create binding primary rules.[54] Moreover, in the specific area of "fair value" EIOPA has so far refrained from adopting guidelines under Article 16 of Regulation (EU) No 1094/2010, which would trigger the comply-or-explain mechanism and thereby impose de facto binding obligations on national supervisory authorities. Unlike the POG guidelines, which were adopted under Article 16,[55] EOPA's work on VfM has remained confined to methodological documents and supervisory expectations, without the quasi-binding effect that guidelines would entail.[56]

Its soft law instruments, although influential in practice, do not have the same normative force as legislation adopted under Article 114 TFEU. It is worth noting, moreover, that ESMA, although exercising regulatory powers of a scope and nature comparable to those of EIOPA, has not yet developed an equally expansive interpretation of product governance. This contrast highlights the discretionary character of EIOPA's reading and the need for caution in assessing its legitimacy.

---

[54] On the institutional limits of ESAs regulatory powers, see TSAGAS, *The Regulatory Powers of the European Supervisory Authorities: Constitutional, Political and Functional Considerations*, in ANDENAS, DEIPENBROCK (eds), *Regulating and Supervising European Financial Markets*, Springer, 2016, p. 116 ff.

[55] See EIOPA, *Preparatory Guidelines on product oversight and governance arrangements by insurance undertakings and insurance distributors*, 18 March 2016, available at https://www.eiopa.europa.eu/publications/preparatory-guidelines-product-oversight-and-governance-arrangements-insurance-undertakings-and_en (last accessed 10 August 2025).

[56] The absence of guidelines on value for money adopted under Article 16 of Regulation (EU) No 1094/2010 is even more striking given EIOPA's own statements. EIOPA's Methodology on Value for Money Benchmarks, cit., explicitly affirms that "As stated in the Supervisory Statment and EIOPA's Approach to POG Supervision, value for money assessment is a clear element of product testing including the identification and quantification of costs to ensure they are justified, proportionate and aligned to the target market's needs, objectives, and characteristics considering comparable offerings in the market" (see at point 1.11). This tension underscores the gap between EIOPA's supervisory expectations, which suggest a quasi-binding understanding of VfM within POG, and the absence of a formal Article 16 instrument that would give such expectations a more consistent and enforceable legal basis.

Consequently, there is an inherent tension: by construing VfM as embedded within POG and encouraging NCAs to intensify supervision, EIOPA may appear to expand the scope of existing obligations beyond what the legislator expressly envisaged. This underscores the importance of recognising the limits of EIOPA's regulatory mandate and of ensuring that any evolution of VfM from supervisory discourse into legal principle occurs through the ordinary legislative process rather than through the gradual accretion of soft law practices.[57]

The issue is further complicated by the gradual expansion of VfM oversight to insurance products involving the transfer of risk, including non-life and traditional life business, where supervisory expectations are beginning to take more structured form.[58] Although traditionally associated with insurance-based investment products, the VfM framework is progressively extending to conventional life insurance products**,** such as endowments and annuities, and is beginning to shape supervisory assessments in the non-life insurance domain.[59] This expansion reflects a broader regulatory trend,

[57] See CJEU, Case C-270/12, *United Kingdom v. European Parliament and Council* (ESMA Short-Selling), ECLI:EU:C:2014:18, paras. 98–110, where the Court confirmed that the delegation of powers to the ESAs must respect the limits set by the Treaties and cannot confer upon them a general regulatory competence of their own. This case illustrates the judicial safeguards against an expansive interpretation of the ESAs' mandate and underscores that only the EU legislator may establish new binding requirements in the internal market.

[58] For instance, see Autorité des Services et Marchés Financiers - FSMA, 2024 Annual Report, which describes the actions taken by the FSMA to improve the value for money of insurance products, including non-life insurance products. The report is available at https://www.fsma.be/fr/rapport-annuel-2024

[59] Cf. EIOPA, *Thematic Review on Credit Protection Insurance Sold via Banks*, 28 September 2022, which raises concerns about the fair value of CPI products, particularly due to high commissions and limited consumer benefit, and EIOPA, *Warning to Consumers on Credit Protection Insurance Products*, 30 August 2022, where EIOPA explicitly cautions that some CPI products may offer poor value for money and do not meet customer needs. Documents are available, respectively, at https://www.eiopa.europa.eu/publications/thematic-review-credit-protection-insurance-cpi-sold-banks_en, and https://www.eiopa.europa.eu/system/files/2022-09/10.0_eiopa-bos-22-434-warning-to-insurers-and-banks-on-credit-protection-insurance.pdf (last accessed on 10 August 2025).
The fair value concept is further reflected in EIOPA's FAQs on the Pan-European Personal Pension Product (PEPP) for professionals. Although the answers reflect EIOPA staff's views on the application of the PEPP, the Q&A highlights (see No. 12 and 27) that the PEPP Regulation introduces a strong

as evidenced by EIOPA's supervisory convergence plan,[60] towards embedding VfM criteria across major insurance business lines, thereby promoting greater consistency in supervisory expectations and market conduct standards.

In the case of the above insurance products involving the transfer of risk, the application of VfM extends beyond cost-benefit considerations to encompass the overall adequacy of cover, the proportionality of premiums to risk, the accessibility and efficiency of claims processes, and the delivery of services quality that is meaningfully in light of the policyholder's needs and expectations. Products that fail this test may be characterised by excessive exclusions, disproportionate costs, or opaque administrative structures that erode the value proposition for customers.

The United Kingdom's Financial Conduct Authority (FCA) has taken a leading role in this area. Its "fair value" framework requires insurers and distributors to assess non-life insurance products throughout their lifecycle using concrete metrics such as

product-based supervisory framework, requiring thorough pre-registration assessment, ongoing compliance monitoring, and tailored supervision, with effective cross-sector cooperation. For IBIPs, similar risk-based product supervision already exists (POG, PRIIPs disclosures, sales process under IDD), where value for money constitutes a central supervisory focus. Insurers offering PEPPs will likewise be monitored to ensure that product oversight activities deliver the outcomes envisaged by the Regulation, including fair-cost-benefit alignment for consumers. On disclosure and comparability, EIOPA observes that comparability between PEPPs and PRIIPs is limited due to differing disclosure methodologies, though some elements (e.g. guarantees) are comparable. Current initiatives to strengthen comparability and support VfM oversight include the integration of PEPPs into the Cost and Past Performance Report, the extension of EIOPA's VfM framework to IBIPs and PEPPs, and the use of EIOPA's central public register. The document is available at https://www.eiopa.europa.eu/browse/regulation-and-policy/pan-european-personal-pension-product-pepp/faqs-pan-european-personal-pension-product-professionals_en (last accessed on 10 August 2025).

[60] See EIOPA, *Final Single Programming Document 2025-2027*, 17 December 2024, p. 27, where the priorities of supervision include <<Promoting products that ensure value for money (first benchmarks developed and increased focus on non-life), are simpler and easy to understand (focus on clarity in exclusions in IPIDs) and correspond to consumers' needs (follow up to mystery shopping) with a view of promoting more financial inclusion (thematic review focused on health and life insurance)>>. The document is available at https://www.eiopa.europa.eu/publications/revised-single-programming-document-2025-2027_en (last accessed on 10 August 2025).

claims ratios, cancellation trends, and complaint levels.[61] Unlike EIOPA's or national supervisors' emphasis on consumer outcomes alone, the FCA framework explicitly considers value from the perspective of all three parties involved — insurer, distributor, and customer. This broader perspective directly echoes the original UK public administration conception of value for money, as discussed in the historical premise of this study. That conception emphasised not only cost efficiency for end-users but also the proportional allocation of resources and outcomes across all stakeholders engaged in the delivery of a public service. The FCA's approach demonstrates that these historical insights retain current relevance: by transposing this systemic balance into the insurance context, it ensures that insurers, distributors, and customers each receive outcomes commensurate with their respective contributions and risks. This approach has elevated "fair value" from a broad policy aspiration to a binding supervisory obligation, thereby enhancing transparency and product discipline.[62] A similar logic had already been applied by the former Financial Services Authority (FSA) with respect to financial products, requiring firms to demonstrate that remuneration structures and product design delivered fair outcomes to end-investors.[63]

---

[61] Financial Conduct Authority (FCA), *General Insurance Pricing Practices – Final Rules* (PS21/11), 28 May 2021. The document is available at https://www.fca.org.uk/publication/policy/ps21-5.pdf. See also FCA Handbook, PROD 4.2 and PROD 4.5, which is available at https://www.handbook.fca.org.uk/handbook/PROD/4/?view=chapter. (last accessed on 10 August 2025).

[62] Cf. FCA**,** *General Insurance Pricing Practices – Final Rules*, cit., p. 3 f., which highlights that the package of measures aims to improve the functioning of the relevant markets and enhance competition by preventing firms from engaging in price walking, ensuring that they deliver fair value, and reducing consumer harm. These measures are also designed to discourage practices that deter customers from shopping around and to promote pricing structures that reflect the fair value of the products offered.

[63] In a press release dated 4 November 2011, the FSA published the findings of its review of firms' structured product design processes (conducted between November 2010 and May 2011), stating that firms should "pre-test new products to ensure they are capable of delivering fair outcomes for the target audience", thereby elevating fair value from a broad policy aim to a binding supervisory obligation. The document is available at https://www.wired-gov.net/wg/wg-news-1.nsf/0/685108EA9656059F8025793E004E66E5?OpenDocument=&utm_source=chatgpt.com (last accessed on 10 August 2025).

In the EU, however, the IDD did not impose a specific obligation to assess or guarantee VfM in non-life products, as previously observed in relation to insurance-based investment products. While the IDD mandates product governance and imposes duties to act in customers' best interest, these provisions stop short of requiring that non-life products demonstrate proportionate economic value. Nevertheless, EIOPA has clarified that the supervisors' expectation on POG include assessing the manufacturer's consideration of the value and utility that products offer to the target market.[64] POG supervision, particularly in product testing, aims to ensure that manufacturers assess whether products falling into the POG rules are fair and provide value to the target market—considering the needs, objectives, and characteristics of that market. This includes evaluating whether, considering the benefits and services offered (such as distribution and advice), the overall pricing is fair.[65]

A concrete example of this statement can be found in EIOPA's warning to insurance and banks on credit protection insurance (CPI), where it is expressly stated that: *"Manufacturers of CPI products should ensure that their products are designed to meet the needs of the identified target market, meaning offering fair value and ensuring fairness in pricing practices*".[66]

The regulatory trajectory therefore suggests that VfM is evolving into a cross-

[64] See EIOPA's Approach to the Supervision of Product Oversight and Governance, 2020, p. 13. The paper is available at https://www.eiopa.europa.eu/publications/eiopas-approach-supervision-product-oversight-and-governance_en (last accessed on 10 August 2025).

[65] EIOPA's Approach to the Supervision of Product, cit., p. 13, where the Authority also emphasises that <<POG supervisory activities do not aim at interfering with key business decisions (e.g. pricing levels), rather they assess whether the process followed by manufacturers is customer-centric and tests the value which products bring to the target market, balancing profitability aspects with fairness and with the services and benefits offered, whilst taking into account that products need to be sustainable also from a pricing perspective>>.

[66] See EIOPA, *Warning to insurers and banks on Credit Protection Insurance (CPI)*, 30 September 2022, p. 3. The document is available at https://www.eiopa.europa.eu/document/download/86343478-edb9-46d1-acc2-5375fa709305_en?filename=EIOPA%20warning%20to%20insurers%20and%20banks%20on%20Credit%20Protection%20Insurance.pdf (last accessed on 10 August 2025).

cutting supervisory principle, gradually encompassing non-life and pure life products.[67] This expansion reinforces broader EU policy goals for consumer protection, financial inclusion, and the sustainability of the insurance market.[68]

Nevertheless, the absence of harmonised metrics, sector-specific benchmarks, or express legal obligations under EU secondary legislation leaves the application of VfM to non-life business both promising, in that it could enhance consumer protection and market discipline, and fragile, owing to its limited normative basis. Without greater regulatory convergence or legislative clarification, VfM enforcement risks remaining inconsistent, under-theorised, or overly discretionary, with significant variations across national markets and supervisory cultures. The risk is heightened where some Member States apply concept developed by EIOPA for IBIPs to other categories of insurance, thereby creating further divergences in approach.[69]

---

[67] See EIOPA, *Union-Wide Strategic Supervisory Priorities for 2024-2026*, 11 March 2024, p. 5, where the authority states that <<Insurance product manufacturers are expected to ensure that they implement customer-centric product design processes which ensure that life and non-life insurance products offer value for money.>>. Therefore, the authority pointed out that, as part of the product monitoring and review process, manufacturers are expected to assess whether their products**,** including non-life insurance products, continue to meet the target market's needs in light of changing macro-economic conditions. This includes evaluating not only <<the overall value and real returns (where relevant), but also the adequacy of coverage in response to rising costs such as repair materials, etc.>>. The document is available at https://www.eiopa.europa.eu/publications/union-wide-strategic-supervisory-priorities-2024-2026_en (last accessed on 10 August 2025).

[68] EIOPA, *Supervisory statement on differential pricing practices in non-life insurance line of business*, 22 February 2023, provides that <<Price is a product characteristic and therefore it should form part of the POG process, whereby insurance manufacturers should assess whether the pricing practice used ensures an alignment with the target market's characteristics, needs and objectives>>. The document is available at https://www.eiopa.europa.eu/publications/supervisory-statement-differential-pricing-practices-non-life-insurance-lines-business_en?utm_source=chatgpt.com (last accessed on 10 August 2025).

[69] Two examples in this direction can be found, for instance, in Italy and Belgium. While the Italian authority adopts a more general and principle-based approach, extending IBIP-related VfM expectations to other insurance products without prescribing detailed assessment criteria, the Belgian authority sets out a prescriptive, indicator-based framework applicable to both life and non-life business, specifying quantitative and qualitative benchmarks for ongoing VfM monitoring.
The Italian authority, the Institute for the Supervision on Insurance (IVASS), issued a Letter to the Market on 27 March 2024 setting out its supervisory expectations on product oversight and governance,

4.3. Despite its growing prominence in supervisory practice, VfM still lacks firm grounding in binding EU law an remains under-theorised in academic doctrine. To date, the Court of Justice of the European Union (CJEU) has not issued any rulings that directly address the enforceability, scope, or legal status of VfM within the framework of financial or insurance regulation.[70] In practice, VfM has entered the EU regulatory vocabulary mainly through non-binding sources, i.e., soft law instruments,[71] adopted under sectorial legislation. While these instruments may guide supervisory expectations and influence market behaviour, they do not, by themselves, confer an explicit and autonomous legal status on VfM. This creates a structural fragility: in the absence of primary or secondary legislative codifications, the normative weight of VfM depends largely on interpretative choices by supervisors and the voluntary

including provisions on testing and measuring value for money. Although addressed to IBIPs, IVASS states within the scope of the Letter that <<It is understood that the same customer protection principles and objectives that govern guidance on IBIPs should guide undertakings in the correct application of POG ules, to the extent applicable, also with respect to non-IBIPs life and non-life product>>. The document is available at https://www.ivass.it/normativa/nazionale/secondaria-ivass/lettere/2024/lm-27-03-24/Letter_to_the_market_of_27_03_2024.pdf?language_id=3 (last accessed on 10 August 2025).
The Belgian authority, Autorité des Services et Marchés Financiers (FSMA), issued a Communication on 4 July 2023 titled *Vade-mecum sur le Product Oversight and Governance (POG) en assurances*. It presents a non-exhaustive set of recommendations and expectations for life and non-life product manufacturers, defining value for money as products whose costs and charges are proportionate to the benefits for the identified target market and reasonable given the expenses incurred by providers. The FSMA expects manufacturers to ensure regular review of products to confirm they continuously offer value for money, to assess the added value of ancillary services, and to establish clear qualitative and quantitative criteria for VfM monitoring, documented in a dedicated section of the POG procedure. Examples of relevant indicators include, for non-life insurance: complaint levels, claims ratio, commission ratio, and the number of claims rejected (e.g., due to exclusions); and for life insurance: complaint levels, commission ratio, investment performance, and surrender ratio. The document is available at https://www.fsma.be/sites/default/files/media/files/2023-07/fsma_2023_17_fr.pdf (last accessed on 10 August 2025).

[70] In general, see TRIDIMAS, *The General Principles of EU Law*[2], Oxford, 2006, p. 53 ff., on the interpretative role of the CJEU in resolving uncertainty around emerging principles.

[71] On the different types of soft law, see SENDEN, *Soft Law in European Community Law*, Hart Publishing, 2004.

compliances strategies of market participants.[72]

Although no binding judicial interpretation exists, and doctrinal scholarship has not yet systematically explored the theoretical underpinnings of VfM, one might consider whether broader conceptual frameworks, such as procedural justice, market fairness, or functional regulation, could offer some interpretive perspective, particularly considering VfM's origins in public sector evaluation and its subsequent extension to financial market products. However, even such theoretical analogies remain entirely external to current regulatory practice and have not been invoked in the emerging regulatory discussion on VfM in financial and insurance regulation. As such, they do not resolve the underlying uncertainty surrounding its normative status, enforceability, and sectoral coherence within EU law.

Procedural justice theory focuses not on the outcomes of decision-making but on the fairness and legitimacy of the procedures through which decisions are made. According to this theory, individuals are more likely to accept decisions, even adverse ones, if they perceive the process as neutral, transparent, respectful, and trustworthy. Core elements include the opportunity to be heard (*voice*), impartiality (*neutrality*), respectful treatment (*respect*), and the belief that authorities act in good faith (*trustworthiness*).[73]

Although not originally conceived for financial regulation, this theory

[72] On the justiciability of soft law in EU financial regulation, see CHAMON - DE ARRIBA-SELLIER, *On the Justiciability of Soft Law and Broadening the Discretion of EU Agencies*, in *European Constitutional law review*, 2022(6), pp.286 ff., who refer to ECJ (Grand Chamber) 15 July 2021, Case C-911/19, Fédération Bancaire Française (FBF) v Autorité de Contrôle Prudentiel et de Résolution, ECLI:EU:C:2021:599; ALBERTI, *Challenging the Evolution of the EMU: The Justiciability of Soft Law Measures Enacted by the ECB against the Financial Crisis before the European Courts*, in Yearbook of European Law, 2018(2), pp. 626 ff.

[73] Cf. TYLER, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, in *Crime and Justice*, vol. 30, 2003, pp. 283 ff.; ID., *Procedural Fairness and Compliance with the Law*, in *Swiss Journal of Economics and Statistic*, 1997, vol.133(1), pp. 219 ff. See also, *J.T. Scholz, Contractual Compliance and the Federal Income Tax System, in 13, Washington University Journal of Law and Policy, 2003, 139 ff.* available at https://openscholarship.wustl.edu/law_journal_law_policy/vol13/iss1/5/.

is abstractly relevant to the concept of VfM. Its assessments involve evaluating whether the cost of a financial or insurance product is justified in consideration of its benefits. In this context, procedural justice can be invoked to emphasise the importance of transparent, consistent, and accountable processes for defining, disclosing, and supervising what constitutes "value".

In other words, while procedural justice does not determine the substantive content of VfM, it supports the legitimacy of regulatory action by highlighting the need for clear evaluative standards, consistent supervisory practices, and due consideration of stakeholders' expectations. However, it does not resolve the normative uncertainty surrounding the legal status or enforceability of VfM in EU financial and insurance law. A fundamental tension should also be acknowledged: VfM is primarily an outcome-oriented principle, concerned with the measurable balance between costs and benefits for the target market. Its implementation typically relies on supervisory assessments and internal product reviews, rather than participatory mechanisms or consumer input[74]. As such, it may fall short of fulfilling the procedural safeguards that lie at the core of procedural justice theory, thereby limiting the normative affinity between the two frameworks.

Similarly, the theory of market fairness could serve as an interpretive framework by linking the concept of VfM to principles of distributive and allocative justice. It aims to curb abusive practices and promote equitable access to financial services, particularly for vulnerable or uninformed consumers.[75] Under this

[74] This limitation is particularly relevant in the context of EU product governance rules, where VfM is assessed through supervisory benchmarks and internal procedures rather than stakeholder consultation or deliberative processes. See, for instance, EIOPA, *Supervisory Statement on Value for Money*, *cit.*, and the associated methodological work on cost-benefit benchmarking.

[75] Cf. LEVITIN, *Safe Banking: Finance and Democracy*, in *University of Chicago Law Review*, 2014, vol. 81, p. 357 ff., where the author develops one of the earliest normative accounts of fairness in financial market design, advocating for a regulatory model that includes not only efficiency and stability but also fairness and democratic accountability. While the term "market fairness" is not formally introduced, the conceptual foundation of the theory is clearly anticipated.

framework, VfM emerges not merely as a technical benchmark but as a normative tool to curb abusive practices and promote equitable access to financial services, particularly for vulnerable or uninformed consumers. Viewed in this way, VfM addresses both allocative efficiency and distributive equity by discouraging the marketing of excessively priced, low-value, or overly complex financial products, especially to retail clients. In doing so, it complements established principles such as suitability and transparency, offering a more holistic benchmark for fairness in financial product distribution. Yet here, too, limitations emerge. Market fairness encompasses broader normative judgments about justice in economic relationships. In contrast, VfM often reduces fairness to technical metrics, such as price-performance ratios, that risk overlooking the more subjective, behavioural, or context-specific dimensions of fairness. There is also a danger that VfM, if defined too narrowly, could legitimise products that formally meet cost-benefit criteria but still exploit consumer biases or information asymmetries.

Finally, functional regulation may offer a valuable framework for understanding how the concept of VfM transcends institutional silos by focusing on the risks associated with financial activities, regardless of the regulatory perimeter.[76] From this

See also MICKLITZ, *The Idea of Justice in Private Law*, in *The Modern Law Review*, 2020, vol. 83, p. 122 ff., where the author explicitly elaborates a theory of *market fairness* within the framework of European private law, drawing on the capabilities approach and the need for structural justice in consumer markets.

Further doctrinal underpinnings can be found in G. Howells – S. Weatherill, *Consumer Protection Law*, Aldershot, 2005, p. 9 ff., whose analysis of consumer vulnerability, information asymmetries, and the justification for regulatory intervention prefigures many of the central tenets of the *market fairness* approach.

[76] The idea of functional regulation is generally traced back to M.H. Miller, who argued that financial regulation should follow the underlying economic functions performed by institutions - such as intermediation, custody, and lending - rather than their formal legal status or sectoral classification. Cf. MILLER, *Financial Innovations and Market Volatility*, Cambridge (MA), Blackwell, 1986, p. 8 ff. While influential in shaping certain supervisory practices, particularly in the United States, functional regulation has not evolved into a coherent legal theory but remains an economic and regulatory heuristic rather than a doctrinal construct.

perspective, VfM can be seen as a risk-based instrument capable of addressing cross-sectoral challenges in product design, distribution, and supervision. However, functional regulation, developed initially to align regulatory mandates with underlying economic functions such as lending, custody, and intermediation, tends to operate at a macro-structural level. VfM, by contrast, functions as a micro-level supervisory tool, applied primarily within the realm of consumer protection and product-level risk assessment. Moreover, its regulatory foundation in soft law, supplemented by non-binding level 2 measurers, raise concerns regarding its robustness and suitability as a vehicle for functional regulatory convergence.

Ultimately, while these theoretical perspectives may be invoked as interpretive references for the reasons discussed above, they do not appear decisive in resolving the conceptual and practical uncertainties surrounding the legal evolution of VfM. Procedural justice emphasises participation, market fairness rests on normative judgments, and functional regulation presumes systemic scope. VfM may align only partially with each of these approaches, thus calling for caution in its theoretical positioning and pointing to the need for a hybrid, context-sensitive doctrinal framework.

In addition to theoretical analogies, it may be worth considering whether existing regulatory conduct rules could offer a more concrete, albeit indirect, normative foundation for VfM. In this respect, a potential, though not uncontroversial, anchoring point within the EU legal framework might be found in the general conduct of business principles enshrined in both MiFID II (Article 24(1)) and the IDD (Article 17(1)). These provisions oblige distributors to act “honestly, fairly and professionally in accordance with the best interests of their clients”. While the notion of “fairly” is not expressly defined, its open-textured formulation arguably leaves room for supervisory interpretations that may encompass economic fairness, proportionality, and cost-benefit alignment, which are elements that appear closely aligned with the

logic underlying VfM. From this angle, VfM could perhaps be construed not as an autonomous legal principle, but more as a possible functional elaboration of the fairness duty, particularly in relation to product design, pricing, and distribution practices.

This functional link between VfM and the fairness duty also enhances its potential judicial relevance, as courts may rely on the fairness standards, explicitly embedded in MiFID II and the IDD, as a normative hook to assess whether a product's cost-benefit profile meets acceptable market standards. Moreover, by incorporating the duty to act "honestly, fairly and professionally" into the EU acquis through sector-specific directives such as MiFID II and the IDD, the legislature has established a common legal framework within which VfM can be interpreted and applied.[77] This enables supervisory authorities to rely on concepts that are, to some extent, detached from national doctrinal traditions. In their interactions with each other and with EIOPA and ESMA, this facilitates the development of a common supervisory language, capable of influencing both the relationships between supervisors and regulated

[77] Cf. EIOPA's *Conduct of Business Supervision Strategy*, 1 June 2021, at 5, identifying supervisory convergence as a key tool to ensure the consistent application of conduct rules and the development of harmonised supervisory practices. The document is available at https://www.eiopa.europa.eu/publications/eiopas-conduct-business-supervision-strategy_en (last accessed on 10 August 2025); EIOPA, *Supervisory Convergence Plan for 2024*, 21 December 2023, at 4, outlining actions such as guidelines, supervisory statements, aimed at building common benchmark for supervisory practices to foster a common supervisory culture among national competent authorities. The document is available at https://www.eiopa.europa.eu/publications/supervisory-convergence-plan-2024_en (last accessed on 10 August 2025); ESMA, *Supervision and Convergence*, available on the ESMA's website, describing how the Authority develops a shared supervisory culture, including coordinated approaches to product governance and investor protection; ESMA, *Guidelines on MiFID II Product Governance Requirements*, 2023, providing detailed guidance to ensure a uniform interpretation of conduct rules and to strengthen supervisory convergence among national competent authorities. The document is available at https://www.esma.europa.eu/sites/default/files/2023-03/ESMA35-43-3448_Final_report_on_MiFID_II_guidelines_on_product_governance.pdf ((last accessed on 10 August 2025).

entities, and those between the latter and their clients.[78]

However, the absence of binding judicial interpretations and harmonised regulatory codification continues to cast doubt on the legal enforceability of VfM. This uncertainty is further compounded by the divergent interpretations and normative weight attributed to VfM by EIOPA and ESMA, respectively. Although both authorities operate under the same conduct of business requirement to act "fairly", they articulate this obligation in markedly different ways: EIOPA adopts a substantive, outcome-oriented approach, whereas ESMA relies on a disclosure-based logic. Such inconsistency in construing a shared legal standard lacks a clear normative rationale and underscores the need for systematic doctrinal clarification. This is also reflected in EIOPA's recent policy communication.[79] Whether an explicit codification of VfM would provide greater legal certainty, or instead risk duplicating and destabilising existing fairness standards, remains an open question.

5. The preceding analysis has identified a range of structural, institutional, and conceptual limitations affecting the current implementation of VfM in EU insurance and financial regulation. These limitations become particularly relevant in light of ongoing efforts to expand VfM beyond its original scope. The following sections

[78] See MARANO, *The Contribution of Product Oversight and Governance (POG) to the Single Marke: A Set of Organisational Rules for Business Conduct*, in MARANO - NOUSSIA, *Insurance Distribution Directive. A Legal Analysis*, Springer, 2021, p. 70 f.

[79] See HIELKEMA, *Europe's life insurance market has no structural value for money problem-but a minority of undertakings do*, who stresses that value for money should serve as the guiding benchmark for the Savings and Investment Union, while acknowledging divergences in product outcomes across Member States and undertakings. This approach illustrates EIOPA's ongoing reflection on how to operationalise VfM within supervisory practice. It also highlights a divergence from ESMA's stance, which continues to frame the fairness duty primarily through transparency and disclosure-based requirements, rather than through substantive product governance and supervisory intervention. The interview to the president of EIOPA is available at https://www.eiopa.europa.eu/publications/op-ed-europes-life-insurance-market-has-no-structural-value-money-problem-minority-undertakings-do_en (last accessed on 24 August 2025).

examine, respectively, the normative risks of overextension, the transformative influence of digitalisation and sustainability, and the emerging role of VfM in private law and judicial enforcement.

5.1. A key concern lies in the risk of applying VfM too broadly and uniformly. Such an approach may result in supervisory overreach, unduly constraining product diversity and infringing upon commercial freedom within the EU internal market. Certain high-risk or complex products, such as structured financial instruments with embedded derivatives without capital protection, or insurance-based investment products without biometric risk cover or guarantees, may be suitable primarily for informed or risk-tolerant consumers. Conversely, structured financial instruments offering capital protection,[80] and insurance-based investment products including biometric risk cover or guarantees, may be more adequate for risk-averse or less financial sophisticated consumers. An overly rigid application of VfM, based on simplified cost-performance metrics or standardised benchmarks, could inhibit financial and insurance innovation or unjustifiably exclude such offerings from the market.

In addition, while VfM is intended to enhance consumer protection, it must not devolve into regulatory paternalism.[81] Respect for consumer autonomy, particularly regarding informed preferences for bespoke, high-cost, or high-risk products, is essential. Where such choices are made transparently and aligned with consumers' objectives and understanding, they should not be unduly restricted by a one-size-fits-

[80] For instance, a principal-protected structured note combining a zero-coupon bond component to secure the return of capital at maturity with an embedded option granting exposure to the performance of an underlying asset or index.

[81] See COLAERT, *Product Governance: Paternalism Outsourced to Financial Institutions*, in European Business Law Review, 2020, pp. 995 ff.; CHIU, *More paternalism in the regulation of consumer financial investments? Private sector duties and public good analysis*, in *Legal Studies*, 2021(41), p. 673 f.

all standard.[82]

These considerations suggest that any further development of VfM should adopt a tailored, risk-sensitive, and proportionally calibrated approach. Rather than imposing uniform benchmarks, regulatory frameworks should be adapted to reflect each product's risk profile, distribution context, and legal design. At the same time, a degree of cross-sectoral alignment may be pursued through shared principles of transparency, outcome monitoring, and sound product governance.

From this perspective, the VfM should not be extended mechanically across all financial sectors but rather integrated thoughtfully into regulatory systems that balance consumer protection, market efficiency, innovation, and legal certainty. In the case of financial products and IBIPs, attention must be paid to the level and structure of the costs deducted from the invested capital, as these have a direct impact on the net return achieved by the client and, therefore, merit specific scrutiny under VfM assessment. By contrast, in the case of non-life insurance products, the evaluation of value should not focus exclusively on cost-efficiency ratios but rather on the relationship between premium paid and the quality, scope, and reliability of the coverage offered. These are factors that may not be immediately reducible to financial

[82] See CAMERER, ISSACHAROFF, LOEWENSTEIN, O'DONOUGH and RABIN, *Regulation for Conservatives: Behavioral Economics and the Case for "asymmetric paternalism"*, in *The University of Pennsylvania Law Review*, 2003 (3), p. 1212 where they define "asymmetric paternalism" as a regulatory approach designed to generate significant benefits for individuals prone to error, while imposing minimal or no costs on those who act rationally and consistently in their own best interest: <<Such regulations are relatively harmless to those who reliably make decisions in their best interest, while at the same time advantageous to those making suboptimal choices>>. See also SANDRONI - SQUINTANI, *Overconfidence, Insurance, and Paternalism*, in *The American economic review*, 2007(12), pp. 1994 ff. where the authors examine how behavioural biases—specifically overconfidence—can distort insurance market outcomes. While not explicitly addressing VfM, their analysis highlights that paternalistic interventions such as mandatory insurance may fail to deliver optimal welfare outcomes when agents misperceive risk. This insight indirectly supports the need for VfM-based assessments that account for consumer biases and ensure proportionality between product costs and benefits, especially in the design of regulatory interventions.

metrics but are central, however, to consumer protection in the insurance context.[83]

5.2. Despite these challenges, the growing use of VfM as a supervisory benchmark in the EU, particularly in the insurance sector, indicates that its relevance will continue to expand. EIOPA has taken a more proactive role than ESMA in promoting VfM as part of supervisory practice, especially in the context of product governance and consumer outcomes. Its application is likely to intersect with other major regulatory priorities, including digitalisation, sustainability, and supervisory convergence. These emerging dimensions raise new questions about how VfM can be operationalised in rapidly evolving market contexts and regulatory frameworks. Within this shifting landscape, VfM could potentially operate as a normative reference, mediating between innovation and consumer empowerment while guiding proportionate, fair, and transparent intervention.[84] However, its anchoring effect remains contingent upon the interpretation of existing business-of-conduct rules, such as the duty to act "honestly, fairly and professionally" under MiFID II and the IDD, rather than on any explicit legislative codification.

EIOPA and ESMA have both acknowledged the challenges posed by the

[83] See EIOPA, *Consumer Trend Report 2024*, 19 December 2024, p. 15 where the authority pointed out that <<Fair coverage – where the coverage is proportional to the price paid – is the most important factor for EU consumers in assessing whether their non-life insurance offers value for money>>. The Report is available at https://www.eiopa.europa.eu/document/download/4f3b2964-455d-497e-b69f-b5c5939d7aee_en?filename=Eurobarometer+CTR+2024+-+Report.pdf&utm_source=chatgpt.com (last accessed on 10 August 2025).

[84] Cf. EIOPA, *Methodology* on *Value for Money Benchmarks*, 27 August 2024, p.19, which acknowledged that the clustering features and VfM indicators provide a comprehensive framework for assessing VfM risks, but do not consider other qualitative benefits that unit-linked and hybrid products may offer to customers. These non-clustering elements include features such as guarantees, digitalisation, risk mitigation techniques, as well as specific advantages related to pension characteristics and/or sustainability aspects - particularly where products are classified under Articles 8 or 9 of the sustainability-related disclosure framework. The paper is available at: https://www.eiopa.europa.eu/document/download/76e6a517-04e1-4f20-8e1e-712f0e2dd16b_en?filename=EIOPA-BoS-24-332%20-%20Methodology%20on%20Value%20for%20Money%20Benchmarks.pdf (last accessed on 10 August 2025).

digitalisation of financial services, particularly in the context of assessing VfM.[85] They have highlighted the risks and benefits associated with automated advice, emphasizing the need for effective safeguards, particularly in relation to conflicts of interest, algorithmic bias, and the explainability of decision-making processes.[86]

This ongoing digital transformation in the design and delivery of financial services not only reconfigures the informational and advisory interface with consumers but also foregrounds operational resilience and the integrity of ICT systems as central dimensions of VfM assessments. In this regard, the Regulation (EU) 2022/2554 (Digital Operational Resilience Act - DORA) becomes particularly relevant, as it introduces mandatory ICT risk management standards across financial entities.[87] These standards reinforce the idea that digital service quality, operational continuity, and cybersecurity are not peripheral to VfM but constitute integral elements of the value delivered to consumers in a digitalised environment.[88]

---

[85] See EIOPA, *Consumer Trends Report 2024*, cit., p.17, where affirms <<Digitalisation may enhance value for money by improving efficiency and aligning services more closely with consumer needs>>; ESMA, *Public Statement on the Use of Artificial Intelligence in Investment Services*, 30 May 2024, p. 1. provides that <<While AI holds promise in enhancing investment strategies and client services, it also presents inherent risks, including algorithmic biases, data quality issues, and (potential) lack of transparency>>. The document is available at https://www.esma.europa.eu/sites/default/files/2024-05/ESMA35-335435667-5924__Public_Statement_on_AI_and_investment_services.pdf (last accessed on 10 August 2025).

[86] Cfr. also, EIOPA, *Artificial Intelligence Governance Principles: Towards Ethical and Trustworthy AI in the European Insurance Sector*, June 2021, which sets out six core principles for the responsible use of AI in insurance. The document is available at: https://www.eiopa.europa.eu/pubication/artificial--intelligence-governance-principles-towards-ethical-and-trustworthy-artificial_en. Moreover, Geneva Association, *Regulation of Artificial Intelligence in Insurance: Balancing costumer protection and innovation*, September 2023, pp. 20 ff., where pointed out risks and concerns related to AI. The document is available at https://www.genevaassociation.org/sites/default/files/2023-09/Regulation%20of%20AI%20in%20ins urance.pdf (last accessed on 10 August 2025).

[87] Cf. Article 5 of Regulation (EU) 2022/2554, which requires financial entities to establish and maintain a comprehensive ICT risk management framework. This includes measures to identify, protect and detect ICT-related risks, as well as to respond to incidents and ensure the continuity and timely recovery of critical functions.

[88] Article 3(1) of Regulation (EU) 2022/2554**,** provided that 'digital operational resilience' means the ability of a financial entity to build, assure and review its operational integrity and reliability by

Taken together, the growing reliance on algorithmic systems in product distribution and the introduction of horizontal regulatory frameworks such as DORA illustrate how digital infrastructure and operational soundness have become central to the assessment of VfM. In the absence of human intermediation, ensuring that automated advice, pricing, and product delivery systems function securely, transparently, and in the interest of consumers is not merely a matter of technical compliance - it is a prerequisite for maintaining fairness, effectiveness, and trust in digitally mediated financial services.[89]

Alongside technological change, the sustainability agenda constitutes a second axis along which the normative scope of VfM is being progressively redefined. The deepening of the EU's sustainable finance agenda implies that VfM can no longer be assessed solely based on financial returns or cost efficiency. Instead, the concept of

ensuring, either directly or indirectly, through the use of services of ICT third-party service providers, the full range of ICT-related capabilities needed to address the security of the network and information systems which such financial entity uses, and which support the continued provision of financial services and their quality.

[89] This perspective finds regulatory support in several instruments. Articles 5 and 6 of Regulation (EU) 2022/2554 (DORA) underscores the centrality of digital resilience in the financial sector by requiring entities to establish a comprehensive ICT risk management framework, while Article 9(1) aims to ensure that ICT systems function reliably, securely, and as intended. These provisions illustrate how digital infrastructure is no longer a mere operational backbone, but a core component of sound financial conduct and consumer protection. Cf. also, ESMA, *Public Statement – Supervisory expectations related to the use of Artificial Intelligence (AI) in the provision of retail investment services*, 30 May 2024, where ESMA clarifies that investment firms remain fully responsible for the deployment of AI tools and must ensure that such technologies comply with MiFID II obligations, including acting in the best interests of clients, ensuring transparency, and managing risks such as opacity or bias. Although VfM is not explicitly mentioned, the statement underlines the need for trustworthy, explainable, and well-governed digital systems, especially in the absence of human intermediation. The document is available at https://www.esma.europa.eu/sites/default/files/2024-05/ESMA35-335435667-5924__Public_Statement_on_AI_and_investment_services.pdf (last accessed on 10 August 2025). See also EIOPA, *Consultation Paper on Opinion on Artificial Intelligence Governance and Risk Management, 10 Febraury 2025*, which outlines supervisory expectations for insurance undertakings using AI systems, emphasizing the importance of transparency, explainability, and human oversight to safeguard consumer interests and maintain trust in the absence of human intermediation. *The document is available at* https://www.eiopa.europa.eu/consultations/consultation-paper-and-impact-assessment-eiopas-opinion-ai-governance-and-risk-management_en (last accessed on 10 August 2025).

value must be broadened to encompass environmental and social objectives, reflecting the ESG preferences of consumers and policy priorities of the Union.[90] This redefinition calls for a multidimensional evaluative framework, in which economic value coexists with non-financial utility.[91] Such a shift may generate methodological and conceptual tensions, particularly when environmental or social value cannot be easily quantified or monetised. Nonetheless, as sustainability-related disclosures, impact metrics, and ESG data become more robust, the integration of sustainability into VfM assessments is likely to gain both normative force and practical feasibility.

5.3. Ultimately, if the VfM were to consolidate as a regulatory principle, its development would depend significantly on supervisory convergence and legal enforceability. The absence of a harmonised methodology for evaluating VfM across

[90] The redefinition of VfM in light of sustainability considerations is supported by several EU regulatory instruments. Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (SFDR) introduces the notion of "sustainability risk"-defined as an ESG event or condition that, if it occurs, could cause a material negative impact on the value of an investment. This implies that financial value cannot be considered independently of environmental or social risks. Regulation (EU) 2020/852 (Taxonomy Regulation) further broadens this perspective by setting criteria for determining whether an economic activity is environmentally sustainable, thereby establishing a normative benchmark for what constitutes positive environmental value. Additionally, the IDD has been supplemented by Commission Delegated Regulation (EU) 2021/1257, which amends Articles 1(2), 1(4), 1(5), and 1(6) of Delegated Regulation (EU) 2017/2359. These amendments require insurance distributors, when carrying out insurance-based investment advice, to identify clients' sustainability preferences and to ensure that recommended products align with those preferences. This may indicate a regulatory shift, whereby value is not understood solely in financial terms, but also increasingly in relation to the alignment with clients' ethical and sustainability preferences, as well as with the Union's broader policy objectives under the Green Deal.

[91] A case illustrating how value assessment should not be confined to purely economic metrics but should encompass overall utility is offered by LANG, *From "value-for-money" to values-for-money? Ethical food and policy in Europe*, in *Environment and Planning A*, 2010, vol. 42, p. 1814 ff., who argues that ethical food challenges the conventional "value-for-money" ethos dominating Western food systems in the second half of the twentieth century, promoting instead a "values-for-money" approach in which non-financial considerations such as moral standards, production methods, and broader societal impacts are integrated into market evaluation.

Member States risks creating fragmentation and regulatory arbitrage,[92] thereby weakening the effectiveness of VfM. Achieving greater coherence requires both alignment in supervisory expectations and clarity in the evidentiary standards firms must meet to demonstrate compliance. At the same time, the potential for cross-border litigation involving VfM-related claims raises complex legal issues, particularly under Regulation (EU) No 1215/2012 (Brussels I bis) concerning jurisdiction and recognition of judgments.[93]

The Brussels I bis Regulation may become relevant in this context. The specific regime on disputes related to insurance matters contained in Articles 10–16 Brussels I bis is conceived as a *lex specialis* and does not provide a normative entry point for introducing substantive standards such as VfM, since it only allocates jurisdiction among the courts of the Member States. Accordingly, the possibility of reframing VfM-related disputes as consumer matters under Articles 17-19 must be regarded as merely hypothetical in the insurance sector and ultimately to be excluded.[94]

By contrast, in the financial sector no equivalent special regime exists. Financial

[92] Cf. EIOPA, *Discussion Paper on Methodological Principles of Value for Money Assessment*, cit., pp. 10–12, where the authority highlights the current heterogeneity in supervisory practices across Member States and the risk that diverging approaches to VfM assessments may lead to inconsistent regulatory outcomes and arbitrage behaviours.

[93] Cf. Regulation (EU) No 1215/2012 n jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I bis), in particular Articles 4 and 7(2), which may apply to consumer or cross-border contractual disputes involving financial products allegedly failing to deliver VfM.

[94] On the rationale and limits of Articles 10-16 of the Brussels I bis Regulation, see HEISS, in MAGNUS, MANKOWSKI, *European Commentaries on Private International Law - Brussels I bis Regulation*, Verlag Dr. Otto Schmidt, 2023, pp. 395 ff. The CJEU has consistently confirmed the exclusive nature of Articles 10–16, stressing that these provisions constitute a self-contained regime to protect the weaker party (the insured party, beneficiary or policyholder) by means of rules on jurisdiction more favourable to his interests than the general rules. Cf. CJEU 9 December 2021, C-708/20, BT, EU:C:2021:986; CJEU 21 October 2021, C-393/20, T.B. en D., EU:C:2021:871; CJEU 20 May 2021, C-913/19, CNP, EU:C:2021:399; CJEU 31 January 2018, C-106/17, Hofsoe, ECLI:EU:C:2018:50; CJEU 21 January 2016, C-521/14, SOVAG, EU:C:2016:41; CJEU 17 September 2009, C-347/08, Vorarlberger Gebietskrankenkasse, EU:C:2009:561; CJEU 13 December 2007, C-463/06, FBTO Schadeverzekeringen v. Odenbreit, EU:C:2007:792.

products fall outside Articles 10-16 and are subject, where applicable, to the consumer contract provisions in Articles 17-19. In this setting, claimants might attempt to rely on VfM considerations to frame the dispute as a consumer matter and thereby shift jurisdiction to a more favourable forum.[95] Such instrumental use could be tested especially in relation to financial products marketed to retail clients, including structured notes, complex derivatives packaged as investment products, or ESG-labelled funds. For insurance, such use case can only be abstractly hypothesised for contracts such credit protection insurance (CPI) or unit-linked life policies. In any case, the enforceability of VfM-related claims would still depend on whether the dispute falls within the scope of jurisdictional rules laid down in Brussels I bis.[96]

It should be clarified, however, that the reference to Brussels I bis is not intended to suggest that the Regulation provides a substantive legal basis for the concept of VfM. Rather, the reference is strictly procedural: the Regulation determines jurisdiction and the competent forum in cross-border consumer disputes, which may also include claims indirectly raising VfM considerations. In this sense, Brussels I bis might function as a potential gateway through which VfM-related disputes could enter judicial proceedings at the European level, without itself supplying the substantive content of VfM.

[95] For an illustrative hypothetical scenario, imagine an Italian retail client purchasing, via an online platform established in Germany, an ESG-labelled fund. If the product subsequently underperforms due to disproportionate costs, the client might seek to invoke VfM considerations in order to characterise the dispute as a consumer contract matter under Articles 17–19 Brussels I bis. This would allow the claimant to bring proceedings before the courts of their domicile rather than before the courts of the provider's Member State. In the absence of such consumer characterisation, indeed, jurisdiction would ordinarily lie with the courts of the defendant's domicile pursuant to Article 4(1) Brussels I bis, or, depending on the circumstances, with the courts of the place of performance under Article 7(1). Such reliance on VfM therefore illustrates the potential, albeit theoretical, risk of forum shopping in this area.

[96] On the admissibility of court actions brought against "soft" law instruments adopted by administrative authorities, including recommendations, opinions, instructions, communications or other guidelines, see Curia, Research Note, *Admissibility of court actions against "soft" law measurers,* June 2017, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/ndr_admissibility_of_court_actions_against_soft_law_measures_en.pdf) (last accessed on 10 August 2025).

Although Articles 17-19 are designed to protect consumers by allowing them to bring proceedings in their own Member State,[97] their application presupposes that the dispute arises from a qualifying consumer contract.[98] This requirement may be particularly difficult to satisfy in certain VfM disputes, where the claim concerns the adequacy or fairness of the product's structure, pricing, or design rather than the breach of a specific contractual obligation.[99] In such cases, the connection between the contested conduct and the contractual rights and obligations may be less direct, especially where the product is distributed through intermediaries, involves standardised terms, or forms part of a collective arrangement.[100]

As commentators have stressed, the scope of Articles 17–19 Brussels I bis is limited to individual contractual claims, and the concept of "consumer" depends on the role assumed in the specific contract rather than on a person's permanent status[101]*. In borderline situations,* such as investment products distributed via online platforms, consumer standing cannot be presumed because the identification of the actual contractual counterparty, whether the platform itself, the issuer of the product, or both, remains uncertain and must therefore be carefully established. By contrast, in directly purchased retail investment products, investor contracts straightforwardly with the provider or issuer, so the role of consumer is more readily identifiable, and

[97] On the Brussels 1 bis Regulation, see REQUEJO ISIDRO (ed), *Brussels I BIS. A Commentary on Regulation (EU) No 1215/2012*, Edward Elgar, 2022.

[98] For the scope and interpretation of Articles 17-19 of Regulation (EU) No 1215/2012, see CJEU, C-498/16, *Schrems v Facebook Ireland Ltd*, EU:C:2018:37, paras 28-32; C-190/11, *Mühlleitner v Yusufi*, EU:C:2012:542, paras 42-43; C-249/16, *Kareda v Benkő*, EU:C:2017:472, paras 29-33.

[99] Cf. CJEU, C-375/13, *Kolassa v Barclays Bank plc*, EU:C:2015:37, paras 30–32 (requiring a direct contractual relationship for consumer jurisdiction); C-630/17, *Milivojević*, EU:C:2019:123, paras 87–94 (providing a narrow interpretation of "consumer contract" and requiring a direct link between the contract and the dispute).

[100] For example, in the financial context, a dispute might involve a structured product whose embedded fee erode its potential returns, thereby calling its VfM into question.

[101] Cf. MANKOWSKY, in MAGNUS, MANKOWSKI, *European Commentaries on Private International Law – Brussels I bis Regulation*, cit., pp. 448 ff.

the consumer contract provisions can be invoked without comparable difficult. Where the "consumer" status is uncertain, identifying the contractual counterparty and determining the applicable law become less straightforward, thereby complicating the designation of the competent forum when attempting to apply Brussels I bis to VfM-related claims.

These jurisdictional and procedural uncertainties illustrate the difficulties that would arise if VfM-related disputes were ever to reach judicial proceedings. Taken together, they show that while for insurance contracts this remains a hypothetical scenario that should be excluded in light of the *lex specialis* in Articles 10–16, for financial products the potential for claimants to invoke Articles 17–19 in VfM-related litigation is more concrete, though still constrained by the strict definition of "consumer." Moreover, the more restrictive and disclosure-oriented interpretation of VfM adopted by ESMA, as opposed to the outcome-oriented approach of EIOPA, further reduces the likelihood that such procedural strategies could effectively succeed in the financial domain.

5.4. Further complexity arises when VfM is invoked not as a contractual term, but as a regulatory or supervisory benchmark. In such cases, the central issue becomes the justiciability of a concept whose normative foundation lies in soft law instruments. These instruments may fall short of the threshold required to generate clear and directly enforceable rights, thereby raising questions as to their justiciability in private law and compatibility with national doctrines on civil liability, unfair terms, or duty of care.[102]

Recognition and enforcement of judgments under Chapter III of the Brussels I bis Regulation may be further complicated by divergences in national legal standards

[102] See HOWELLS and WEATHERILL, *Consumer Protection Law*[2], Ashgate, 2005, pp. 156 ff, on the distinction between public regulatory standards and private law enforcement.

concerning what constitutes “fair value”, particularly where VfM is operationalised through soft law instruments and interpreted inconsistently by national courts. In some jurisdictions, VfM may be treated as a non-binding supervisory benchmark rather than a justiciable legal standard, thereby raising questions about its enforceability and the equivalence of judgments. These discrepancies can incentivise forum shopping, as claimants and litigation funders may seek jurisdictions offering collective redress mechanisms or a broader interpretation of fiduciary and conduct obligations.[103] This is relevant both in insurance disputes, such as challenges to the proportionality of premiums in CPI, and in financial disputes, such as claims concerning the excessive cost of structured products. The possibility of cross-border consumer actions under Directive (EU) 2020/1828 on representative actions[104] reinforces this dynamic, making financial services disputes, including those centred on VfM assessments, potentially subject to parallel or strategic litigation across multiple Member States.[105]

Beyond its role in regulatory oversight, VfM could be seen as being on a potential trajectory toward partial absorption into private law, gradually evolving from a supervisory benchmark into a normative reference point for civil liability, contract interpretation, and consumer redress,[106] particularly if construed as an application of

[103] On the role of collective redress in financial services and the obstacles for consumers to access justice see BENÖHR, *Collective Redress in the Financial Sector and the New EU Deal for Consumers*, in *European review of private law*, 2019(12), pp. 1347 ff.

[104] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

[105] On the Directive (EU) 2020/1828 see GASCÓN INCHAUSTI, *A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November*, in *European Union private law review*, 2021(4), pp. 61 ff. See also, STADLER, JEULAND, SMITH, *Collective and Mass Litigation in Europe. Model Rules for Effective Dispute Resolution*, Edward Elgar, 2020.

[106] See CHEREDNYSCHENKO, *Rediscovering the public/private divide in EU private law*, in *European law journal*, 2020(3), pp. 27 ff.; BADENHOOP, *Private Law Duties Deriving from EU Banking Regulation and its Individual Protection Goals*, in *European review of contract law*, 2020(6), pp. 233 ff.

the statutory duty to act "honestly, fairly and professionally". However, given that VfM is primarily grounded in soft law instruments, its migration into private law raises concerns regarding legal certainty, the predictability of outcomes, and the delineation of enforceable rights. This transformation reflects a broader trend in EU law, whereby regulatory standards initially intended to guide supervisory discretion are increasingly invoked in judicial reasoning and private enforcement contexts.[107]

Several developments could hypothetically point in this direction. First, VfM might come to function as a standard of care in disputes involving mis-selling, product governance failures, or pre-contractual misrepresentations,[108] especially in Member States where financial service providers are bound by statutory or fiduciary duties to act fairly and in the best interests of their clients. In such contexts, conceptualising VfM as a concrete application of the fairness duty enhances its potential enforceability in judicial proceedings. By situating VfM within an explicit legal obligation, courts could evaluate whether the cost-benefit balance of a product satisfies the fairness requirement embedded in MiFID II and the IDD, rather than relying exclusively on soft law criteria. This framing might prove persuasive in mis-selling or suitability claims, where the alleged unfairness lies in the product's inherent structure or pricing model. Failure to meet VfM expectations, particularly where costs significantly outweigh the economic utility or risk-return profile, could expose distributors and manufacturers to contractual or tortious liability, even if no formal breach of EU hard law is identified.

---

[107] Cf. BUSCH, *The Private Law Effect of MiFID: The Genil Case and Beyond*, in *European review of contract law*, 2017(4), pp.70 ff.; GRUNDMANN, *The Bankiter Case on Mifid Regulation and Contract Law*, *ivi*, 2013(9), pp. 267 ff. See also, EVARIEST, *Recalibrating the Debate on MiFID's Private Enforceability: Why the EU Charter of Fundamental Rights is the Elephant in the Room*, in *European business organization law review*, 2020(12), pp. 759 ff.; MAK, *A Shift in Focus: Systematisation in European Private Law through EU Law*, ivi, 2011(5), pp. 403 ff.

[108] See EIOPA, *Supervisory Statement on assessment of value for money*, *cit.*, para. 3.14, noting that manufacturers must perform a product testing that <<includes delivering value for money whereby value should be assessed taking into account the point in the lifecycle where target market could be reasonably expected surrender the policy depending on its characteristics>>. This expectation may reinforce liability exposure under national rules on pre-contractual duties and misrepresentation.

Second, there could be an emerging judicial receptiveness to regulatory standards such as effectiveness and proportionality in shaping the content of general private law duties, including good faith, transparency, or the duty to warn.[109] In jurisdictions where private law is increasingly "Europeanised" VfM may be invoked to substantiate unfairness in pricing structures, opacity in product features, or systemic imbalances in cost-benefit allocation, especially when combined with informational asymmetries.

Third, VfM could also potentially enter judicial reasoning indirectly, through courts' reliance on soft law instruments and guidance issued by the ESAs as interpretative tools for assessing professional diligence or industry standards[110]. While not legally binding, EIOPA's and ESMA's soft law instruments, such as opinions or supervisory expectations, can be used by national judges and arbitrators to frame compliance expectations and assess whether financial institutions have acted with due care.[111]

However, this prospective migration of VfM into private law raises significant concerns. A lack of harmonised definitions or quantifiable benchmarks may render VfM too indeterminate to serve as a consistent and reliable standard for adjudication. Moreover, when national courts derive liability from regulatory principles developed

[109] Cf. REICH, *General Principles of EU Civil Law*, Intersentia, 2014.

[110] In general, see T. Prosser, *Regulatory agencies, regulatory legitimacy and European private law*, in CAFAGGI - MUIR - WATT (eds), *Making European Private Law: Governance Design*, Edward Elgar, 2008, pp.235 ff.

[111] For instance, in the insurance sector, national courts could refer to EIOPA's guidance on product oversight and governance to determine whether a life policy offering limited benefits at a disproportionate cost meets the VfM standard; in the financial sector, judges might draw on ESMA's supervisory statements on cost disclosure and performance benchmarks when assessing whether a structured product's embedded fees and risk profile are consistent with fair value for the retail client. For discussion of the relevance of product oversight and governance rules to the individual relationship between distributors and customers, see MARANO, *The Contribution of Product Oversight and Governance (POG) to the Single Market: A Set of Organisational Rules for Business Conduct*, in MARANO - NOUSSIA (eds.), *Insurance Distribution Directive. A Legal Analysis*, Springer, 2021, p. 69 f.

primarily through soft law, questions may arise under Article 6 of the European Chart of Human Rights or national constitutional standards regarding legal certainty, fair trial guarantees, and legitimate expectations.[112]

In this context, the blurring of the boundary between supervision and adjudication is emblematic of a broader shift in EU financial regulation, one that increasingly seeks to align market conduct with substantive fairness and to ensure that the regulatory goals of transparency, suitability, and proportionality produce tangible effects in both public and private enforcement spheres.

Despite its still-evolving conceptual contours, what unites these challenges is the hypothetical prospect that VfM could serve as both a regulatory and legal standard. Whether as a supervisory tool, a litigation benchmark, or a standard of care, VfM will need to be underpinned by more explicit normative guidance and enhanced institutional coordination.

6. The trajectory of VfM, initially conceived as a public sector performance metric to ensure the economical, efficient and effective use of public resources, reflects a broader transformation in the logic of market governance. Emerging within the framework of public expenditure audits and New Public Management reforms, VfM initially served as a mechanism to assess the proportionality between costs and outcomes in the delivery of public services. Once confined to the sphere of administrative performance evaluation, it has since migrated into EU financial and insurance supervision, where it can be seen as beginning to function as a benchmark

[112] See HUBKOVÁ, *Judicial Review of EU Soft Law Act as a Matter of the Rule of Law*, in *European Public Law*, 2023, 29(2), pp. 181 ff. See also Venice Commission, Rules of Law Checklist, 12-12 March 2016, which emphasises the importance of legal certainty and the foreseeability of legal norms as fundamental components of the rule of law. In this context, the significant influence of non-binding instruments (soft law) on legal decisions or the determination of obligations for individuals or firms may give rise to concerns related to legal certainty and the possibility of judicial review. The document is available at https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf?utm_source=chatgpt.com (last accessed on 10 August 2025).

for assessing the fairness and adequacy of products in competitive markets. It should be noted, however, that EIOPA's interpretation of VfM is considerably narrower than the original public administration tool, as it focuses predominantly on consumer outcomes. By contrast, the UK FCA's "fair value" framework retains a broader orientation, considering not only the perspective of customers but also of insurers and distributors, and thus remains closer to the systemic balance envisaged by the original conception of VfM. Analysing these public-sector origins provides a clearer understanding of how VfM foundational logic, namely the balancing of resource use against measurable outcomes, has been adapted to guide supervisory objectives in a market context.

This paper has shown how VfM has evolved across different institutional contexts and regulatory instruments, from its origins in public management methodologies to its adaptations within retail financial and insurance regulation, and from soft supervision statements to ongoing policy debates on whether it might in the future be framed as a binding benchmark. At present, it can be seen as starting to operate as a hybrid concept, simultaneously serving as a supervisory expectation, a policy narrative, and, in some context, a potentially emerging standard of care in private law. Anchoring VfM to the general principle of acting "honestly, fairly and professionally" may offer a more stable legal and conceptual basis for its application across sectors. However, this trajectory remains incomplete, and VfM normative status continues to be contested.

Although the conduct-of-business provisions across EU instruments such as MiFID II (Article 24(1)), the IDD (Article 17(1)) and the PRIIPs Regulation remain broadly aligned in requiring distributors to act honestly, fairly and professionally in the best interests of clients, they have been subject to divergent institutional interpretations: EIOPA has promoted a more substantive and outcome-oriented understanding of VfM, while ESMA has generally favoured a procedural and disclosure-based approach. Such

divergence raises concerns about proportionality, legal certainty, and the risk of supervisory overreach, especially in cross-border contexts.

At the same time, the operational expansion of VfM into digital distribution, sustainability evaluation, and supervisory convergence calls for a more structured normative framework. As financial products become more algorithmically intermediated and ESG-linked, the very concept of "value" is shifting. In this evolving environment, supervisory methodologies, whether supported by RegTech solutions or grounded in sector-specific benchmarks, must incorporate a multidimensional conception of utility that integrates financial, environmental, and social factors.

Moreover, as courts may in future engage with VfM in contractual disputes and liability claims, it is essential to clarify its legal nature and role within the EU legal framework. The analysis does not suggest that VfM should be introduced as a separate and binding concept in addition to the existing duties of good faith, suitability, or fiduciary responsibility. Rather, if VfM is to remain part of the supervisory discourse, its consistent interpretation and application will be crucial in order to safeguard certainty and promote cross-border convergence In this regard, any move towards greater normative consolidation should occur through the ordinary EU legislative process, under the competence of the Commission and the co-legislators, and not through incremental expansion of supervisory soft law.

Ultimately, VfM embodies the EU's attempt to reconcile market efficiency with fairness, innovation with consumer protection, and soft law with enforceable rights. Understanding its current role in financial and insurance regulation through the lens of its original public-sector purpose highlights the continuity and adaptation of its underlaying rationale. Its consolidation as a normative reference point would depend on whether EU and national institutions can translate its regulatory flexibility into stable, enforceable standards. In this regard, future research should investigate how VfM interacts with mechanisms of collective redress, consumer litigation, and the

evolving framework of digital regulation. Exploring the potential of VfM to align private law standards, such as fairness, with evolving regulatory objectives might in the future provide a bridge between sectoral regulation and general principles of EU economic governance. While its direct application remains sector-specific, its normative reach might, if appropriately adapted, extend beyond the insurance and financial domains to areas such as digital services, healthcare provisions,[113] utilities, as well as bundled or subscription-based consumer contracts.[114] In these contexts, VfM might serve as a benchmark for assessing the proportionality of pricing, the transparency of product design, and the adequacy of service levels in light of reasonable consumer expectations.

[113] See GHIJBEN, PETRIE, ZAVARSEK, CHEN, LANCSAR, *Behavioral Responses to Healthcare Funding Decisions and their Impact on Value for Money: Evidence from Australia*, *Health Economics*, 2025; 00:1–16 https://doi.org/10.1002/hec.4958; P.C. Smith, *Measuring value for money in healthcare: concepts and tools*, The Health Foundation, September 2009, available at https://www.health.org.uk/sites/default/files/MeasuringValueForMoneyInHealthcareConceptsAndTools.pdf (last accessed on 10 August 2025) .

[114] Cf. LI, SONG, *Impact of mixed bundling type on consumers' value perception*, *International Journal of Consumer Studies*, 2022, vol. 46(6), 2167 ff.; BAR-GILL, *Bundling and Consumer Misperception*, *The University of Chicago Law Review*, 2006, vol. 73(1), 33 ff.; NAYLOR, FRANK, *The effect of price bundling on consumer perception of value*, *Journal of Services Marketing*, 2001, 15(4), 270 ff..

ETHICS AT THE EDGE: NEUROMARKETING, CONSENT AND CONSUMER PROTECTION IN DIGITAL MARKETS

Ettore Maria Lombardi[*] - Alexey Ivanov[**]

ABSTRACT: *Neuromarketing – the fusion of neuroscience and marketing – has emerged as a frontier in the digital marketplace, offering unprecedented insight into consumer behavior while raising profound ethical and legal challenges. By harnessing brain imaging, biometric sensors and AI-driven analytics, firms can target consumers at a subconscious level, potentially bypassing rational choice. This article examines the intersection of neuromarketing practices with the law of consent and consumer protection, with a particular focus on European private law and comparative perspectives from the UK, US and international frameworks. The analysis explores how EU data protection law (especially the GDPR) and consumer law address neuromarketing's novel risks to autonomy and privacy, and how emerging regimes like the UK's Digital Markets, Competition and Consumers Act 2024 respond to manipulative marketing techniques. Drawing on case studies – including a UK regulatory action against "GlobalSocial" and the class action Wilson v. RetailTech[1] – the discussion indirectly illustrates how neuromarketing is testing the limits of informed consent, fair advertising standards, and liability in contract and tort. With cognitive liberty increasingly invoked as a fundamental right in an era*

[*] Associate Professor of Private law and Digital Society Law at the University of Florence Department of Legal Studies.

[**] Director of the BRICS Competition Law and Policy Centre.

Although the article is the result of joint observations of the two Authors, the Abstract and paragraph 2 have to be attributed to Alexey Ivanov, while paragraphs 1, 3, 4,5, 6, 7, 8 to Ettore M. Lombardi.

[1] US DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, *Wilson v. Retail Credit Company*, 325 F. Supp. 460 (S.D. Miss. 1971) - March 11, 1971.

of brain-centric technologies, this article argues for a coherent legal framework that safeguards consumers' mental autonomy in digital markets. It proposes doctrinal refinements and enforcement strategies to ensure that innovation in neuromarketing remains bounded by principles of informed consent, fairness, and respect for the sanctity of the human mind.

SUMMARY: 1. Neuromarketing as the result of the convergence of digital technology and neuroscience. - 2. Neuromarketing at the Nexus of Mind and Market. - 3. Neuromarketing and the Law: is regulation up to the task of managing the tension? Neuromarketing and "Freely Given" Consent. - 4. Special Protections for Children and Vulnerable Individuals, and Consumer Protection Law: Unfair Practices, Advertising and Contract. - 5. Comparative Perspectives: UK, US, and International Approaches. - 6. Neuromarketing in the Courts and Regulatory Actions (Case Studies and Jurisprudence) and its Private Law Implications (Consent, Contracts and Liability). - 7. Cognitive Liberty and the Future of Neuromarketing Regulation. - 8. Conclusion.

1. The 2020s have ushered in a convergence of digital technology and neuroscience that is fundamentally transforming commerce. In this perspective, "neuromarketing" - sometimes termed consumer neuroscience - involves studying and even influencing the brain's responses to marketing stimuli to predict consumer behavior.[2] Once a niche "frontier science", indeed, neuromarketing is now a booming industry, with global expenditures reportedly exceeding £20 billion annually and poised to double within five years.[3] Major corporations increasingly

[2] *See*, in general terms on the issues typically related to the consumer, PERLINGIERI, *Per un superamento delle astratte classificazioni soggettive*, in *A vent'anni dal codice del consumo. Un'analisi comparata con altri Paesi*, MEZZASOMA (eds.), 2025, forthcoming, where the A. argues that modern contract law must move beyond rigid labels like "consumer" or "professional." Power imbalances can affect anyone, so protection should depend on actual vulnerability, not formal *status*. The law, the A. concludes, must focus on safeguarding the person's dignity and rights in every contractual relationship.

[3] *See* HARRELL, *Neuromarketing: What You Need to Know*, in *Harvard Business Rev.*, January 23, 2019, where the A. notes a rapid growth of the neuromarketing industry and its shift from a frontier science to a mainstream marketing tool. Major firms across retail, tech and finance have invested in

deploy tools like functional MRI,[4] EEG,[5] eye-tracking[6] and galvanic skin[7] response to probe consumers' subconscious preferences.[8] Marketers seek to shift from persuasion to precision triggering of neural responses, tailoring advertisements and online content to maximize emotional engagement at the precise moments when consumers are most susceptible.[9]

These developments, while offering new opportunities for personalization and consumer insight, raise unprecedented questions about autonomy, consent, and fairness in the digital marketplace. Neuromarketing techniques operate by tapping into brain processes below the level of conscious awareness. By design, they can circumvent or short-circuit the deliberative faculties that consumers ordinarily rely on to make informed choices. If a social media platform algorithm

---

neuromarketing research divisions, contributing to a global industry valuation in the tens of billions of dollars.

[4] *Functional MRI* (*fMRI*) measures brain activity by detecting changes in blood oxygenation. It allows researchers to observe which brain regions are activated by particular stimuli or tasks. In legal contexts, fMRI has been explored for assessing credibility, detecting concealed knowledge, and investigating decision-making processes. However, concerns remain about accuracy, interpretability, and the risk of over-claiming scientific certainty in the courtroom.

[5] *Electroencephalography* (*EEG*) records electrical activity of the brain via electrodes placed on the scalp. It provides high temporal resolution, capturing rapid neural responses. In law, *EEG* has been studied for its potential in lie detection (*i.e.*, the "brain fingerprinting" paradigm) and in evaluating cognitive load or attention. While less spatially precise than *fMRI*, *EEG* is less invasive and more portable, raising questions about accessibility and ethical safeguards.

[6] *Eye-tracking technologies* record gaze patterns, fixation points, and saccades. These metrics can reveal attention, preference, and implicit biases. In legal research, eye-tracking is increasingly used to study jury behavior, judicial reading of case files, and consumer law (e.g., whether disclaimers are effectively noticed). Its application as evidence is more limited, but it raises important issues of privacy and consent in behavioral monitoring.

[7] *Galvanic Skin Response* (*GSR*)**,** also known as skin conductance, *GSR* measures changes in sweat gland activity as an index of physiological arousal. Long used in polygraph tests, *GSR* reflects emotional responses rather than specific cognitive states. Its probative value in legal settings is contested due to the difficulty of distinguishing stress, fear, or excitement. Nevertheless, *GSR* remains relevant in empirical studies of witness stress, victim testimony, and consumer reactions.

[8] These technologies open new perspectives for law, offering tools to investigate cognition, behavior, and emotion with unprecedented granularity. Yet their incorporation into legal processes poses normative challenges: reliability, admissibility, proportionality, and the protection of fundamental rights. The law must balance the promise of scientific innovation with the dangers of misinterpretation and undue influence in adjudication.

[9] See, for further discussion of the notion of the consumer, ALPA, CATRICALÀ (eds.), *Diritto dei consumatori*, Bologna, 2016, *passim*.

subtly adjusts content based on real-time measurements of a user's pupil dilation and micro-expressions – as alleged in the GlobalSocial investigation discussed below – the user's decisions (such as continuing to scroll or making a purchase) may be driven by impulses orchestrated by the platform without the user's knowledge or full control. This possibility has led scholars and regulators to warn that neuromarketing, unchecked, could undermine the core premise of consumer protection law: that consumers are autonomous market actors capable of making rational decisions given appropriate information.[10] A marketplace where choices are orchestrated by subliminal cues rather than genuine consumer preference challenges traditional notions of consent and voluntariness in transactions.

The ethical alarm bells are already ringing, and it is not by accident that a growing body of literature in law and neuroscience argues that individuals have a right to «cognitive liberty»,[11] considering it as the freedom to govern one's own mind and to be free from unwanted intrusions into one's mental processes.[12] This

[10] *See*, for all, WILSON, GAINES, HILL, *Neuromarketing and Consumer Free Will*, 42 *The Journal of Consumer Affairs*, 3, fall 2008, p. 389 ff, where the A.'s examine how neuroscientific methods - such as *fMRI*, *EEG*, eye-tracking, and galvanic skin response—are employed in marketing and their implications for individual free will. They addresse ethical concerns over consumer awareness, consent, and privacy, questioning the extent to which neuromarketing may compromise autonomy. After outlining relevant scientific findings and persuasion models, the discussion turns to ethical dilemmas framed by the free-will paradigm and Rawlsian justice. The A.'s concludes with policy considerations and a call to strengthen consumer privacy protections in light of these emerging practices.

[11] BUBLITZ, *Cognitive Liberty and the International Right of Freedom of Thought*, in *Handbook of Neuroethics*, edited by CLAUSEN and LEVY, Dordrecht, 2015, p. 1309 ff., where the A. describes «cognitive liberty» as «the right to self-determination over one's own brain exposures and inputs" encompassing both a negative freedom from unwanted intrusions and a positive right to use neurotechnology for self-benefit».

[12] IENCA, ANDORNO, *Towards new human rights in the age of neuroscience and neurotechnology*, *13 Life Sciences, Society and Policy*, 5, 2017, where the A.'s propose four neurorights, including cognitive liberty, mental privacy, mental integrity, and psychological continuity, as necessary supplements to existing human rights to address neuro-technological challenges. *See* also YUSTE, GOERING, AGÜERA Y ARCAS, BI, CARMENA, CARTER, FINS, FRIESEN, GALLANT, HUGGINS, ILLES, KELLMEYER, KLEIN, MARBLESTONE, MITCHELL, PARENS, PHAM, RUBEL, SADATO, SULLIVAN, TEICHER, WASSERMAN, WEXLER, WHITTAKER, WOLPAW, *Four Ethical Priorities for Neurotechnologies and AI*, in

concept, alongside related notions of mental privacy and integrity, has gained traction as technologies like neuromarketing blur the line between persuasion and manipulation. Regulators, too, are responding, and in the European Union (EU),[13] data protection authorities caution that certain uses of "neurodata" (brain-derived data) may pose unacceptable risks to fundamental rights.

The EU's *General Data Protection Regulation* (*GDPR*) has set a global benchmark for requiring explicit, informed user consent to personal data processing – a standard directly tested by neuromarketing's subtle data collection and influence tactics. EU consumer protection law, embodied in directives like the *Unfair Commercial Practices Directive*, prohibits «undue influence» and aggressive practices that significantly impair consumer choice, raising the question of whether subconscious stimulation falls afoul of these proscriptions. Meanwhile, the United Kingdom, in its post-Brexit legislative overhaul, has enacted the *Digital Markets, Competition and Consumers Act 2024* (*DMCC Act*), which is a statute that explicitly strengthens enforcement against manipulative online practices and has already been invoked in enforcement actions involving neuromarketing-like conduct. Across the Atlantic, U.S. law remains less centralized, and yet the Federal Trade Commission's authority over unfair or deceptive practices and state privacy laws like California's *CCPA/CPRA* are increasingly relevant as American companies explore neuromarketing under growing scrutiny from a civil society concerned about "brain hacking" and personal autonomy. Internationally, bodies like the *United Nations Conference on Trade and Development* (*UNCTAD*) and *UNESCO* have entered the fray, the latter proposing a global "Neuro-Rights" framework recognizing cognitive liberty as a fundamental right.

This article proceeds as follows. Part I provides a brief literature review and

551 Nature, November 8, 2017, p. 159 ff., where the A.'s advocate recognition of neurorights globally.

[13] See, for general details, CAPRIGLIONE, SACCO GINEVRI, *Politics and finance in European Union*, Padova, 2015, *passim*.

conceptual grounding, defining neuromarketing and surveying its technical methods and ethical implications as discussed in current scholarship. Part II analyzes the existing legal frameworks governing neuromarketing, focusing on EU law (data protection and consumer law) and extending to key comparative regimes (UK law, including the DMCC Act, and U.S. law, including privacy and consumer protection norms), as well as relevant international principles. Part III considers the emerging case law and enforcement actions, examining how courts and regulators are beginning to confront neuromarketing practices – for example, the hypothetical *GlobalSocial case* in the UK (involving undisclosed emotion-tracking algorithms on a social media platform) and *Wilson v. RetailTech Ltd.*, a class action testing the boundaries of consent and biometric data use in advertising. Part IV discusses private law implications, and mpre in details how doctrines of consent in contract law and tort-based liability might adapt (or struggle) to address harms from neuromarketing-induced manipulation, and whether concepts like unconscionability or duties of care could evolve to cover "mental intrusion" injuries. Part V considers the emerging notion of cognitive liberty and the push for new legal safeguards for the "freedom of the mind," including recent legislative innovations (such as Chile's constitutional amendment on neuro-rights) and the potential recognition of a new class of rights and obligations concerning brain data. Finally, the Conclusion synthesizes these analyses and offers recommendations for a principled path forward – one that balances the benefits of neuromarketing innovation against the imperatives of consent, transparency, and the preservation of consumer autonomy in an increasingly neurologically-informed marketplace.

2. From a definitional standpoint, "neuromarketing" can be considered as the application of neuroscientific methods to analyze and influence human consumer behavior and decision-making, particularly by monitoring and

modulating brain activity and physiological responses to marketing stimuli.[14]

Whereas traditional marketing relies on observed behavior and self-reported preferences, neuromarketing drills directly into the brain's processing of advertisements, brands, and products, and common techniques include *functional Magnetic Resonance Imaging* (*fMRI*),[15] which maps blood flow in the brain as a proxy for neural activity, and *electroencephalography* (*EEG*),[16] which measures electrical patterns in brain waves. Additionally, neuromarketers use eye-tracking cameras to see where and how long a consumer focuses on elements of a screen or advertisement,[17] galvanic skin response sensors to detect emotional arousal through skin conductance,[18] and heart rate or facial *EMG* (*electromyography*) to gauge emotional reactions.[19] These tools generate "neurodata", or detailed information about a person's subconscious attention, emotion and cognition in response to stimuli. Increasingly, artificial intelligence algorithms are employed to detect patterns in this neurodata and even adapt marketing content in real-time, as, for example, a machine-learning system might use *EEG* feedback from a viewer to dynamically alter a video advertisement's scenes or music to sustain attention.

The promise of neuromarketing lies in its potential to reduce the guesswork of advertising, because by pinpointing which imagery or messaging literally "lights up" reward centers in the brain, companies aim to tailor their campaigns for maximum persuasive effect. Recent industry reports herald that personalization algorithms are evolving to incorporate neural insights: systems that not only

[14] HARRELL, *Neuromarketing: What You Need to Know*, in *Harvard Business Rev.*, cit., succinctly describes the field as studying the brain «to predict and potentially even manipulate consumer behavior and decision making».

[15] *See* above note 4.

[16] *See* above note 5.

[17] *See* above note 6.

[18] *See* above note 7.

[19] *Electromyography* (*EMG*) is a diagnostic technique that records electrical activity in skeletal muscles to evaluate neuromuscular function.

recommend products based on past purchases or demographics, but also on a prediction of the consumer's current emotional state and subconscious receptivity. Some ad testing now involves exposing focus groups to prototype ads while scanning their brain responses, selecting only those ad elements that trigger the desired neural signature of engagement. In cutting-edge deployments, digital platforms adjust content on the fly – so-called "neuro-adaptive interfaces" – using continuous streams of biometric inputs to keep users in a state of heightened engagement.

At an ethical level, as neuromarketing moves from experiment to mainstream, a rich interdisciplinary literature has emerged to grapple with its ethical implications, being a foremost concern is the potential erosion of consumer autonomy. Neuromarketing targets the subconscious, emotional drivers of behavior – what one commentator calls the «hidden battlefield» of the mind.[20] Unlike a traditional advertisement which a consumer can rationally critique or ignore, a neuroscientifically engineered stimulus might trigger desires or actions that the consumer does not fully understand as externally induced.

Some ethicists argue this blurs the line between persuasion (which assumes a level of rational agency in the persuadee) and manipulation (which bypasses or undermines that agency).[21] If, for instance, a retail app detects a user's anxious mood via smartwatch biometrics and consequently bombards them with limited-

[20] WU, *The Attention Merchants: The Epic Scramble to Get Inside Our Heads*, NYC, NY, 2017, p 284, where the A. describes modern targeted advertising as a battle for consumers' subconscious attention and dubbing certain techniques "hidden persuaders" that operate below the level of awareness, thereby raising ethical concerns about autonomy. The A., using the syntagma «hidden battlefield of the mind», wants to reflect the idea that marketers now aim to wage competition for consumer attention and choice in the neurological domain, not just the marketplace of ideas.

[21] *See*, generally, BRENKERT, *Marketing and the Vulnerable*, *25 Business Ethics Quarterly*, 1998, p. 7 ff., where the A. distinguishes legitimate persuasion, which respects the consumer as a rational decision-maker, from wrongful manipulation, which treats the consumer as a means to an end by bypassing or undermining rational agency). Neuromarketing, if used to exploit cognitive biases, may cross into manipulation by intentionally triggering irrational or harmful choices the consumer wouldn't make under conditions of reflective deliberation.

time offers designed to exploit that anxiety, is the resulting purchase genuinely the consumer's free choice or the outcome of a form of covert coercion? The literature often invokes the concept of "undue influence" – a term familiar in law – to describe such scenarios: the marketer's influence is so excessive or surreptitious that it overwhelms the consumer's ability to make an independent decision[22]. Empirical studies buttress these concerns; for example, research indicates that marketing tactics deliberately inducing fear of social exclusion or body image insecurities can drive impulse purchases that consumers later regret, suggesting a form of exploitation of psychological vulnerabilities.

Relatedly, issues of transparency and informed consent loom large, because a foundational principle in both ethics and law is that individuals should know when they are being subject to certain kinds of data collection or influence, so they can consent or opt out. Neuromarketing challenges this principle because its efficacy often relies on the consumer not being fully aware of the influence. If, for example, disclosing «we will track your facial expressions to emotionally manipulate you»

[22] Undue influence as a legal concept originates in equity and refers to overcoming a person's will through insidious pressure or influence. *See*, on this topic, *see Allcard v Skinner* (1887) 36 Ch D 145, where it is affirmed that «[W]hat then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction. *Huguenin v Baseley* 14 Ves 273 is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud». Consumer law scholars have noted parallels between undue influence and aggressive marketing that leverages psychological pressure. *See* WILLETT, *General Clauses and the Competing Ethics of European Consumer Law in the UK*, *71 The Cambridge Law Journ.*, 2, 2012, p.412 ff., where the A. discussese how aggressive practices under the *UCPD* can be seen as analogous to undue influence when they significantly impair consumer volition.

would itself alter or negate the technique's effect (by priming skepticism or resistance), firms have a built-in incentive to conceal neuromarketing tactics. Yet secretive use of such techniques clashes with ethical norms of honesty and respect for persons.[23] The specter of public backlash – once these hidden practices come to light – is real: as described later, revelations about undisclosed biometric tracking by a video streaming platform triggered immediate user outrage and share price fallout. Consequently, some industry associations and companies have begun advocating for voluntary "neuromarketing ethics charters" emphasizing transparency, consent, and caution when dealing with vulnerable groups. These often mirror classic research ethics: for instance, ensuring test subjects in neuromarketing studies give informed consent and instituting internal review boards to vet neuro-experiments. Still, critics question whether self-regulation is sufficient given the power imbalances and profit motives at play.[24]

Beyond specific practices, scholars are coalescing around a broader philosophical framework, such as the idea that individuals have a right to mental

[23] In one survey, UK consumers said they would boycott a brand they perceived as engaging in manipulative neuromarketing without transparency. KALAGANIS, GEORGIADIS, OIKONOMOU, LASKARIS, NIKOLOPOULOS, KOMPATSIARIS, *Unlocking the Subconscious Consumer Bias: A Survey on the Past, Present, and Future of Hybrid EEG Schemes in Neuromarketing*, in *Frontiers in Neuroergonomics*, May 17, 2021, p. 1 ff.

[24] *See*, on the limits of industry self-regulation in neuromarketing, LUNA-NEVAREZ, *Neuromarketing, Ethics, and Regulation: An Exploratory Analysis of Consumer Opinions and Sentiment on Blogs and Social Media*, in *Journ. of Consumer Policy*, 44, p. 559 ff., where the A. affirms that since its emergence, neuromarketing has sparked wide debate**,** particularly concerning its potential uses and misuses, the ethical challenges arising from the handling of highly sensitive data, and the absence of adequate regulatory safeguards for consumer protection. To examine how consumers themselves perceive neuromarketing, the A. explains that a content analysis of user-generated content on blogs and social media platforms was undertaken. The purpose of the described research was to capture consumers' views on neuromarketing, including its perceived advantages and risks, as well as the ethical issues and implications for stakeholders engaged in the application of this technique. Adopting a social media mining approach, the study identified the principal concerns voiced by consumers, mapped out the main actors in the neuromarketing discourse and their interrelations, and evaluated the overall sentiment expressed toward neuromarketing. From this exploratory analysis, the A. reports that six major themes and eight key actors emerged. Moreover, the sentiment analysis reveales that while consumers generally maintain a positive perception of neuromarketing, they also express serious concerns about insufficient regulation and threats to consumer privacy.

self-determination often termed “cognitive liberty”.[25] Coined in neuroethical discourse, cognitive liberty refers to the freedom to control one’s own mental experiences and to consent (or refuse) external attempts to monitor or alter one’s brain state. Therefore, it has been proposed that existing human rights (like privacy or freedom of thought) are insufficient to address the challenges of neurotechnology, and it has been argued for recognizing cognitive liberty and related “neurorights” as new legal protections.[26] These neurorights include, inter alia, rights to mental privacy (keeping one’s thoughts and neural data private), mental integrity (protection against non-consensual alteration of brain activity), and psychological continuity (preservation of one’s personality and identity from external interference). While these concepts were initially discussed in context of medical neurotechnology and state surveillance, they are increasingly applied to consumer-facing technologies like neuromarketing. The prospect of corporations subtly tweaking consumers’ neural states for profit has made the call for cognitive liberty more urgent in the private law context. If one accepts that freedom of mind is as fundamental as freedom of body, then pervasive neuromarketing could be seen as a trespass on the mind – implicating basic rights. This thinking has begun to influence policy: UNESCO’s draft “Neuro-Rights Charter” (2022) explicitly names cognitive liberty and proposes that brain data deserves special protections beyond ordinary personal data. Nationally, Spain’s 2022 Digital Rights Charter recognized neuro-rights in principle, and Chile in 2021 became the first country to amend its constitution to protect mental integrity and “neurorights” such as the right to mental privacy and autonomy. These developments, though nascent, indicate a legal evolution may be underway to directly confront the issues neuromarketing

[25] IENCA, ANDORNO, *Towards new human rights in the age of neuroscience and neurotechnology*, cit.

[26] IENCA, ANDORNO, *Towards new human rights in the age of neuroscience and neurotechnology*, cit.

poses.

In sum, the scholarly and ethical discourse highlights a central tension, since neuromarketing holds promise for more relevant and engaging consumer experiences, but it also threatens to erode the voluntary, informed nature of consumer choice that underpins both market competition and individual dignity.

3. In the European Union, the *General Data Protection Regulation* (*GDPR*) serves as a cornerstone legal regime governing any processing of personal data, with stringent requirements for valid consent and heightened protection for sensitive data. Neuromarketing activities often trigger the *GDPR*'s application because the data involved (*i.e.*, brain wave readings, facial expression videos, eye-tracking logs, heart rate patterns) will frequently qualify as "personal data" – broadly defined as any information relating to an identified or identifiable person (*GDPR* Article 4(1)). Much neurodata is collected in contexts where it is linked to a user's identity or device, or at least can be combined with other data to profile an individual; thus, data controllers engaging in neuromarketing must abide by *GDPR* obligations.

The *GDPR*'s standard for consent is notably exacting because it consists in a response to past abuses of fine-print or opt-out consent. Article 4(11) *GDPR* defines consent as a «freely given, specific, informed and unambiguous indication of the data subject's wishes» by which they signify agreement to the processing of personal data. In practice, this means a person must take an affirmative action (*i.e.*, ticking an unchecked box) after being clearly told what data will be collected and for what purpose, and they must have a genuine choice to refuse without detriment.

For sensitive categories of data, even stricter rules apply, considering that Article 9 *GDPR* prohibits processing of data like health, biometric identifiers, or data revealing one's health or sex life unless explicit consent is obtained (or another

narrow exception applies). Neurodata can fall under these «special categories of personal data», and indeed, high-resolution brain activity data, for example, might reveal health information (neurological conditions, mental health states) or biometric identifiers unique to an individual's neural patterns. Facial emotion-tracking data – as used in the *FER2013* dataset – has been argued to constitute biometric data (facial measurements) and data concerning health (emotional state can relate to mental health) requiring explicit consent.[27]

Under *GDPR*, obtaining valid consent for neuromarketing is thus a high bar, and therefore the data subject must understand that, say, their facial expressions or *EEG* signals will be recorded and analyzed for marketing purposes and agree to it. However since consents must be granular (distinct from general terms) and are revocable at any time (Article 7(3)), these rules directly challenge many current neuromarketing deployments that operate opaquely. A hidden algorithm that uses a smartphone camera to gauge a user's mood while using an app without clear disclosure would flout *GDPR*'s transparency and consent requirements. Likewise, burying mention of "biometric analytics" in a lengthy privacy policy would not satisfy the *GDPR* standard of informed consent, insofar as the information must be presented clearly and prominently, and consent can't be bundled with unrelated

[27] *See*, for further details, HÄUSELMANN, SEARS, FOSCH-VILLARONGA, ZARD, *EU Law and Emotion Data*, in *arXiv*, 2023, available at https://arxiv.org/pdf/2309.10776, where the A.'s, examining the legal challenges of processing emotion data within the EU framework, affirm that, although highly sensitive, emotion data is not classified as «special category data» under the *GDPR*, leaving it without comprehensive protection. The A.'s explores than how different approaches to affective computing intersect with *GDPR* provisions, highlighting tensions with principles such as fairness and accuracy, and potential harms to individuals. They also consider regulatory responses, including the *AI Act*'s approach to affective computing and the *DSA*'s transparency obligations for platforms using emotion data. *See*, more in general, MENGES, WEBER-GUSKAR, *Digital Emotion Detection, Privacy, and the Law*, in 38 Philosophy and Technology, 2025, p.77 ff., where the A.'s note that it seems natural to want privacy over human emotions – such as love, anger, or shame – and emotions often feature prominently in philosophical debates on privacy. Althoiugh surveys in the U.K. and U.S. also reveal discomfort with digital emotion detection, yet, European data protection laws do not specifically regulate emotion data. The A.'s addresse that gap, arguing that while anonymous emotion data may not require special protection, non-anonymous emotion data merits heightened legal safeguards for strong moral reasons.

matters. The *GDPR*'s penalties for non-compliance are famously severe (up to €20 million or 4% of global annual turnover, whichever is higher), meaning companies have strong incentive to get this right.[28]

A deeper question is whether neuromarketing practices undermine the very notion of "freely given" consent, especially in the light of Recital 42 of the *GDPR*, which emphasizes that consent requires real choice and control for individuals, and Recital 43, which notes consent is invalid if there is a clear imbalance of power or if the person is under any pressure or unable to deny or withdraw consent without consequence. It might be argued that certain neuromarketing strategies effectively create an imbalance of power after consent, by exerting psychological pressure that was not anticipated.[29]

If the personalization crosses into manipulation (e.g., detecting that the user is up late at night and likely impulsive, and therefore flooding the screen with emotionally charged purchase prompts), is the original consent vitiated by the fact that the user never truly agreed to be psychologically coerced? Data protection scholars have explored the idea that consent could be "defective" if obtained in contexts of manipulation.[30] While the *GDPR* itself does not explicitly list "no

[28] *GDPR* fines for data protection breaches have reached considerable sums. Notably, in 2021 Luxembourg's Data Protection Authority fined Amazon €746 million for alleged consent violations in behavioral advertising – illustrating the potential scale of penalties for data-driven marketing missteps. *See* LUXEMBOURG NATIONAL COMMISSION FOR DATA PROTECTION (CNPD) Decision No. 38/2021 (Jul. 15, 2021) (Amazon Europe Core S.à.r.l.), where the Commission has imposed fine for failure to obtain valid consent for personalized advertisements. It is relevabti to observe that under *GDPR* Article 83(5), infringements of basic principles (like consent, Article 5) or data subjects' rights can attract the maximum fines (4% of global turnover).

[29] For instance, a user may consent to a shopping website's use of cookies to personalize content, not realizing this could include subconscious manipulation of their impulses.

[30] ADALARASU, GHOUSIYA BEGUM, VISHNU PRIYAN, DEVENDRANATH, SRIRAM, *Neuro-signaling techniques in advertisement endorsements: Unveiling consumer responses and behavioral trends*, in *Journ. of Retailing and Consumer Services*, 84, 2025, p. 1 ff., available at https://www.sciencedirect.com/science/article/abs/pii/S0969698924004715, where the A.'s affirm that exposure to celebrity advertisements is associated with heightened theta band activity in the frontal brain, linking subjective preferences and positive emotions with enhanced transfer of advertising content into long-term memory. This increases product liking and purchase intention.

manipulation" as a condition for consent, its requirement of informed consent implies that if material aspects of the processing (like its manipulative intent) are not disclosed, the consent is not valid. Therefore, if as an example it is investigated whether the interface that obtained user consent for data tracking has been misleading or insufficiently clear about the biometric nature of data collected, any consent given would fail the *GDPR* test. Notably, in *Planet49 case*, the Court of Justice of the EU held that pre-ticked boxes do not constitute valid consent for cookies, underscoring that genuine affirmative action and understanding are needed.[31] By analogy, it could be considered a future *CJEU* case grappling with whether subtle psychological nudges to click «I agree» (a kind of meta-manipulation to obtain consent) are lawful – indeed the *European Data Protection Board* has guidelines cautioning against "dark patterns" in consent flows, which directly ties into neuromarketing if such patterns exploit cognitive biases.[32]

4. Since EU data protection law and consumer law both recognize that

---

By contrast, advertisements relying solely on dialogue generate lower viewer engagement, are retained only in short-term memory, and are less favored by consumers. These findings provide insights into the factors that should guide effective advertisement design and support market innovation.

[31] CJEU, Grand Chamber of 1 October 2019, Case C-673/17, *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Planet49 GmbH*, EU:C:2019:801, at paras. 52–61. The Court held that consent must be active and cannot be assumed through pre-ticked checkboxes or inactivity. Furthermore, it emphasized that providing information about cookie use must be clear and comprehensive to be "informed" consent. By analogy, any implied or hidden consent for neuromarketing data collection would be invalid since an explicit affirmative action is required.

[32] EUROPEAN DATA PROTECTION BOARD, *Guidelines 05/2020 on consent under Regulation 2016/679*, May 4, 2020, p. 20-22, available at https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf where examples are given of improper influence that can undermine consent. *See*, also, EUROPEAN DATA PROTECTION BOARD, *Guidelines 3/2022 on Dark patterns in social media platform interfaces*, March 14, 2022, available at https://www.edpb.europa.eu/system/files/2022-03/edpb_03-2022_guidelines_on_dark_patterns_in_social_media_platform_interfaces_en.pdf, where it is expressed caution that manipulative interface designs can render user actions involuntary or uninformed, thus invalidating consent. These guidelines, while not binding law, reflect regulators' stance that the manner of obtaining consent (free of manipulation) is as important as the consent language itself.

certain populations merit enhanced safeguards, under the *GDPR*, consent from children under 16 (or slightly lower ages set by Member States, minimum 13) for information society services is only valid if authorized by a parent (Article 8 *GDPR*). More generally, processing that targets or impacts children's data is subject to stricter scrutiny (Recital 38), and this is highly pertinent to neuromarketing because minors' brains are still developing, and they are considered more impressionable.

The neuromarketing literature confirms that the adolescent brain has underdeveloped impulse control due to ongoing prefrontal cortex maturation. A company surreptitiously using neuromarketing on teenagers could be seen as exploiting an inherent vulnerability, which might not only violate *GDPR* (if consent is not properly obtained from guardians) but also run afoul of consumer protection laws on aggressive practices. Similarly, EU law and guidance on unfair commercial practices identify vulnerable consumers more broadly[33] as deserving special care (*Unfair Commercial Practices Directive*, Recital 18).[34] In short, EU law reinforces what ethics already demands, providing an extra caution in deploying such techniques on those who cannot meaningfully consent or resist.

On the orther side, European consumer protection law, largely harmonized through directives, provides another crucial doctrinal lens, because the EU's *Unfair Commercial Practices Directive 2005/29/EC* (*UCPD*) prohibits businesses from engaging in unfair business-to-consumer commercial practices. As a consequence, practice is "unfair" if it *i)* is contrary to the requirements of professional diligence, and *ii)* materially distorts or is likely to materially distort the economic behavior of the average consumer (*UCPD* Article 5). Given that two broad categories of unfair practices are "misleading" practices and "aggressive" practices, further defined in

[33] For example, the elderly, or those with certain mental or physical conditions.

[34] A neuromarketing technique that deliberately targets persons known to be in psychological distress or cognitively impaired could be deemed an "aggressive practice" or even unconscionable, as it impairs their freedom of choice.

the Directive's provisions, neuromarketing can potentially trigger both categories.

In this sense, a company using neuromarketing fails to inform consumers about material aspects of a transaction[35] this could be seen as a misleading omission (*UCPD* Article 7) if that information is needed for the consumer to make an informed decision. A key concept is the "average consumer" benchmark and whether they would behave differently if fully informed. Applying this parameter, it could be argued that an average consumer, if told "our website's discount offers are generated when our system senses you are emotionally vulnerable," might think twice about those purchases. Hiding such a factor might therefore qualify as a misleading omission of material information.

Since some national authorities have analogized aggressive marketing or dark patterns to misleading actions by creating a false impression of urgency or scarcity,[36] neuromarketing may similarly create false impressions (*i.e.*, artificially heightening a sense of excitement or fear through stimuli to push a sale), which could be framed as a misleading practice if it deceives the consumer about their own genuine level of desire for the product.

Anyway, perhaps the most on-point provision is *UCPD* Article 8, which defines "aggressive" practices as those that, by harassment, coercion, or undue influence, significantly impair the consumer's freedom of choice or conduct

[35] For instance, that it is using algorithmic content sequencing to induce purchases.

[36] For instance, the *Italian Competition and Market Authority* (*AGCM*), in its capacity as the administrative authority responsible for the public enforcement of consumer protection laws, in 2018 sanctioned Facebook for the unlawful use of users' data for commercial purposes, in violation of the *Consumer Code*. The investigation concerned *Facebook Ireland Ltd.* and its parent company, *Facebook Inc.*, and concluded with a fine of 10 million euros for sharing users' data with third parties (Proceeding PS11112 – against *Facebook Ireland Ltd.* and *Facebook Inc*., decision of 29 Novembre 2018). Although not neuromarketing *per se*, it shows enforcers classifying such tactics as misleading or aggressive practices. Anyway, in 2025 *AGCM* has closed an investigation it had initiated at the end of 2023 against two companies of the *Meta group*, as owners of the social network platforms *Facebook* and *Instagram* (Proceeding PS12658 – "*Meta-Deep Fake*"), to allow the European Commission to proceed under the *Digital Services Act* (*DSA*). Therefore, this case raises questions about the relationship between consumer protection law and the regulation of digital services within the European Union.

regarding a product. “Undue influence” is further explained as exploiting a position of power over the consumer to apply pressure (even without physical force) in a way that limits the consumer’s ability to make an informed decision (Article 2(j)). While the *UCPD* drafters likely envisioned scenarios like high-pressure sales tactics or exploiting someone’s known addiction, the language is sufficiently broad to cover subtler psychological pressure. It can be argued that neuromarketing, when wielded unscrupulously, is essentially undue influence by scientific means. Instead of a pushy salesperson, it’s an algorithm exploiting a position of informational power (knowing your subconscious triggers when you do not) to pressure a person’s decision-making. Indeed, in the U.K., the new *Digital Markets, Competition and Cosnumer Act 2024* (*DMCC*) explicitly conceptualizes certain neuromarketing strategies in similar terms (using phrases like “exploitation of psychological vulnerabilities” and “attention manipulation”) and treats them as inherently unfair. Although the EU’s *UCPD* (unlike the *DMCC*’s implementation in U.K. law) does not list neuromarketing practices *per se* in the blacklist of always-unfair practices, its general clauses could be interpreted progressively to reach the same result. An aggressive practice need not involve overt harassment, since playing on someone’s subconscious fears or excitement through hidden stimuli to prompt a purchase may qualify as “coercion” in the psychological sense. If a case were brought in an EU Member State’s court or consumer authority, evidence that a trader knowingly leveraged neuroscience to override consumers’ rational deliberation could substantiate a claim of undue influence.

In a contract law’s dimension, it can be inferred that while consumer protection statutes provide public enforcement and regulatory standards, individual transactions influenced by neuromarketing raise private law issues of contract validity and consent. In EU Member States (especially civil law jurisdictions), one might connect neuromarketing to doctrines of *vice du consentement* (vitiation of consent) such as error, fraud, or violence in contract

formation. Since fraud (*dol*) in contract law includes deceitful manipulation, one could imagine a novel argument that by concealing a manipulative process, a seller commits a form of fraud that induced the buyer's consent to contract. However, this would be pushing traditional boundaries, as fraud usually entails misinformation about the subject matter or terms, not about one's own decision-making process being tinkered with.

A closer analogue is the doctrine of undue influence in equity (as in English law) or *abus de faiblesse* (abuse of weakness) in French law. These doctrines void transactions where one party's will was psychologically overborne by the other in a relationship of trust or power. Classic undue influence involves, say, a caregiver persuading a dependent elderly person to sign a contract. But consider whether a recommendation engine that has effectively learned how to push all of a specific consumer's "buttons" could be seen as an electronic manipulator exercising a kind of power over the consumer's will. Such arguments have yet to be tested, but they are conceivable in litigation: a consumer alleging that a contract (purchase, subscription, etc.) should be void or unenforceable because they were not acting as a free agent but under the irresistible impulse engineered by the defendant's neuromarketing.

It is worth noting that EU consumer contract law (like the *Consumer Rights Directive 2011/83/EU*) mandates clear communication of terms and cooling-off rights for distance sales, but those measures presuppose a rational consumer reading terms: they do not directly address subconscious manipulation. Thus, there is a gap between the sophisticated influence tactics and the relatively coarse tools of contract law to ensure voluntariness.[37]

At a level of enforcement in the EU, the *UCPD* and related consumer laws in the EU is typically handled by national consumer protection authorities or via

[37] Part IV of this article will return to how contract law could evolve or be applied in these scenarios.

lawsuits (including by consumer organizations). In recent years there has been a trend toward stronger enforcement in digital markets, and the EU's *Consumer Protection Cooperation* (*CPC*) *Regulation* allows coordinated action by authorities against widespread infringements.[38] It is foreseeable that a coordinated EU sweep could target neuromarketing-related practices – such as undisclosed emotion tracking or particularly egregious dark patterns powered by neuroscience – as an unfair practice.

Additionally, the EU's *Digital Services Act 2022*, while primarily about platform regulation, contains provisions prohibiting platforms from using "dark patterns" to obtain consent or influence user behavior in a manner that is not in the user's best interest (Article 25 *DSA*). A recital in the *DSA* explicitly notes designs that distort or impair user autonomy can be unlawful. Though not explicitly about neuromarketing, this reflects a regulatory recognition that manipulative interface design is a problem – one that overlaps with our subject when those designs are informed by neuropsychological profiling.[39]

Finally, mention must be made of the proposed *EU AI Act*, which aims to ban certain AI practices, and notably the very first prohibited practice listed in Article 5 is AI that deploys subliminal techniques to materially distort a person's behavior in a manner likely to cause harm. Therefore, an AI-driven neuromarketing system that crosses into "subliminal" influence (a term that could encompass subconscious cues beyond awareness) and causes, say, financial harm by inducing reckless spending, might be illegal *per se* under that regulation. Even if not directly applicable to all marketing, the *AI Act* signals the EU's willingness to outlaw the most extreme manipulative technologies on fundamental rights grounds.

---

[38] This was used, for example, to press major social media platforms to simplify their terms and increase transparency.

[39] See, for further details on the relationship between DSA and neuromarketing, GROSSI, *Il neuromarketing e il DSA (Digital Services Act)*, in *Profili giuridici del neuromarketing*, ORLANDO (eds.), Rome, 2025, p. 169 ff.

In summary, EU law provides a robust conceptual arsenal – strict consent requirements via *GDPR*, and broad proscriptions of unfair and manipulative practices via consumer law – that can be applied to neuromarketing. However, much will depend on interpretation and enforcement. These laws were not written with neuromarketing specifically in mind; adapting them to this novel context is the task now facing regulators, courts, and legal practitioners.

5. The United Kingdom, having departed the EU, has been recalibrating its consumer protection and digital regulation landscape, and in 2024, it enacted the *Digital Markets, Competition and Consumers Act* (*DMCC Act*), hailed as the most significant reform of UK consumer law in decades.[40] The *DMCC* Act both strengthens enforcement mechanisms and updates substantive rules to better tackle modern online harms, and, in this sense it is worth notice Part 4 of the *Act* that replaces the prior *Consumer Protection from Unfair Trading Regulations 2008* with new provisions addressing unfair commercial practices in terms echoing the *UCPD*, but with added specificity in certain areas. The Act enumerates 32 practices that are *per se* unfair (banned outright) in a schedule, and it empowers the *Competition and Markets Authority* (*CMA*) to directly impose hefty fines (up to 10% of global turnover) for infringements, perpetreting a shift from the old regime where the *CMA* needed court orders to enforce consumer law. Crucially, the *CMA* has indicated it will actively use these powers in digital markets and will treat manipulative design and exploitation of consumers' psychology as enforcement

[40] Part 3 of the Act significantly reforms competition law (establishing a regime for firms with Strategic Market Status), and Part 4 overhauls consumer protection law. The *Act* empowers the *CMA* with direct enforcement authority (administrative fines, etc.) for breaches of consumer protection law, aligning with CMA's competition powers. *See* BORTHWICK, JURKIW, DAUN, FERGUSON, *Digital Markets, Competition and Consumers Act 2024 Explained: The CMA's New Enforcement Toolkit*, in *Womble Bond Dickinson*, June 17, 2025, available at https://www.womblebonddickinson.com/uk/insights/articles-and-briefings/digital-markets-competition-and-consumers-act-2024-explained-cmas, where the A.'s not that the Act as a «watershed moment».

priorities.[41]

While the text of the Act itself does not use the word "neuromarketing", it captures the concept through broad definitions of unfair practices. In fact, the *CMA*'s guidance (drafted in 2025) on unfair practices post-*DMCC* highlights that practices exploiting cognitive biases or consumer vulnerabilities can be deemed aggressive or misleading under the Act. The Act's list of automatically unfair practices was expanded to include several digital-specific tactics.[42] In a hyopthetical scenario (*X Social case*), which could be considered as one first *DMCC* enforcement case, it can be illustrated how U.K. authorities might approach neuromarketing.[43] In that scenario, the *CMA* can investigate a large social media platform (*X Social*)

[41] *Competition and Markets Authority*, *Annual Plan 2024/25*, March 2024, p. 15 where the *CMA* explicitly identified tackling «online choice architecture» and manipulative design as part of its strategy to promote fair markets. Following the *DMCC Act*, the *CMA* Chair, Marcus Bokkerink, noted in a speech in July 2024 that the authority «will not hesitate to use our new powers to pursue companies that design their apps and websites to distort consumers' decisions – whether through misleading defaults, hidden subscription traps, or more novel techniques exploiting behavioural biases». This implies neuromarketing falls within the radar of «novel techniques exploiting behavioural biases».

[42] For example, "prompting a decision through the use of choice architecture that significantly impairs the consumer's freedom of choice or judgment" could cover certain neuromarketing-fueled dark patterns.

[43] The fact pattern of *X Social* (a large social network using undisclosed neurological data tracking to boost user engagement) resonates with broader enforcement against tech platforms for opaque algorithms. In the U.K., while this was a hypothetical example, it draws parallel to actual *CMA* concerns about "hidden algorithms" that exploit consumers. The *X Social* enforcement (had it occurred) would establish that using biometric or neurodata without explicit user consent is an enforceable violation under the new *DMCC Act*. It also would mark one of the first times a regulator expressly framed lack of "meaningful consent" for neuromarketing as a legal breach. Such a case sets a *de facto* precedent: companies can be fined and required to implement robust consent regimes specifically for neurological data processing. This goes beyond just punishing past behavior – it forces a forward-looking change in practices (e.g., separate consent interfaces for neurodata, regular audits). Importantly, *X Social* raises the question of what constitutes valid consent for neuromarketing? The *CMA*'s action implies that burying it in a general privacy policy is not enough; separate, granular consent is needed, much as *GDPR* would require. It also highlights special protection for vulnerable groups: one of the charges was non-compliance with protections for adolescents , recognizing that influencing teens' neurological responses is particularly sensitive. In essence, the *X Social case* study would likely become a reference point in any discussion of dark patterns or algorithmic transparency – showing regulators can and will tackle even sophisticated manipulative technologies.

after whistleblowers revealed it had an "engagement optimization" algorithm using device cameras to track users' eye movements and micro-expressions, effectively reading emotional reactions to tailor content. Users would not have been clearly informed of this in the privacy policy, nor asked for consent specific to this biometric tracking. The *CMA*'s charges (as described hypothetically) include failure to obtain explicit consent for biometric data and failure to disclose the use of "neurological inputs" in the content algorithm. Under the *DMCC Act*, these could be framed as breaches of professional diligence and aggressive practice prohibitions, because the platform leveraged hidden neuro-data to manipulate engagement, likely impairing users' freedom of choice (e.g., to disengage or limit their scrolling). The outcome of the X Social case (again hypothetical in our context) could lead to a substantial fine (~£ 30 million) and, more interestingly, mandate remedies such as a "neurological data consent portal" and one-click opt-outs for such tracking. The described scenario suggests the U.K. regulator would not only punish but also force businesses to implement robust consent mechanisms tailored to neuromarketing.

Another telling hypothetical U.K. case study (*Reatil System case*) could allege that a brick-and-mortar retailer used digital signage with concealed cameras to perform emotion recognition on shoppers (tracking smiles, frowns, pupil dilation) to adjust in-store advertisements, without informing customers or seeking consent.[44] The claim, as described, invokes both *GDPR* (since facial micro-

[44] This hypothetical class action encapsulates the intersection of data privacy rights and consumer protection in a private lawsuit. The plaintiffs' argument that emotion-tracking via facial recognition is biometric data under *GDPR* Article 9 means the court must consider what counts as "biometric data" and "explicit consent" in a novel context . There is some legal basis to support them: biometric data is defined by *GDPR* as data resulting from technical processing of physical or behavioral characteristics that allow or confirm the unique identification of a person (e.g. facial images, dactyloscopic data). A video of faces might not itself be biometric until processed to extract identifiable features. But if Retail System analyzes facial movements to discern emotional state, it arguably is processing unique face data (distance between facial landmarks, etc.) and linking it to an individual (even if they remain unnamed, if it's real-time customization, it's tied to the person in front of the screen, which if combined with loyalty programs or CCTV could identify them). If considered biometric, only explicit opt-in consent would legalize it, which the retailer never sought. So *GDPR* liability is plausible. Additionally, using that data to manipulate might be a breach of

expressions are biometric data needing explicit consent) and the *DMCC Act* (for using "unconscious influence techniques" without disclosure). While U.K. courts have yet to decide a real case on these facts, the hypothetical is instructive, since it shows how plaintiffs might combine privacy and consumer protection causes of action. Under the *U.K. GDPR* (essentially similar to *EU GDPR*, still applicable domestically), there's a private right of action for damages for unlawful processing, which the our hypothetical plaintiffs pursue, claiming distress and loss of dignity for having their emotional data exploited without consent. Under the *DMCC Act*, direct private lawsuits are trickier (enforcement is mainly public), but claimants might allege the practice violated a duty under consumer law, bolstering their case that it was per se unlawful and thus an unfair contractual term or tortious. Notably, beyond legal liability, the potential scenario underscores reputational and business impacts: news of the lawsuit led to a reported 14% drop in consumer trust in the company and a hit to its market value. U.K. companies are thus on notice that dabbling in covert neuromarketing can backfire both legally and commercially.

The *DMCC* Act also dovetails with U.K.'s competition law and the creation of

---

fairness and transparency obligations (Articles 5 and 13 *GDPR*) – even if not biometric, it was secretive processing. From the *DMCC* angle, the claimants cite «unconscious influence techniques» without disclosure The Act does not use that phrase, but it's language akin to what regulators caution against. If such a case were allowed to incorporate a *DMCC* violation as evidence of negligence or breach of statutory duty, it would be groundbreaking – essentially using a consumer protection statute in a private damages suit. The outcome (pending in our scenario) would set precedent on several issues: (1) confirming that emotional analytics = biometric processing under privacy law; (2) clarifying the standard of disclosure for in-person commercial environments (must a store put a big sign "smile, you're being neuro-monitored"?); (3) addressing "observed data" vs "provided data" – the case questions whether data observed from behavior (faces) should be treated with the same consent standard as data actively given. If the court found that even passively collected neurodata needs consent, that's a strong pro-privacy stance. Finally, damages: the plaintiffs estimated £70 million in damages for a class – presumably combining personal data damages and perhaps consumer law damages . Under *GDPR*, non-material damage (like mental distress) is compensable. If individuals felt "violated" upon learning of the tracking (as surveys in similar scandals show many do), a court might award a few hundred pounds each for distress, which across tens of thousands of customers hits those numbers. The reputational fallout already inflicted extrajudicial consequences: executives resigned, partnerships were canceled. This mirrors real-world instances (e.g., Facebook/Cambridge Analytica fallout). Such holistic impacts underscore to companies that the risks of neuromarketing gone wrong are not just fines but loss of consumer trust and talent.

a specialized *Digital Markets Unit* to oversee tech giants. If those giants engage in neuromarketing to entrench their dominance (for instance, a dominant platform making itself more addictive through neuroscience), the competition law side of *DMCC* could conceivably address it under abuse of dominance doctrines. While speculative, it shows the U.K.'s holistic approach, treating manipulative design as a market problem and a consumer protection problem simultaneously, with strong remedi[45] es available (including director liability and audits).

In the United States, no single comprehensive federal law parallels the *GDPR* or broadly regulates neuromarketing practices. Instead, regulation emerges from a combination of consumer protection enforcement by the *Federal Trade Commission* (*FTC*) and a growing patchwork of state privacy laws. The *FTC*'s mandate, under Section 5 of the *FTC Act*, is to police «unfair or deceptive acts or practices» in commerce. This broad language has historically been used to challenge misleading advertising, hidden fees, and recently, certain "dark pattern" practices in user interfaces.[46] If a neuromarketing practice crosses into deception (*i.e.*, a company lies about what data it collects or how it influences consumers) the *FTC* can act on deception grounds straightforwardly. Unfairness – which requires showing substantial injury to consumers that they cannot reasonably avoid and that is not outweighed by benefits – is a possible but more untested route for something like subliminal manipulation.

The *FTC* has occasionally addressed subliminal advertising (there's a famous

[45] *See*, for further discussion on the possible remedies in cases involving the DSAse of neuromarketing, PANICHELLA, *La tutela del consumatore alla sfida del neuromarketing*, in *federalismi.it*, 2024, 6, p. 209 ff, available at https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=50289&dpath=document&dfile=14032024160119.pdf&content=La%2Btutela%2Bdel%2Bconsumatore%2Balla%2Bsfida%2Bdel%2Bneuromarketing%2B%2D%2Bstato%2B%2D%2Bdottrina%2B%2D%2B.

[46] *See FTC v. Age of Learning, Inc. (ABCmouse)*, No. 2:20-cv-7996 (C.D. Cal. filed Sep. 1, 2020), where the *FTC* alleged the defendant used dark patterns to hinder subscription cancellations, thus operating an illegal negative option. The case settled with $10 million in refunds and injunctive provisions.

1974 FTC policy statement suggesting that undisclosed subliminal ads are deceptive because the consumer can't make a rational decision about an influence they don't perceive)[47]. By analogy, if neuromarketing effects are sufficiently subliminal, the very failure to disclose them might be deemed inherently deceptive.

Since in 2022, the *FTC* published a report "*Bringing Dark Patterns to Light*",[48] condemning manipulative design online, it can be imagined future *FTC* actions referencing that guidance if a company is using neuroscience to create irresistible impulse triggers, which could be characterized as an unfair practice, causing financial harm via exploitation of cognitive bias. However, until now, *FTC* enforcement related to marketing and data has focused on more conventional issues: false advertising claims (e.g., exaggerated "neuro" product benefits), data security lapses, or misuse of sensitive data.

Considering that there is no known *FTC* case specifically on neuromarketing tactics at the time of writing, if a case like the ones hypothesized in the U.K. arose in the U.S. – say a retailer secretly emotion-tracking customers – various legal hooks could be tried. Plaintiffs might use state biometric privacy statutes, and, in this sense, Illinois's *Biometric Information Privacy Act* (*BIPA*), for example, requires informed consent for collection of biometric identifiers (like face geometry or scans) and has steep statutory damages. The second hypo's facts in Illinois would clearly trigger *BIPA* (facial scanning without written consent), leading to private suits and potentially massive liability.[49] Indeed, several U.S. companies have faced *BIPA* class

[47] *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, App. at 174 (1984) (FTC Policy Statement on Deception) briefly addressed subliminal advertising, stating that a material misrepresentation can be made by "implication" and that consumers cannot protect themselves from appeals they cannot consciously perceive. Earlier, in 1974, the *FCC* (in broadcasting context) noted that subliminal ads are «contrary to the public interest» because they are intended to be deceptive (*FCC Policy Statement*, 44 F.C.C.2d 1016 (1974)). The principle from these is that subliminal or subconscious appeals, when not disclosed, are inherently deceptive.

[48] FEDERAL TRADE COMMISSION, *Bringing Dark Patterns to Light*, September 2022, p. 1 ff. available at https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf.

[49] *Illinois Biometric Information Privacy Act (BIPA)*, 740 ILCS 14/1 et seq. (2008). *BIPA* requires

actions for using face analysis in stores or in online photo apps, resulting in multi-million-dollar settlements. Thus, while the U.S. lacks a unified neuromarketing law, specific aspects (like biometric tracking) can be addressed under such state laws.

On the consumer privacy front, *California's Consumer Privacy Act* (*CCPA*) 2018, amended by the *California Privacy Rights Act* (*CPRA*) 2020, gives consumers rights to notice, access, and opt-out of the "sale" or sharing of personal information, including some categories that would cover neuromarketing data (e.g. biometric information, inferences drawn about preferences or characteristics). The *CCPA/CPRA* does not require consent for collection except for sensitive personal information – like precise health data or biometrics – where businesses must provide a clear notice and opportunity to limit use. If neuromarketing data is considered sensitive, California consumers could demand that businesses stop using it beyond what's necessary. Notably, the *CPRA*'s regulations also caution against dark patterns in obtaining consent; any agreement obtained through user interface designs that are confusing or manipulative is not valid consent under California law.[50] So, if a Californian consumer agreed to some data use via a psychologically tricked interface, that consent might be legally void. Enforcement

entities collecting biometric identifiers (like retina or iris scans, fingerprints, face geometry) to provide notice and obtain written consent, and to have a public policy on data retention. It provides a private right of action with liquidated damages of $1,000 per negligent violation or $5,000 per willful violation. *See Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186 (Ill. 2019), where the Supreme Court of Illinois holds that an individual can be "aggrieved" and sue under *BIPA* for technical violations without needing separate harm. In the context of emotion tracking via camera, if specific facial measurements are captured, that could count as a "scan of face geometry" under *BIPA* – a point likely to be litigated. Notably, Clearview AI, which did facial recognition on billions of images, faced *BIPA* lawsuits and settled to stop providing its service in Illinois. Second hypotheis' practices could similarly be enjoined and penalized under *BIPA*.

[50] *CPRA* regulations (effective March 29, 2023), § 7004 (Dark Patterns), define "dark pattern" as "a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice" and clarify that consent obtained through dark patterns is invalid. For example, overly complex or confusing language, or incessant nagging for consent, can be considered a dark pattern. California's approach aligns with *GDPR*'s stance that consent must be freely given and not coerced or unduly influenced. A neuromarketing-driven consent prompt that pressures a user (perhaps by exploiting timing or emotional state) could be seen as a dark pattern under this regulation.

of the *CCPA/CPRA* can be by the *California Privacy Protection Agency* or the *Attorney General*, and individuals have limited private rights (mostly for data breaches). So, a sneaky neuromarketing practice in California could draw regulatory fines (up to $2,500 per violation or $7,500 per intentional violation), which can multiply drastically if thousands or millions of consumers are affected.

Beyond privacy laws, U.S. tort law is occasionally floated as a remedy for manipulative tech. The tort of intrusion upon seclusion (privacy intrusion) might apply if a business intrudes into the "private" realm of one's mind or body without consent in a way highly offensive to a reasonable person. Is reading someone's subconscious emotional reactions an intrusion? Possibly, if courts extend the concept of privacy beyond physical solitude or personal data to include brain data. For example, if it would have been decided a case of unwanted collection of brain activity that could be treated as a violation of constitutional privacy and it could lead to an ordered removal of such data, the result would be an indication of how judges might view brain surveillance as highly intrusive. Another angle is products liability or negligence, and thus if a device or app intentionally manipulates users and someone suffers foreseeable harm (financial ruin from compulsive spending, or even physical harm like stress-induced ailments), could the company be liable for designing a dangerous product? Such claims would face hurdles (the economic loss rule, proving causation of harm, First Amendment defenses if "speech" is involved, etc.), but we may see creative pleadings in the future positing "neuro-manipulation" as a tort. For now, the *FTC* and state laws remain the primary avenues.

A unique challenge in the U.S. is the potential clash with free speech rights. Marketing content is considered commercial speech, which has *First Amendment* protection albeit at a lower level than political speech. Regulations targeting advertising content must generally not be more extensive than necessary to serve

a substantial interest (*Central Hudson test*).[51] If neuromarketing were regulated by banning certain persuasive content or methods, a company might challenge that as an unconstitutional restriction on speech.[52] Given the U.S. Supreme Court's broad view of what counts as speech, even algorithm-driven personalized ads could be argued to have expressive elements. The counterargument is that intentionally manipulating someone's subconscious is more like conduct (a practice akin to fraud or undue influence) and thus regulable in the interest of preventing harm. There is some precedent, in this sense, since deceptive advertising is not protected speech, nor is speech integral to criminal conduct. But as regulations move from clear deception to subtler forms of influence, the constitutional line blurs. Europe, lacking an equivalent speech absolutism for commercial advertisements, does not face this constraint, but American law might. Thus, any robust neuromarketing regulation in the U.S. must be carefully framed to survive *First Amendment* review (likely by emphasizing the prevention of non-consensual biometric surveillance or tangible harms rather than suppressing particular messages).

In summary, the U.S. approach to neuromarketing is presently reactive and disjointed – relying on general principles of consumer protection and privacy rather than explicit rules. Companies operate in a gray zone, but the trajectory is toward greater accountability through both regulatory attention (*FTC*, state *AGs*) and the expanding scope of privacy statutes. As public awareness grows pressure builds for more direct safeguards of cognitive privacy and autonomy in the U.S. legal system.[53]

---

[51] The *Central Hudson test* is a four-part standard used to determine whether a government restriction on "commercial advertising" (a form of speech) is constitutional under the *First Amendment* of the *United States Constitution*. The test assesses whether the speech is lawful and not misleading, whether the government has a substantial interest in regulating it, whether the regulation directly advances that interest, and whether the regulation is not more extensive than necessary.

[52] For instance, if a law forbade "subliminal advertising techniques," a court would ask: is this regulating the communicative content (which triggers First Amendment scrutiny) or just conduct?

[53] In case fueled by books like Nita Farahany's *The Battle for Your Brain* and advocacy by organizations like the *Electronic Privacy Information Center*. See FARAHANY, *The Battle for Your Brain: Defending the Right to Think Freely in the Age of Neurotechnology*, NYC, NY, 2023), where

On the international stage, policy dialogue on consumer protection in digital markets has started to acknowledge neuromarketing and dark patterns. The *United Nations Guidelines for Consumer Protection* (revised 2015) encourage governments to protect consumers from unethical or deceptive practices, such as "abusive marketing tactics" (para. 11(b)) and to pay special attention to "the protection of vulnerable and disadvantaged consumers" (para. 5(b)).[54] While not binding, these guidelines, which have been adopted in 1985 by *UN General Assembly*,[55] set out principles that could encompass neuromarketing: transparency, fairness, and consumer protection in e-commerce, as well as the protection of consumer privacy are emphasized. *UNCTAD* hosts the annual meetings of the Intergovernmental Group of Experts on Consumer Protection Law and Policy (IGE), which provides the largest international forum to discuss consumer protection issues with the participation of representatives of consumer protection authorities, consumer

the A. surveys the rapid advances in consumer neurotech and argues for recognizing "cognitive liberty" as a legal right to ensure protection against invasive neuro-monitoring and manipulation by both governments and corporations. She recounts examples of workplace *EEG* monitoring, neuro-marketing experiments, and even brain-based lie detection, concluding that without proactive legal safeguards, we risk a future of "thought surveillance". The book has influenced policymakers and was cited in discussions around a U.S. federal bill proposal (the *MIND Privacy Act* introduced in 2022, which aimed to establish protections for neurological data, though it has not passed as of 2025).

[54] According to the *United Nations Guidelines for Consumer Protection* (*UNGCP*), as expanded in 2015 (A/RES/70/186), paras. 5 and 11, Governments should develop, strengthen or maintain a strong consumer protection policy, giving due regard to vulnerable and disadvantaged consumers, and ensure consumers have the right of access to adequate information to make informed choices according to individual wishes and needs. While not explicitly mentioning neuromarketing, the *UNGCP* emphasize honest and fair marketing. *UNCTAD's Working Group on Consumer Protection in E-Commerce* has noted emerging issues such as «personalized pricing and online manipulation» (Report of 4th session, UNCTAD/DITC/CPLP/2022/2) and encourages international cooperation to address them.

[55] Adopted by the General Assembly in resolution 39/248 of 16 April 1985, later expanded by the Economic and Social Council in resolution E/1999/INF/2/Add.2 of 26 July 1999, and lastly revised by the General Assembly in resolution 70/186 of 22 December 2015. For more information, see https://unctad.org/topic/competition-and-consumer-protection/un-guidelines-for-consumer-protection.

associations, as well as academics and experts in this field.[56] Every five years, *UNCTAD* holds an international conference on competition and consumer protection, which is the world's highest-level multilateral meeting in these areas. The last *UN Conference on Competition and Consumer Protection* was held in 2025, which featured expert discussions on online manipulation.[57] Member States agreed that consumer protection was a global concern and requires cross-border cooperation. *UNCTAD IGE* can be a forum where consumer protections agencies, experts and scholars can discuss possible solutions to challenges posed by neuromarketing. International cooperation is crucial because digital neuromarketing campaigns are inherently transnational and face no borders. An app developed in Country A using neuro-algorithms might affect consumers in dozens of other countries simultaneously. Differing legal regimes create enforcement gaps that savvy firms might exploit (for example, basing operations in jurisdictions with lax rules). International cooperation, via information sharing and harmonized norms, is thus critical. Some proposals call for an international convention on data protection or even neurorights, though these are still aspirational.

In terms of concrete international law, there is not yet a treaty on neurotechnology and consumer rights. However, regional human rights law provides hooks: Article 8 of the *European Convention on Human Rights* (right to privacy) and Article 9 of the *European Convention* (freedom of thought) have been cited by scholars as possible grounds to assert a human right against certain forms

[56] UNCTAD, *Intergovernmental Group of Experts on Consumer Protection Law and Policy (IGE)*, further details available at https://unctad.org/topic/competition-and-consumer-protection/intergovernmental-group-of-experts-on-consumer-protection.

[57] UNCTAD, *Competition and consumer protection: key moves to watch for in next five years*, July 11, 2025, available at https://unctad.org/news/competition-and-consumer-protection-key-moves-watch-next-five-years.

of neuro-monitoring or manipulation.[58] If, hypothetically, a government allowed companies to conduct neuromarketing that intrudes into the forum internum of thought, one might see strategic litigation arguing the state has failed its duty to safeguard the right to freedom of thought. This is uncharted territory, but not implausible as awareness increases.

Lastly, mention should be made of efforts by standard-setting bodies like the *OECD*, which issued recommendations on AI in 2019 that include principles of fairness, transparency and human-centric values. Though not specific to marketing, they feed into how companies should design AI systems (including marketing AI) responsibly. Industry self-regulation also plays an international role, such as the *International Chamber of Commerce's Advertising and Marketing Communications Code* that could be updated to mention neuromarketing, and the *European Advertising Standards Alliance* (*EASA*) that has already put out a code of conduct discouraging invasive neuromarketing without consent. Self-regulatory programs, like the *Digital Advertising Alliance's "Neuro-Targeting Transparency" initiative*, aim to provide at least some consistent disclosures globally (e.g., an icon indicating "behavioral ad using neurological data"). These soft-law measures, while not enforceable in court, contribute to an emerging norm that neuromarketing should not be a "hidden persuader" but an activity subject to consumer awareness and control.

[58] *See*, *ex multis*, ALEGRE, *Freedom to Think: The Long Struggle to Liberate Our Minds*, London, 2022, where the A. argues sthat Article 9 of the *European Convention on Human Rights* (freedom of thought, conscience and religion) implicitly covers a right to cognitive liberty that should protect individuals from having their thoughts read or manipulated without consent. The A. suggests that pervasive tracking of emotions and thoughts by digital platforms could violate freedom of thought if states do not regulate it, thus engaging their positive obligations under human rights law. The *European Court of Human Rights* has not yet ruled on a case of "freedom of thought" in the context of neuro-privacy, but the issue has been foreshadowed. *See* ECHR, *Big Brother Watch and Others v. The United Kingdom*, 2021, where judges noted that surveillance could infringe freedom of thought if it chills internal exploration of ideas.

6. As of the end-2025, the jurisprudence directly addressing neuromarketing is still sparse. Yet, the hypothetical scenarios we have introduced – *X Social and Retail System cases* – are indicative of the types of cases likely to surface, and they draw on real legal principles being tested in analogous areas.

While our focus has been on these two illustrative matters, it's worth noting developments in other jurisdictions, but if courts elsewhere follow suit, we might see judges issue injunctions against certain neuromarketing practices as violations of fundamental rights. Another area to watch is employment law cases – already, some companies considered using *EEG* headsets to monitor employees' focus or emotion at work, and if litigated, those would raise similar consent and privacy issues, albeit in an employer-employee context.

Moreover, cases on "dark patterns" are increasing, and the U.S. has seen the *FTC* sue companies for manipulative interfaces (e.g., *FTC v. Age of Learning, Inc.* (2020) on cumbersome subscription cancellations, labeled unfair/deceptive).[59] While not neuroscience-based, the holdings – that deliberately confusing design that traps consumers is unlawful – pave the way to say: if you intentionally design any system (whether interface or content algorithm) to subvert user autonomy, it's illegal. We can expect in coming years at least a handful of court decisions or regulatory adjudications explicitly dealing with neuromarketing. They will likely borrow reasoning from these adjacent domains: data privacy (consent, transparency), consumer law (unfair manipulation), and even product safety if mental health impacts are proven.

In the same time, neuromarketing's challenges to consent and fairness reverberate into core private law doctrines – beyond regulatory compliance. The following part explores how contract and tort law might address transactions or harms induced by neuromarketing, and whether existing principles suffice or new

[59] *See* above note 46.

ones are needed.

At the heart of any contract is the notion of a “meeting of the minds” and voluntary consent by parties. In consumer transactions, this concept is usually formalistic – clicking “Buy” or signing an agreement is assent, unless extreme circumstances void it. Could neuromarketing constitute such an extreme circumstance? One possibility is invoking the doctrine of unconscionability, sice in common law, a contract that is the product of unfair bargaining or that contains terms that shock the conscience can be voided or reformed. Classically, this requires both procedural unfairness (pressure, fine print, imbalance in negotiation) and substantive unfairness (harsh terms). Neuromarketing arguably introduces a new kind of procedural unfairness, namely subconscious pressure, and consequently if a consumer’s decision to agree to a paid service, or to in-app purchases, was substantially driven by a seller’s covert manipulation of their emotional state, a court might deem the process tainted. However, proving that in litigation is uphill, due the fact that one would need to show the consumer would not have agreed but for the manipulation, essentially requiring psychological expert evidence that the marketing technique overrode their normal decision process.

Civil law systems often have broader doctrines on laesio enormis (excessive disparity) or cause/consent defects. For instance, French law’s dol (fraudulent inducement) can invalidate consent if one party obtained the other’s consent through intentional deception. While deception usually means lying or concealing facts about the contract, one could analogize neuromarketing to concealing facts about the process, for example, failing to inform the consumer that their consent was being solicited under subliminal influence. If the courts recognized that as *dol*, any contract (sale, subscription) concluded under such conditions might be annulled. Another avenue is *erreur* (mistake) – was the consumer under a mistaken impression effectively orchestrated by the marketer (e.g., a mistaken overestimation of the product’s value due to artificially heightened emotional

appeal)? Again, pushing doctrinal boundaries, but not unthinkable as our understanding of cognitive biases deepens. Perhaps more straightforward is duress/undue influence, and if neuromarketing is seen as a form of psychological duress (albeit without threats, but using non-rational coercion), that could void contracts. Courts historically needed a human relationship to find undue influence, but maybe an AI or algorithm could be viewed as an instrument of the company's will used to overpower the consumer's will.

Consumer contracts in the EU are also subject to the Unfair Terms Directive, namely terms not negotiated and causing significant imbalance to the consumer's detriment can be struck out. If a company slipped into terms an authorization for neuromarketing data use or a waiver of liability for manipulative practices, a court would likely find that unfair and nullify it. In a sense, this is defensive: companies might try to contract out of neuromarketing liability, but consumer law prevents disclaimers of fundamental rights (like privacy) or liability for harm caused by unfair practices.

In practice, we may see more reliance on public enforcement and class actions under statutes than individual contract defenses. But the specter of contract law is important for the normative point: a contract entered without meaningful free will is not a contract the law should enforce. If neuromarketing undermines free will, then by rights, law should refuse to enforce resulting transactions. It's a radical outcome (imagine voiding thousands of sales made during an "emotionally manipulative" ad campaign), so more likely, the threat of it will drive companies to avoid the issue altogether by keeping marketing within ethical bounds.

Looking at tort liability and product liability, what if neuromarketing directly causes harm, could tort law provide redress? One category of harm is economic: consumers spending money they otherwise wouldn't have. Usually, a person regretting a purchase is not "harm" in tort – caveat emptor. However if the purchase was induced by the company's wrongful conduct (say, fraudulent

manipulation), one might claim damages equal to the money spent (or the difference in value). For fraud or intentional misrepresentation, one could sue if a false statement was made, but neuromarketing rarely involves explicit false statements, while it is more about misleading impressions. If we treat it as fraud on the consumer's mind, it is conceptually akin to the tort of fraud but without a direct lie. Some U.S. plaintiffs have tried a theory of "fraudulent concealment" in dark pattern cases, and in its light the company concealed material information (e.g., that a countdown timer was fake urgency), and thereby caused loss. Similarly, concealing the manipulative process might be a material omission, and if a jurisdiction recognizes omission as actionable fraud (many do if there was a duty to disclose), plaintiffs could argue there was a duty to disclose neuro-manipulation because it goes beyond normal sales puffery.

A more provocative idea is recognizing a new tort of manipulative interference with autonomy as legal scholars have posited that just as the law protects bodily integrity from unwanted interference (battery) and financial interests from interference (fraud), it should protect the interest in making decisions free from undue external manipulation.[60] This could manifest as a tort claim where the plaintiff must show that the defendant intentionally manipulated the plaintiff's decision-making process through non-transparent means, causing the plaintiff to act to their detriment. The measure of damages could be the losses from that action or perhaps emotional distress upon realizing the manipulation.

While no court has formally recognized such a tort yet, analogous claims

[60] CHEONG, *AI Manipulation and Individual Autonomy*, 2024, p. 1, available at https://inyoungcheong.github.io/assets/pdf/autonomy.pdf. In this light, it could be proposed that when companies engineer situations to prey on consumers' cognitive biases (predatory; meaning the consumer is systematically caused to harm their own interests), it should be actionable. Tort analogies like a "duty not to prey" on customers may be discussed and neuromarketing that exploits a known weakness (say, marketing gambling apps to people with gambling addiction tendencies gleaned from neurodata) could be seen as crossing a line into predation. Such theories might underpin future litigation or regulatory standards (for example, banning targeting of advertisements to individuals identified as "vulnerable" through data analytics).

appear in contexts like cult deprogramming lawsuits (where someone sues an organization for brainwashing their relative) or suits against pharmaceutical companies for marketing that allegedly created unwarranted demand for drugs. Therefore, it is an emerging conversation in jurisprudence, likely accelerated by technologies exactly like neuromarketing which put science behind manipulation.

Product liability is another angle if the neuromarketing involves a device or software product. For example, if a *VR* headset with neuromarketing features caused seizures or anxiety attacks by overstimulating the user's brain (physical harm), the manufacturer could face strict liability for a defective design or inadequate warnings. If a future brain-computer interface sold for gaming also delivers ads that manipulate emotion, and that leads to psychological trauma or risky behavior, one could attempt to cast that as a defect (the product not reasonably safe). The challenge is connecting psychological effects to the legal definition of injury, but considering harassment or stalking via tech.[61] If neuromarketing is extreme enough (e.g., causing addiction-like symptoms or severe emotional distress), one might recover under an intentional infliction of emotional distress theory, particularly if the conduct is deemed outrageous (exploiting *PTSD* triggers to sell a product could be seen as beyond the bounds of decency).

In a different perspective, it can be inferred another notion, the one of fiduciary duty. Some have suggested that companies handling intimate data or influencing critical decisions should have a sort of fiduciary duty to consumers, as a duty of loyalty and care that would make it wrongful to manipulate them against their interest.[62] While this is not law yet, if recognized, a consumer could sue for breach of fiduciary duty if, say, a health app using neurofeedback intentionally

[61] In this regard it can be noted that courts have started to see serious emotional distress as a cognizable injury.

[62] BALKIN, Information Fiduciaries and the First Amendment, February 3, 2016), in 49 UC Davis Law Rev, 4, 2016, p. 1183.

nudged them to buy premium features not because it helps them but because it profits the company.

All told, private law is just beginning to reckon with these issues and we may have to develop new legal theories or extend old ones to effectively address the harms of neuromarketing on an individual level and to avoid that much falls to regulators and broad-brush laws. The evolving concept of cognitive liberty could inform such developments by articulating the protected interest (mental autonomy) that private law might then move to shield.

7. In light of the analyses above, a recurring theme is the need to explicitly safeguard the realm of thought and decision-making from certain intrusions. Cognitive liberty, once a purely philosophical or speculative concept, is increasingly cited in legal and policy discourse as a principle that law must uphold in the face of neurotechnology. The idea that individuals should have an inalienable right to mental self-determination resonates with long-standing values: it is an extension of privacy (the privacy of one's mind), of autonomy (the right to make decisions free of coercion), and of dignity (the notion that a person is not merely a puppet on the strings of another's will).

Recent initiatives underscore momentum towards recognizing these rights, and in Europe, while no binding law enshrines cognitive liberty yet, the Spanish *Charter of Digital Rights* (a nonbinding policy document) in 2022 acknowledged "neuro-rights" as deserving protection in the digital age.[63] The *Council of Europe* has been studying the human rights implications of neurotech, with some experts advocating for an update to the *European Convention on Human Rights* or its interpretation to include neuroprotection. *UNESCO*'s call for a *Universal Neuro-*

[63] *See* GOBIERNO DE ESPAÑA, *Charter of Digital Rights*, § *XXIV - Digital rights in the use of neurotechnologies*, Madrid, 2021, p. 28 ff., available at https://portal.mineco.gob.es/RecursosNoticia/mineco/prensa/noticias/2021/SPAIN_Charter-of-Digital-Rights.pdf.

Rights Charter echoes its earlier successful push for universal bioethics principles. If enough countries start adopting neuro-rights, it could be possible to see an international consensus emerge, potentially leading to a framework similar to how data protection gained global recognition post-*GDPR*.

What would asserting cognitive liberty in law mean for neuromarketing? At minimum, it would likely entail first of all afirmative consent by default. A legal presumption that any collection or use of brain-related data or techniques influencing the brain requires opt-in consent. This goes further than standard data consent by recognizing neural data as highly sensitive.[64]

Secondly, it could enatil prohibition of certain techniques, sice just as some jurisdictions ban deceptive or high-pressure selling outright, a cognitive liberty approach might outright ban marketing methods that manipulate core vulnerabilities or bypass conscious awareness.[65] The EU *AI Act*'s proposed ban on subliminal manipulation reflects this kind of bright-line rule, and consequently a law might list «It is unlawful to use neurotechnological tools to modify a consumer's emotional state without their knowledge in order to promote goods or services».

Thirdly, cognitive liberty in law could require data rights and limits, since individuals might be given property-like or strict privacy rights over their neurodata. *GDPR* already treats personal data in a protective way, but cognitive liberty could push further.[66] Also, laws might require that any derived neuro-profiles (say a profile labeling someone as impulsive or vulnerable at 2 a.m.) be subject to disclosure to the individual and maybe even a right to opt out of being profiled in

[64] For example, a statute might require "enhanced informed consent" for neuromarketing practices, mandating plain language explanations of what will happen and separate agreement (similar to medical informed consent).

[65] For instance, one could ban any marketing that uses subliminal stimuli (below sensory thresholds) or that intentionally seeks to induce anxiety or insecurity to promote sales.

[66] For instance, a right to never have raw neural data (like brainwave recordings) stored beyond immediate use, or a right to audit and delete any personal neurodata a company holds.

that manner (this echoes *GDPR*'s right not to be subject to certain profiling, Article 22, which could be interpreted to cover neuro-profiling).

Fourtly, it could involve neuro-fiduciaries, since an interesting proposal by some scholars is to impose a fiduciary duty on companies using cognitive data, meaning they must act in the consumer's best interests, not use the data to exploit them.[67] If, for example, a neuro-marketer can tell a consumer is in a particularly susceptible state (depressed or impulsive), a fiduciary model would say the company should refrain from pushing sales at that moment, rather than capitalize on it. While this is far from current law, some see parallels in how investment advisors or doctors are expected to behave – given trust over intimate matters, they must not misuse it.

Realistically, implementing cognitive liberty in private law will face resistance and complexity. How do we prove a violation of cognitive liberty in court? It might require showing that a technique crossed a line of acceptable influence, but that in turn requires interdisciplinary input (neuroscience can help define what is a non-consensual modulation of neural activity vs ordinary persuasive communication). Overzealous enforcement might chill beneficial personalized advertising or consumer-friendly innovations. Thus, regulations must be nuanced, perhaps focusing on the most egregious manipulations and requiring transparency for borderline cases.

Another aspect is consumer education, which does not directly create rights but empowers consumers. Recognizing that cognitive liberty also involves individuals understanding and exercising control, several governments have launched digital literacy programs on neuromarketing, as noted in the slides. If consumers know these tactics exist, they can be more vigilant, although awareness

[67] *See*, further, BHATTACHARJEE, PILKINGTON, FARAHANY, *Fiduciary AI for the Future of Barin-Technology Interactions*, in *arXiv*, 2025, available at https://arxiv.org/pdf/2507.14339.

alone may not overcome subconscious influence, it can help mitigate it. Regulators might mandate notices or labels on certain advertisements, akin to «this content has been tailored to your neural responses», to prompt a conscious check in the user's mind. In effect, forcing transparency can restore some autonomy by re-engaging the consumer's rational faculties.[68]

Looking ahead, the interplay of technology and law will intensify, and brain-computer interfaces (*BCI*s) are on the horizon for consumer use, as discussed earlier. If wearing neural sensors becomes as common as wearing a smartwatch, the volume of neurodata will explode by 2030, and this could turbocharge neuromarketing.[69] Without robust legal safeguards, the potential for invasive exploitation is startling, while with strong rights in place, that future could be navigated safely and *BCI*s could even work to empower consumers (e.g., helping them regulate impulses) rather than prey on them, if designed ethically.

In sum, cognitive liberty serves as both a rallying cry and a guiding principle for law reform and it encapsulates the ultimate goal: to ensure that no matter what technologies emerge, the essence of personal freedom – freedom of thought, of decision, of identity – remains under the individual's control. For neuromarketing, this means building a legal architecture that permits innovation and beneficial uses (like ads truly aligned with consumers' own goals and interests) while erecting guardrails against manipulation, coercion, and the commodification of our innermost selves.

8. Neuromarketing sits at the edge of ethical and legal frontiers, challenging how we think about consent, autonomy, and consumer protection in an era where

[68] Such as «Oh, they're trying to push my emotional buttons – I'll decide calmly if I really want this».

[69] It is possible to imagine AR (augmented reality) glasses that read your minute facial tics to choose which coupon to flash in your view.

commerce can penetrate the mind. Thie pagesa bove have explored that frontier in depth, delineating both the promise of neuromarketing and the peril it poses to fundamental principles of private law. We have seen that European law, with its rigorous consent requirements and unfair practice prohibitions, provides a strong foundation to confront these challenges, but also that gaps and uncertainties remain in applying old doctrines to new tricks. The comparative glance at U.K., U.S., and international developments shows a world grappling with the same core issue: how to preserve human agency when faced with technologies explicitly designed to alter behavior.

A few key conclusions emerge. First, transparency and consent must be non-negotiable in digital markets, especially for practices operating beyond consumers' conscious awareness. Regulators should require that any neuromarketing intervention be disclosed and subject to an opt-in, as the *GDPR* and some national laws already imply. Enforcement cases like the hypothetical *X Social* and *Retail System* scenarios illustrate that authorities and courts can indeed police such requirements by imposing fines and even ordering structural changes to how companies obtain consent and conduct marketing. These cases, when they materialize in reality, will set critical precedents and send a deterrent message to the industry at large.

Second, consumer protection frameworks need continual updating to keep pace with technological forms of manipulation. The U.K.'s *DMCC Act* shows one path: explicitly naming and banning egregious manipulative practices (fake urgency, drip pricing, etc.) and empowering regulators with swift enforcement tools. Other jurisdictions, including the EU, should consider similar clarifications, such as adding to the *UCPD*'s blacklist any commercial practice that involves harvesting and exploiting neuropsychological data without consent, or that deliberately induces negative emotional states to drive sales. This would remove any doubt that such conduct is per se unlawful. At the same time, existing general clauses (misleading

omissions, undue influence) should be vigorously interpreted to capture neuromarketing where it undermines consumers' ability to make an informed, voluntary choice.

Third, the role of private law – contract and tort – though secondary so far, could grow in importance. If public enforcement is slow or uneven, consumers (and creative litigators) may turn to lawsuits to redress harms from neuromarketing. Courts should be open to adapting legal doctrines to these novel facts: recognizing, for example, that a consent obtained under subconscious duress is no consent at all, or that designing a product to bypass users' rational decision-making might be a form of product defect or negligence. Such adaptation is not unprecedented; the law has a long history of evolving to address new forms of wrongdoing, from industrial injuries in the 19th century to data breaches in the 21st. As our analysis suggests, established concepts like undue influence or fraud have analogues in the neuromarketing context – it will be the task of skilled advocacy to draw those lines persuasively in court.

Fourth, and perhaps most profoundly, the discussion around cognitive liberty signifies that we may be on the cusp of recognizing new human rights for the neuro-digital age. Just as the 20th century saw privacy and data protection rise to prominence as legal rights in response to technological surveillance, the coming years could see mental self-determination enshrined in constitutions and international conventions. Such recognition would provide a powerful normative backstop: a clear statement that the "freedom of the mind" is inviolable. This could drive legislation, for example, laws explicitly forbidding certain neuromarketing practices not just as consumer fraud, but as assaults on human rights. It could also guide courts in balancing interests, namely tilting the balance against companies when a practice impinges on cognitive liberty, much as they would when privacy or free expression is at stake. Of course, operationalizing cognitive liberty will require careful line-drawing (not every influence on the mind is unlawful – education,

persuasion, even advertising per se are part of society). The law will need to distinguish between legitimate influence and illicit manipulation. That line likely lies where the influence becomes hidden, irresistible, or antithetical to the person's own interests absent the influence.

Finally, the conducted analysis highlights that protecting consumers in digital markets is a moving target, one that demands interdisciplinary collaboration. Law cannot operate in isolation here, but insights from neuroscience, psychology, and marketing studies are essential to understand what techniques truly do, how strong their effects are, and what safeguards might work. Policymakers should engage with scientists to define safe versus dangerous neuromarketing, and perhaps certifications or impact assessments could be mandated – akin to data protection impact assessments – for marketing campaigns using advanced neuro-analytics, to evaluate risks to consumer autonomy before deployment.

In closing, neuromarketing exemplifies the double-edged sword of technological progress in commerce. It has the capacity to enrich consumer experiences and align products more closely with our desires. Yet it also has a dark side that, if unchecked, could reduce consumers to mere subjects of influence, undermining the trust and freedom that underlie genuine market choice. The legal system's challenge is to keep our digital marketplaces free and fair when the battleground is the human mind itself, and meeting that challenge will require vigilance, creativity, and a steadfast commitment to the proposition that even as marketing enters the neural domain, the age-old principle volenti *non fit injuria* – injury cannot be done to one who consents – must not be turned on its head. Consent, to mean anything, must remain informed and voluntary, not engineered or extorted from the recesses of our brains. Ensuring that is the work of the coming years for jurists and lawmakers. With thoughtful action, we can secure an ethical framework where neuromarketing serves consumers rather than subverts them, and where the edge of innovation never cuts away the rights and dignity of the

individual.

CLIMATE CHANGE, ENVIRONMENTAL SUSTAINABILITY AND THE CORPORATE PURPOSE

Marco Bodellini[*] - GiJin Yang[**]

ABSTRACT: *Climate change and environmental sustainability-related issues are increasingly regarded as potentially having an impact also on the corporate purpose. Since climate change and environmental degradation are – also – a man-made phenomenon, certainly capable to affecting human communities and activities without any geographical restraints, common efforts are needed to effectively fight them. On these grounds, both financial and non-financial institutions should proactively contribute to the solution of such problems.*

Nevertheless, the traditional understanding of the corporate purpose seems to fall short on prompting corporations to play a more proactive role vis-à-vis these challenges. A more solid legal basis to re-conceptualize, to some extent, the role of corporations in modern times is hence necessary and might be provided by the so-called double materiality principle, which has been embedded in the European Union legal framework.

[*] Associate Professor of Law and Economics at University of Bergamo.
[**] Professor of Commercial Law at Jeonbuk National University.
This paper was presented at the Mercatus Center - George Mason University, in Fairfax – Virginia (United States of America) on 24 April 2025. Although jointly elaborated, this article has been drafted as follows: paragraphs 1, 2, 3, 4, 5, 6 and 8 by Marco Bodellini and paragraph 7 together by Marco Bodellini and GiJin Yang.

and environmental sustainability and the double materiality principle as a tool to prompt the needed paradigm change in doing business. - 8. Concluding remarks.

1. Climate change and environmental sustainability-related issues are increasingly regarded as potentially having an impact also on the corporate purpose. While traditionally corporations have been considered as being - primarily, if not exclusively - bound to value maximization in the interest of their shareholders, challenges have emerged in recent times that demand a paradigm shift which needs to get corporations involved in the first line. Climate and environmental emergencies offer a primary example of such a need.

Climate change and environmental degradation are – also – a man-made phenomenon, certainly capable to affecting human communities and activities without any geographical restraints. Fighting and preventing their consequences are thus a responsibility which cannot be left on the shoulders only of countries, some business sectors, or public institutions. Instead, common efforts are needed, and it is thus fundamental that corporate entities – both financial and non-financial institutions – do not lag behind, but rather proactively contribute to the solution of this problem.

Nevertheless, the traditional understanding of the corporate purpose, as based on well-known principles, such as shareholder value maximisation, stakeholderism and, to some extent, also the enlightened shareholder value, seems to fall short on prompting corporations to play a more proactive role *vis-à-vis* these challenges. A more solid legal basis to re-conceptualize, to some extent, the role of corporations in modern times is crucial and can be offered by the so-called double materiality principle, which has been embedded in the European Union legal framework. On these grounds, if corporations will be called upon to embody in their decision-making the two opposite dimensions of sustainability (*i.e.* the risk dimension and the externality/opportunity dimension) they might become able to contribute to the paradigm shift which is required to face the climate and environmental challenges

without betraying the legitimate expectations of their shareholders.

In dealing with these issues, this paper proceeds as follows. Section 2 analyses the shareholder value (or primacy) principle also known as shareholderism. Section 3 deals with stakeholderism. Section 4 seeks to reconcile shareholderism and stakeholderism. Section 5 explores the so-called enlightened shareholder value. Section 6 looks into the judicial application of the enlightened shareholder value. Section 7 focuses on the so-called double materiality principle. Section 8 concludes.

2. In its most uncompromising formulation, the shareholder value principle posits that directors, in the exercise of corporate management, owe their duties exclusively to shareholders, with their mandate confined to the pursuit of short-term profit maximization for the shareholders' benefit.[1] When the academic debate sparked in the 1930s surrounding the proper purpose of public corporations, "shareholderism" was the view upheld by Adolph A. Berle, according to whom «… all powers granted to a corporation or to the management of a corporation, or to any group within the corporation whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears».[2]

The issue of the divergence of interests between corporate directors and shareholders had already assumed central importance in Berle's scholarship.[3] His views, however, were further developed in a famous contribution published in the Harvard Law Review in 1932, entitled «Corporate Powers as Powers in a Trust». Although acknowledging that the specific context of business enterprises might

[1] See KEA, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 581.
[2] See BERLE, Corporate powers as powers in trust, in Harvard Law Review, 1931, 44(7), 1049.
[3] See BERLE and MEANS, The modern corporation and private property, The Macmillan Company, 1932, *passim*; see also BERLE, Protection of non-voting stock, in Harvard Business Review, 1926, 4, 257-265.

necessitate greater flexibility, the analysis nevertheless drew a parallel between the corporate structure and the trust model.[4] Berle argued, in particular, that any power[5] granted to corporations or their managers – which, in his view, had been increasingly indicated by both laws and academia as being "absolute powers"[6] – should be exercised in the sole interest of shareholders, and in line with the same accountability standards applicable to persons acting in a fiduciary capacity.[7] This led to the conclusion that, despite laws and language possibly pointing to the opposite, «…no power, however absolute in terms, is absolute in fact…».[8] Accordingly, the legitimacy of corporate action ought to be assessed on two levels: first, by reference to the technical rules governing the existence and proper exercise of corporate powers, and second, by reference to equitable principles analogous to those regulating a trustee's conduct toward the beneficiary.[9]

The shareholder primacy theory reached a further milestone in 1970 with Milton Friedman's seminal essay, eloquently titled "The Social Responsibility of Business is to Increase its Profits", published in the New York Times. Friedman argued that a corporation's sole responsibility lies with its shareholders; since corporate executives are employees of the owners, their overriding duty is to act in accordance with the latter's interests. On this basis, he rejected the notion of corporate social responsibility independent of shareholder approval, contending that managers who

[4] BERLE, Corporate powers as powers in a trust, in Harvard Law Review, 1931, 44(7), 1074.
[5] ID., 1050-1072; particularly, corporate powers which according to Berle should have been exercised in the sole interest of shareholders included: the power to issue stock; the power to declare or withhold dividends; the power to acquire stocks in other corporations; the reserved power of the corporation to amend its own statutes; and the power to transfer the corporate enterprise to another enterprise by merger, exchange of stock, sale of assets or otherwise.
[6] For a discussion of the background to the BERLE-DODD debate and of the increased freedom left to corporate managers in the US at that time, see Macintosh, The issues, effects and consequences of the Berle-Dodd debate, 1931-1932, in Accounting, Organizations and Society, 1999, 24, 139-144.
[7] Id., 144.
[8] See BERLE, Corporate powers as powers in a trust, in Harvard Law Review, 1931, 44(7), 1073.
[9] ID., 1049.

unilaterally assume such responsibilities act in a fundamentally subversive manner. Because contributions to the community entail significant financial commitments affecting corporate assets, Friedman maintained that such initiatives should not be mandated by the legislator but rather voluntarily undertaken by shareholders, as the ultimate decision-makers regarding the allocation of corporate resources.

Although often criticized for its individualistic underpinnings, Friedman's theory has also been regarded as difficult to sustain, particularly from a legal standpoint. Corporate law does not recognize shareholders as the owners of the corporation itself, but merely as holders of specific securities - namely, shares - issued by it. The rights conferred by such securities are not sufficiently far-reaching to grant shareholders direct control over, or direct access to, corporate assets. These remain under the authority of the board of directors, such that any influence shareholders may exert over the company must necessarily be exercised indirectly, through their capacity to influence the board.

Conversely, the shareholder value theory found strong support among the so-called 'contractarians', namely, corporate law scholars who conceptualize the company as a network of complex, consensual, and predominantly private contractual relationships - whether explicit or implicit - among those who voluntarily associate with it. Within this contractual framework, the various constituencies of the firm (such as employees, creditors, and even managers) are generally entitled to fixed remuneration, whereas shareholders must rely on an implicit contract that grants them rights only over the residual assets remaining once all other obligations have been satisfied. In this sense, they are often identified as the sole residual claimants and ultimate risk-bearers in public corporations. On this basis, shareholder primacy has been defended as a doctrinal foundation for directors' fiduciary duties.

From a corporate law perspective, however, shareholders are effectively treated as residual claimants only in bankruptcy. In ordinary circumstances,

shareholder remuneration is contingent upon the company's financial performance and, crucially, upon the board of directors' decision to distribute dividends. Even when such distributions are permitted, the decision-making authority resides with the board, which retains discretion over the allocation of earnings and the management of corporate resources. It is therefore more accurate to regard shareholders not as the exclusive, but rather as one among several groups that may be characterized as residual claimants or risk-bearers. Like other constituencies within the firm - employees, creditors, or managers - they may benefit disproportionately or bear heavier burdens depending on the company's economic fortunes, often extending beyond what is expressly stipulated in their contractual arrangements.

A third, and arguably more compelling, justification for shareholder primacy may be derived from the problem of the so-called 'agency costs'. This approach regards corporate managers as imperfect agents: although, in principle, they ought to exercise their discretion in the interest of all corporate constituencies alike, in practice they remain subject to human limitations and may at times prioritize their own interests over their fiduciary duties. Such divergences generate agency costs, which can only be mitigated where managerial performance is capable of being effectively monitored and assessed. In this respect, the pursuit of shareholder wealth maximization provides the most reliable standard for evaluating managerial conduct. Share prices - serving as a primary proxy for shareholder returns - are relatively easy to observe, whereas attributes such as employee security, consumer satisfaction, or other benefits accruing to non-shareholder constituencies are far more difficult to quantify. Accordingly, focusing on shareholder value not only facilitates an objective measure of managerial performance but also constrains the scope for managers to advance their own interests at the expense of the corporation. Conversely, if directors were required to be simultaneously accountable to all corporate stakeholders - including creditors, who are often able to negotiate contractual safeguards for their

participation - the task of balancing such heterogeneous interests would likely prove unworkable. The result would be a heightened risk of managerial error and, paradoxically, an increase in the very inefficiencies shareholder primacy is intended to reduce.

It has also been pointed out that other categories of stakeholders that company law identifies, (the so-called "constituencies"), actually find themselves in a position which is stronger than the one of shareholders and less vulnerable to directors' discretion, since they are often able – as it is typical the case of creditors – to contractually negotiate specific clauses for their participation into the corporate entity.[10] In addition, the weakness of shareholders' position *vis-à-vis* other constituencies might also lie in the fact that it is way more difficult for them to leave the company in case of disagreement with how the latter is managed, or with the values it promotes in the course of its business. This issue clearly concerns all investors in a firm, independently of whether their engagements have been envisaged for a shorter or a longer term. In fact, while it could be easier for employees or even more for consumers who disliked a particular company's way of operating to move towards a competitor, things would not be as automatic for shareholders, who could decide to sell their capital participation but would - first of all - need to find somebody willing to acquire that,[11] and might still have to endure considerable sacrifices in terms of sale price.[12]

The interest that shareholders necessarily have in the maximization of the company's profits can also be seen as a driver of economic efficiency, since their satisfaction is probably the most fruitful and least costly – in purely economic terms –

[10] See ZINGALES, Corporate Governance, in NEWMAN (ed), The New Palgrave Dictionary of Economics and the Law, Palgrave Macmillan, 1998, 501.

[11] ZINGALES and WALDOCK, Capitalisn't – Shareholders vs. Stakeholders, 29 August 2019, available at https://capitalisnt.com/episodes/shareholders-vs-stakeholders-qtK3q9_Z/transcript.

[12] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 584.

objective for directors to pursue.[13] In other words, and in light of the above considerations, shareholder primacy has been indicated as more certain and easier to administrate for many of the parties involved; these include courts, fundamental actors for the purpose of this analysis, to whom this principle allows a more rational review of managerial conduct.[14]

The possibility that giving priority to the shareholders' interest in making profits might actually end up benefitting society at large should not be excluded either. While ensuring an easier traceability of managerial decisions, in fact, shareholderism could also promote a more efficient – if not optimal – allocation of capital, thereby ensuring that precious resources are not diverted from key objectives such as higher quality controls or new hirings.[15]

3. To fully grasp the debate surrounding the role of the modern corporation, it is essential to acknowledge the emergence of a second perspective diametrically opposed to pure shareholder value. While the latter has long held predominance - particularly within Anglo-Saxon jurisdictions - its shortcomings have been often identified. Some of these critiques are relatively modest, such as the contention that the shareholder value principle was originally devised as a tool to address conflicts between majority and minority shareholders, and that its application as a basis for asserting the primacy of shareholders as a whole over other stakeholders extends beyond its proper scope.[16] Others, on the other hand, do in fact trigger the question of the compatibility of such an approach with the current legal and economic

[13] See VAN DER WEIDE, Against Fiduciary Duties to Corporate Stakeholders, in Delaware Journal of Corporate Law, 1996, (21), 27, 56-57.

[14] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 584.

[15] ZINGALES and WALDOCK, Capitalisn't – Shareholders vs. Stakeholders, 29 August 2019, available at available at https://capitalisnt.com/episodes/shareholders-vs-stakeholders-qtK3q9_transcript.

[16] See SMITH, The Shareholder Primacy Norm, in Journal of Corporate Law, 1998, 23, 277 – 279.

necessities to move towards sustainability. It can be argued, in particular, that the sole focus of this principle is the creation of value in the short-term. In this way, long-term social wealth is not maximized as it would probably be optimal in today's context, and the position of other actors both within (*e.g.* employees and suppliers) and outside (*e.g.* consumers and members of the community where the firm is active) a company is not adequately taken into account.[17]

Moreover, some structural flaws are present in the shareholder primacy approach as well. The quality of shareholders as sole residual risk bearers within the company has first of all been contested, since there can also be other constituencies assuming firm-specific types of risk by making their own firm-specific investments. An example of this could be employees whose training is very unique to the activities they perform for a certain corporation, and could not be of any use if they were to be relocated anywhere else.[18]

The identification of shareholders as actual owners of the firm, and not just of their respective shares, can also be seen as inconsistent with the concept of the company as a separate legal entity.[19] At the same time, viewing the corporation as its own agglomeration of constituents – in line with the so-called "entity model", which, as further argued below, is very often preferred in practice not only by company law, but also by shareholders and managers themselves[20] - would require the board to take into account the interests of other stakeholders, such as employees, creditors and the overall community.[21]

To address such critical points, a new and opposite approach to the role of

[17] See MITCHELL, Corporate Irresponsibility: America's Newest Export, Yale University Press, 2001, *passim*.
[18] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 585-586.
[19] ID., 586.
[20] STOUT, Bad and Not-so-Bad Arguments for Shareholder Primacy, in Southern California Law Review, 2002, 75, 1208.
[21] ID., 1208.

corporations emerged already in the 1930s American academic debate, where it was mainly promoted by Merrick Dodd. In his view, companies are to be treated as economic institutions having a social service role to play in the interest of a wider array of different stakeholders, alongside their function of merely ensuring profits for their shareholders.[22] Dodd's response to the primacy of shareholders' interests was based, precisely, on the argument that when a company becomes a separate legal entity upon incorporation, it should not be seen as a mere aggregation of shareholders.[23] All in all, as Berle himself recognized, it was generally accepted that directors in an incorporated enterprise are primarily supposed to act as fiduciaries of the entity itself, and not of its members.[24] Throughout its lifecycle, it is such entity that will have the capacity to enter into contracts with third parties. Consequently, lawmakers should focus on creating accountability mechanisms for companies towards the society where they operate and that is affected by their operations[25] – provided that, ideally, business executives should already have committed to fulfill such responsibilities on a voluntary basis.[26] Dodd believed this approach to be aligned with the public opinion's beliefs at that time,[27] which had previously proven capable of influencing managerial conduct[28] and which were growing «… in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function …».[29]

[22] See KERR, Sustainability Meets Profitability: The Convenient Truth of how the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship, in Cardozo Law Review, 2007, 29(2), 636.

[23] See DODD For Whom Are Corporate Managers Trustees?, in Harvard Law Review, 1932, 45(7), 1160, also making reference to the possibility of defining any organized group as «… a body which from no fiction of law but from the very nature of things differs from the individuals of whom it is constituted».

[24] BERLE, Corporate powers as powers in trust, in Harvard Law Review, 1931, 44(7), 1162-1163.

[25] DODD, For Whom Are Corporate Managers Trustees?, in Harvard Law Review, 1932, 45(7), 1146-1148.

[26] ID., 1153.

[27] ID., 1153.

[28] ID., 1154.

[29] ID., 1148.

This "pole", opposite to the shareholder value principle, has shown many nuances and has been identified with many names. The idea that companies should not be seen as bundles of contractual relationships but rather as communities «… of interdependence, mutual trust and reciprocal benefit …»,[30] for instance, is referred to as "communitarianism", pointing to the importance that any value added to the community should have in understanding whether a company is a good or a bad one.[31] "Stakeholderism", on the other hand, is slightly different, as it focuses on the need to consider and involve stakeholders in the operations of the company on the basis not only of ethics and fairness, but also of economic evaluations.[32] It is important to underline that "stakeholderism" would require companies to "broaden their horizons" and consider a wider range of interests on their own initiative, without being required to do so by external legislation and regulation.[33] One could also refer to a "pluralist approach", in the sense that the interests of different stakeholders should not just be considered in their own right but also balanced against those of shareholders, so as to evaluate which one would be the best course of action for the corporation.[34]

The vague definitions and boundaries of this approach have, however, somehow weakened its credibility as an alternative to the pure shareholder value. In particular, it has been argued that "stakeholderism" and the "pluralist approach" tend to grant too wide a margin of discretion to directors. As the board would no longer be fully accountable to shareholders, in fact, its decisions – even when purely opportunistic – would become more difficult to monitor, and easier to justify by simply

[30] See MILLON, Communitarianism in Corporate Law: Foundations and Law Reform Strategies, in MITCHELL (ed), Progressive Corporate Law: New Perspectives on Law, Culture and Society, Westview Press, 1995, 10.
[31] See SULLIVAN and CONLON, Crisis and Transition in Corporate Governance Paradigms: The Role of the Chancery Court of Delaware, in Law and Society Review, 1997, 31(4), 713.
[32] On this see PLENDER, A Stake in the Future: The Stakeholding Solution, UNKNO, 1997, *passim*.
[33] See BEBCHUCK and TALLARITA, The Illusory Promise of Stakeholder Governance, in Cornell Law Review, 2020, 106, 1, 177.
[34] ID., 115.

hiding behind what is believed to be the best interests of a certain constituency.[35] It should also be pointed out that not even reliance on such theories would offer strong guarantees that the interests of stakeholders would be considered more carefully. In other words, where the directors' discretion was to be broadened as described above, these might still prefer to give priority to the interests of the shareholders, as under most applicable company law frameworks they are the only ones effectively able to appoint and dismiss members of the board.[36] Finally, "stakeholderism" has been criticized for its idea that the involvement of a wider variety of actors should come from within the corporation itself and not be imposed by means of regulation, given that this could limit and delegitimize regulatory intervention.[37]

Despite these flaws, it cannot be denied that an alternative attitude towards the role of corporations, which is more sensitive to the necessities of all affected categories rather than simply revolving around profit, would likely fit better with the challenges of contemporary times, often requiring a shift towards new and more cautious business models. This idea gained particular momentum not only in light of the current climate crisis but also in the aftermath of the Covid-19 pandemic, whose repercussions on economy and society have quickly manifested themselves, for instance through massive employees' dismissals and the reduced capability of fulfilling contractual obligations *vis-à-vis* creditors.[38] It is equally noteworthy that empirical

[35] ID., 115.

[36] ID., 161-164, also evaluating the possibility that stakeholders are given voting rights in the directors' election to advance their interests.

[37] ID., 168-175.

[38] See WINTER, Addressing the Crisis of the Modern Corporation: The Duty of Societal Responsibility of the Board, 2020, *passim*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574681, where the author identifies the need to introduce a duty of societal responsibility for board members alongside the traditional duties of loyalty and care – by intervening on directors as individuals with their own beliefs and consciousness, despite the de-humanizing factors which have characterized company law in recent times. Still, the author does not exclude that such a solution could possibly emerge from law. Particular reference in this regard is made to the Dutch Code of Corporate Governance, imposed on listed companies on a "comply-or-explain" basis, but whose recognition may require statements on

evidence on corporate conduct during the Covid-19 crisis suggests the limited effectiveness of more inclusive models. Likewise, contemporary geopolitical dynamics have increasingly relegated environmental and social concerns to secondary status, subordinating them to objectives such as economic resilience and competitiveness. Nonetheless, the scale of the transition toward a greener economy is such that meaningful progress cannot be confined to the efforts of a single state, a single sector, or public actors alone. In other words, no strategy can succeed without requiring corporations to pursue objectives beyond mere profit maximization—an argument that may well reinvigorate support for a more stakeholder-oriented conception of the corporation.

4. As the previous paragraphs have shown, both approaches on the purpose of the modern corporation have faced significant challenges and yielded only partial solutions; neither has succeeded in posing the foundations for a comprehensive framework capable of reconciling the diverse interests coexisting within the firm. Against this background, it is worth considering however whether the two perspectives - shareholderism and stakeholderism - each marked by its own strengths and weaknesses, are in fact as irreconcilable as often portrayed, or whether avenues for convergence might exist.

An examination of the historical and economic context in which the Berle–Dodd debate first crystallized this dualism, beginning with Berle's articulation of shareholder primacy, makes clear that the arguments advanced at the time were deeply rooted in a corporate landscape significantly different from the current one. During the 1920s, the regulation of corporate activity in the United States was largely within the remit of individual States, which frequently adopted divergent standards and assigned to

the part of management boards which, as indicated by the national Supreme Court, could qualify as binding engagements *vis-à-vis* shareholders. A similar model could be applied to voluntary statements of directors concerning the social objectives and interests they might want the corporation to pursue.

corporations wide discretion in the disclosure of information to shareholders. Coupled with increasingly dispersed share ownership - given that enterprises were typically financed through the issuance of securities or organized as investment trusts - this regulatory environment effectively left managerial power substantially unchecked and corporate control largely concentrated in the hands of directors.[39] In the absence of clear provisions on the matter, shareholders were often forced to resort to the judiciary in order to settle their divergences with corporate executives.[40] An early example of this may be found in the 1919 Dodge vs Ford Motor Co. case, where the company was eventually compelled by the court to pay dividends to its shareholders instead of investing in Henry Ford's goal of increasing employment while maintaining his products as accessible as possible.[41]

Thus, what originally prompted Berle's reflection was the consideration that the public more at large was totally unprotected from such a lack of corporate accountability.[42] In this sense, it could be argued that his approach – although normally considered at odds with the consideration by companies of wider societal interests on which they might have an impact – was in fact quite reconcilable with that of Dodd, considered, on the other hand, to be the main supporter of stakeholderism. Both scholars were, eventually, concerned with the difficulty of controlling corporate conduct, and advocated for regulatory intervention in this regard. The major difference between them revolved rather around the question of whom such greater accountability should have been owed to: *i.e.* just shareholders or, as it will be discussed in further detail in the next section, a wider variety of groups. The latter option was rejected by Berle, as he feared that it would have led to greater powers

[39] See MACINTOSH, The issues, effects and consequences of the Berle-Dodd debate, 1931-1932, in Accounting, Organizations and Society, 1999, 24, 140.
[40] ID., 140.
[41] *Dodge v. Ford Motor Co.*, 204 Mich 459; 170 NW 668 (1919).
[42] See MACINTOSH, The issues, effects and consequences of the Berle-Dodd debate, 1931-1932, in Accounting, Organizations and Society, 1999, 24, 143.

being entrusted to managers in general terms.[43]

Further parallels between the two positions become apparent when considering Berle's immediate response to Dodd's arguments. While Berle acknowledged that corporate responsibility was gaining prominence and undergoing a transformation, he remained unwilling to accept that such developments extended beyond the realm of theoretical speculation. In his view, the absence of adequate enforcement mechanisms to ensure that managerial decisions took account of interests other than those of shareholders meant that corporate executives would never be genuinely attentive to their broader social responsibilities.

What is particularly noteworthy about the Dodd–Berle debate, however, is that both of them gradually revised their respective positions, ultimately adopting views that were no longer diametrically opposed. This evolution was especially evident in Berle's scholarship, who eventually conceded "victory" to his counterpart by declaring that «The argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention».[44]

Commentators in more recent times seem not to have completely settled on which one of the two approaches actually had the greatest relevance in shaping business conduct. It was argued, for instance, that even though Berle ended up admitting the defeat of shareholderism, his theories ended up enjoying way greater popularity than Dodd's throughout the second half of the 20th century, especially in the US[45] where «… dominant understandings of the corporation's role and purpose … remain decidedly shareholder-oriented».[46] The empirical analyses conducted by others, conversely, reached the conclusion that – except in very limited instances –

[43] ID., 146-147.
[44] See BERLE, The 20th Century Capitalist Revolution, Hartcourt, Brace, 1954, 169.
[45] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 581.
[46] See HO, Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder Stakeholder Divide, in Journal of Corporation Law, 2010, 36(1), 72.

corporate laws do allow directors to moderately disregard the exclusive interests of shareholders when this can be justified as serving the (often intangible) interests of other constituencies, and that even those same directors and shareholders often adhere to a more inclusive conception of the corporation as an entity itself composed of different categories of stakeholders.[47]

What is clear, however, is that the stance of major U.S. corporations - as expressed through the well-known CEOs Business Roundtable - has shifted repeatedly between the two poles of the debate. In 1981, the Roundtable explicitly acknowledged that modern companies operate within a complex web of competing interests, arguably in reaction to Milton Friedman's critique of socially conscious executives as deviating from their proper role. By contrast, its 1997 statement adopted the opposite view, affirming that the primary purpose of the corporation was to generate returns for its owners. In 2019, the Roundtable appeared to embrace an intermediate position, akin to the 'Enlightened Shareholder Value' model discussed below. While CEOs recognized the importance of considering the objectives of non-shareholder constituencies, they presented this as compatible with, and not subordinate to, shareholder interests, and suggested that no legislative intervention was required to prioritize one over the other. Yet the question remained unresolved as to whether stakeholders' interests were to be genuinely maximized, or merely accommodated insofar as doing so did not conflict with shareholder value. Against this backdrop, one might argue that the history of the shareholder–stakeholder divide has, at least in part, been a history of misunderstandings. Both approaches have at times been portrayed as more rigid and irreconcilable than they truly are. Milton Friedman's work provides a telling example. It may be contended that Friedman did not, in principle, reject the idea that individuals within a corporation could have a social conscience or pursue

[47] See STOUT, Bad and Not-so-Bad Arguments for Shareholder Primacy, in Southern California Law Review, 2002, 75, 1208-1209.

social responsibilities. Rather, he insisted that such responsibilities could only be exercised in their capacity as principals, not as corporate agents. In other terms, his objection related to the use of corporate resources for social or charitable purposes at the discretion of managers, which he regarded as tantamount to spending shareholders' money without authorization.[48] This perspective aligns with what other actors - notably courts - have observed regarding the organizational forms available to enterprises at incorporation. Where a corporation elects the standard for-profit form, management assumes a fiduciary duty to promote corporate value, and thereby generate profits, in the interests of shareholders. Where profit maximization is not the entity's primary objective, alternative legal forms are available, such as the benefit corporation. It should be emphasized, however, that any serious discussion of corporate purpose must also take into account the complex decisions managers are required to make in practice. In such context, strict adherence either to shareholder primacy or to pluralistic stakeholder models proves difficult. An example is the decision of Dick's Sporting Goods' CEO, who - responding to heightened social sensitivities around gun control in the United States - chose to discontinue sales of assault weapons nationwide, despite the likely reduction in market share and adverse impact on shareholder profits. Decisions of this nature are difficult to take and to assess, and their justification is better captured by intermediate approaches that move beyond the rigidity of both pure shareholderism and pure stakeholderism.

While Friedman contended that a corporation's social responsibility lies in adhering to shareholder wishes, cases such as Dick's Sporting Goods - and, in a different vein, Trinity Church vs Walmart - demonstrate that shareholders' preferences may extend beyond the pursuit of greater profits. In the context of widely dispersed ownership, particularly in public companies, aggregating diverse shareholder

[48] See FRIEDMAN, The Social Responsibility of Business is to Increase its Profits, in The New York Times Magazine, 13 September 1970.

conceptions of utility becomes extremely challenging. The practical solution often consists of focusing on the lowest common denominator and in this regard most investors expect financial returns on their capital. Yet, this does not preclude them from having additional values or beliefs they may wish to see reflected in the firm's conduct. Within a corporate law framework, that would result in further enhancing communication with shareholders, for instance through renewed voting rules on the presentation of proposals at the general meeting.[49] Practical solutions could be found in maintaining shareholders as the primary focus of corporate action, while trying to maximize their "welfare" rather than just their "value". This would include taking into consideration whatever objective or principle shareholders were to consider important for their investment, even when this was to go beyond mere profit-seeking.[50]

5. Created as a "pathway between the shareholder-stakeholder divide",[51] the principle of Enlightened Shareholder Value finds its most explicit expression in Section 172(1) of the UK Companies Act, enacted on 8 November 2006. The origins of this provision can be traced back to March 1998, when the Company Law Review Steering Group was tasked with revising the 1985 Companies Act. In the course of its work, the Steering Group directly identified the two opposing approaches previously discussed: shareholder primacy, that was identified as having been prevailing in the UK until then, and "pluralism",[52] which was then rejected since it would have required too many

[49] Voting procedures, and in particular the rules governing the inclusion of shareholders' proposals in proxy statements ahead of the general meeting, were at the core of the *Trinity Church v Walmart* dispute, eventually ruled in favor of the company.

[50] See ZINGALES and HART, Companies Should Maximize Shareholder Welfare Not Market Value, in Journal of Law, Finance, and Accounting, 2017, 2, *passim*.

[51] See HO, Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder Stakeholder Divide, in Journal of Corporation Law, 2010, 36(1), *passim*.

[52] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 588-589.

modifications of national laws.[53] Later in time, the Group even declared that implementation of a "pluralist" approach in the UK would have been neither workable nor desirable.[54]

Seeking to reconcile the incompatibilities between the two approaches and to ensure that all constituencies within the firm might benefit without undermining economic prosperity and competitiveness, the Group ultimately endorsed a middle-ground solution: the principle of Enlightened Shareholder Value.[55] Starting from the (already widely shared) assumption that, as its name suggests, the best interest of shareholders should have been prioritized in managing the company, this theory still «… eschewed an 'exclusive focus on the short-term financial bottom line' and sought a more inclusive approach that valued the building of long-term relationships …».[56] This was supposed to cover not only corporate relationships with employees, customers, suppliers and so on, but also the company's position within the community where it operates, including, importantly, the impact of its activities on the environment.[57] In other words, the Steering Group maintained the interests of shareholders at the core of its novel view of the focus of corporate activities. This did not mean, however, that different positions should not be added to the overall picture that the board is required to look at when adopting decisions: such different positions are exactly what adds to decision-making an element of "enlightenment",[58] and they seek to provide a broader and more detailed context to the fulfillment of the fiduciary

[53] The Company Law Review Steering Group, Department of Trade and Industry, Modern Company Law for a Competitive Economy: Completing the Structure, 2000, 37-38.
[54] ID., 34.
[55] See Keay, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 589-590.
[56] Id., 590.
[57] The Company Law Review Steering Group, Department of Trade and Industry, Modern Company Law for a Competitive Economy: Developing the Framework, 2000, 12–14.
[58] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 592.

duties normally imposed on directors.[59] In this sense, this approach could be further connected to the principle of Enlightened Value Maximization, according to which maximization of any long-term value requires that no relevant group is mistreated or ignored.[60]

On these grounds, Section 172 (1) of UK Companies Act provides a detailed list of the stakeholder-related factors to be taken into consideration by the board as complementary to shareholders' profit in the short-term. These are:

a. the likely consequences of any decision in the long term;
b. the interests of employees, as formerly protected under Section 309 of the Companies Act 1985;[61]
c. the need to foster business relationships with suppliers, customers, and so on. The broader category of creditors, on the other hand, is specifically dealt with by Section 172 (3) covering situations where the firm is facing financial difficulties;[62]
d. the impact of the company's operations on the environment and on the community – generally intended as covering both the public interest in general and the interests of businesses, people and institutions of the territory where the company is located;[63]
e. the desirability of the company maintaining a reputation for high standards of business conduct;
f. the need to act fairly.

Turning from the UK to the United States, it is noteworthy that an approach akin to that embodied in Section 172(1) can be found in the so-called constituency

[59] See Corporations and Markets Advisory Committee, The Social Responsibility of Corporations, 2006, 103-107.
[60] See JENSEN, Value Maximization, Stakeholder Theory and the Corporate Objective Function, in European Financial Management, 2001, 7(3), 309.
[61] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 593.
[62] ID., 593-594.
[63] ID., 594

statutes, which permit directors to take into account the interests of stakeholders beyond the pursuit of profit alone. In practice, however, the application of these statutes has remained relatively limited - most notably in the context of takeover regulation - and has generated only a modest body of case law;[64] such documents though remain an interesting example of the legislative attempt to ensure that the harshest version of shareholder value is not applied, and that short-termism is not excessively promoted.[65] The first of these acts - the 1983 Pennsylvania constituency statute - expressly provides that the board is not required to give precedence to the interests of any particular constituency - not even those of shareholders. By contrast, other statutes, such as that of Connecticut, adopt a position more closely aligned with Section 172(1) of the UK Companies Act 2006, by explicitly obliging directors to take non-shareholder interests into account. In either case, however, it may be argued that the general effect of constituency statutes largely mirrors that pursued by the UK provisions,[66] as, in both cases, consideration of the interests of any other constituency within the corporation would still have to be rationally related to the consideration of shareholders' interests.[67]

It is important to point out that US constituency statutes have sometimes been subject to one of the key criticisms normally raised against "stakeholderism" or "pluralistic" approaches, which is that by reducing directors' accountability they encourage opportunistic behavior,[68] as any decision could be justified and hidden

[64] In particular, only three constituency statutes have even been cited in court, and only in one occasion (*Georgia Pacific Corp v Great Northern Nakoosa Corp*) reference to a statute led to a decision in favor of the managers.

[65] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 594.

[66] ID., 594-595.

[67] See HANKS JR, Playing With Fire: Nonshareholder Constituency Statues in the 1990s, in Stetson Law Review, 1991, 21, 97, 102.

[68] See CAMPBELL JR, Corporate Fiduciary Principles for the Post-Contractarian Era, in Florida State University Law Review, 1996, 23, 561, 622.

behind the goal of protecting some unspecified constituency within the firm. The same conclusion would, however, hardly be reached with regard to Section 172 (1), which clearly offers protection to board members as long as their decisions still consider the interests of shareholders before all others.[69]

Nonetheless, several criticisms may be raised regarding the effective implementation of Enlightened Shareholder Value as articulated in the Companies Act 2006. A first issue concerns the wording of Section 172(1), and in particular the meaning of the phrase 'a director of a company must … have regard'. It remains unclear whether this obliges directors to treat the interests of stakeholders as ends in themselves, or merely as instrumental considerations to the overarching objective of promoting shareholder value. The Company Law Review Steering Group ultimately endorsed the latter interpretation.[70] In effect, the wording of the provision in question imposes only a relatively weak obligation on directors to take account of a broader range of interests beyond shareholder benefit, and to accommodate them where possible, provided that the promotion of shareholder welfare remains a non-derogable objective.[71] This implies that if directors were faced with a choice between two courses of action - one generating greater marginal benefits for shareholders, and another one more protective of the interests of one or more constituencies identified in Section 172(1) - and opted for the latter on the grounds that it would nonetheless advance the company's overall success and thereby indirectly benefit shareholders, it could still be contended that such a decision would not fully realize the objectives that Section 172(1) is intended to promote.[72]

[69] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 596.
[70] ID., 597
[71] See DAVIES, Enlightened Shareholder Value and the New Responsibilities of Directors, Lecture at University of Melbourne Law School, inaugural W E Hearn Lecture, 4 October 2005.
[72] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 597.

The provision's reliance on good faith as the benchmark for assessing managerial conduct has also been regarded as highly problematic. Its inherent vagueness risks rendering such conduct virtually immune from challenges. In this respect, it is noteworthy that, in addressing the Steering Group's concerns, the British government emphasized that directors, when determining what would best promote the interests of the company, are required to consider in good faith all factors that it is practicable to identify in the circumstances of the case. Moreover, it was clarified that such material factors should include «… (a) the likely consequences (short and long term) of the actions open to the director, so far as a person of care and skill would consider them relevant; and (b) all such factors as a person of care and skill would consider them relevant…».[73]

Importantly, however, these indications – originally formulated in a draft bill – were then removed from the final version of the document, and incertitude thus remained with regard to this point.[74] Similarly, the adoption of the Companies Act 2006 did not definitively settle the question of how boards should deal with conflicts among the interests of different groups of stakeholders – a doubt which had been raised with reference to US constituency statutes as well.[75]

All of the foregoing considerations ultimately raise the question of the actual impact - if any - of the shift toward an 'Enlightened Shareholder Value' model within the UK framework. Section 172(1) of the Companies Act 2006 was never intended to stand as an isolated provision. The Steering Group's proposal coupled it, for example, with a new obligation imposed on listed companies and certain other large enterprises to publish Operating and Financial Reviews, detailing how the interests of different

[73] Clause 2(b) of Schedule 2, draft Bill annexed to Department of Trade and Industry – Government White Paper, Modernising Company Law, Command Paper Cm 5553–1 (Comment) and 'Modernising Company Law: Draft Clauses', Command Paper 5553–11, Draft Companies Bill.
[74] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 598.
[75] ID., 599.

stakeholders had been taken into account.[76] This led some commentators to believe that the UK was actually shifting towards a more European and stakeholder-centric model.[77] In reality, however, the British legislator's shift away from shareholder primacy cannot be considered as too evident or dramatic. It should be noted, first of all, that the disclosure requirements originally envisaged by the Steering Group ended up being substantially reduced in practice, as the government preferred not to impose on companies the filing of additional documents and decided to simply rely on Business Reviews included in the Directors' Report.[78] For listed companies, this obligation was to include a more detailed assessment of the factors likely to influence the future development, performance, or position of the business, together with disclosures concerning environmental issues, the company's workforce, and broader social and community matters. Significantly, however, these requirements - originally set out in Section 417 of the Companies Act 2006 - were definitively repealed in 2013.

From a more general standpoint, furthermore, the approach adopted by UK law on the balancing of different interests within the corporation appears to be way more modest than what is applied, for instance, by other regimes in continental Europe, where stakeholders are conferred direct control over managerial decisions – as it happens in the German "codetermination" system,[79] characterized by the participation of employees' representatives in corporate supervisory bodies.[80] Moreover, Section 172(1) leaves it uncertain whether directors could incur liability for

[76] The Company Law Review Steering Group, Department of Trade and Industry, Modern Company Law for a Competitive Economy: The Final Report, 2001, Volume 1, 49–54.
[77] See CLARKE, Introduction, in CLARKE (ed), Theories of Corporate Governance, Routledge, 2004, 13–14; see WILLIAMS and CONLEY, An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct, in Cornell International Law Journal, 2005, 38(2), 494, 498-499, 510.
[78] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 603.
[79] German Codetermination Act 1976.
[80] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 605.

adopting a decision that takes stakeholder interests into account and promotes the overall success of the company, when in fact it produces a less favorable outcome than an alternative decision that would have disregarded stakeholder considerations altogether.[81] The view that shareholders' interests remain of primary relevance has been further underlined by statements of the Company Law Review Steering Group itself, arguing that the enforcement of Enlightened Shareholder Value should still consider the dynamics of running a commercial enterprise and should not turn «company directors from business decision makers into moral, political or economic arbitrators».[82]

Finally, it is evident that the Companies Act 2006 obliges directors, in discharging their duty of reasonable care, skill, and diligence, to give genuine and substantive consideration to a broader range of interests. This suggests that it is insufficient for the board to merely look at the list of factors set out in Section 172(1).[83] Still, as demonstrated by the very limited use of other UK provisions aimed at safeguarding weaker parties within a company (particularly Section 309 of Companies Act 1985 on the protection of employees, eventually repealed by the 2006 version of the Act),[84] it remains quite difficult, for members of a constituency who feel that their interests have been disregarded, to obtain judicial redress against board decisions. Indeed, shareholders remain, under UK law, the only corporate constituency empowered to bring derivative actions against directors, supplementing the already powerful mechanisms of appointment and removal. Specifically, Section 260(1) of the Companies Act 2006 provides for shareholder derivative actions, enabling proceedings to be initiated in respect of a cause of action vested in the company, with relief sought

[81] ID., 601.

[82] Company Law Review Steering Group, Department of Trade and Industry, Modern Company Law for a Competitive Economy: Developing the Framework, 2001, 14.

[83] Department of Trade and Industry, Guidance to Key Clauses to the Companies Bill, 17.

[84] See KEAY Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 593 and 607.

on its behalf. In such cases, the enforcement of any personal right against directors is excluded.[85]

This kind of actions may be based on actual or proposed acts or omissions on the part of a director, involving negligence, default, breach of duty or breach of trust, which are believed to have damaged the situation of the company.[86] In this sense, it may be observed that, since directors are ordinarily bound by their duties not to the investors but to the company as a separate legal entity, the availability of derivative actions enabling shareholders to sue the board constitutes something of an exception. The rationale for this mechanism lies precisely in preventing wrongs committed against the company from going unremedied merely because they were perpetrated by those in control of the company itself - namely, its managers.

Still, as not all causes of action cannot be considered relevant to the company as an overall legal entity, Section 261 of the Companies Act 2006 provides for continuation of the claim to be authorized by a court, based on the claimant's capability of disclosing the existence of a *prima facie* case.[87] This entails that courts may refuse permission to proceed with a derivative action, and in certain circumstances such refusal is mandatory. These include situations where the court is satisfied that a director acting in accordance with Section 172 would not pursue the claim, where the cause of action arises from a prospective act or omission already authorized by the company, or where the cause of action concerns a past act or omission that has either been authorized in advance or subsequently ratified by the company.[88]

In determining whether to grant permission for a derivative action to proceed, courts are required to take into account specific factors. Under Section 263(3)–(4) of

[85] ID., 607.
[86] Section 260(3) Companies Act 2006.
[87] Section 261(2) Companies Act 2006.
[88] Section 263(2) Companies Act 2006.

the Companies Act 2006, these include: whether the applicant is acting in good faith, whether a director acting in accordance with Section 172 would attach particular importance to the continuation of the claim, whether the company itself has decided not to pursue the claim, and any evidence concerning the views of members without a direct or indirect personal interest in the matter. On this basis, for example, long-term shareholders could seek to challenge board decisions they regard as insufficiently oriented toward long-term objectives, or as failing to promote sustainable relationships with suppliers, customers, or other stakeholders. Comparable effects might arise where employees are also shareholders, or where shareholders are members of the community in which the company operates.[89]

Despite the somewhat privileged position of shareholders, however, these actions could be rendered hardly effective in practice if directors decided to rely on the argument that they acted in good faith.[90] Section 172 (1) and its underlying "Enlightened Shareholder Value" principle, then, appear to be even more innocuous when it comes to the protection of other stakeholders that would probably be forced to limit their demands to injunctive relief or other remedies offered outside company law – such as those granted (at least in theory, way less easily in practice) to creditors in the event of directors engaging in wrongful trading.[91] Administrators or liquidators might also decide to act against directors for breaches of Section 172 (1), but the good faith argument could remain quite difficult to challenge even in such a situation.[92]

6. Although the intermediate approach embodied in Enlightened Shareholder Value has often provided a useful framework for addressing the complex issues

[89] See KEAY, Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach, in Sydney Law review, 2007, 29(4), 609.
[90] ID., 609.
[91] ID., 610.
[92] ID., 609-610.

corporate executives face in day-to-day management, its practical implementation is not without difficulties. Certain aspects of managerial conduct—such as good or bad faith in adopting a particular course of action—can be especially difficult to prove. Moreover, if one considers judicial scrutiny of directors' behavior in related contexts, such as wrongful trading under the UK Insolvency Act, the pattern suggests that courts are generally reluctant to engage in hindsight review and have tended to adopt a lenient stance toward executives, intervening only in cases of manifestly reckless decision-making.[93] Viewed within the broader Anglo-Saxon context, such judicial leniency is consistent with the corporate law doctrine of the business judgment rule, under which managerial decisions are presumed to be taken in good faith for the benefit of the company and are therefore insulated from judicial second-guessing.

In recent years, however, challenges of a global magnitude have arisen that demand an equally global and coordinated response. Climate change provides a paradigmatic example in that it is a fundamentally anthropogenic phenomenon whose effects transcend geographical boundaries and disrupt human communities and economic activity alike. Addressing its consequences cannot be left to individual states, specific sectors, or public institutions alone. Rather, collective action is essential, and corporations - both those directly responsible for gas emissions and financial actors channelling capital flows - must play a central role. In this context, the evaluation of long-term impacts has become an indispensable component of directors' decision-making, that must increasingly be prioritized alongside, or even above, more linear objectives such as the maximization of share prices. Provisions such as Section 172(1) of the UK Companies Act 2006 thus acquire heightened significance. Should shareholders object to the sacrifice of immediate profits in the name of ethical or environmental concerns, such rules would provide directors with protection against

[93] See Re Welfab Engineers Ltd [1990] BCC 600; Re Sherborne Associates Ltd [1995] BCC 40; Re Continental Assurance Co Ltd [2001] Bankruptcy and Personal Insolvency Reports 733; The Liquidator of Marini Ltd v Dickensen [2003] EWHC 334 (Ch); [2004] BCC 172.

liability by explicitly obliging them to consider a broader set of constituencies. Any assessment of Section 172(1)'s effectiveness, however, must also take account of its judicial implementation. British courts have, at times, suggested that directors' duties extend beyond the narrow pursuit of shareholder wealth, and have occasionally endorsed the incorporation of long-term perspectives into managerial decision-making. In this regard, the interpretation of the duty to consider the interests of members as a whole has been understood as encompassing both present and future shareholders.

Matters become significantly more complex nevertheless when environmental impacts are brought into consideration - a difficulty exemplified by the restrictive interpretation of Section 172(1) adopted by the London High Court in ClientEarth vs Shell.[94] The dispute arose in February 2023, when the environmental NGO ClientEarth, relying on its limited shareholding in Shell plc, sought permission to pursue a derivative action under Section 260 of the Companies Act 2006 against the company's board. The directors were alleged to have breached their statutory general duties under both Section 172 and Section 174 of the Act, the latter establishing the standard of reasonable care, skill, and diligence in the performance of managerial functions. These provisions were also argued to give rise to additional incidental duties, reflecting the particular exposure to climate-related risks faced by companies such as Shell. These included: i) a duty to make judgments regarding climate on the basis of reasonable scientific consensus; ii) a duty to accord appropriate weight to climate risk; iii) a duty to implement reasonable measures to mitigate the risks to the long-term financial profitability and resilience of Shell throughout the transition aimed at aligning both the global energy system and the economy to the goals of the Paris Agreement; iv) a duty to adopt strategies which were reasonably likely to meet Shell's targets to

[94] Approved judgement in the derivative claim *ClientEarth v Shell's Board of Directors* (2023) EWHC 1897 (Ch) (UK).

mitigate climate risk; v) a duty to ensure that the strategies adopted to manage climate risk were reasonably in the control of both existing and future directors; and vi) a duty to ensure that Shell took reasonable steps to comply with applicable legal obligations.[95]

An additional claim concerned Shell's alleged failure to comply with the order of the Hague District Court in Milieudefensie vs Royal Dutch Shell plc, delivered two years earlier and subsequently overturned on appeal. That decision had required the company to reduce its Scope 1, 2, and 3 emissions - including those generated through the use of sold products - by 45% by 2030 compared to 2019 levels. ClientEarth argued that, under both Dutch law and English common law, directors who are aware of a judicial order binding the company have a duty to take reasonable steps to secure compliance. In this case, however, while Shell had adopted clearer pathways for reducing its aggregate emissions by 2050 and intermediate milestones for Scope 1 and 2 emissions, no equivalent measures were envisaged for Scope 3 emissions, which represented the overwhelming majority. Furthermore, the board's planned investments in fossil fuel projects appeared inconsistent with its public claims of alignment with the Paris Agreement.[96]

As noted, however, reliance on Section 172 proved ineffective. The court found that ClientEarth had failed to establish a prima facie case warranting permission for the derivative action to proceed. This conclusion was based, in part, on what the court regarded as a weak evidentiary foundation. Although ClientEarth submitted voluminous documentation, it relied primarily on a witness statement prepared by one of its own lawyers, whose lack of technical expertise in sustainability was deemed to undermine its credibility. More fundamentally, and irrespective of the parties involved, the court emphasized that no universal scientific consensus exists on what

[95] ID.
[96] ID.

constitutes an appropriate corporate transition strategy or how such a strategy should be implemented. In the absence of such guidance, it concluded that no objective standard could be imposed upon reasonable directors in evaluating the adequacy of their climate-related decisions.[97]

Even more significant, however, was the second part of the judgment, where the court delineated the boundaries of the Enlightened Shareholder Value principle in the context of climate-related litigation. The court held that ClientEarth's claim rested on a fundamentally distorted reading of Section 172 of the Companies Act 2006. By attempting to establish directors' liability on the basis of insufficient consideration of climate and environmental risks in particular, the claimant overlooked the true focus of Section 172, *i.e.* the requirement that directors take into account 'a whole range of considerations … towards promoting [the company's] success for the benefit of its members as a whole' and balance the weight of such factors 'against the many other competing commercial considerations with which the law permits and indeed requires them to be concerned'. In other words, Section 172 permits directors to adopt a broader perspective than pure shareholder primacy, but it does not require them to prioritize any stakeholder interest over others.[98]

The court also rejected the remedies sought by ClientEarth. These included a declaration that the directors had breached their duties, together with a mandatory injunction requiring them to adopt and implement a climate risk strategy consistent with those duties, and to comply immediately with the Milieudefensie ruling. The latter, in the court's view, was too vague to be enforceable, while the former served no legitimate legal purpose. Such concerns, in the view of the court, should properly be raised at the general meeting of shareholders, where ClientEarth also had a voice as a shareholder.[99]

[97] ID.
[98] ID.
[99] ID.

Finally, and perhaps most importantly, the court assessed the dominant motive behind the claim, concluding that the derivative action was not brought in good faith, as required by Section 263(2)(a). Applying the 'but for' test developed in earlier case law, the court observed that a claim may be deemed to have been brought in good faith if its dominant purpose is to benefit the company as a whole, such that it would still have been pursued. In this instance, however, the court found that ClientEarth's dominant purpose was the advancement of its own environmental agenda. The action, therefore, would not have been brought but for that purpose, and consequently failed the statutory good faith requirement.[100]

As already mentioned, derivative actions – although designed as a tool to protect the position of weaker parties within the company, including minority shareholders – represent a fundamental deviation from the presumption that a director's duties are not owed to investors in the company but to the company itself as a legal entity. What those investors are allowed to pass off as an appropriate cause of action brought on the company's behalf is, thus, subject to strict judicial scrutiny. In this case, the court noted that a derivative claim of considerable size and relevance, which would likely have been quite expensive for Shell to pursue, was being raised on behalf of the whole corporation by an investor who, all in all, merely held 27 shares. This clearly showed, according to the court, that ClienEarth's interest in what would have promoted the success of the company for the benefit of all of its members was, in reality, very limited. The focus of its action was, on the other hand, «… the imposition of its views and those of its supporters as to the right strategy for dealing with climate change risk …».[101]

Taken together, these considerations make it difficult to deny that judicial interpretation of Section 172 of the Companies Act has, in effect, substantially diluted

[100] ID.
[101] ID.

its intended meaning, casting doubt on the provision's effectiveness as a legal basis for climate-related claims. The acquisition of minority shareholdings in major corporations - enabling participation in general meetings and the exercise of voting rights - is often regarded as a central tool for activist organizations seeking to influence business strategies. Yet the decision in ClientEarth vs Shell Board of Directors demonstrates that derivative suits pursued on this basis may offer only limited effectiveness, even when founded upon a provision such as Section 172, which was itself designed to promote a less profit-centred conception of the corporate purpose.

It may indeed be accepted that actions contrary to the agenda of minority shareholders, however compelling from an ethical perspective, cannot automatically be equated with actions contrary to the company's interests as a whole. Nevertheless, if sustainability-related claims were deemed viable only when supported by majority shareholders, then both Section 172 and the Enlightened Shareholder Value approach it embodies - and, to some extent, derivative actions as a remedial mechanism more generally - would be deprived of much of their practical significance.

While environmental activism against corporations has faced significant setbacks, a complete disregard of climate-related risks may nonetheless prove problematic for directors, particularly where such risks affect not merely the ethical convictions of certain shareholders but their financial interests. The primacy of profit over principles in this context can be illustrated by two notable disputes against major oil companies, one in the United States and the other on in France, *i.e.* Ramirez vs Exxon Mobil Corporation and Métamorphose vs Total Energies, respectively.

The first case, brought by a shareholder of Exxon against the company and three of its officers, relied on Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Filed as a securities fraud class action on behalf of purchasers of Exxon common stock between 19 February and 27 October 2016, it alleged that the company had issued false and misleading public statements during this period which

failed to disclose its true exposure to climate-related risks. Specifically, it was claimed that Exxon's internal reports acknowledged the existence of climate risks which would limit its ability to exploit hydrocarbon reserves, and that certain oil and gas asset valuations were based on inaccurate carbon pricing assumptions. The plaintiffs argued that these omissions artificially inflated Exxon's stock price, which subsequently declined by over $2 per share when, in October 2016, the company announced in its third-quarter results that it might have to write down 20% of its reserves.[102]

The Northern District of Texas held that the investors had adequately pleaded material misstatements concerning Exxon's use of proxy costs for carbon in business and investment decisions, as well as other misrepresentations relating to specific businesses. The motion to dismiss was therefore denied, and the case remains pending. Exxon has since argued that the plaintiffs' claim regarding internal reliance on different proxy costs is based on confusion between two separate measures - one for carbon and another one for greenhouse gas emissions.[103] On the contrary, the court found that the plaintiffs had sufficiently demonstrated that Exxon's management committee regularly received detailed reports on carbon-related risks and proxy costs, that the company was especially motivated to maintain its high credit rating in advance of a $12 billion public debt offering, and that three of the defendants had signed SEC filings containing the allegedly misleading statements.[104]

Similarly, in July 2023, an action was brought against TotalEnergies by several of its shareholders on the basis Article L232-12 of the French commercial code concerning unlawful dividends.[105] As French law considers dividends to be unlawful when they are distributed despite the company's profits being insufficient, such an

[102] Ramirez vs Exxon Mobil Corp (2018) Civil Action No. 3:16-CV-3111-K (US).
[103] ID.
[104] ID.
[105] Métamorphose and others v TotalEnergies, Commercial Court of Nanterre (France), filed on July 6, 2023.

allegation was strictly related to that on insincere accounts, according to which erroneous information on distributable profit and on the real value of corporate assets had been relied on. Recognition of a dividend as unlawful entails a duty for the shareholders to restitute it, but may also give rise to the liability of directors (and auditors) in case of negligence.[106]

In the case at hand investors argued that, despite recommendations from both the French AMF and international accounting standards that climate-change-related risks should be taken into account in evaluating cash flows and the discount rate of assets, Total had overvalued and overstated its financial position. This had been caused, first of all, by a failure to correctly quantify carbon price – which should be externally fixed for entities like TotalEnergies that are covered by French law and engaged in Net Zero Emission trajectory – and the way in which this could have led to a depreciation in the company's assets. Moreover, Total's own GHG emissions (and Scope 3 emissions in particular) had been severely underestimated.[107]

7. The EU legal framework on sustainability and sustainable finance ranks among the most advanced and ambitious globally, not least because it is grounded in the principle of double materiality. Under this approach, firms - including financial institutions—are required to account for both dimensions of sustainability: not only the impact of external factors on their business, but also the effects of their own activities on the external environment.[108] The very concept of double materiality builds upon and adds to the one of financial materiality, which, in accounting, is also referred to as materiality of financial information. Financial materiality concerns those facts

[106] Article L. 232-17 of the French Commercial Code.

[107] Métamorphose and others v TotalEnergies, Commercial Court of Nanterre (France), filed on July 6, 2023.

[108] See ZETZSCHE, BODELLINI and CONSIGLIO, The EU Sustainable Finance Framework in Light of International Standards, in Journal of International Economic Law, 2022, 25, 659.

which are deemed material as they can influence the investment decisions of an average prudent investor. In the U.S., the SEC defines financial materiality as "the significance of an item to users of a registrant's financial statements".[109] Therefore, a matter is deemed to be material "if there is a substantial likelihood that a reasonable person would consider it important".[110] Based on this, the U.S. Supreme Court held that a fact is material insofar as "there is – a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available".[111] Yet, despite the existence of judicial precedents, materiality in practice remains a vague and somehow subjective concept, thus difficult to apply.[112]

Looking at sustainability-related factors from a financial materiality perspective, it has been observed that the latter could be material if they would be taken into account by a reasonable investor when making investment decisions.[113] Yet, whereas there is now consensus on seeing sustainability-related risks as capable to affect firms (bringing down their economic value), thereby being potentially material, opinions are still conflicting with regard to the financial materiality of a firm's impact on sustainability factors.[114] This is not, however, the view of the European Commission, which several years ago observed that financial materiality and environmental and social materiality already overlap in certain instances and are likely to do so with increasing frequency in the future. As markets and public policies continue to evolve

[109] Securities and Exchange Commission, SEC Staff Accounting Bulletin: No. 99 – Materiality, 17 CFR Part 211, 12 August 1999, available at https://www.sec.gov/interps/account/sab99.htm#foot4.
[110] ID.
[111] TSC Industries v. Northway, Inc., 426 U.S. 438, 449 (1976).
[112] See BODELLINI, Tra principi generali e standards internazionali di soft law: la disciplina europea sulla finanza sostenibile e l'inizio di una nuova stagione per il 'Brussels effect'?, in Rivista Trimestrale di Diritto dell'Economia, 2023, 3, 338.
[113] See ZETZSCHE, BODELLINI and CONSIGLIO, The EU Sustainable Finance Framework in Light of International Standards, in Journal of International Economic Law, 2022, 25, 659.
[114] See PEIRCE, We are Not the Securities and Environment Commission - At Least Not Yet, Statement 21 March 2022.

in response to climate change and environmental degradation, the positive or negative impacts of a company on environmental factors will increasingly translate into financially material risks or opportunities.[115]

Importantly, the inward dimension and the outward dimension are treated by the framework as interrelated in that one can affect the other.[116] Accordingly, the firm's impacts on the environment cannot be disregarded on the simple assumption that they are not financially material, since any unsustainable activity can give rise to financial risks, through legal liabilities or negative effects on reputation.[117] Furthermore, reasonable investors might base their decisions to invest (or not to invest) upon those factors.[118] This final point, however, remains contentious because historically poor environmental and social practices have oftentimes resulted in higher returns.[119]

Additionally, advocates of double materiality argue that by firstly focusing on externalities (and subsequently on sustainability risks), a firm can align its vision with that of its stakeholders, broadly understood, shifting from a short-term to a long-term horizon.[120] This shift could be particularly significant not only for stakeholders but also for the firm itself, as some financiers may be interested in the firm's ability to create

[115] European Commission, Guidelines on Non-financial Reporting: Supplement on Reporting Climate-related Information, June 2019, available at https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines_en.pdf.

[116] On this see DE VILLIERS - LA TORRE - MOLINARI, The Global Reporting Initiative's (GRI) Past, Present and Future: Critical reflections and a research agenda on sustainability reporting (standard-setting), in Pacific Accounting Review, 2022, 34(5), *passim*.

[117] See ADAMS et al., The double-materiality concept. Application and issues, Global Reporting Initiative, May 2021.

[118] See TÄGER, 'Double materiality': what is it and why does it matter?, London School of Economics and Political Science and Grantham Research Institute on climate change and the environment, Commentary 21 April 2021, available at https://www.lse.ac.uk/granthaminstitute/news/double-materiality-what-is-it-and-why-does-it-matter/.

[119] See CHIU, The EU Sustainable Finance Agenda: Developing Governance for Double Materiality in Sustainability Metrics, European Business Organization Law Review, 2022, 23 *passim*.

[120] See ADAMS et al., The double-materiality concept. Application and issues, Global Reporting Initiative, May 2021.

long-term value for both themselves and society.[121] Conversely, prioritizing short-term profits could harm both the firm's long-term performance and sustainable development.[122]

Building on the double materiality principle, additional and more intrusive requirements might be embedded in the legal framework. The latter can be: a) disclosure obligations to show to stakeholders the firms' environmental footprint;[123] b) obligations to revise firms' operations with a view to ending the impacts of their activities which are detrimental to the environment;[124] c) obligations to prepare and implement a transition plan on the basis of which the business must adapt to a net-zero compliant external scenario.[125] Provisions of this kind have been introduced in

[121] See ADAMS, DRUCKMAN and PICOT, Sustainable Development Goal Disclosure (SDGD) Recommendations, Association of Chartered Certified Accountants, Chartered Accountants Australia New Zealand, Institute of Chartered Accountants Scotland, International Federation of Accountants, International Integrated Reporting Council and World Benchmarking Alliance, London, 2020.

[122] See ADAMS et al., The double-materiality concept. Application and issues, Global Reporting Initiative, May 2021.

[123] See CHRISTENSEN, HAIL and LEUZ, Mandatory CSR and Sustainability Reporting: Economic Analysis and Literature Review, Review of Accounting Studies, 2011, 26, 1176 - 1178, underlining that the double materiality approach requires disclosures on both the impacts of sustainability on the firm (inward dimension) and the impacts of the firm's operations on sustainability (outward dimension).

[124] Recital l6 of the CSDDD states that 'This Directive aims to ensure that companies active in the internal market contribute to sustainable development and the sustainability transition of economies and societies through the identification, and where necessary, prioritisation, prevention and mitigation, bringing to an end, minimisation and remediation of actual or potential adverse human rights and environmental impacts connected with companies' own operations, operations of their subsidiaries and of their business partners in the chains of activities of the companies, and ensuring that those affected by a failure to respect this duty have access to justice and legal remedies'.

[125] Recital 50 of the CSDDD states that 'In order to ensure that this Directive effectively contributes to combating climate change, companies should adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5 °C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets. The plan should address, where relevant, the exposure of the company to coal-, oil- and gas-related activities. Such requirements should be understood as an obligation of means and not of results. Being an obligation of means, due account should be given to the progress companies make, and the complexity and evolving nature of climate transitioning'.

the EU framework to ensure that the double materiality principle is properly applied although their scope of application is currently limited to big market players. Accordingly, disclosure obligations concerning firms' environmental footprint have been embedded in the Corporate Sustainability Reporting Directive (CSRD),[126] the Sustainable Finance Disclosure Regulation (SFDR)[127] and the Commission Delegated Regulation on Disclosures under the Taxonomy.[128] Also, obligations to revise firms' operations with a view to ending the impacts of activities which are detrimental to the environment and to prepare and implement a transition plan on the basis of which the business must adapt to a net-zero compliant external scenario have been introduced in the Corporate Sustainability Disclosure Directive (CSDDD).[129] Furthermore, through the taxonomy framework (*i.e.* Taxonomy Regulation[130] and the related Commission Delegated Regulations), firms can now align their business operations to the highest environmental standards, thereby substantially contributing to the achievement of an

[126] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

[127] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector; on this see Busch, Sustainability Disclosure in the EU Financial Sector, European Banking Institute Working Paper Series 2020 n. 70, *passim*.

[128] Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation.

[129] European Parliament legislative resolution of 24 April 2024 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 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)). Interestingly, in South Korea, a legislative reform has been recently passed which requests corporate directors to consider stakeholders' interests. The new provisions require that big corporations establish and implement due diligence systems to support sustainability, report to the board of directors and obtain their approval. The expected outcome would be an expansion of directors' duties.

[130] 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; on this see Gortsos, The Taxonomy Regulation: More Important Than Just as an Element of the Capital Markets Union, European Banking Institute Working Paper Series 2020 n. 80, *passim*.

environmental objective while not significantly harming the other environmental objectives.[131] On these grounds, it has been posited that double materiality might prompt true change, since, relying upon detailed criteria concerning sustainability risks and impacts on the environment, it can potentially enable the transition to net zero as well as the achievement of other environmental objectives.[132]

Yet, there are practical challenges associated with implementing the double materiality principle in environmental sustainability.[133] First, assessing the negative impacts of investment decisions on sustainability factors, as required by the SFDR, can be quite difficult for financial institutions due to a lack of data and universally accepted models.[134] Second, adopting the double materiality principle does not completely eliminate the risk that environmental materiality will be used solely to prioritize the firm's financial value, as firms might continue to give precedence to their financial performance over social and environmental sustainability, thereby limiting the broad accountability potential of double materiality.[135] Third, there are still uncertainties about what is considered to be material and therefore needs to be reported in relation to the external aspects of double materiality.[136]

While embedding the double materiality principle in the legal framework is certainly a remarkable step forward, it is to be underlined also that jurisdictions other

[131] Article 3 of the Taxonomy Regulation.

[132] See ZETZSCHE, BODELLINI and CONSIGLIO, The EU Sustainable Finance Framework in Light of International Standards, in Journal of International Economic Law, 2022, 25, 659.

[133] ID., 659.

[134] See ZETZSCHE and BODELLINI, A Sustainability Crisis Makes Bad Laws - Towards Sandbox Thinking in EU Sustainable Finance Law and Regulation, Working Paper, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4147295.

[135] See LA TORRE, Sabelfeld, Blomkvist and Dumay, Rebuilding trust: sustainability and non-financial reporting and the European Union regulation, Meditari Accountancy Research, 2020, 20(5), 715.

[136] See BOSSUT, JÜRGENS, PIOCH, SCHIEMANN, SPANDEL and TIETMEYER, What information is relevant for sustainability reporting? The concept of materiality and the EU Corporate Sustainability Reporting Directive, Sustainable Finance Research Platform - Policy Brief – 7/2021, 11, urging the European Commission to provide a definition of double materiality and to precisely indicate what to report and who should report.

than the EU have taken critical positions in this regard.[137] Also, for the reasons previously discussed, the mentality shift potentially prompted by double materiality will deliver tangible outcomes only if such a principle will be integrated in the legal framework of the other major jurisdictions around the world.

8. While, on one side, pure shareholderism seems to be no longer aligned with the nature of some key challenges that the humankind is called upon to face (particularly climate change and environmental degradation) and, on the other side, stakeholderism might excessively deviate from some key principles featuring capitalism and the market economy, the so-called enlightened shareholder value, that at first looked to some as a sensible compromise between the two extreme approaches, has struggled to be effectively applied by the judiciary. On these grounds, a new principle – double materiality – embedded in the European framework might represent the bridge that can fill the gap between shareholderism and stakeholderism, by providing corporate directors with the legal basis they need to effectively take into consideration crucial issues the solution of which is instrumental for the survival of humankind. Double materiality would allow to embed in corporate decision-making two dimensions of sustainability which to a large extent are intertwined and self-fulfilling. Double materiality requires that economic players do not only focus on the impact of outside factors on their business, but also engage in a careful analysis of how their own activities impact on the external world. Consensus exists on seeing sustainability-related risks as capable to affect firms (bringing down their economic value), thereby being potentially material; yet, more importantly, even the firm's impact on sustainability factors, through the double materiality principle, is to be considered as potentially financially material. On this matter, the European

[137] See PEIRCE, We are Not the Securities and Environment Commission - At Least Not Yet, Statement 21 March 2022.

Commission several years ago pointed out that financial materiality and environmental and social materiality already overlap in some cases and will increasingly do so in the future. As markets and public policies evolve in response to climate change and environmental degradation, the positive and/or negative impacts of a company on climate and environmental factors will translate into business opportunities and/or risks that are financially material. Accordingly, the inward dimension and the outward dimension are treated by the European framework as interrelated in that one can affect the other. Hence, the firm's impacts on the environment cannot be disregarded on the simple assumption that they are not financially material, since any unsustainable activity can give rise to financial risks, through legal liabilities or negative effects on reputation. Furthermore, reasonable investors might base their decisions to invest (or not to invest and even divest) upon those factors.

Embedding double materiality in the legal framework could thus 'do the trick' of making directors mandatorily and sensibly consider environmental and climate-related issues in their decision-making. While there is no question about sustainability-related risks having to be taken into account even when embracing pure shareholderism, also the impact of corporate decision-making on climate and the environment could be seen as a facet of shareholderism in that – at least in the long-term – it will be able to affect the corporate's value by attracting and/or distancing investors. On top of this, for business to successfully flourish a safe environment is needed with the consequence that every company will have – again in the long run – an interest in keeping the environment safe. But this will also very much depend on how corporates conduct their activities.

On these grounds, double materiality could give to the corporate purpose a meaning which is more sensitive to new emerging issues and in turn could provide a sensible contribution to the solution of those issues. Corporates will have to play a key and proactive role. Double materiality could create the legal basis for that key and

proactive role to be played by corporates throughout directors' decision-making.

A DIGITAL MARSHALL PLAN

Marcello Minenna*

ABSTRACT: *The article examines how the digital transition can become the new driving force of the European project. In the absence of a significant technological leap, Europe risks losing global competitiveness, remaining dependent on non-EU platforms, and undermining its capacity for social inclusion and resilience. A strategic plan based on innovation, digital infrastructure, and the attraction of capital and talent could instead reduce the gap with the United States and China, strengthen strategic autonomy, and foster political cohesion. Digitalization thus emerges as an essential tool to complete European integration and move closer to the goal of a "United States of Europe"*.

1. Between the late 1990s and the beginning of the new millennium, the single currency gave a powerful boost to the European project, laying the foundation for economic-financial risk sharing and for the development of a federal vision. Unfortunately, the global financial crisis interfered with this project, pushing Member States back toward the re-nationalization of risks. Today, due to the unanimity rule set out in the Lisbon Treaty, the EU is, in practice, its own hostage.

In more recent years, neither the energy crisis, the Russia–Ukraine war, nor the

* *Dirigente* Consob.

trade wars have been sufficient to prompt a common strategy on energy, commerce, or defense.

Only the NGEU program - launched in response to the COVID-19 crisis, when the urgency of the pandemic outweighed political caution - temporarily reversed this trend, effectively financed by about €800 billion in eurobond-style securities. Yet the program is now drawing to a close, and it remains to be seen whether there will be room for another shared, EU-driven initiative.

Pinpointing a suitable policy area is complex, especially after repeated failures in energy, defense, and trade. Ideally, the focus should be on a sector with enough critical mass to foster cooperation among Member States and, potentially, also among candidate or former members. A leading candidate is the high-tech sector, where the global economic and financial contest of the future will be decided. It is no coincidence that, under Trump, the United States maintained strong pressure on the EU and the UK precisely over digital regulation. Washington has openly criticized the EU's Digital Services Act and Digital Markets Act, as well as the UK's Digital Tax, branding them "discriminatory and unjustified".

This paper therefore explores the feasibility and utility of an extraordinary European high-tech plan and attempts to quantify its economic-financial impact.

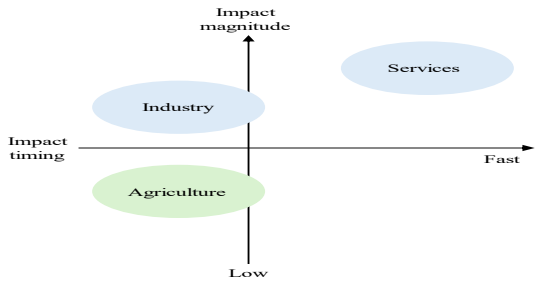
2. High-tech investment refers to channeling financial resources into sectors and activities with a high technological and innovative content. This includes, on the one hand, the acquisition of advanced capital goods - such as ICT systems, robotics, semiconductors, and biomedical equipment - and, on the other, spending on R&D and projects to upgrade digital infrastructures. It also encompasses investment in emerging technologies such as artificial intelligence, cloud computing, blockchain, biotechnology, and advanced renewable energy. These investments typically feature a high risk–return profile and have the potential to generate positive externalities and

productivity spillovers throughout the economy. The potential contribution of high-tech investment spans all sectors of the economy, though at varying speeds and magnitudes.

- Industry: High-tech investment supports automation of production (intelligent robotics, predictive maintenance, quality control), logistics optimization (more efficient global supply chains, lower energy and material waste), and design/R&D (new materials, pharmaceuticals, semiconductors). These translate into significant productivity gains, especially in advanced manufacturing and high-tech segments.
- Agriculture: High-tech investment aids irrigation, fertilization, and harvesting optimization via drones, robotic sensors, and autonomous machinery, as well as predictive models for climate, pest development, and crop rotation. Efficiency gains, however, are expected to be slower than in industry, given the continued influence of natural and logistical variables.
- Services: Here the impact is most rapid and disruptive. In professional services (finance, legal, consulting), generative AI is already reducing analysis and drafting times. In healthcare and education, high-tech investment translates into diagnostic support, personalized tutoring, and research optimization.

In summary: services benefit most in the short run, while industry and agriculture reap medium- to long-term productivity improvements.

Figure 1*: Timing and magnitude of the impact of high-tech investment across the three sectors.*

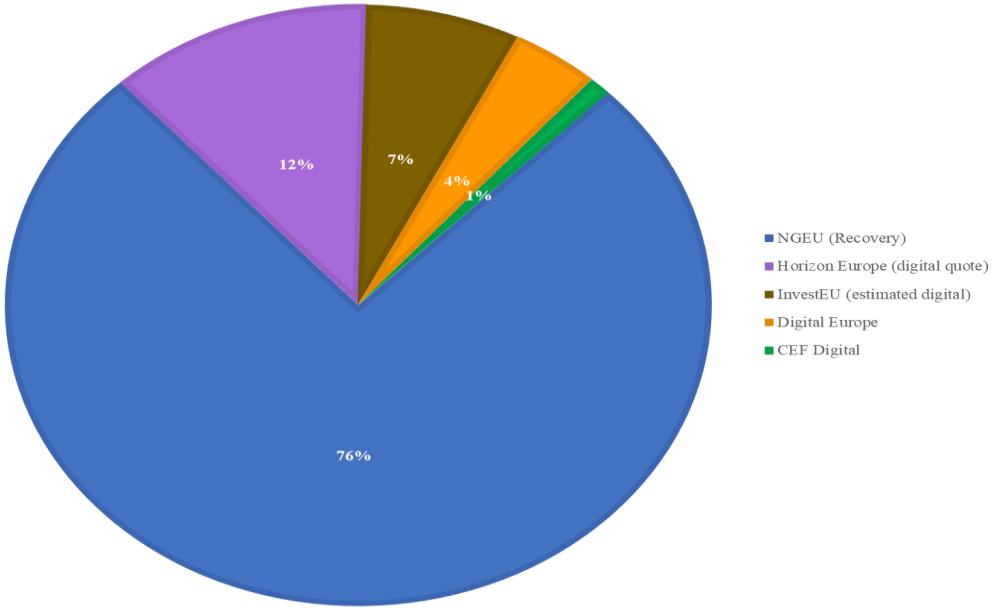


Sources: OECD, World Bank, IMF, UNESCO Institute for Statistics (UIS), NSF – National Science Foundation (Science & Engineering Indicators), Eurostat, BEA (Bureau of Economic Analysis), author's estimates.

3. The EU's digital strategy - launched with the *Digital Compass 2030* (published in March 2021), which set targets for digital skills, infrastructure, business digitalization, and public services, and reinforced by the *Digital Decade Policy Programme 2030* (formally adopted in 2022 with Regulation EU 2022/2481) - does not envisage a single "extraordinary plan" (for example, an EU-wide recovery fund). Instead, it sets binding targets for Member States, monitored by the Commission, with inherent risks of fragmentation and duplication.

The European "digital plan" is not a single fund but rather a package of initiatives (NGEU, Digital Europe, Horizon, CEF), amounting to about €200 billion in direct public investment by 2027, with the aim of also mobilizing private capital and achieving a much larger leverage effect (the European Commission estimates a total of €500–600 billion).

Figure 2*: EU-27 – Breakdown of public digital investments (2021–2027, ~€200bn)*



Sources: **European Commission (AMECO), Eurostat, OECD, author's estimates.**

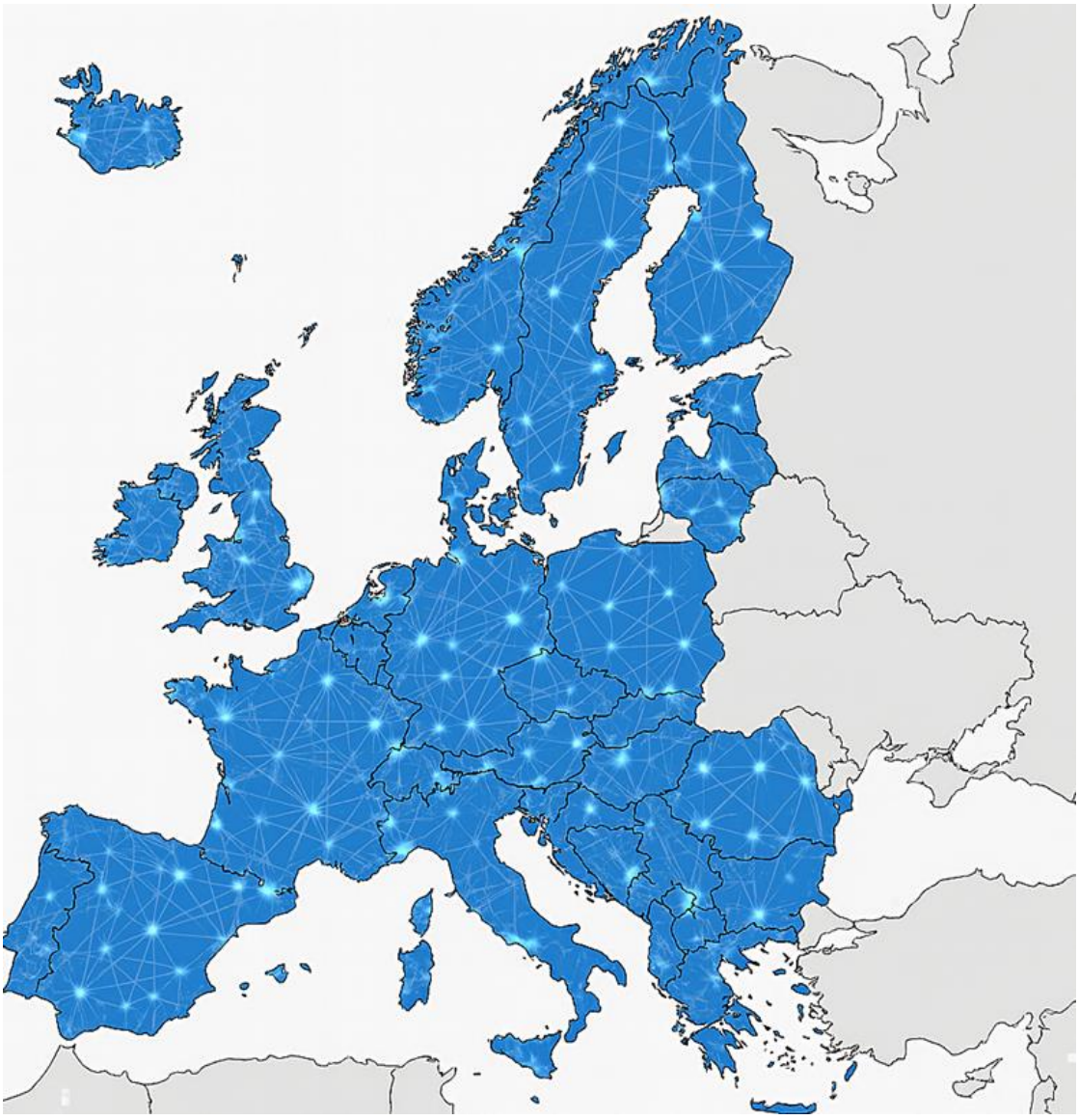
According to preliminary European Commission estimates, a full digital transition could lift cumulative annual GDP by 2.5% by 2030 compared with the baseline. The OECD calculates that accelerating the adoption of artificial intelligence and cloud services could raise total factor productivity in EU-27 services by 10–15% within a decade. Meanwhile, simulations by the IMF and the World Bank suggest that closing just half of the digital gap with the United States could generate more than US$1 trillion in additional GDP for the EU-27 by 2030.

There is thus a clear case for an extraordinary European high-tech plan. Such a plan could plausibly also involve the United Kingdom, which faces similar delays. The UK likewise lacks a single, unified national digital plan. Instead, it has developed a patchwork of ministerial strategies, infrastructure initiatives, and sectoral programs addressing different digital objectives. The UK Digital Strategy (June 2022) focuses on five areas - digital foundations (infrastructure, data, regulation), innovation, digital skills, access to finance, and digital security - without binding 2030 targets. The Home Office 2030 Digital Strategy (July 2025) governs improvements to Ministry of the Interior services (airport e-gates, digital passports, eVisas). The Blueprint for Modern Digital Government (2025) sets out five principles for modernization: interdepartmental integration, AI, digital inclusion, resilience, and organizational agility. The National Infrastructure and Service Transformation Authority (NISTA), established in 2025, has issued a UK Infrastructure Strategy providing at least £725 billion over the next decade, including digital infrastructure investments.

It is therefore conceivable that the EU could draw the UK into a coordinated high-tech plan. Looking beyond the Union, such an EU-driven initiative would likely appeal to Albania, North Macedonia, Montenegro, Serbia, Bosnia and Herzegovina,

and Kosovo—all long-standing aspirants to EU membership. Moldova, Ukraine, Georgia, and Turkey might also be considered, though their participation appears unlikely in the short term given the geopolitical turmoil affecting them. Other non-EU countries, such as Norway, Iceland, Switzerland, and Liechtenstein, could likewise seek agreements to participate in an extraordinary European high-tech plan as a means of reducing their dependence on the two global blocs led by the United States and China.

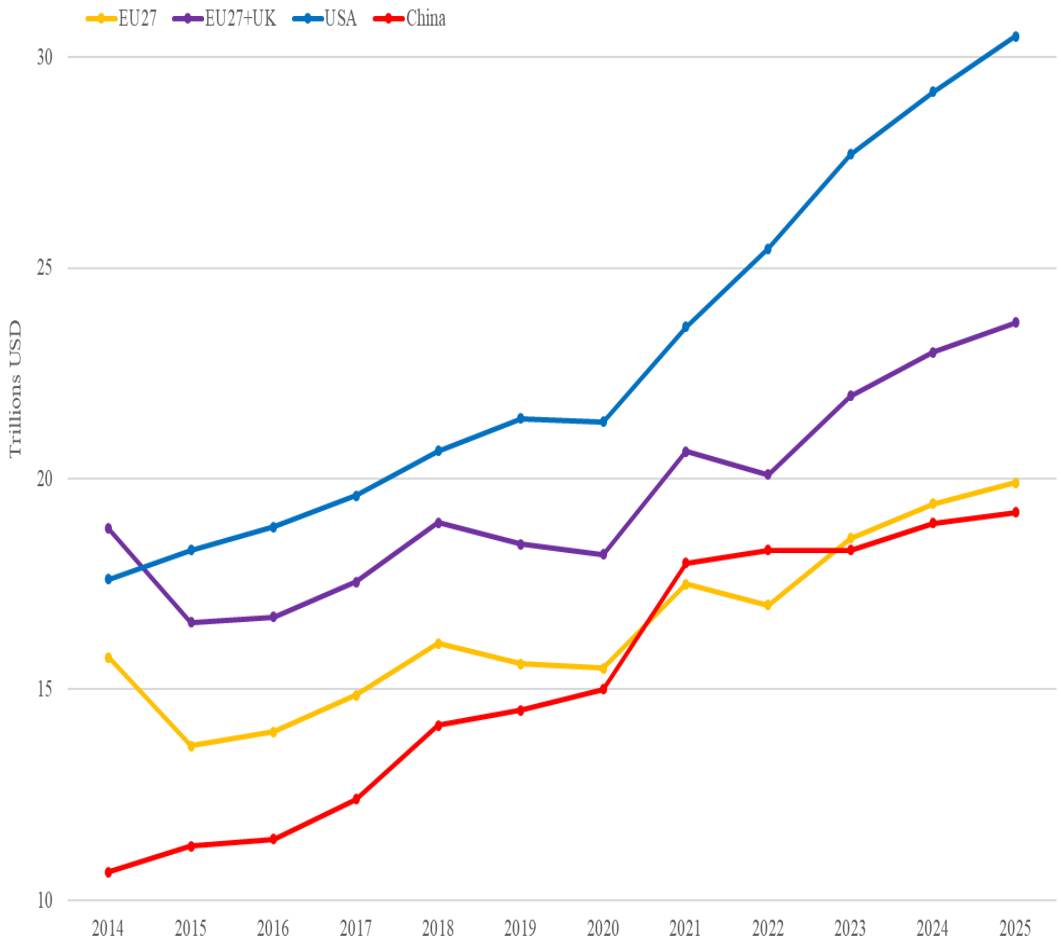
Figure 3*: Countries that could take part in the European "Marshall Plan"*



Source: author's estimates.

4. Analysis of GDP trends indicates that 2025 could mark the year when the EU-27 once again overtakes China, after having been overtaken in the post-pandemic period and narrowly surpassed in 2024.

Figure 4*: Nominal GDP – China, USA, EU-27, and EU-27 + UK (2014–2025)*

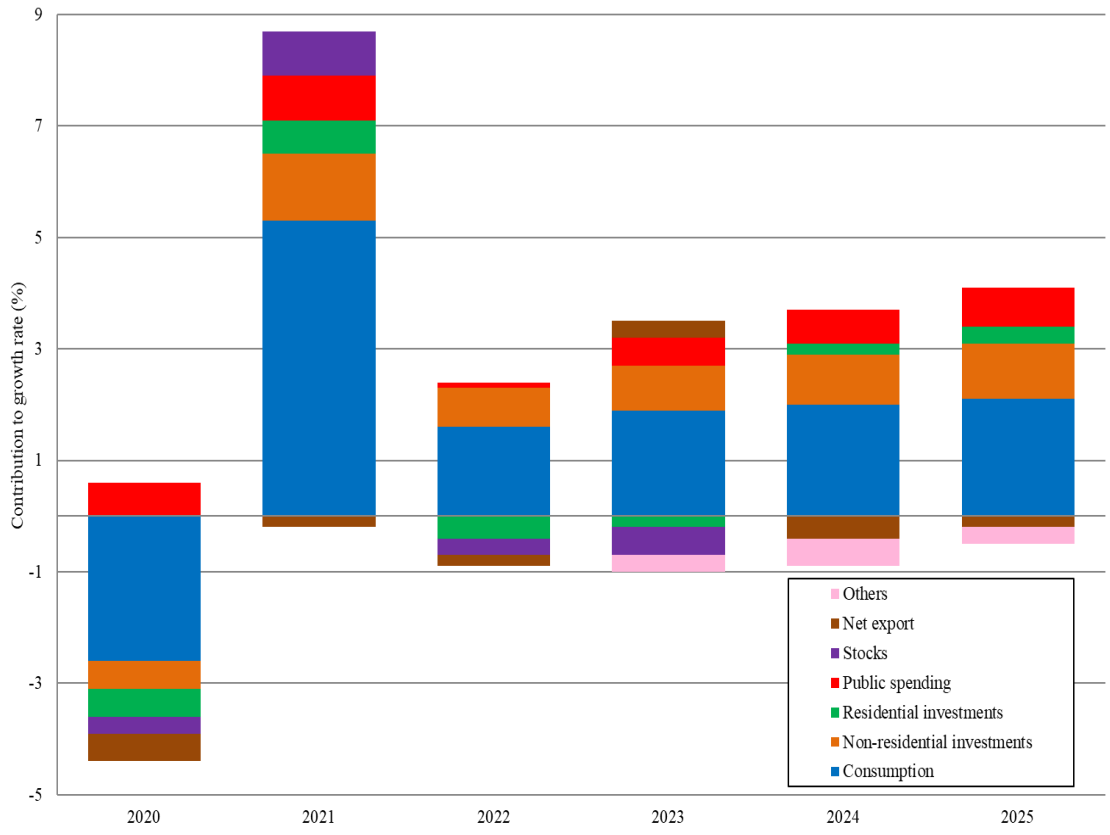


Sources: Eurostat, OECD, World Bank, IMF, BEA (Bureau of Economic Analysis), FRED, National Bureau of Statistics of China, China Statistical Yearbook, UK Office for National Statistics, UK Blue Book, European Commission (AMECO), ECB, author's estimates.

What stands out most is the trajectory of the US economy, which has widened the gap both with the EU-27 (even including the UK, in a hypothetical "Brentry") and with China.

The divergence seen in 2022–2024 can be explained by expansionary fiscal policies (COVID stimulus, ambitious industrial and infrastructure programs linked to the IRA and CHIPS Act), which fueled robust and stable household spending, a boom in high-tech investments supported by favorable regulatory frameworks, and the presence of a single market that enabled the rise of digital giants like Google, Microsoft, and Amazon. This accelerated the adoption of IT and AI, triggered a productivity rebound, and maintained a strong labor market further reinforced by renewed migration flows.

Figure 5*: Components of US Real GDP Growth (2020–2025)*



Sources: BEA, FRED, OECD, World Bank, IMF, author's estimates.

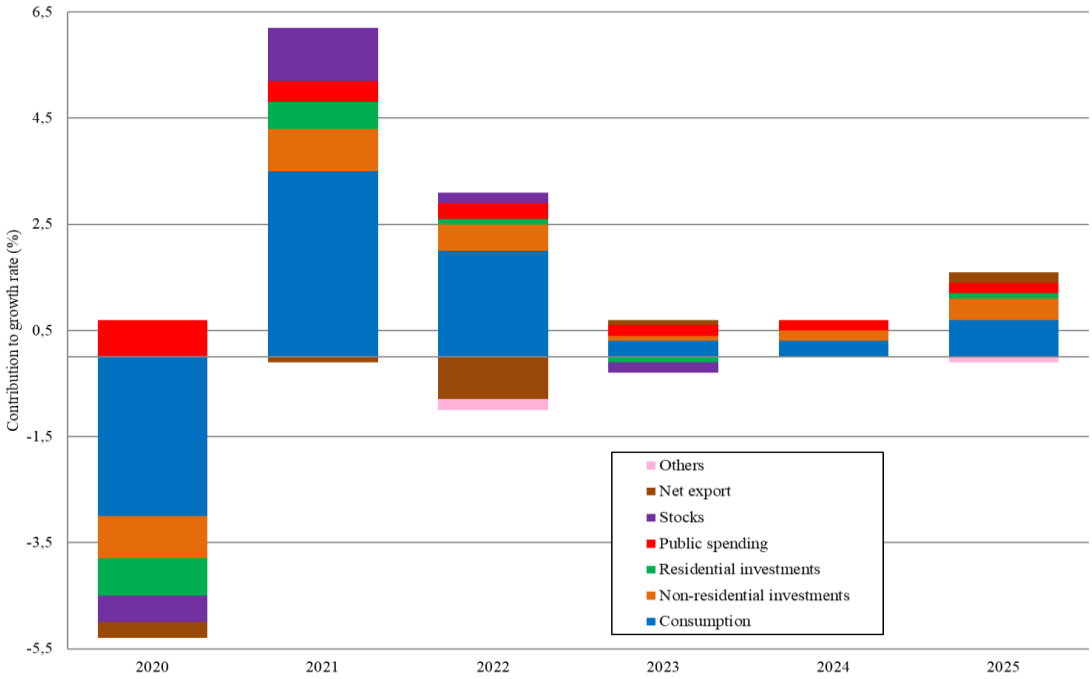
For the EU-27, the 2022 energy shock caused by the Russia–Ukraine conflict increased costs and constrained industrial growth, while the US benefited as a net energy exporter (LNG, oil).

On the domestic demand side, European consumption has been weaker than in the United States, partly because fiscal policies—even when expansionary, as in the case of the NGEU—remain subject to stricter budgetary constraints.

Moreover, the high-tech investment component of European policy remains both modest and fragmented. Duplication and inefficiencies, overlapping projects, dispersed resources, slow implementation, heterogeneous rules on data, privacy, cybersecurity, and software licensing, as well as the absence of European champions, have all hindered progress.

This situation has prevented a turnaround in productivity trends and has led to a significant investment gap.

Figure 6*: Components of EU-27 Real GDP Growth (2020–2025)*



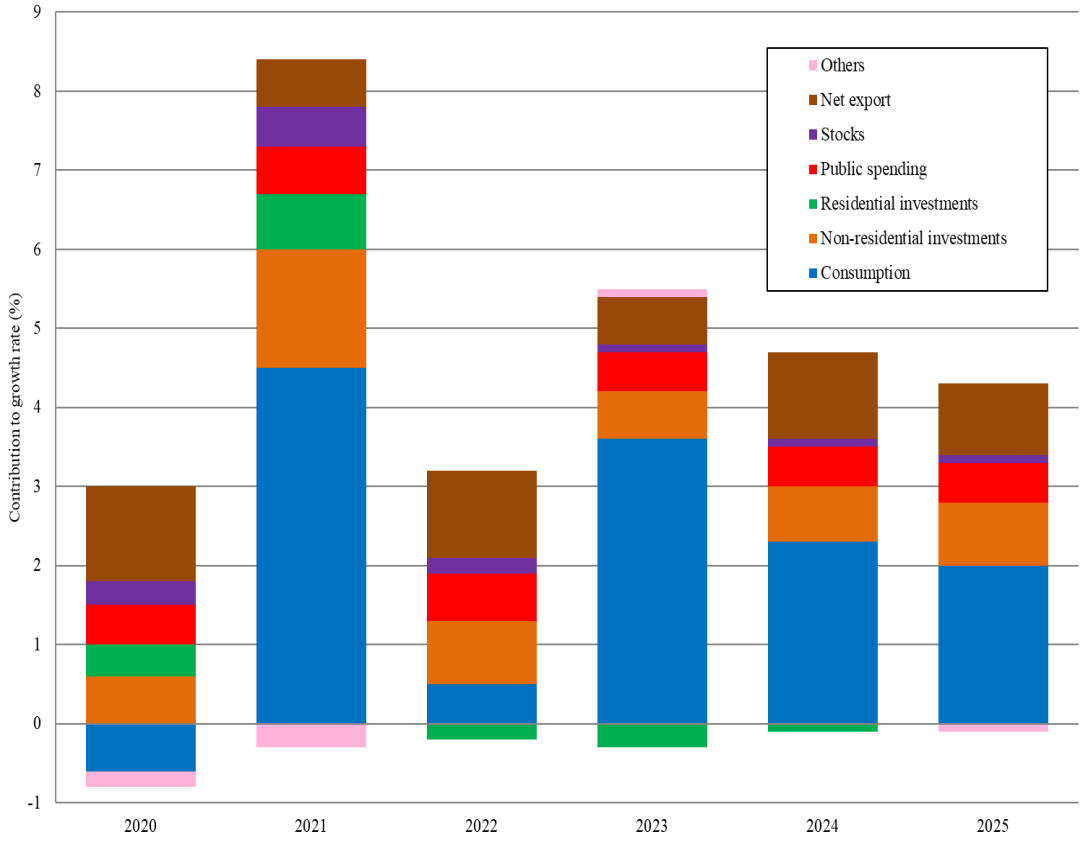
Sources: Eurostat, European Commission (AMECO), OECD, World Bank, IMF, author's estimates.

As for China, the real estate crisis (e.g., Evergrande and Country Garden) has had severe repercussions on investment and related consumption, prompting fiscal caution for fear of aggravating local debt.

Uncertainty surrounding high-tech investments has also been exacerbated by protectionist and political control over AI development, enforced by the State Administration for Market Regulation (SAMR) and the Cyberspace Administration of China (CAC).

In addition, the end of the favorable demographic cycle in 2022 has not restored confidence in domestic consumption.

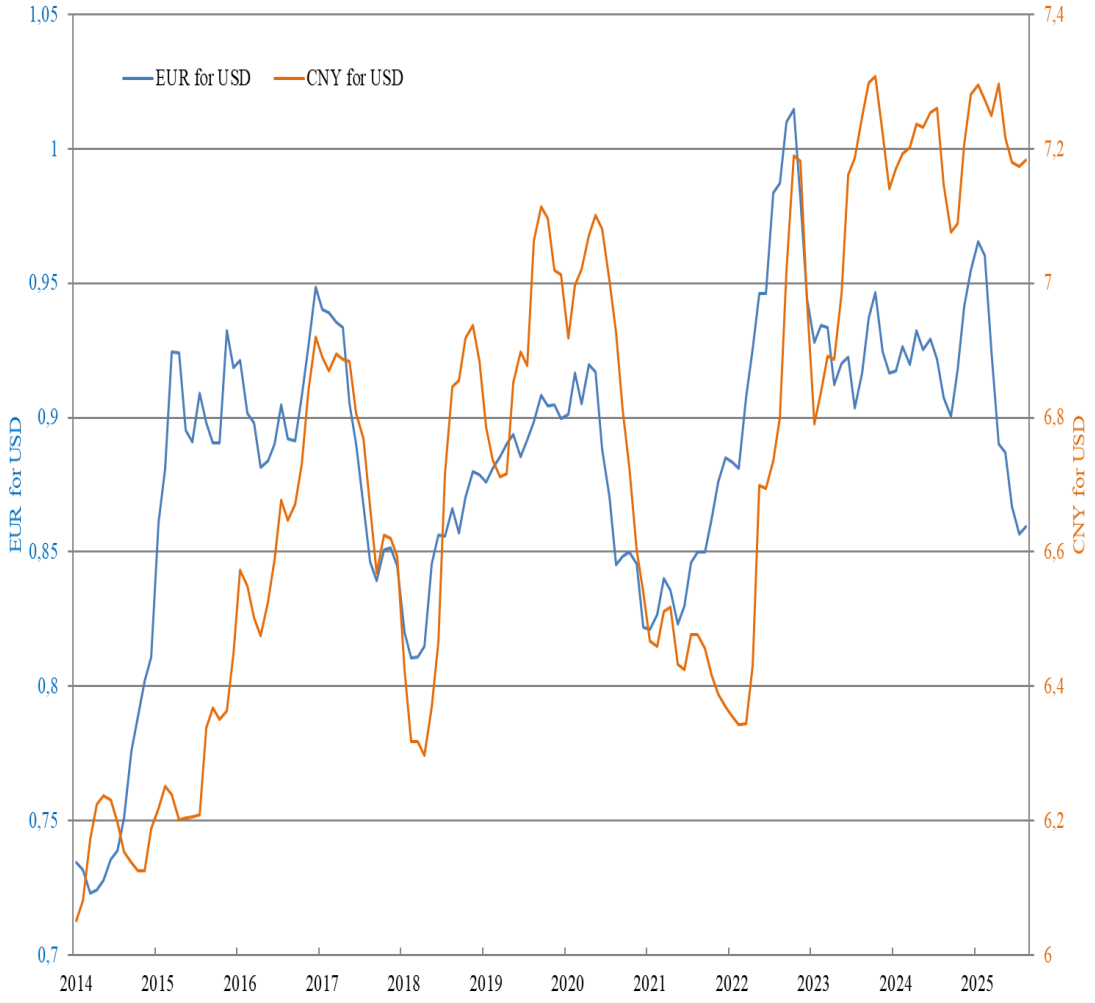
Figure 7*: Components of China's Real GDP Growth (2020–2025)*



Sources: National Bureau of Statistics of China, China Statistical Yearbook, World Bank, IMF, author's estimates.

Another factor influencing the GDP paths of the three major economies has been the strengthening of the US dollar against the euro and the renminbi in the post-COVID period.

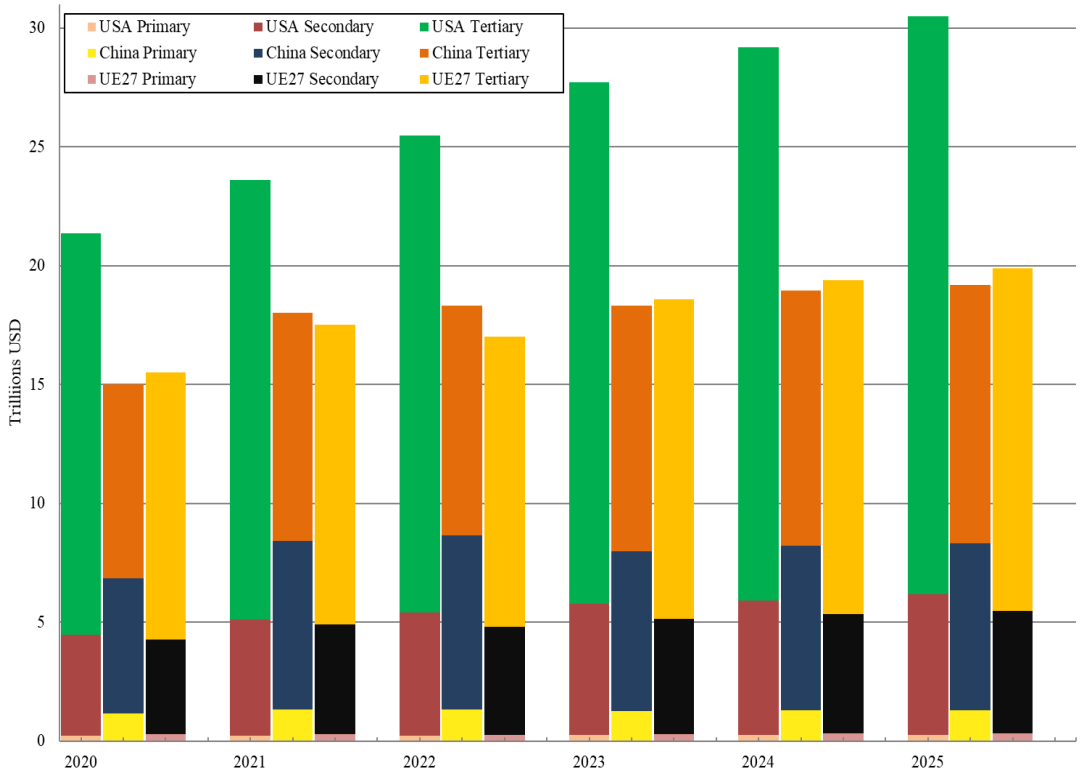
Figure 8*: Exchange Rates (EUR/USD and CNY/USD), 2014–2025*



Sources: FRED, ECB, author's estimates

To contextualize these trends, it is useful to analyze the breakdown of GDP in the three largest economies into the main sectors.

Figure 9*: GDP by Sector – USA, China, EU-27 (2020–2025)*



Sources: Eurostat, OECD, World Bank, IMF, BEA, FRED, National Bureau of Statistics of China, China Statistical Yearbook, European Commission (AMECO), ECB, author's estimates.

The 2020–2025 data highlight:

- a marginal role of the primary sector in the US and EU-27,
- a still-strong secondary sector in China,
- services as the dominant sector in the US and steadily growing in China.

In detail:

- In the US, services dominate (over 80% of GDP), confirming a highly advanced, post-industrial economy. The secondary sector (industry and construction) accounts for less than one-fifth but is stable in absolute value. The primary sector (agriculture) is marginal (<2%) and essentially unchanged.
- In the EU-27, the structure is similari to that of the US: services account for 70–

75% of GDP, the secondary sector about one-quarter, and the primary sector is negligible (<2%), reflecting high development and urbanization.

- In China, the secondary sector remains strong (35–37% of GDP), far higher than in the US or EU. The primary sector, while still over US$1 trillion in absolute terms, is shrinking as a share. Meanwhile, services are steadily expanding and have now surpassed industry, reflecting China's structural shift toward a service-driven economy.

In short:

- The growth of GDP in the US and EU-27 in the last five years has been almost entirely driven by services.
- China is undergoing a structural transition toward services but still maintains a central industrial sector, reinforcing its role as the "world's factory."

The 2021–2024 period thus coincides with the strengthening of the dollar and highlights the greater resilience of the US compared with the EU and China—fundamentally driven by services.

Given the predominance of services in US and EU GDP, and the disruptive impact of high tech, it is no coincidence that this has become Trump's chosen battlefield. Equally evident is that the EU and the UK are right to exclude digital regulation from tariff negotiations.

5. The impact of a high-tech investment plan is not determined solely by the ICT component within services but also by its indirect effects on the economy, namely, the spillover of ICT into user sectors.

These spillovers take several forms:

- Technological spillover: An ICT innovation in one sector diffuses into others (e.g., cloud computing initially created for e-commerce adopted in healthcare and finance).

- Productivity spillover: The use of ICT raises efficiency even in non-ICT sectors.
- Know-how spillover: Digital skills developed in one sector tend to migrate into others.

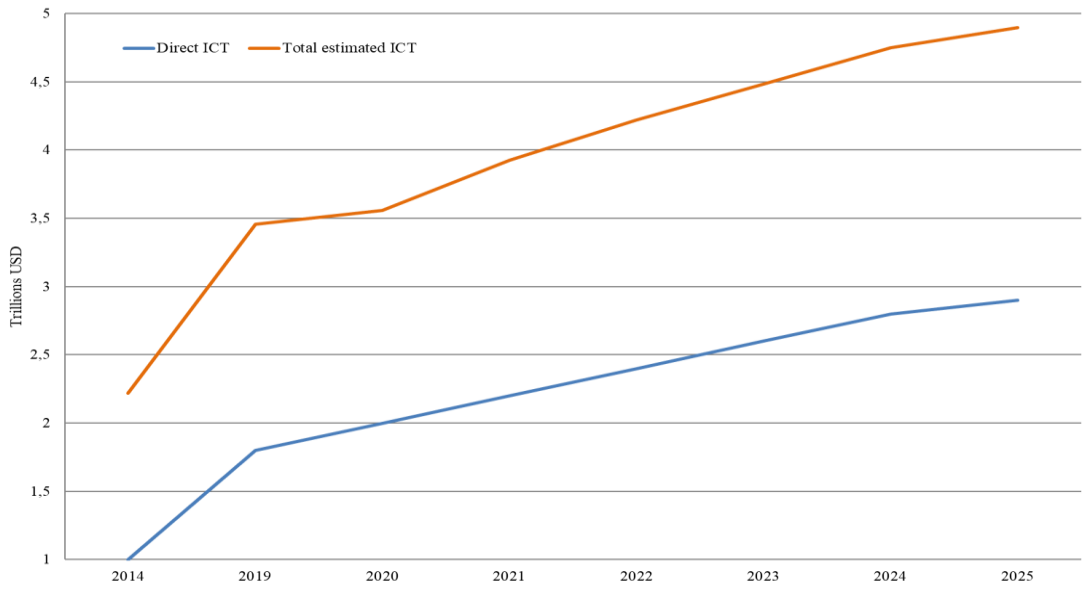
By using the Leontief input–output matrix, it is possible to determine how much ICT "overflows" into other sectors and to measure ICT intensity across sectors. The inversion of the Leontief matrix also allows quantification of an average multiplier, estimating for every dollar of ICT spending what the total economic impact will be.

Thus, ICT is not just a line item but a transversal enabler supporting the entire set of services that rely on it.

ICT has strong inter-sectoral linkages: it provides inputs to finance (fintech), healthcare (healthtech), retail (e-commerce), and transport (digital logistics).

An application of this analysis to the US economy—which has made the most significant commitment in this area—shows that ICT's contribution to services rises, on average, from about 12% to over 20%.

Figure 10*: An estimate of ICT spillover effects*



Sources: BEA, U.S. Census Bureau, FCC (Federal Communications Commission), Eurostat, OECD, World Bank, IMF, author's estimates.

This multiplicative effect, combined with the structural similarity of the US and EU economies in terms of the predominance of services, illustrates why the digital transition is crucial for the EU-27's future.

In the EU-27, services account for about 65–70% of GDP, but the share tied to ICT, digitalization, and AI is significantly lower than in the US or China. In the United States, ICT and the "digital economy" contribute directly and indirectly to more than 10% of GDP, while in the EU the figure remains below 7%.

The EU-27 therefore faces a technological gap: although strong in manufacturing and traditional services, it lags in the cloud economy, artificial intelligence, big data, and digital platforms.

Estimates by the OECD and the European Commission suggest that over half of the productivity gap between EU and US services is due to the underuse of digital technologies. On top of this, the positive spillover effects of ICT - well illustrated by the US experience - further amplify the gap.

Without such a digital transformation, several strategic consequences would follow:

- Global competitiveness: the gap between Europe, the US, and China in high value-added sectors would continue to widen.
- Strategic autonomy: Europe's independence would remain fragile due to ongoing reliance on non-EU platforms (cloud, AI, semiconductors), which also pose economic security risks.
- Inclusion and resilience: social cohesion and the ability to respond to future shocks (e.g., pandemics, energy crises) would be weakened, as digital public services like education and healthcare are essential.
- Capital and talent attraction: Europe would continue to struggle to attract investment and skilled professionals, whereas a strong digital plan could boost venture capital and startups - areas where the EU is currently

underrepresented.

These points can clearly be extended to the United Kingdom and to the broader "extended Europe" scenarios discussed above.

6. In light of the above considerations—and based on US multiplier effects—it is reasonable, as a first approximation, to envisage an extraordinary EU-27 plan worth €500 billion to be implemented over five years (2026–2030). The resources could be allocated as follows: roughly half (~€250 billion) for infrastructure and cloud/AI, one-quarter for digital skills, and one-quarter for enterprise and startup support.

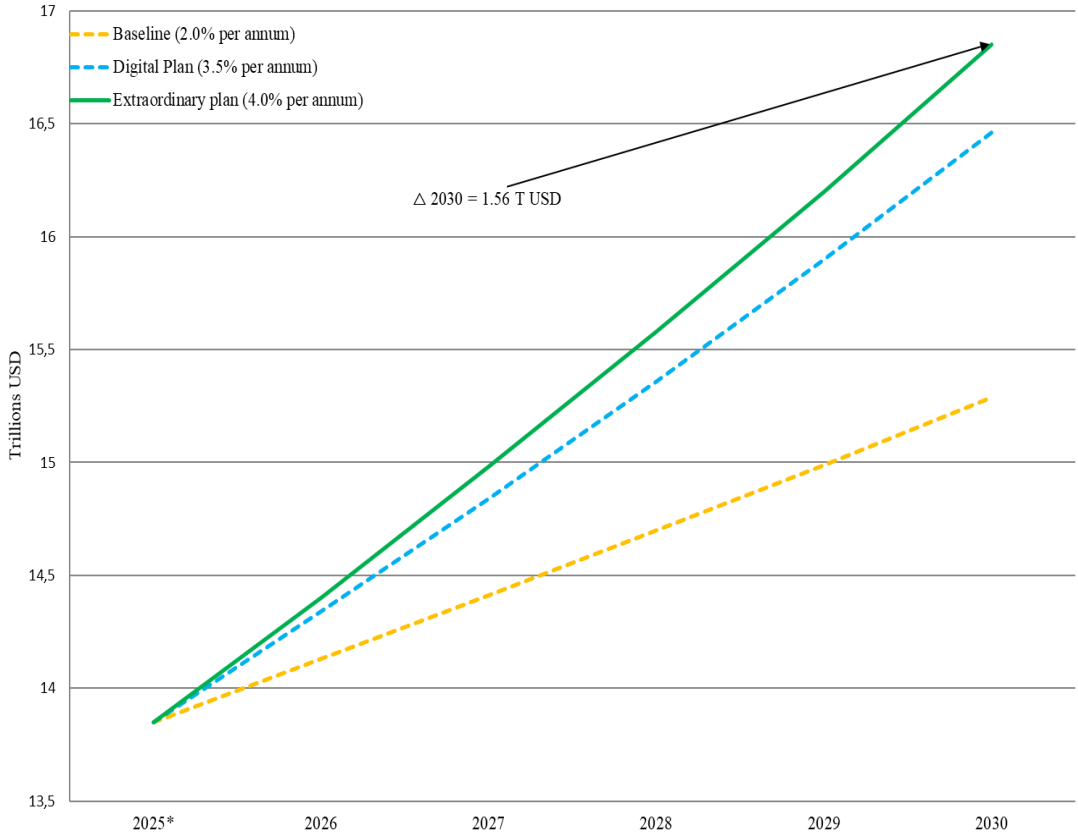
The estimated leverage effect suggests that each €1 of public funding could generate €2 of private investment - a ratio similar to that observed in InvestEU and Horizon programs. This would translate into approximately €1.5 trillion in additional digital investment by 2030.

Projecting from European Commission and OECD estimates of direct GDP impact, the macroeconomic effects could be expected as follows:

- For every +1 percentage point of digital investment, annual GDP growth could increase by +0.25–0.4 percentage points.
- In the services sector, productivity could rise by +10–15% by 2030 relative to the baseline.

Under a €500 billion extraordinary plan, growth in the service sector could reach about 4% annually (compared with 2–3.5% in the baseline scenario), resulting in a total output of US$17.5–18 trillion in 2030—i.e., US$2.5–3 trillion above the inertial projection.

Figure 11*: EU-27 – Service-sector growth scenarios (2025–2030)*



Sources: Eurostat, European Commission (AMECO), ECB, World Bank, IMF, author's estimates.

Nevertheless, this result may appear unconvincing due to diminishing marginal returns and results' lag effect. Moreover, the estimate uses the same multipliers as the current €200 billion program, and therefore incorporates the inefficiencies of the present fragmented approach.

Currently, the 27 EU countries operate with rules and priorities that are not always aligned, leading to duplication and inefficiency: overlapping projects, resource dispersion, slow implementation, heterogeneous regulations on data, privacy, cybersecurity, and software licensing, and the absence of cross-border champions.

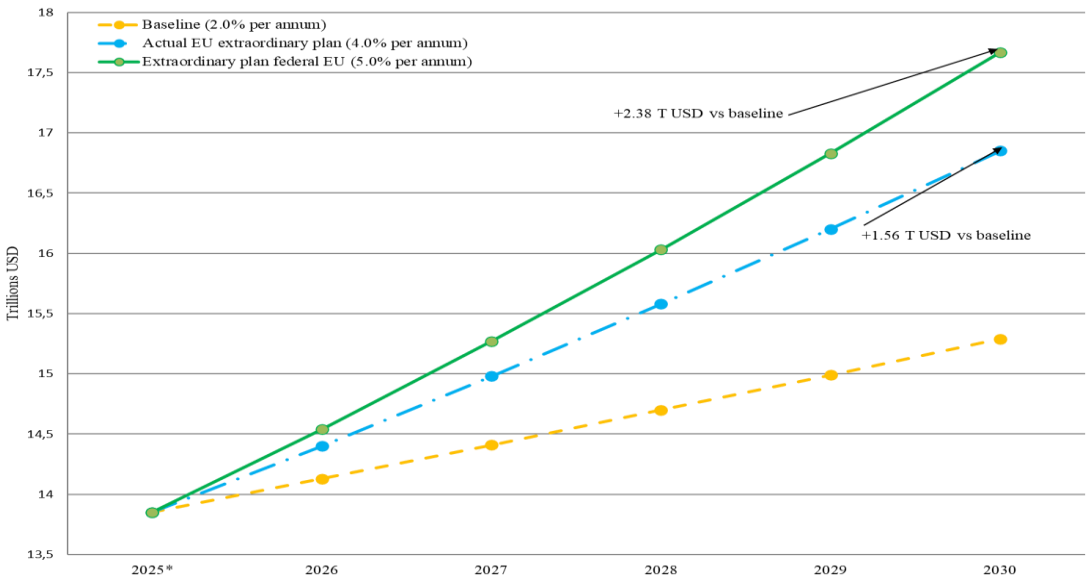
As a result, European digital firms are compelled to adapt to 27 distinct markets, rather than benefiting from a truly integrated single market such as in the US, where

340 million people operate under one framework. This has enabled the emergence of global 'digital giants' (Google, Microsoft, Amazon). In the EU, fragmentation limits scalability. Despite having over 450 million inhabitants (one-third more than the US), the EU fails to generate the multiplicative effects needed to create major European digital players.

By contrast, a federal EU digital budget of €500 billion—centrally managed as a genuine Digital Marshall Plan within a truly integrated single market regulated by common rules on data, AI, cloud infrastructure, and semiconductors—would eliminate duplication, reduce execution times, favor scalability, and encourage the rise of pan-European "digital champions." Moreover, such a plan would strengthen the private multiplier effect by attracting more venture capital and global investors.

In this perspective, applying US multipliers would produce much more significant results.

Figure 12*: EU-27 – Service-sector growth scenarios with extraordinary plan (2025–2030)*



Sources: Eurostat, European Commission (AMECO), ECB, World Bank, IMF, author's estimates.

An extraordinary plan implemented under current EU governance would generate about +0.5 percentage points of GDP annually until 2030, and roughly US$2.5–3 trillion in additional services.

Under a federal EU digital plan, the marginal return could rise to +0.8–1.0 percentage points of GDP annually, as seen in the US with large federal ICT programs. This would translate into an additional US$4–5 trillion in services by 2030 compared with the baseline, rather than the +2.5–3 trillion projected under a less coordinated approach.

In summary, the impact of a €500 billion extraordinary plan would be substantially greater in a federal and coordinated EU: investment returns would be higher, implementation faster, the market more integrated, and the ability to attract private capital significantly stronger.

7. In light of the above considerations, it is possible to extend the EU-27 Digital Marshall Plan to other countries.

First, a Brentry scenario: including the United Kingdom, with a proportional increase of the extraordinary plan to about €670 billion. Sectoral breakdowns show that the ICT share in the UK remains modest compared with total services. The creation of the NISTA authority and the allocation of £725 billion over ten years for infrastructure could greatly facilitate the UK's participation.

The advantages would be numerous:

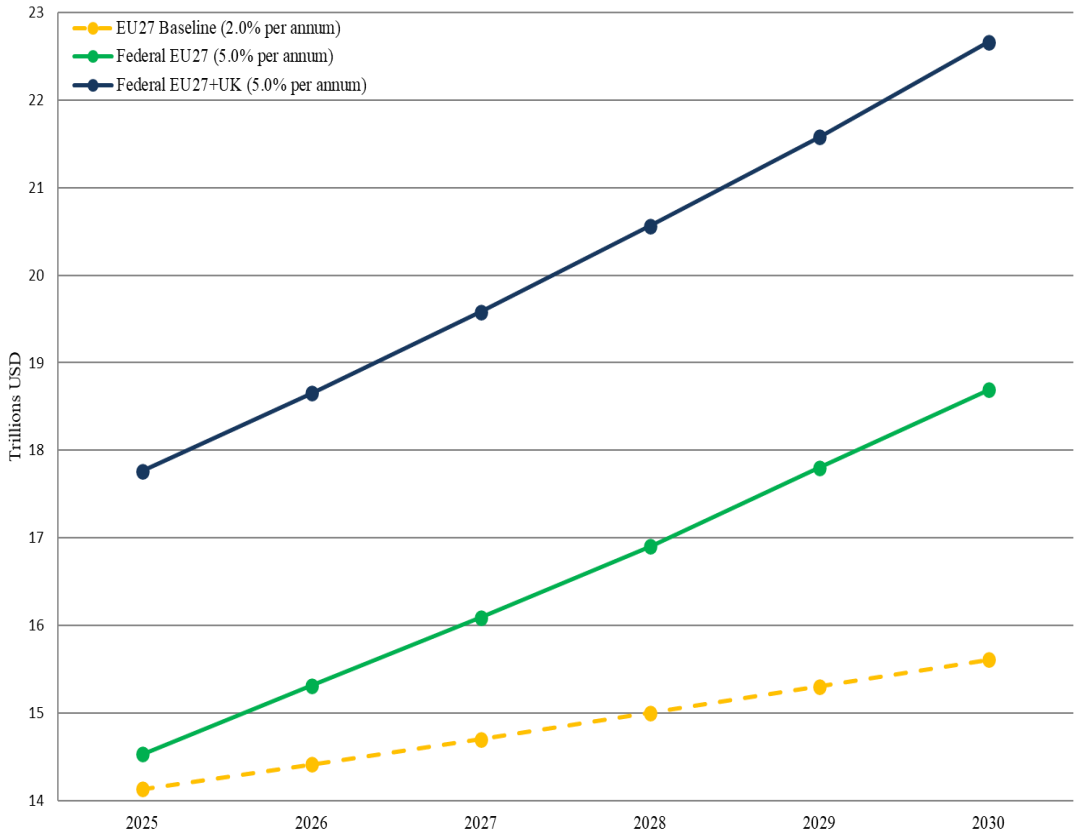
- a larger Digital Single Market, expanding from 450 million (EU-27) to nearly 520 million people with the UK, making the bloc more competitive even compared with the US and China;
- elimination of regulatory fragmentation risk;
- economies of scale in costs, expertise, and infrastructure, as major digital investments (European cloud, semiconductors, supercomputing, 6G) require

hundreds of billions;

- enhanced strategic autonomy vis-à-vis China and the US, bringing geopolitical benefits that are difficult to quantify, such as stimulating European big tech and strengthening Europe's global bargaining power (on AI standards, cybersecurity, digital taxation, cloud, and 5G/6G infrastructure).

Furthermore, joint defensive strategies on cybersecurity could be developed through the sharing of CERTs (Computer Emergency Response Teams), and joint training and research programs could be launched (e.g., a digital Erasmus).

Figure 13*: EU-27 – Service-sector growth scenarios (2025–2030)*



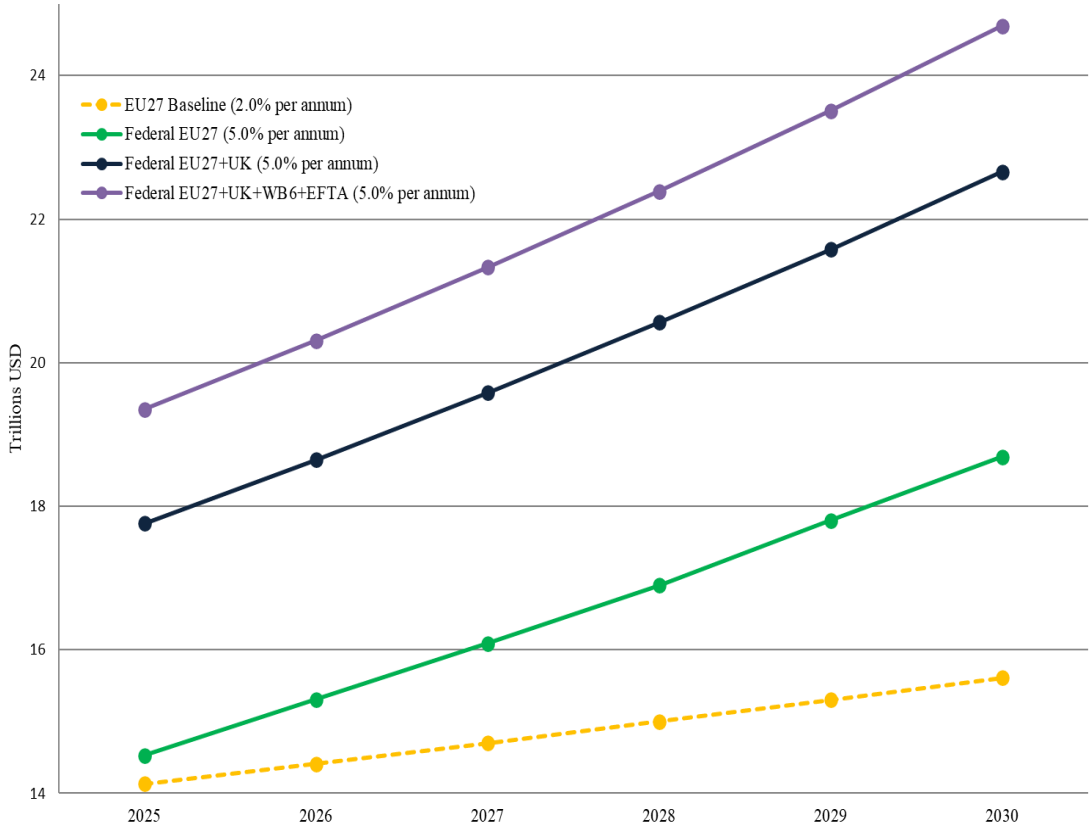
Sources: Eurostat, European Commission (AMECO), OECD, World Bank, IMF, author's estimates.

This reasoning can easily be extended to three further enlarged-Europe

scenarios:

- Western Balkan Six + Moldova: Albania, North Macedonia, Montenegro, Serbia, Bosnia and Herzegovina, Kosovo, and Moldova, with a total population of about 22 million, would scale the plan to about €675 billion.
- EFTA countries: Norway, Iceland, Switzerland, and Liechtenstein, with about 15 million inhabitants, would bring the plan to around €715 billion.

Figure 14*: EU-27 – Service-sector growth scenarios (2025–2030)*



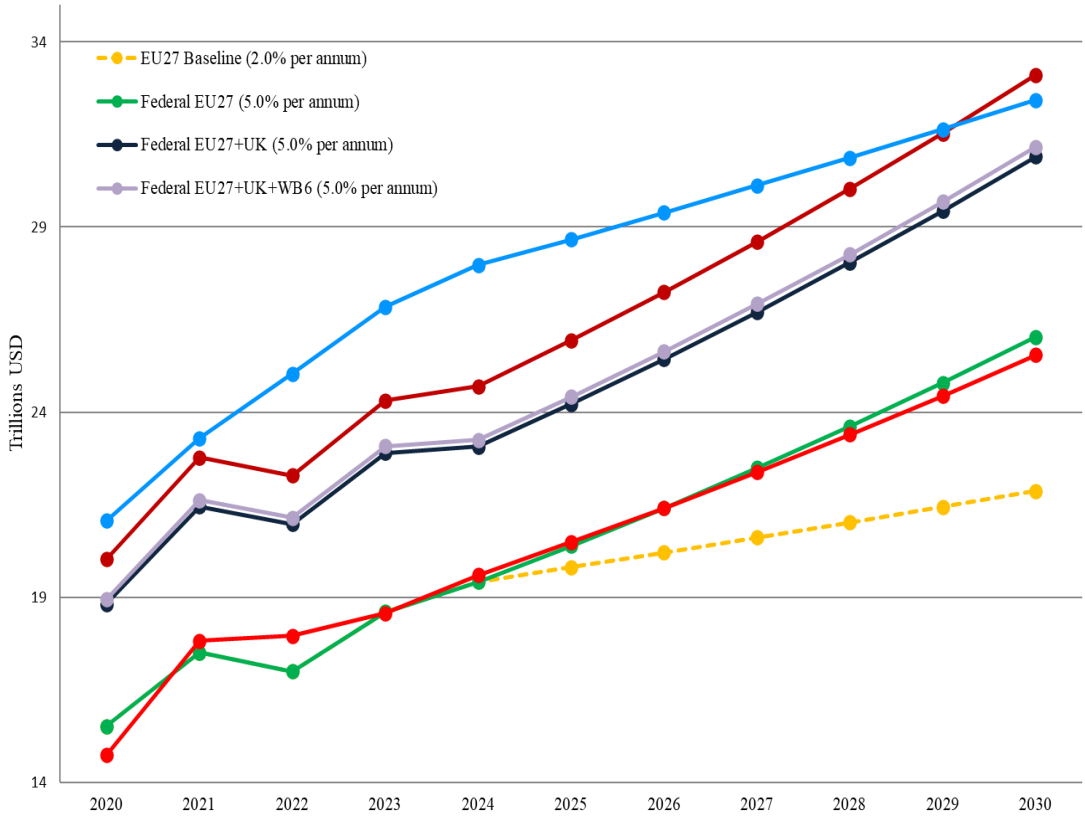
Sources: Eurostat, European Commission (AMECO), OECD, World Bank, IMF, author's estimates.

From a governance perspective, the UK model could be replicated by creating an independent authority responsible for managing investments and coordinating projects-essentially, a "European Central Bank of high tech" - mandated to ensure

Europe's strategic autonomy in digital matters, thus overcoming the governance impasse created by the Lisbon Treaty rules.

These results can then be projected using World Bank and IMF estimates to quantify GDP impact, also comparing with China and the US.

Figure 15*: Total GDP – EU-27 scenarios vs USA and China (2020–2030)*



Sources: Eurostat, OECD, World Bank, IMF, BEA (Bureau of Economic Analysis), FRED, National Bureau of Statistics of China, China Statistical Yearbook, UK Office for National Statistics, UK Blue Book, European Commission (AMECO), ECB, author's estimates.

The result would be a high-tech-driven Europe taking a leading role by 2030. Although these projections are, of course, only scenarios within the complex landscape of geoeconomics and finance, they nonetheless provide considerable food for thought.

8. References / Bibliography

- Aghion P., Jones B., Jones C. (2017), *Artificial intelligence and economic growth*, National Bureau of Economic Research, No. 23928.
- Balcerak A. (2016), *Technological potential of the EU*, Economic Research Working Papers, No. 33.
- Chang Y., Gurbaxani V. (2012), *The impact of IT-related spillovers on long-run productivity: an empirical analysis*, Information Systems Research, Vol. 23, No. 3.
- Ciaffi G., Deleidi M., Mazzucato M. (2024), *Measuring the macroeconomic responses to public investment in innovation: evidence from OECD countries*, Industrial and Corporate Change, Vol. 33.
- Comunale M., Manera A. (2024), *The Economic Impacts and the Regulation of AI: A Review of the Academic Literature and Policy Actions*, IMF Publications, Washington.
- De Laurentis R. (2021), *Digital Economy*, Turin, Giappichelli.
- Donnelly S. (2023), *Semiconductor and ICT industrial policy in the US and EU: geopolitical threat responses*, Politics and Governance, Vol. 11, No. 4.
- Filippucci F., Gal P., Schief M. (2024), *Miracle or myth? Assessing the macroeconomic productivity gains from Artificial Intelligence*, OECD Artificial Intelligence Papers, No. 29.
- Ghiretti F. (2021), *Technological competition: Can the EU compete with China?*, IAI Papers, No. 15.
- Gondauri D., Batiashvili M. (2023), *The impact of Artificial Intelligence on Gross Domestic Product: a global analysis*, International Journal of Innovative Science and Research Technology, Vol. 8, No. 4.
- Grima S. (2024), *Economic development and resilience by EU member states*,

Bingley, Emerald Publishing.

- Gurler M. (2022), *Innovation as an accelerating effect on Gross Domestic Product (GDP) per capita*, The European Journal of Research and Development, No. 3.
- Kalai M. (2024), *Effect of artificial intelligence on economic growth in European countries: a symmetric and asymmetric cointegration based on linear and non-linear ARDL approach*, Journal of Economic Structures, No. 13.
- Kerr W., Nicoud F. (2020), *Tech clusters*, Journal of Economic Perspectives, Vol. 34.
- Kusairi S., Wong Z. (2022), *Impact of digitalisation and foreign direct investment on economic growth: Learning from developed countries*, Journal of International Studies, Vol. 16, No. 1.
- Kuzmin E., Vlasov M., Strielkowski W. (2024), *Digitalization of the energy sector in its transition towards renewable energy: a role of ICT and human capital*, Energy Strategy Reviews, 2024.
- Jean C. (2014), *Geopolitics of the 21st Century*, Bari, Laterza.
- Labhard V., Lehtimäki J. (2022), *Digitalisation, institutions and governance, and growth: mechanisms and evidence*, ECB Working Paper Series, No. 2735.
- Marelli E., Signorelli M. (2015), *Policies in the new European and global scenario*, Turin, Giappichelli.
- Matthess M. (2023), *The impact of digitalization on energy intensity in manufacturing sectors – A panel data analysis for Europe*, Journal of Cleaner Production, Vol. 397.
- Mbassi C. (2023), *Historical technology and current economic development: Reassessing the nature of the relationship*, Technological Forecasting and Social Change, Vol. 195.
- Minenna M. (2016), *The incomplete currency: the future of the Euro and*

solutions for the eurozone, Hoboken (New Jersey), Wiley.

- Nunziante G. (2023), *The effect of the digital economy on total factor productivity in European regions*, Telecommunications Policy, Vol. 47, No. 10.
- Roberts R. et al. (2023), *The economic potential of generative AI: the next productivity frontier*, New York, McKinsey & Co.
- Tassey G. (2024), *Growth policies for the high-tech economy*, Cheltenham, Edward Elgar Publishing.
- Ulnicane I. (2022), *Artificial intelligence in the European Union*, in *The Routledge Handbook of European Integrations*.
- Wang F., Wang H., Xiong L. (2024), *Does the digital economy exhibit multiplier effects? A case study on the optimization of agricultural production structure in rural digital economy*, International Journal of Agricultural Sustainability, Vol. 22.
- Zhao Z., Yang C. (2012), *Rebalancing and sustaining growth in China*, Canberra, ANU Press.

FINANCIAL LITERACY: STILL A PRIORITY FOR THE WELL-FUNCTIONING OF FINANCIAL MARKETS

Trude Myklebust[*] - Francesca Maria Mancioppi[**]

ABSTRACT: *This article explores the evolution of the role of financial literacy in the European regulatory and policy framework, highlighting its growing importance for the proper functioning of financial markets. Examining recent EU initiatives, including the Capital Markets Union, the Retail Investment Strategy and the Savings and Investments Union, the study highlights how financial literacy is key to increasing the direct involvement of retail investors in capital markets, thereby reducing systemic dependence on bank deposits. Particular attention is paid to behavioural finance, which studies how cognitive biases, complexity and regulatory fragmentation influence investor choices and examines the challenges posed by digitalisation and algorithm-based advisory services. By linking financial literacy to broader issues such as financial stability, market inclusion and digital trust, the contribution positions it as a key driver of change as it enables individuals to correctly interpret the information available and to interact knowledgeably with the automated mechanisms that influence their choices, restoring to them the capacity for self-determination that the excessive hetero-regulation of the last decade has widely compromised.*

[*] PhD, Postdoctoral researcher at the University of Oslo.
[**] PhD candidate at "Guglielmo Marconi" University of Rome.
This paper is the result of a unitary approach and a common reflection by the two authors. However, section 1 to 5 can be attributed, in particular, to Dr. Francesca Maria Mancioppi; section 6 can be attributed, in particular, to Dr. Trude Myklebust.

Financial literacy and capital market participation: art. 25 of the Italian Capital Law. - 4. Rethinking financial literacy through behavioral finance - 4.1. The contribution of the Retail Investment Strategy - 5. The challenges of algorithmic financial advice - 6. Discussion.

1. The current environment, deeply affected by health and geopolitical crises - from the COVID-19 pandemic to the conflicts in Ukraine and the Middle East - has highlighted the structural fragility of economic systems.[1] At the same time, while digitalisation and the growing complexity of financial products have accelerated the transformation of markets and business models, international tensions, combined with progressive economic decoupling, have had a deep impact on supply chains and the availability of strategic resources.[2]

At the same time, there have been profound changes in people's behaviour and culture: the spread of smart working, increasing urbanisation, greater mobility for study or work, changing family structures, the pervasiveness of digital interconnection and the growing automation of everyday activities have profoundly altered investors' points of reference. These changes are reflected in a new approach to wealth management and asset allocation, where needs are increasingly complex, personalised and influenced by variables that are not only economic but also psychological, social and environmental.

It has long been recognised that transparency of information alone, although essential, is not sufficient to protect investors in financial markets, as information is often too technical and detailed to be fully understood by the average retail investor.[3]

[1] With specific reference to the effects of the COVID-19 pandemic on the financial sector, see CAPRIGLIONE, *Il Covid 19 e la faticosa ricerca di nuovi paradigmi operative*, in *Rivista di Diritto Bancario*, 1, 2021, p. 13 ff.

[2] International Monetary Fund, *World Economic Outlook, Steady but Slow: Resilience amid Divergence*, 2024, p. 16 ff.

[3] SICLARI, *Tutela del risparmio ed educazione finanziaria*, in *Dirigenza bancaria*, 183, 41, 2017, p. 9 ff.

In this perspective, financial literacy takes on an enabling role, becoming a condition for the effective protection of savings,[4] which in Italy is provided for by Article 47 of the Constitution.[5] Without citizens with an adequate level of education, transparency of information remains formal and trust turns into blind delegation rather than informed participation.[6]

Saving combines its private nature with an essential public function. It represents an "intelligent virtue"[7] in that it implies the ability to forego immediate consumption in favour of greater stability and autonomy in the future. This occurs when saving is based on informed and strategic decision-making, closely linked to the capability to deal with uncertainty in a rational and conscious manner.[8]

In light of these considerations, this paper argues that financial literacy should be recognised as an essential condition for the proper investor protection, particularly

[4] On this point, *ex multis*, see CAPRIGLIONE (edited by), *La nuova legge sul risparmio, Profili societari, assetti istituzionali e tutela degli investitori*, Cedam, Padova, 2006; DE LUCA, MARTORANO (edited by), *Disciplina dei mercati finanziari e tutela del risparmio*, Giuffré, Milano, 2008; SABBATELLI, *Tutela del risparmio e garanzia dei depositi*, Cedam, Padova, 2012; ROSSANO, *Tutela del risparmio e regolazione delle crisi bancarie*, in *DPER Online*, 1, 2018, p. 77 ff.

[5] "*The Republic encourages and protects savings in all its forms; it regulates, coordinates and controls the exercise of credit. It promotes access by the people to home ownership, to direct ownership of land for cultivation and to direct and indirect investment in the large productive complexes of the country*". On this point, *ex multis*, see MERUSI, *Commento sub art. 47*, in BRANCA (edited by), *Commentario della Costituzione*, Zanichelli, Bologna, 1980, p. 153 ff.; ZATTI, *La dimensione costituzionale della tutela del risparmio. Dalla tutela del risparmio alla protezione dei risparmiatori/investitori e ritorno?*, in *Studi in onore di Vincenzo Atripaldi*, Juvene, Napoli, 2010, p. 1469 ff.; ATRIPALDI, *La tutela del risparmio popolare nell'ordinamento italiano: dinamiche attuative dell'art. 47, 2. comma, Cost*., Editoriale Scientifica, Napoli, 2014; BUZACCHI, *Risparmio, credito e moneta tra art. 47 Cost. e funzioni della Banca centrale europea: beni costituzionali che intersecano ordinamento della Repubblica e ordinamento dell'Unione*, in *costituzionalismo.it*, 2, 2017, p. 39 ff.; SCUTO, *La tutela costituzionale del risparmio negli anni della crisi economica. Spunti per un rilancio della dimensione oggettiva e sociale dell'art. 47 Cost*., in *federalismi.it*, 5, 2019, p. 169 ff.; PAGLIARIN, *Le radici costituzionali della tutela del risparmio*, in *Banca impresa società*, 1, 2021, p. 29 ff.

[6] LUSARDI, *Financial literacy and the need for financial education: evidence and implications*, in *Swiss Journal of Economics and Statistics*, 155, 1, 2019, p. 4 ff.

[7] GROS-PIETRO, *Perché il risparmio è virtù intelligente*, La Stampa, 23rd July 2025.

[8] *Ibidem.*

in view of behavioural and cognitive biases and the rise of algorithmic finance. In this regard, the second paragraph will analyse the evolution of financial education in the context of European policies. The third paragraph will examine Article 25 of the Italian Capital Law, which introduced financial education into school curricula. The fourth paragraph will address the interaction between financial education and behavioural finance, emphasizing the limitations of traditional transparency mechanisms. The fifth paragraph will focus on the new issues raised by algorithmic financial advice, with a particular focus on robo-advisory. The final section will offer some reflections on the significance of financial literacy in the context of a broader shift from traditional bank savings towards direct investments in capital markets and its implications for retail investors.

2. Financial literacy – defined as the set of knowledge, skills, attitudes and behaviours that enable people to make informed economic decisions to achieve financial well-being[9] – is a central theme of European Union policies. Since its 2007 Communication on Financial Education,[10] in response to the Green Paper on retail financial services[11] (which stressed the need to address gaps in consumer protection in the financial sector) and following the conclusions of the Ecofin meeting of 8 May 2007, the Commission has identified financial education as essential for the proper functioning of the single market and the well-being of citizens.

The subprime mortgage crisis of 2008 seems to confirm this approach. European consumers' limited understanding of financial products and poor financial

[9] OECD, *Recommendation on financial literacy*, 2020, available at https://legalinstruments.oecd.org /en/instruments/OECD-LEGAL-0461.

[10] Commission of the European Communities, *Communication from the Commission Financial Education*, COM(2007) 808 final, Brussels, 18.12.2007, available at https://eur-lex.europa.eu/LexUri Serv/LexUriServ.do?uri=COM:2007:0808:FIN:EN:PDF.

[11] Commission of the European Communities, *Green Paper on retail financial services in the Single Market*, COM(2007) 226 final, Brussels, 30.4.2007, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007DC0226&from=ET.

literacy has contributed to the instability of the system, revealing the importance of adequate communication and financial education for non-experts.[12] Hence, the belief that improving individual financial literacy promotes more balanced consumer behaviour and more informed decisions, broadening the population's access to the financial system and strengthening overall economic stability. Indeed, the financial crisis has stressed the need to amend the rules on information transparency, particularly those affecting the relationship between banks and their customers and, therefore, the position of investors and savers.

The COVID-19 pandemic has reinforced this awareness. Households and SMEs have been faced with sudden income shocks, debt moratoriums and the use of digital payment instruments without the necessary technical skills.[13]

At the same time, the spread of new financial technologies has raised the minimum level of knowledge required to operate confidently and safely in the digital environment.[14]

EU institutions have complemented traditional disclosure requirements (such as those provided for in the Markets in Financial Instruments Directive also known as MiFID II[15]) with a dense network of soft law initiatives – the financial competence

[12] KLAPPER, LUSARDI, PANOS, *Financial literacy and the financial crisis*, National Bureau Of Economic Research, Working Paper 17930, 2012, p. 4.

[13] CAPRIGLIONE, *La finanza UE al tempo del coronavirus*, in *Rivista Trimestrale di Diritto dell'Economia*, 1, 2020, p. 2 ff.

[14] The World Bank has revealed that the global health crisis caused by COVID-19 and the measures taken by governments have accelerated the transition to digital finance in many economies. However, data has shown that there is a need for greater digital literacy skills citizens. See KLAPPER, MILLER, *The impact of COVID-19 on digital financial inclusion*, Global Bank Group, 2021, available at https://www.gpfi.org/sites/gpfi/files/sites/default/files/5_WB%20Report_The%20impact%20of%20COVID-19%20on%20digital%20financial%20inclusion.pdf.

[15] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, L 173/349, 12.6.2014, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0065.

frameworks for adults in the European Union,[16] the EU Retail Investment Strategy[17] – aimed at transforming financial literacy into a substantive right of economic citizenship.

It is in this perspective that the protection of savings can – and must – be reinterpreted. If savings are a protected asset, then the right to be enabled to save in an informed manner takes on fundamental value. Savings cannot be truly protected if citizens are left without the essential knowledge to understand risk, evaluate products and discern between opportunities and financial traps. Financial education, then, is a prerequisite for the provision of effective and efficient advice.[18] Without a minimum level of financial literacy, even the best advice risks being accepted passively, without information or critical thinking. It would therefore be merely formal protection rather than substantive protection. In essence, ensuring financial literacy means promoting the economic self-determination of consumers so that they can fully exercise their rights.

It remains to be determined which actors should take responsibility for promoting financial education. Although the State has the primary duty to ensure

[16] European Union/OECD, *Financial competence framework for adults in the European Union*, 2022, available at https://finance.ec.europa.eu/system/files/2022-01/220111-financial-competence-framework-adults_en.pdf.

[17] On this point see European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Capital Markets Union for people and businesses-new action plan*, COM(2020) 590 final, Bruxelles, 24.9.2020, available at eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0590; ANNUNZIATA, *Retail investment strategy, How to boost retail investors' participation in financial markets*, Policy department for economic, Scientific and Quality of life Policies, Directorate General for International Policies, 2023.

[18] On this point see BHATTACHARYA, HACKETHAL, KAESLER, LOOS, MEYER, *Is unbiased financial advice to retail investors sufficient? Answers from a large field study*, in *the Review of Financial Studies*, 25, 4, 2012, p. 975 ff.; COLLINS, *Financial advice: A substitute for financial literacy?*, in *Financial Services Review*, 21, 4, 2012, p. 307 ff.; FINKE, *Financial advice: Does it make a difference?*, in MITCHELL, SMETTERS (edited by), *The market for retirement financial advice*, Oxford University Press, Oxford, 2013; BUCHER-KOENEN, KOENEN, *Do seemingly smarter consumers get better advice?* MEA Discussion Paper, 2015.

access to education, it is equally reasonable to consider financial literacy as a cross-cutting issue that necessarily involves the market and its operators. Some legal systems have entrusted this task to central banks;[19] others also provide for the intervention of intermediaries.[20] This raises the question of whether financial education should be considered a public service or an ancillary obligation linked to private intermediation. In any case, it can no longer be considered simply a policy option or voluntary "good practice". Rather, it is a prerequisite for ensuring substantial equality of access to financial markets and, as such, an economic right that should be recognised and protected.

Financial literacy, therefore, appears to act as a bridge between stability and inclusion: research by the OECD shows that countries with higher levels of financial literacy tend to have more stable national economies and a greater ability to withstand financial crises.[21]

Yet the 2023 Eurobarometer reveals that only 18% of EU citizens have a high level of financial literacy, while the remaining 82% have average or low skills; the gaps are more pronounced among young people, women and those with low incomes or education.[22]

A 2023 study by the Bank of Italy shows that financial literacy is among the

[19] For instance, in France the Banque de France has been designated to coordinate and implement the national strategy for economic, fiscal and financial education.

[20] In Italy, for example, it was envisaged that the Committee for the Planning and Coordination of Financial Education Activities (the so-called "Comitato Edufin"), formalised at the Ministry of Economy and Finance in 2017, would offer training content "on demand", but on a voluntary basis.

[21] Specifically, the study revealed that financial literacy and financial inclusion act as enablers for financial resilience. See OECD, *G20/OECD-INFE Report on supporting financial resilience and transformation through digital financial literacy*, 2021, available at https://www.bancaditalia.it/focus/g20-2021/temi-gruppi/gpfi/5_Report_Supporting_resilience_through_digital_financial_literacy.pdf?language_id=1.

[22] EUROPEAN COMMISSION, *Monitoring the level of financial literacy in the EU*, 2023, https://europa.eu/eurobarometer/surveys/detail/2953.

lowest in developed countries.[23] However, compared to 2020, there has been a slight improvement in behaviour and attitudes, while knowledge seems to have deteriorated. This exposes citizens – especially those who are most vulnerable due to their education or age – to harmful economic choices and fraud. On a positive note, Italians seem to be aware of their ignorance, reducing the Dunning-Kruger effect.[24] Moreover, in 2023 the Bank of Italy also recorded, for the first time, the level of digital financial skills among citizens, revealing worrying gaps as well as a gender gap which, although less pronounced than in traditional literacy, particularly penalises women. In this regard, some studies have shown that women tend to achieve better results than men when investing because they approach investments in a more disciplined and patient manner and tend to take fewer risks.[25]

3. It is appropriate to mention the Capital Markets Union (CMU) which, aimed at creating a single capital market, also seeks to increase the involvement of retail investors in financial markets.[26] Raising the level of financial literacy among citizens is a useful tool for strengthening confidence in investment and promoting broader and more informed participation in the market. The implementation of the Capital Markets Union therefore requires a paradigm shift that cannot ignore financial education. In

[23] BANCA D'ITALIA, *Indagini sull'alfabetizzazione finanziaria e le competenze di finanza digitale in Italia: adulti*, 2023, available at https://www.bancaditalia.it/pubblicazioni/indagini-alfabetizzazione/2023-indagini-alfabetizzazione/statistiche_AFA_20072023.pdf.

[24] DE BONIS, GUIDA, ROMAGNOLI, STADERINI, *Educazione finanziaria: presupposti, politiche ed esperienza della Banca d'Italia,* in *Questioni di Economia e Finanza*, Banca d'Italia, 726, 2022, p. 16.

[25] In particular, the study conducted by the Warwick Business School concluded that, after monitoring investor performance for three years, women outperformed men by 1.8% in investments, as men tend to choose more speculative stocks and female investors have a longer-term perspective. See Warwick Business School, *Are women better investors than men?*, 2018, available at https://www.wbs.ac.uk/news/are-women-better-investors-than-men/.

[26] European Commission, *Green Paper*, *Building a Capital Markets Union*, COM(2015) 63 final, Brussels, 18.2.2015, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0063.

order for households and SMEs to have direct access to capital markets, it is necessary to bridge the information and knowledge gaps that have historically reinforced dependence on bank credit.[27] In this regard, financial education plays a key role in the 2020 New Strategy for the Capital Markets Union; in the CMU Action Plan presented by the Commission in September 2020, Action 7 is explicitly entitled "Empowering citizens through financial literacy".[28]

In this context, the Savings and Investments Union (SIU) recently proposed by the European Commission to channel savings – which are currently held by households in EU in the form of bank deposits with a value of approximately €10 trillion[29] – towards productive investment is also noteworthy. The SIU aims to broaden citizens' participation in capital markets through wider investment options and better financial literacy, contributing not only to the growth of private savings but also to the financing of the real economy and the competitiveness of European industry. It is a complementary initiative to the CMU, aimed at strengthening financial integration and increasing the resilience of the internal market, including through the strengthening of the banking union.[30]

In essence, the EU has called on Member States to adopt national financial

[27] In particular, financial literacy improves SMEs' ability in making financial choices, securing financing, embracing new technologies and handling risk. See MOLOSIWA, HOLLAND, *The impact of financial literacy on the performance of Small and Medium-sized Enterprises (SMEs): A review of literature*, in *International Journal of Research in Business and Social Science*, 14, 3, 2025, p. 320 ff.

[28] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Capital Markets Union for people and businesses-new action plan*, COM(2020) 590 final, Brussels, 24.9.2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0590.

[29] European Commission, *Savings and investments union: better financial opportunities for EU citizens and businesses*, 2025, available at https://commission.europa.eu/news-and-media/news/savings-and-investments-union-better-financial-opportunities-eu-citizens-and-businesses-2025-03-19_en.

[30] BERRIGAN, *Towards a More Competitive European Economy: The Role of the Savings and Investments Union (SIU)*, International Banker, Authoritative analysis on international banking, 2025, available at https://internationalbanker.com/banking/towards-a-more-competitive-european-economy-the-role-of-the-savings-and-investments-union-siu/.

literacy and financial inclusion strategies. In Italy, a significant regulatory shift came with Article 25 of Capital Law,[31] which incorporates financial education as a compulsory component of the civic education curriculum in schools. The aim is to promote economic awareness from an early age. The law explicitly states that the courses aim to promote a culture of saving and investment, financial and insurance skills, pension planning, the informed use of digital money management tools, sustainable finance and entrepreneurial culture. In other words, financial education is recognised as a tool for economic citizenship, essential for full participation in the life of the country. This unique formulation elevates financial literacy to a right, emphasising that the state has a duty to provide citizens with training opportunities to manage money, investments, insurance and pensions in an informed manner. Also noteworthy is the explicit reference to new digital money management technologies and new forms of economy and finance, a sign that the legislator intends to promote financial education that is up to date with current challenges, in line with digital and sustainable finance skills.

However, there is an undeniable time lag of almost a decade between the launch of the European strategy and Italy's introduction of financial education as a structural component of school curricula. This cannot be attributed to a mere political oversight, but it has its roots in the country's economic model. Italy has historically had a bank-centric financial structure, in which business growth has been mainly supported

[31] Legge 5 marzo 2024, n. 21, Interventi a sostegno della competitività dei capitali e delega al Governo per la riforma organica delle disposizioni in materia di mercati dei capitali recate dal testo unico di cui al decreto legislativo 24 febbraio 1998, n. 58, e delle disposizioni in materia di società di capitali contenute nel codice civile ((, per la modifica delle disposizioni del codice di procedura civile in materia di arbitrato societario, nonché per la modifica di ulteriori disposizioni vigenti al fine di assicurarne il miglior coordinamento, nonché delega al Governo per la riforma organica e il riordino del sistema sanzionatorio e di tutte le procedure sanzionatorie recati dal medesimo testo unico di cui al decreto legislativo n. 58 del 1998)). (24G00041), available at https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2024-03-25;21.

by bank credit,[32] while participation in capital markets has remained marginal. In this context, financial education has never emerged as a systemic priority, lacking both social demand and political impetus to build an economically aware citizenry.

The school environment is the most effective vehicle for disseminating financial knowledge and skills. Schools, in fact, make it possible to involve the entire youth population - regardless of social background - and to introduce future consumers to economic concepts at a time in their lives when they are not yet called upon to make decisions that will determine their financial stability. Moreover, today's young people will face financial decisions that are far more complex than those faced by previous generations.[33] The inclusion of financial education modules in school curricula, in addition to having a direct impact on students' skills, can also have positive repercussions within families. This is because as young people become more aware, they will tend to share and discuss what they learn, thus triggering an intergenerational dialogue that is useful for raising the level of economic information among parents as well.[34]

It should be noted that, in order to implement these objectives, the Italian Capital Law strengthens the role of the Committee for the Planning and Coordination of Financial Education Activities, already established within the Ministry of Economy

[32] BUCĂ, VERMEULEN, *Corporate investment and bank-dependent borrowers during the recent financial crisis*, in *Journal of Banking & Finance*, 78, 2017, p. 164 ff.; ARISTEI, ANGORI, *Heterogeneity and state dependence in firms' access to bank credit,* in *Small Business Economy*, 59, 1, p. 47 ff.

[33] LUSARDI, OGGERO, *Millennials and Financial Literacy: A Global Perspective*, Global Financial Literacy Excellence Center, The George Washington University School of Business, 2017, p. 3; MEGHA, GUPTA, *A comparative study of Financial Literacy level of Generation Z and Millennials*, in *Journal of Informatics Education and Research*, 5, 1, 2025, p. 1725.

[34] BIANCO*, L'educazione finanziaria nelle scuole, Indicazioni dall'esperienza internazionale e da quella della Banca d'Italia,* Università La Sapienza – OCF, 2024, available at https://www.bancaditalia.it/pubblicazioni/interventi-vari/int-var-2024/Bianco-12.06.2024.pdf?utm_source.

and Finance in 2017.[35]

4. Although institutional efforts are essential to support the dissemination of financial education, it is equally necessary to reflect on the actual effectiveness of the information conveyed. According to the traditional approach, more information enables individuals to make more informed and therefore better decisions. However, over time, this assumption has been rethought in light of individuals' sometimes limited ability to process the information they receive correctly. In fact, an excessive amount of data can distract investors from what is really important leading them into error,[36] particularly considering how digital innovation in finance has increased the variety and complexity of the products on offer,[37] which may appear less understandable to end users. Added to this a fragmented regulatory framework that can sometimes struggle to provide clear and consistent guidance. In this context, it is worth remembering that the often-disjointed regulatory stratification has ended up fuelling uncertainty and opacity, opening the door to phenomena such as shadow banking system and mis-selling.[38]

Furthermore, the language used in financial information is often overly complex

[35] Other Member States have also recently strengthened their programmes. For instance, Spain has updated its 2022-2025 financial education plan to include FinTech modules while France has given the Banque de France a central role in coordinating and implementing the national financial education strategy, which includes managing initiatives linked to the Cité de l'Économie.

[36] BERNALES, VALENZUELA, ZER, *Effects of Information Overload on Financial Markets: How Much Is Too Much?*, International Finance Discussion Papers, 1372, 2023, p. 2 ff.

[37] LEMMA, *FinTech Regulation, Exploring New Challenges of the Capital Markets Union*, Palgrave Macmilan, Cham (SW), 2020, p. 4 ff.

[38] On this point see FRANKE, MOSK, SCHNEBEL, *Fair Retail Banking: How to Prevent Mis-selling by Banks*, Sustainable Architecture for Finance in Europe, White Paper No. 39, Goethe University, 2016; MARTYSZ, RAKOWSKI, *Misselling consumer awareness study – Circumstances surrounding the occurrence of misselling*, in *International Journal of Management and Economics*, 57, 2, 2021, p. 121 ff.

and marked by a high degree of legal technicality.[39] It is a language that informs but does not explain. As a result, the adequacy of information cannot be assessed on a purely quantitative basis, but rather in qualitative terms, with an emphasis on clarity and comprehensibility, especially given the limited rationality of investors. The decision-making process of the latter is influenced by many external factors which affect the way they interpret and evaluate the information they receive. Ultimately, individual irrationality cannot be eliminated, but it can be contained through an effective combination of education, advice and clarity of information.

Consequently, fnancial education should not be understood as the simple transmission of technical knowledge, but as a strategic tool for cognitive empowerment. It is a path towards greater awareness, capable of correcting (or at least reducing) well-known behavioural biases – such as loss aversion[40] and the illusion of control[41] – that influence economic decisions. In this sense, financial education is intertwined with the principles of behavioural finance, which is applied in financial education programmes by enhancing the cognitive and non-cognitive processes that

[39] LESMY, MUCHNIK, MUGERMAN, *Lost in the FOG: Growing Complexity in Financial Reporting - A Comparative Study*, 2024, available at SSRN: https://ssrn.com/abstract=4542676 or http://dx.doi.org /10.2139/ssrn.4542676.

[40] Loss aversion describes the tendency, widely documented in psychology and economics, to attribute greater emotional and decision-making weight to the loss of a particular resource than to the gain of the same resource. On average, it is estimated that a loss is perceived as approximately twice as intense as an equivalent gain (ratio of 2:1). See KAHNEMAN, TVERSKY, *Prospect Theory: an analysis of decision under risk*, in *Econometrica*, 47, 2, 1979, p. 263 ff.; BENARTZI, THALER, *Myopic loss aversion and the equity premium puzzle*, National Bureau of Economic Research, Working Paper No. 4369, 1993; BROWN, IMAI, VIEIDER, CAMERER, *Meta-analysis of Empirical Estimates of Loss Aversion*, in *Journal of Economic Literature*, 62, 2, 2024, p. 485 ff.

[41] The illusion of control represents the tendency of individuals to believe that they can control (or at least influence) the outcomes of their decisions to a greater extent than is actually possible in reality. See ABDIN, QURESHI, IQBAL, SULTANA, *Overconfidence bias and investment performance: A mediating effect of risk propensity*, in *Borsa Istanbul Review*, 22, 4, 2022, p. 780 ff.; SCHÜTZE, SCHMIDT, SPITZER, WICHARDT, *Illusion of Control: Psychological Characteristics as Moderators in Financial Decision Making*, in *Journal of Risk and Financial Management*, 17, 65, 2024.

influence how information is learned and internalised.[42] Behavioural finance essentially ensures greater customer protection, especially for retail customers.

However, financial literacy has shown significant limitations over the years, especially when entrusted to occasional initiatives that are not integrated into a systemic strategy. The doctrine has observed that, in some cases, it can even reinforce dysfunctional attitudes, exacerbating the misperception of risk.[43]

Therefore, financial education must be tailored to the characteristics of the target audience and geared towards the formation of a true risk culture.[44] In this perspective, risk should not be presented as a monolithic entity to be avoided, but as a natural and necessary element of financial activity, which must be understood, differentiated and governed.[45] A more nuanced perception of risk allows investors to exploit its potential, transforming it from a factor of exclusion to a tool for market participation.

Similarly, even advisory services do not produce any real protective effects if

---

[42] ROA GARCIA, *Financial education and behavioral finance: new insights into the role of information in financial decisions*, in *Journal of Economic Surveys*, 27, 2, 2013, p. 297 ff.

[43] One of the biggest risks arising from financial education is overconfidence, which occurs when people's confidence in their financial abilities exceeds their actual level of financial competence. More specifically, overconfidence can manifest itself in overestimation (meaning the tendency to believe oneself more capable than one actually is), overplacement (referring to the inflated conviction of being superior to others) and overprecision (understood as the excessive confidence in the accuracy of one's own knowledge or judgments). Usually, this phenomenon is related to advice aversion. For this reason, financial knowledge should be balanced with financial confidence to avoid harmful financial choices. See GARCÍA, GOMEZ, VILA, *Financial overconfidence, promotion of financial advice, and aging*, in *Journal of Business Research*, 145, 2022, p. 325 ff.; MOORE, SCHATZ, *The three faces of overconfidence*, in *Social and Personality Psychology Compass*, 11, 8, 2017, p. 1 ff.; KRAMER, *Financial literacy, confidence and financial advice seeking*, in *Journal of Economic Behavior & Organization*, 131, 2016, p. 198 ff.

[44] XU, *Behavioral Finance Provides Insights into Risk Perception and Risk Management*, in *Academic Journal of Management and Social Sciences*, 4, 1, 2023, p. 12 ff.

[45] Here, the risk-as-feelings hypothesis comes into play. See LOEWENSTEIN, WEBER, HSEE, WELCH, *Risk as feelings*, in *Psychological Bulletin*, 127, 2, 2001, p. 267 ff.; LUCARELLI, MAGGI, UBERTI, *Risk seeking or risk averse? Phenomenology and perception*, in VIALE, FILOTTO, ALEMANNI, MOUSAVI (edited by), *Financial Education and Risk Literacy*, Edward Elgar Publishing, Cheltenham, 2024, p. 220 ff.

the client does not have the minimum tools to understand, evaluate and communicate with the advisor. In this regard, behavioural finance has also become essential in financial advice because if the role of the advisor is to guide the investor towards the best economic decision,[46] it is equally reasonable to consider how the advisor should eliminate cognitive errors that may affect the client's decision-making process, either to satisfy the client's interests or to establish a stable and long-lasting relationship with the client, thus avoiding a misalignment between expectations and results which inevitably affects the advisory relationship.

It should also be considered that financial advisors may also be subject to cognitive and behavioural distortions, as highlighted by numerous experimental studies[47] showing their vulnerability to framing effects[48] and to simplistic heuristics of complex problems.[49] Furthermore, another issue of concern to investors is the potential conflict of interest that arises in relation to incentives originating from the system.[50] Hence the long-felt need for more holistic advice geared to the real interests

[46] In accordance with the obligation to act honestly, fairly and professionally, in the best interests of their clients, as required by Article 24(1) of MiFID II. See CAPRIGLIONE, *Intermediari finanziari investitori mercati. Il recepimento della Mifid. Profili sistematici*, Cedam, Padova, 2008, p. 104 ff.

[47] *Ex multis*, ATHOTA, PEREIRA, HASAN, VAZ, LAKER, REPPAS, *Overcoming financial planners' cognitive biases through digitalization: A qualitative study*, in *Journal of Business Research*, 154, 113291, 2023; BERTHET, *The Impact of Cognitive Biases on Professionals' Decision-Making: A Review of Four Occupational Areas*, in *Frontiers Psychology*, 2022; BAKER, FILBECK, RICCIARDI, *How Behavioural Biases Affect Finance Professionals*, in *The European Financial Review*, 2017.

[48] The framing effect refers to how the presentation of a choice can significantly shape the final decision, as individuals' perceptions are highly sensitive to the way options are formulated and the context in which they are embedded.

[49] It includes familiarity, representativeness and anchoring. Familiarity leads to overestimating the probability of an event based on its notoriety or the ease with which it can be recalled (ease of retrieval). Representativeness, on the other hand, leads to probabilistic judgements based on stereotypical models or similar past experiences. Anchoring bias occurs when initial information or assumptions influence subsequent assessments, reducing the propensity to adjust one's beliefs in light of new data. This mechanism would explain, for example, the excessive stability of financial advisors' judgements even when updated information is available.

[50] Clients fear that intermediaries may abuse the trust placed in them by pursuing their own interests to the detriment of their clients' interests. In this regard, a recent EU survey shows that only 38% of investors surveyed are confident that the financial advice they receive is primarily in their best interests,

of investors. In this perspective, financial education should not be aimed exclusively at clients, but also at operators where they do not have the ability to critically assess the repercussions of their choices (which are then recommended to clients) on the overall functioning of the market.

4.1 It should also be noted that over the last few decades European legislation has embarked on a process of gradual cultural transformation of the financial market, inspired by a more mature and ethical view of economic activity,[51] where transparency, sustainability and social responsibility have taken on an increasingly important role in regulatory processes and in the orientation of financial policies. The recent reform proposals are currently being discussed under the name MiFID III of December 2022, which is emerging as a regulatory and behavioural innovation project, promoting fairer financial markets through, for example introducing the concept of "value for money" for retail investment and packaged insurance products, strengthening product governance requirements and introducing benchmarks for assessing financial products.

In more detail, In May 2023, the European Commission presented the Retail Investment Strategy (RIS). It is a comprehensive regulatory package aimed at strengthening the protection, trust and empowerment of retail investors in EU

while 45% explicitly state that they do not trust it. See European Commission, *Monitoring the level of financial literacy in the EU*, 2023, available at https://europa.eu/eurobarometer/surveys/detail/2953.

[51] Suffice it to consider the principle of graduated client protection introduced with MiFID II, with which European legislators sought to strengthen the system of investor safeguard, recognising the need for adequate differentiation between market participants. In particular, the Directive divides clients into three categories: retail clients (art. 4, par. 1, n. 11), professional clients (art. 4, par. 1, n. 10) and eligible counterparties (art. 30). The less able a person is to understand and assess risk, the more stringent the obligations imposed on the intermediary must be. The complex regulatory framework aims to overcome the information asymmetries that have historically weakened the position of investors.

financial markets.[52] At present, the strategy is still being finalised,[53] but it includes a proposal for an Omnibus Directive[54] – aimed at amending MiFID II, the Undertaking for Collective Investment in Transferable Securities (UCITS) Directive, the Alternative Investment Fund Managers Directive (AIFMD), the Taking-up and Pursuit of the Business of Insurance and Reinsurance Directive (Solvency II), and the Insurance Distribution Directive (IDD) – and a proposal for a regulation amending the PRIIPs Regulation.[55]

This regulatory package gives a central role to financial education while promoting the essential principles of behavioural finance. Indeed, one of the objectives of the Omnibus Directive is to encourage Member States to implement national measures to support financial literacy among citizens.[56] Measures are also planned to increase the transparency and comprehensibility of information,[57] accompanied by "nudging" techniques which, without resorting to greater clarity of information, commands or prohibitions, aim to "gently" guide consumer behaviour

[52] Indeed, the initiative is part of the 2020 Action Plan for the Capital Markets Union (CMU) with a view to creating a single capital market.

[53] The European Parliament and the Council have stated their positions – sometimes conflicting – on the Commission's proposal. For the proposal for a regulation, see https://data.consilium.europa.eu/doc/document/ST-6975-2025-INIT/en/pdf. For the proposal for a directive, see https://data.consilium.europa.eu/doc/document/ST-6976-2025-INIT/en/pdf. Trilogue negotiations are now underway.

[54] Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union retail investor protection rules, COM(2023) 279 final, 2023/0167(COD), Brussels, 24.5.2023, available at eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023PC0279.

[55] Proposal for a Rregulation of the European Parliament and of the Council amending Regulation (EU) No 1286/2014 as regards the modernisation of the key information document, COM(2023) 278 final, 2023/0166(COD), Brussels, 24.5.2023, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023PC0278.

[56] European Council, Council of the European Union, *Retail investment strategy*, available at https://www.consilium.europa.eu/en/policies/retail-investment-strategy/.

[57] *Ibidem*.

towards responsible choices that are not affected by bias.[58]

Given that financial advisors may be subject to cognitive and behavioural biases, independent financial advice is particularly important as it appears to be potentially more suitable for generating customer trust since, in theory, it is more autonomous and less exposed to conflicts of interest thanks (also) to the prohibition on receiving incentives from third parties.[59] However, the use of independent advisory services to date has been quite limited, essentially due to the duplication of costs. For these reasons, the Retail Investment Strategy proposes to encourage the use of such services by introducing the possibility of independent advice limited to specific financial instruments that are "weel-diversified, non-complex and cost-efficient".[60] Consequently, the assessment of suitability must be focused on a limited amount of information about the customer, excluding information relating to his or her knowledge and experience as well as the diversification of the portfolio.[61]

As is well known, MiFID II clearly distinguishes between retail investors and professional investors;[62] the RIS aims to ease the requirements of this classification. In particular, the proposed Omnibus Directive aims to relax the limits required to qualify as a "professional investor" upon request by lowering, for example, the capital

[58] DAVOLA, *Bias cognitivi e contrattazione standardizzata: quali tutele per i consumatori*, in *Contratto e Impresa*, 2, 2017, p. 62; VELLA, *Diritto ed economia comportamentale*, Il Mulino, Bologna, 2023, p. 77 ff.

[59] DI CIOMMO, *La consulenza finanziaria alla luce della MiFID2: profili giuridici*, in *Rivista Trimestrale di Diritto dell'Economia,* 1, 2017, p. 64; ESMA, *Final Report ESMA's Technical Advice to the Commission on the impact of the inducements and costs and charges disclosure requirements under MiFID II*, ESMA35-43-2126, 31 March 2020, p. 5 ff., available at https://www.esma.europa.eu/sites/default/files/library/esma35-43-2126_technical_advice_on_inducements_and_costs_and_charges_disclosures.pdf?; RESTELLI, *Shaped by the Rules. How Inducement Regulation Will Change the Investment Service Industry*, in *European Company and Financial Law Review*, 18, 4, 2021, p. 640 ff.

[60] Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union retail investor protection rules, cit., p. 24.

[61] *Ibidem*.

[62] Directive 2014/65, art. 4, para. 1, nn. 10, 11.

threshold (from €500,000 to €250,000) and recognising any education or training qualifications as an additional criterion. In addition, legal entities will be able to apply for professional client status, provided that they meet specific requirements in terms of balance sheet, net turnover and own funds.[63] In this regard, although the intention to reduce administrative burdens and provide a more appropriate classification is clear, some concerns arise.

Firstly, these amendments do not address the problem of fragmentation in the EU legislative framework. Suffice it to say that the IDD does not provide for a distinction similar to that provided for in MiFID II, thus precluding adequate regulatory harmonisation between functionally comparable financial and insurance products. This creates differences and, at the same time, normative overlaps and also increases the complexity for market operators in managing and distributing products across the EU.[64] Secondly, facilitating the recognition of the customer as a "professional" also requires a high capacity to take risks. It therefore seems appropriate to ask whether this result is fully consistent with the objectives of behavioural finance. This is particularly important given that financial education constitutes a necessary but not sufficient condition for ensuring effective consumer protection.

5. In light of the above considerations, it seems appropriate to briefly examine the role played by financial education – and behavioural finance – in algorithmic advisory services, better known as robo-advisory, and, consequently, in the investor's ability to address the challenges placed by the opacity of such instruments. This should also take into account the implications of the new European regulatory framework on

[63] Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union retail investor protection rules, cit., p. 20.

[64] ANNUNZIATA, *Retail investment strategy*, *How to boost retail investors' participation in financial markets*, cit., p. 33.

AI.

As is well known, robo-advisory helps to bridge the advice gap[65] by broadening the pool of investors (especially younger ones[66]) who can access the service thanks to generally low costs,[67] more flexible time constraints and a lower asset threshold than traditional financial advice.[68] Hence, it is not surprising that in 2024, the global market for automated financial advice was estimated at around $8.39 billion, with growth to around $69.32 billion by 2032.[69]

Although this service is considered suitable for promoting greater democratisation of the financial market,[70] there are some doubts about its real effectiveness in promoting financial literacy among users. The robo-advisory model tends to minimise active customer involvement by replacing the decision-making process with algorithms that generate passive investment recommendations.

More specifically, in order to define their investment portfolio, users must first develop their profile within the platform, providing information such as their risk appetite, objectives, desired frequency, and so on. To this end, it is clear that customers must have sufficient financial knowledge and skills. Nevertheless, robo-advisors themselves sometimes promise to provide access to the market even to those

---

[65] CARATELLI, GIANNOTTI, LINCIANO, SOCCORSO, *Valore della consulenza finanziaria e robo advice nella percezione degli investitori, Evidenze da un'analisi qualitativa*, in *Quaderno FinTech*, 6, 2019, p. 7.

[66] BRENNER, MEYLL, *Robo-advisors: A substitute for human financial advice?*, in *Journal of Behavioral and Experimental Finance*, 25, 2020, p. 3.

[67] SIONG TAN, *Robo-advisors and the financialization of lay investors*, in *Geoforum*, 117, 2020, p. 48.

[68] D'ACUNTO, ROSSI, *Robo-Advising*, in RAU, WARDROP, ZINGALES (edited by), *The Palgrave Handbook of Technological Finance*, Palgrave macmillan, Cham, 2021, p. 726.

[69] This corresponds to a compound annual growth rate (CAGR) of 30.3% over the period 2025-2032. See *Robo Advisory Market Size, Share & Trends Analysis Report By Type (Pure Robo Advisor, Hybrid Robo Advisor), By Provider (Fintech Robo Advisor, Bank), By Service Type, By End-use, By Region, And Segment Forecasts, 2024 – 2030*, Report ID 109986, 14 luglio 2025, Fortune Business Insights, available at https://www.fortunebusinessinsights.com/segmentation/robo-advisory-market-109986.

[70] REHERA, SOKOLINSKIB, *Robo advisors and access to wealth management*, in *Journal of Financial Economics*, 155, 2024, p. 6.

without prior financial knowledge.[71] In essence, the real complexity of investing is downplayed in order to attract customers. Such a dynamic entails multiple risks; just think of the case of inexperienced investors who achieve initial positive results through robo-advisory and consequently develop overconfidence. This bias can not only harm the individual investor, who will tend to be more willing to take risks, but in the long run can also compromise financial well-being as a whole.[72]

Of course, the decision to opt for algorithmic financial advice may depend on the well-known advantages of digital innovation, such as efficiency and timeliness. However, it should be remembered that legal doctrine has long emphasised that algorithms, and in this case those on which robo-advisors are based, acquire and incorporate a human element throughout their life cycle that cannot be eliminated. This is because such algorithms are designed by human beings who are subject to bias and cognitive limitations and are therefore unable to predict future outcomes with absolute accuracy, as they cannot contemplate all the potential possibilities present in the market (also considering the uncertainty and inherent complexity of financial markets and investment activities).[73] In light of the above, automated (or semi-automated) advisory systems, rather than striving for perfect and unattainable rationality, should aim to acquire purely human elements such as intuition, empathy or, more generally, emotions in order to predict (and understand) investor behaviour more accurately.[74]

---

[71] SIONG TAN, *Robo-advisors and the financialization of lay investors*, cit., p. 58.

[72] KAHNEMAN, TVERSKY, *Prospect Theory: an analysis of decision under risk*, cit.

[73] SIMON, *A Behavioral Model of Rational Choice*, in *The Quarterly Journal of Economics*, 69, 1, 1955, p. 99 ff.; SCHWARZ, CHRISTENSEN, ZHU, *Bounded Rationality, Satisficing, Artificial Intelligence, and Decision-Making in Public Organizations: The Contributions of Herbert Simon*, in *Public Administration Review*, 82, 5, 2022, p. 902 ff.; LUO, LI, YU, HUANG, YANG, HUANG, *Research on human dynamics characteristics under large-scale stock data perturbation*, in *The North American Journal of Economics and Finance*, 70, 2024, p. 3 ff.

[74] MAGDALENE, KOVILA, COOPAMOOTOO, TOREINI, AITKEN, ELLIOT, Moorsel, *Simulating the Effects of Social Presence on Trust, Privacy Concerns & Usage Intentions in Automated Bots for Finance*, in *IEEE European Symposium on Security and Privacy Workshops*, 2020, p. 2 ff.

At the same time, while some scholars call for greater "humanisation" of algorithmic services for the reasons outlined above,[75] others consider such anthropomorphisation to be equally worrying. This is because some fear that the adoption of more familiar language could generate excessive emotional trust in robo-advisors, which could lead users, who may be inexperienced or unfamiliar with technology, towards overly risky investment strategies that are not suited to their investment profile.[76]

In reality, there does not seem to be a meaningful correlation between the level of digital skills and trust in automated systems. In this regard, some studies show that the likelihood of following an investment recommendation does not depend so much on the nature of the advisor – whether human or robo-advisor – as on the consistency between the proposal received and the decision that the investor would have made independently.[77] In essence, the tendency to follow the advisor's recommendation increases if it confirms the client's opinions. Furthermore, it has been revealed that an additional determining factor is the trust placed by the individual in automated systems, whereas the level of financial literacy is not correlated.[78]

In conclusion, the applicability of the Artificial Intelligence Act[79] to robo-

[75] On this point, see HYUN BAEK, MINSEONG, *Ai robo-advisor anthropomorphism: The impact of anthropomorphic appeals and regulatory focus on investment behaviors*, in *Journal of Business Research*, 164, 2023; HILDEBRAND, BERGNER, *Conversational robo advisors as surrogates of trust: onboarding experience, firm perception, and consumer financial decision making*, in *Journal of the Academy of Marketing Science*, 49, 2021, p. 659 ff.

[76] On this point, see HODGE, MENDOZA, SINHA, *The Effect of Humanizing Robo-Advisors on Investor Judgments*, in *Contemporary Accounting Research*, 38, 1, p. 770 ff.

[77] ALEMANNI, ANGELOVSKI, DI CAGNO, GALLIERA, LINCIANO, MARAZZI, SOCCORSO, *Do investors rely on robots? Evidence from an experimental study,* in *Quaderni FinTech*, 7, 2020, p. 24.

[78] CRUCIANI, GARDENAL, TONON, *Fiducia e accettazione del consiglio di investimento: consulenza tradizionale e automatizzata a confronto*, in *Bancaria*, 4, 2024, p. 27.

[79] 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

advisory remains to be verified. On the one hand, Article 5 of the Regulation prohibits the use of AI systems that employ manipulative, deceptive or subliminal techniques if they cause significant damage. In the context of automated advice, this could be relevant in cases where the "humanised" interaction of the robo-advisor leads the user to make unconscious or overly risky choices. However, there is still uncertainty in the doctrine as to whether purely financial damage – and not physical or psychological damage – is sufficient to fall within this prohibition.[80] On the other hand, robo-advisors used for creditworthiness assessment are expressly classified as high-risk systems,[81] with the consequent application of stringent obligations in terms of transparency, traceability and governance.[82] In light of possible future developments, the European Commission may extend the list of high-risk AI systems if it considers that their impact is comparable to that of the cases already covered by the Regulation.[83] Furthermore, the relevance of the provisions on generative AI cannot be ruled out if robo-advisors are based on general-purpose models capable of generating complex content (such as images, text, music, etc.).[84] Finally, there are those who believe that if automated advice is not personalised, the rules for low-risk systems should apply, as these are tools that generate standardised content.[85] In such cases, only transparency requirements are envisaged to ensure that the user is aware that they are interacting

2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), 2024/1689, 12.7.2024, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401689.

[80] MARANO, SHU, *Regulating Robo-Advisors in Insurance Distribution: Lessons from the Insurance Distribution Directive and the AI Act*, in *Risks*, 11, 12, 2023, p. 9.

[81] Regulation (EU) 2024/1689, Annex III, para. 5, l. b).

[82] Regulation (EU) 2024/1689, Chapter III.

[83] Regulation (EU) 2024/1689, art. 7.

[84] SCHWARCZ, BAKER, LOGUE, *Regulating Robo-advisors in an Age of Generative Artificial Intelligence*, in *Washington and Lee Law Review*, 775, Minnesota Legal Studies Research Paper No. 25-09, U of Michigan Law & Econ Research Paper No. 24-042, 2025, p. 802.

[85] DE SANTIS, *Piattaforme di "Robo-Advice" tra disciplina MiFID e AI Act*, in *Analisi Giuridica dell'Economia*, 1, 2025, p. 217.

with an AI system.[86]

6. As noted at the outset, the emphasis on financial literacy has been increasingly recognized in European policymaking over the past two decades. Pivotal events such as the Global Financial Crisis of 2008 and the COVID-19 pandemic revealed that consumers and retail investors often lacked a solid understanding of essential market functionalities and investment alternatives, exacerbating the adverse effects of these crises. In response, EU policy has sought to remedy this situation through various initiatives aimed at enhancing financial literacy within the consumer segment of financial markets, complemented by a wide range of legal and institutional measures designed, among others, to strengthen consumer protections.[87]

Nevertheless, as mentioned earlier, significant drivers contribute to a rapidly shifting financial landscape, indicating that the demand for financial literacy remains persistent. Consumers and savers must possess adequate knowledge to navigate this increasingly complex environment. Among the most noticeable changes is the digitization of financial services, enhanced cross-border provision, increased structural connectivity, and challenges related to geopolitical uncertainty. These developments amplify the complexity of financial markets, further complicating consumers' understanding of how to engage effectively with them, thereby increasing the urgency to elevate the level of financial literacy across the population.

Beyond these immediate concerns, there are also deeper underlying trends that warrant attention to grasp the growing focus on financial literacy. These trends are tied to high-level European policy objectives that, if realized, could have significant implications for the structure of the European savings and investment market. A key

[86] Regulation (EU) 2024/1689, art. 50.

[87] For an overview, see for instance MOLONEY, *EU financial market regulation a decade from the financial-crisis-era reforms: crisis, uncertainty, and capacity*, in *Yearbook of European Law*, 42, 2023, p. 169 ff.

objective in this context is the EU's ambition to promote direct household participation in EU capital markets. This goal is one of several within the CMU, which aims among others, to improve capital access for businesses, particularly for small and medium-sized enterprises (SMEs).[88] In comparison to other geographic regions where capital markets play a more prominent role in savings, Europe has traditionally relied heavily on bank savings. The CMU's establishment acknowledged this reliance on bank deposits, highlighting the benefits more diverse investment alternatives could offer the consumer segment.[89]

There has been a reiterated desire to increase the share of household savings channeled into direct investments in capital markets across various European policies, including the European Retail Investment Strategy[90] and the Savings and Investments Union.[91] For instance, within the latter strategy, it is noted that bank savings in Europe constitute 70% of total savings. The Commission emphasizes that while bank deposits are safe and easily accessible, usually earn less money than investments in capital markets.[92] It is furthermore suggested that consumers have often missed out on

[88] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union*, COM(2015) 468 final, Brussels, 30.9.2015, p. 3, available at eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0468.

[89] *Ibidem*, p. 18 ff.

[90] European Commission, *Retail Investment Strategy, Empowering retail investors on EU capital markets*, May 2023, available at https://finance.ec.europa.eu/document/download/ce290ee2-1f05-41f6-9540-84c3605ccb0f_en?filename=230524-retail-investment-strategy-factsheet_en.pdf; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Capital Markets Union for people and businesses-new action plan,* cit.; ANNUNZIATA, *Retail investment strategy*, *How to boost retail investors' participation in financial markets,* cit.

[91] European Commission, *The Savings and Investments Union Connecting savings and productive investments*, March 2025, available at https://finance.ec.europa.eu/document/download/2701e5bb-e5e8-484e-b206-6bb5e6a27044_en?filename=250319-factsheet-siu_en.pdf.

[92] European Commission, Directorate-General for Communication, *Savings and investments union: better financial opportunities for EU citizens and businesses*, 19.05.2025, available at https://commission.europa.eu/news-and-media/news/savings-and-investments-union-better-financial-opportunities-eu-citizens-and-businesses-2025-03-19_en.

potentially higher returns that could have been earned through investments in securities compared to the traditionally low returns associated with bank deposits.[93]

The commission further asserts that the new strategy can assist EU citizens in building their wealth and improving future savings. They state: 'Thanks to the savings and investments union, citizens who wish to invest will have better opportunities to invest in capital markets. This means having easy, simple, and low-cost access to a wide variety of investment opportunities. More investments in capital markets support the economy by enabling EU companies to grow and thrive. This can create better jobs with higher salaries for workers and drive investment and growth across all economic sectors'.[94]

The EU's ambition to draw household savings into capital markets aligns with the Draghi report's[95] observations of significant investment needs, driven by the necessity to equip Europe to address current challenges, including climate change, rapid technological shifts, and new geopolitical dynamics. The Draghi report estimates an additional investment requirement of €750-800 billion per year by 2030, particularly impacting SMEs and innovative companies that cannot depend exclusively on bank financing. Consequently, the aspiration is to develop integrated capital markets alongside an integrated banking system, effectively connecting savings and investment needs.

---

[93] European Commission, *Questions and answers on the Retail Investment Package*, Brussels, 24.05.2023, available at https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_23_2869/QANDA_23_2869_EN.pdf.

[94] European Commission, Directorate-General for Communication, *Savings and investments union: better financial opportunities for EU citizens and businesses*, 19.03.2025, available at https://commission.europa.eu/news-and-media/news/savings-and-investments-union-better-financial-opportunities-eu-citizens-and-businesses-2025-03-19_en.

[95] DRAGHI, *Presentation of the report on the Future of European Competitiveness*, European Parliament, Strasbourg, 17.09.2024, available at https://commission.europa.eu/document/download/fcbc7ada-213b-4679-83f7-69a4c2127a25_en?%20filename=Address%20by%20Mario%20Draghi%20at%20the%20Presentation%20of%20the%20report%20on%20the%20future%20of%20European%20competitiveness.pdf.

From a structural perspective, the aforementioned European policy initiatives signify an ambition to alter the balance between the primary channels for resource allocation within the financial system - the banking system and capital markets. These European ambitions form a crucial backdrop for understanding the significance of increasing financial literacy in the EU. While financial literacy has been a crucial self-contained goal over the past decades, its importance escalates as part of the broader agenda aiming to boost investments in the European capital markets.

The financial literacy strategy is espoused as a key measure in the SIU 'to encourage retail participation in capital markets'.[96] This indicates that financial literacy, while traditionally viewed through the lens of consumer protection, is now integrated into a larger agenda encompassing European competitiveness, providing capital for businesses, and alleviating both the banking system and fiscal budgets concerning major strategic financial needs. This shift illustrates how financial literacy has become a tool to achieve objectives that transcend the conventional consumer-centric goals of protecting individuals or groups of consumers in various contexts.

The aspirations to increase direct investments from the retail segment of European citizens imply that, if successful, there will be a transition away from bank deposits as the primary means of saving for households. As a consequence, consumers will become exposed to the differences between bank savings and direct investments. The risk-return characteristics of bank savings and investments in capital markets differ significantly, a distinction reflected in the respective regulations governing banking and securities operations. Although both sectors are heavily regulated, and there are increasingly fluid transitions between them, the differences remain discernible, as evidenced by variations in regulation and institutional oversight, each with its own supervisory authorities.

[96] European Commission, *The Savings and Investments Union Connecting savings and productive investments*, cit.

From a regulatory standpoint, the framework governing capital markets largely arises from the presence of risks created by information asymmetries and principal-agent problems. While these considerations are also critical in banking regulation, the focus on managing systemic risk traditionally takes precedence in that sector. Given the banking sector's historical role as a financing source, the regulatory framework for banks is stringent, encompassing extensive rules to prevent systemic risk and ensure financial stability as preemptive measures. Concurrently, there are significant ex-post regulations that come into play if a bank encounters financial difficulties. An essential ex-post measure is the existence of deposit guarantee schemes, which swiftly reimburse depositors within specified limits, typically sufficient to cover a consumer's ordinary deposit. This means that households have an almost risk-free investment alternative for their deposits that serves their liquidity needs while acting as a genuine buffer against unforeseen expenses.

The EU Commission points out that consumers have experienced low returns from bank deposits compared to what could be achieved through investments in capital markets. However, a direct comparison of returns from bank savings versus direct investments in capital markets fails to consider the associated risks of the different investment alternatives. It is the risk-adjusted returns that reveal the true value of a financial investment. Moreover, the liquidity of an investment holds intrinsic value, dependent on the individual saver’s needs. Depending on an individual’s overall financial situation—including the necessity of maintaining a risk-free financial buffer for unforeseen expenses and liquidity needs—the lower returns from bank deposits may indeed represent a sensible trade-off considering the broader investment choices available in capital markets.

This perspective is further substantiated by examining individual savings and investment decisions in the context of shifts in occupational pension schemes over recent decades where defined benefit schemes have been replaced with defined

contribution models.[97] This change implies that our future pension income is now directly contingent upon the performance of capital markets, also impacting on the individual's ability to bear risk.

From the points previously discussed, it is clear that the desire to recruit a larger portion of household savings into direct investments in capital markets represents a shift in risk profile compared to traditional bank savings. The complexity of decision-making will inevitably increase with the availability of numerous investment options and providers, each with distinct characteristics. This situation is likely to drive up reliance on advisory services and the transaction costs associated with utilizing such services. Greater complexity invariably leads to heightened opacity, making investment comparisons more challenging and complicating the monitoring of existing investments.

To summarize the discussion thus far, it is evident that the increased emphasis on financial literacy is a significant response from EU policymakers amidst changes in the financial sector driven by digitalization, internationalization, and heightened complexity. In addition to these general trends, the political ambitions to change the allocation dynamics between bank savings and direct capital market investments could lead to more retail investors engaging with the complex risk landscape that characterizes this sector of financial markets.

However, a pressing question arises regarding the effectiveness of enhanced financial literacy in navigating these emerging complexities. As highlighted in previous sections, research in behavioral finance provides insights suggesting cautious optimism regarding individual responses to products and systems characterized by high complexity, particularly in environments populated by actors with compelling incentive structures. This complexity is intensified by the introduction of new players in digital finance, employing mechanisms with which consumers have little prior

[97] LUSARDI, *Financial literacy and the need for financial education: evidence and implications*, cit.

experience, such as robo-advisors and algorithm-driven service provision. These factors exacerbate the already existing challenges facing consumers which are discussed in Section 4 above associated with overly complex language, fragmented regulatory frameworks and problems with discerning the various external factors that may impact on the viability of their investments. To this comes that the ever-increasing complexity and opacity of the financial environment may serve to cloud the transparency of the field, thereby increasing information asymmetry and leaving the consumers open to being taken advantage of as a result of conflicts of interest and principal-agent problems. Considering the relatively low levels of financial literacy identified in various surveys, it is unrealistic to expect the consumer segment to transition from traditional bank deposits to direct investments in intricate and opaque market settings without encountering significant challenges.

A common objective underlying the breadth of financial regulation, be it banking regulation, securities law or insurance and pensions regulation, is the importance to preserve trust and confidence among the market participants. Trust in the markets is essential both to encourage participation and acts as a bulwark against panics and disorderly withdrawal from the markets, which could threaten financial stability. Lack of understanding, and unpredictable outcomes, of investment decisions could significantly altern consumers' level of trust in the financial sector. Therefore, it seems critical for European policymakers to avoid hasty actions and instead allow their efforts aimed at improving financial literacy ample time to cultivate within a framework attuned to what can reasonably be expected from a diverse populace with varying capacities to understand the new financial landscape they must navigate to meet their financial needs.