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Foreword: My Farewell to the Cambridge Law Review

I am honoured to present the Autumn Issue of Volume 10 of the Cambridge Law Review, which is the culmination of several months of dedicated work by our team of student editors at the University of Cambridge and International Editors from a number of universities across the world. This Issue is a particularly poignant one for me as it is my final Issue as Editor-in-Chief of the Cambridge Law Review. I will be stepping down from this role at the end of the month, having watched the journal grow from my early beginnings as an Associate Editor in 2020. In preparing this Issue, I am incredibly grateful to our Editors, in particular the members of the Managing Board (Samuel Soh, Christopher Symes, Thomas Loke Zhih Hahn, Kaden Pradhan, and Jonathan Rutherford) who provided their expertise on different areas of law during the review process and who devoted significant time to helping me select the articles for publication in this Issue. Additionally, I would like to express my gratitude to the authors whose critical and challenging articles have made this Issue possible.

I am also delighted to announce the winner of the Serle Court Chambers Essay Prize for the best submission to Volume 10 on a topic in English commercial law and/or equity. The winner is Canel Derya Paris Atik, whose article, ‘Authorised Push, Institutional Pull: A Critical Appraisal of Competing Priorities in the UK’s APP Fraud Reimbursement Regime’, (which is published in this Issue) was chosen to win by the Managing Board for the original contribution that it makes to financial services law. I am immensely thankful to Serle Court Chambers, a leading commercial chancery barristers’ chambers, for sponsoring this prize.

We begin with Elliot Tierney’s article, ‘The Limited Rights of Cohabitees: Does the Law Go Far Enough to Protect Cohabiting Couples in England and Wales?’, which examines the current legal position of cohabiting couples in England and Wales, focusing in particular on how the law treats these couples in the event of either the breakdown of their relationship or the death of a partner. Tierney opens with a discussion of the ‘common law marriage myth’ (i.e. the ‘erroneous belief’ that unmarried couples who cohabit for a period of time enjoy the same legal rights and remedies as those who are married), before identifying substantial differences in the legal protections that are afforded to cohabiting couples, on the one hand, and to married spouses and civil partners, on the other. Adopting a ‘functionalist’ approach (which assumes that family law should correspond with the lived realities of family life), he then considers whether there are significant differences between these relationship groups, *in practice*, which might justify these substantial *legal* differences. Here, he responds to three arguments within the literature that appear to suggest that cohabitation is substantially different, in practice, from marriages and civil partnerships. These arguments are the following: first, that, by choosing to cohabit as opposed to entering into a marriage or civil partnership, cohabitees have freely elected not to subject themselves to the ‘legal consequences’ that arise from the latter unions and the law should therefore respect their ‘autonomous choice’; secondly, that cohabitation is often ‘merely a precursor’ to a marriage or civil partnership; and thirdly, that cohabitation may be a ‘lifestyle choice’, which some view as indicating that cohabiting couples are less committed or stable than those in marriages and civil partnerships. Responding to these arguments, Tierney contends that there are many cases in which cohabitation is *not* substantially different from marriages or civil partnerships, in practice, and that, in accordance with his ‘functionalist’ view of family law, the differences in the legal protections that are afforded to these relationship groups cannot be justified. He ends his article by discussing two different ways in which the law in relation to cohabitation rights might be reformed in England and Wales (specifically, through the introduction of a system of opt-in rights or opt-out rights),

IV

before ultimately determining that an opt-out system, like that which has been adopted in New Zealand, would best protect the interests of cohabiting couples.

Turning to EU data protection law, Keisuke Noma's article, 'Beyond Transparency: A Case for Risk Warnings in Content Personalisation under EU Law', begins by highlighting how content personalisation ('CP') (i.e. the 'tailoring of digital content' to target users based on their data) poses significant risks to online service users, particularly risks of addiction and manipulation. However, as Noma observes, EU data protection law does not currently require online service providers to inform users of these risks. He argues that this failure of EU law to impose a 'risk-notice obligation' on services providers can be explained by the fact that the transparency principle (which requires that those who are responsible for data processing inform individuals about how they handle their data) is primarily libertarian in its orientation. According to Noma, when the transparency principle is understood in this way, it reflects a latent assumption that online service users can make their own rational decisions once they are informed of how their data is processed. However, he goes on to state that the imposition of a 'risk-notice obligation' on online service providers regarding CP would require that EU law shift away from the libertarianism of the transparency principle and towards a more 'paternalistic' approach, which would involve greater interference with users' freedom of choice so as to 'promote their welfare'. By drawing a comparison with the EU's regulation of tobacco products (in particular, its imposition of both positive and negative obligations with respect to Tobacco Warnings), Noma advocates for the introduction of analogous CP Warnings under EU data protection law 'as a form of libertarian paternalism'. Like Tobacco Warnings, which preserve individuals' freedom to smoke, but nevertheless attempt to 'steer' how individuals exercise this freedom 'away from smoking', the introduction of CP Warnings would likewise preserve users' freedom to choose whether to accept personalised content online, while drawing to their attention the associated risks. In his article, Noma also evaluates potential legal objections that might be raised to the introduction of CP Warnings, including, *inter alia*, objections relating to their supposed incompatibility with the principle of proportionality and their interference with the right to freedom of expression and information of service providers, before determining that such measures would, in fact, be 'legally permissible' under EU law.

In the third article, 'Authorised Push, Institutional Pull: A Critical Appraisal of Competing Priorities in the UK's APP Fraud Reimbursement Regime', Canel Derya Paris Atik focuses on critically examining the UK's Authorised Push Payment Reimbursement Scheme ('APPRS'), which came into force in 2024 with the primary goal of reimbursing eligible victims of Authorised Push Payment ('APP') fraud. After describing the statutory foundations of the APPRS, Atik identifies three 'key structural limitations' to this framework: first, a 'jurisdictional limitation', according to which victims of international APP fraud fall outside the scope of the APPRS; secondly, a 'payment-system limitation', where transactions that have not taken place via the Faster Payments Service are excluded from the APPRS; and thirdly, an 'institutional limitation', where certain financial providers are exempted from the APPRS. She then goes on to critique additional features of the APPRS. These include the apparent cost-benefit analysis that underpins the 'maximum level of reimbursement', which she argues prioritises 'quantifiable metrics over qualitative dimensions of harm' (such as the emotional distress that some APP fraud victims experience), and the lack of clarity in the Payment Systems Regulator's guidance on how to assess the 'vulnerability' of consumers when applying the 'Consumer Standard of Caution Exception'. Atik contends that, taken in the round, these features and limitations of the APPRS reveal that this framework typically prioritises 'institutional efficiency over the lived realities of fraud victims'. She later draws a comparison with the 'whole-of-ecosystem' ('WOE') model in Australia, which focuses on *preventing* fraud (as opposed to

remedying the harm that it causes *ex post*) and treats *all* of the relevant parties, not just financial providers and consumers, as bearing a ‘collective responsibility’ to prevent APP fraud. Atik considers that these features of the WOE model might usefully inform the UK’s regulatory framework in the future. However, she also acknowledges that there have been certain promising developments in UK law (albeit in contexts that are ‘adjacent’ to APP fraud) that are reminiscent of the preventative orientation of the WOE model, such as the ‘failure to prevent fraud’ offence under the Economic Crime and Corporate Transparency Act 2023.

Lastly, Emma Minerva Brambilla’s article, ‘Algorithmic Tacit Collusion: Addressing the Gaps in Article 101(1)(a) of the TFEU’, addresses the worrying (albeit, at present, purely hypothetical) phenomenon of ‘algorithmic tacit collusion via supra-competitive price fixing’ and the potential implications that this might have for EU competition law. As Brambilla describes this phenomenon, it would involve dynamic pricing algorithms autonomously identifying that collusion through supra-competitive price fixing is the optimal strategy to achieve profit maximisation. She notes that, if such algorithmic tacit collusion were to occur (a scenario she terms the ‘Digital Eye’), it would produce four ‘tiers’ of legal uncertainty. The first tier involves there being uncertainty as to whether algorithmic tacit collusion via supra-competitive price fixing would fall within the scope of article 101(1) of the TFEU, owing to the apparent ‘*de facto* exemption of tacit collusion’ from its purview. Secondly, it is unclear whether such algorithmic tacit collusion would be classified as either an ‘agreement’ or a ‘concerted practice’ under article 101(1) of the TFEU. Thirdly, it is uncertain whether this algorithmic conduct would be considered a ‘by object’ restriction of competition under this article. And fourthly, questions arise as to who ought to be held liable for potential infringements of competition law in these circumstances and how this liability would be established. When investigating this fourth tier of legal uncertainty, Brambilla envisions two possible scenarios involving algorithmic tacit collusion and contemplates potential ways in which to allocate responsibility. In the first scenario, a competing firm uses a dynamic pricing algorithm that has been developed by an external undertaking with the aim of maximising profit, but this algorithm tacitly colludes with other firms. Here, Brambilla investigates two possible ways in which accountability, and then liability, might be established, namely through strict product liability and joint liability. The second scenario sees a competing firm using a dynamic pricing algorithm that it *itself* has developed to achieve profit maximisation, but again the algorithm tacitly colludes with other undertakings. In this scenario, Brambilla considers that the following two approaches might be used to establish accountability, and subsequently to assign liability: strict liability and vicarious liability. However, given that there is a ‘lack of consensus’ among competition authorities (at both the national and EU levels) on how to resolve the ‘Digital Eye’, she ultimately determines that the most effective solution would be to seek to *prevent* this scenario from arising in the first place, through the introduction of ‘*ex ante* measures’.

This has been another successful year for the Cambridge Law Review and I feel incredibly honoured to have served as Editor-in-Chief for Volume 10. As I bid my farewell to the journal, I now pass the torch on to Kaden Pradhan (Gonville & Caius College) and Thomas Loke Zhih Hahn (Trinity College), who will succeed me as Co Editors-in-Chief for Volume 11 next academic year. I look forward to reading future Volumes of the journal as it continues to flourish in the years to come.

Wednesday Eden
Editor-in-Chief
Darwin College
12 September 2025

TABLE OF CONTENTS

<i>The Limited Rights of Cohabitees: Does the Law Go Far Enough to Protect Cohabiting Couples in England and Wales?</i>	1
Elliot Tierney	
<i>Beyond Transparency: A Case for Risk Warnings in Content Personalisation under EU Law</i>	34
Keisuke Noma	
<i>Authorised Push, Institutional Pull: A Critical Appraisal of Competing Priorities in the UK's APP Fraud Reimbursement Regime</i>	61
Canel Derya Paris Atik	
<i>Algorithmic Tacit Collusion: Addressing the Gaps in Article 101(1)(a) of the TFEU</i>	77
Emma Minerva Brambilla	

The Limited Rights of Cohabitees: Does the Law Go Far Enough to Protect Cohabiting Couples in England and Wales?

ELLIOT TIERNEY*

ABSTRACT

The law of England and Wales currently provides little protection for cohabiting couples upon relationship breakdown and death. Despite numerous calls for legislative intervention, both in recent years and in the past, Parliament has been reluctant to address this issue. In Section II, this article begins by outlining the current law in relation to cohabiting couples and drawing comparisons to married spouses and civil partners. In Section III, this article then examines whether these groups are substantially different in practice to partners who cohabit, before presenting routes to reforming this area of the law in Section IV. Ultimately, this article advocates for the introduction of statutory opt-out rights to strengthen and protect the position of individuals in cohabiting couple relationships.

Keywords: family law, cohabitating couples, cohabitation rights, opt-out systems

I. INTRODUCTION

In 1984, the ‘infamous’ case of *Burns v Burns* highlighted the stark differences in how the law treats cohabiting and married couples.¹ Despite their lengthy cohabitation of around 19 years, the court held that ‘Mrs’ Valerie Burns (‘V’) had no rights against ‘Mr’ Patrick Burns (‘P’) in relation to the property they shared after their relationship broke down, despite their having lived together as if they were married. V had taken P’s surname and they had bought a house together, though it was only registered in P’s name. Furthermore, while P handled the financial aspects of the relationship and paid the mortgage instalments, V paid for the household bills and redecorating, carried out domestic duties, and raised their two children. Socially, the couple were seen as man and wife. When the couple separated, V believed that she ought to have a beneficial interest in the property by virtue of her contributions. Finding that V had no beneficial interest in the property, Fox LJ commented on the unfairness of the situation but noted that ‘the unfairness of that is not a matter which the courts can control. It

* London School of Economics and Political Science (2024 LLB Graduate). Thank you to my friends and family for all their encouragement and support, Sarah Trotter for her feedback and guidance, and the editors of the *Cambridge Law Review* for their time, comments, and suggestions.

¹ Andy Hayward, ‘John Eckelaar’s Contribution to Family Property: Reflections on “A Woman’s Place – A Conflict between Law and Social Values”’ in Jens M Scherpe and Stephen Gilmore (eds), *Family Matters: Essays in Honour of John Eckelaar* (Intersentia 2022).

² *Burns v Burns* [1984] Ch 317 (CA).

is a matter for Parliament'.³ The case passes its fortieth anniversary this year, and yet the outcome of a similar case facing the courts today would likely be much the same.⁴ Parliament has not substantially legislated on the matter of cohabitation rights and cohabitation has only become more and more common.⁵

A large proportion of the British public are cohabitantes. In 2021, there were approximately 3.6 million cohabiting couple families, marking a 22.9 per cent increase over the past decade.⁶ This makes cohabiting couples the fastest growing family group in recent years.⁷ For reference, it was predicted in the late 2000s that there would be 2.93 million cohabiting couples by 2021.⁸ In 2022, these numbers remained fairly consistent, meaning that almost one in five families (19 per cent) are cohabiting couple families.⁹ Cohabitation no longer makes up an insignificant minority of the population, nor is it generally deemed to be socially unacceptable.¹⁰ In fact, 22 per cent of couples who lived together were cohabiting rather than committing to marriage or civil partnership.¹¹ It is also important to note that these statistics only account for cohabiting couples; they do not include other forms of cohabitation, such as that found between siblings or friends. These statistics are therefore unlikely truly to represent the scale at which individual adults choose to cohabit. With ever-increasing living costs, an acute shortage of stock in the housing market,¹² and record-breaking levels of inflation in recent years,¹³ it is foreseeable that cohabiting will only become more common in the years to come, both between couples and other groups.

As cohabitation becomes increasingly more common, the way the law responds to cohabitantes' rights will become increasingly important too.¹⁴ A greater number of individuals will be affected by the legal differences between cohabitation and legally recognised unions,

³ *ibid* 332 (Fox LJ).

⁴ See discussion of *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 and *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 in text to n 87.

⁵ See Graeme Fraser, 'Cohabitation Law' (Family Law Reform Now conference, London, 27 January 2023) <<https://www.birmingham.ac.uk/research/law/family-law-reform-now/cohabitation-reform-in-england-and-wales>> accessed 16 October 2023.

⁶ Office for National Statistics, 'Families and Households in the UK: 2021' (*Office for National Statistics*, 9 March 2022) <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2021>> accessed 2 September 2025.

⁷ See for example Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (2022–23, HC 92); Office for National Statistics, 'Families and Households in the UK: 2022' (*Office for National Statistics*, 18 March 2023) <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2022>> accessed 1 September 2025.

⁸ Anastasia de Waal, 'Cohabitation' (2008) 97 *Studies: An Irish Quarterly Review* 47, 47.

⁹ Office for National Statistics, 'Families and Households in the UK: 2022' (n 7).

¹⁰ See Law Commission, *Intestacy and Family Provision Claims on Death* (Law Com No 331, 2011) ('Law Commission, *Intestacy*').

¹¹ See Catherine Fairbairn, 'Common Law Marriage' and Cohabitation' (Commons Library Research Briefing, 3 November 2022) 5.

¹² See for example Glen Bramley, *Housing Supply Requirements across Great Britain for Low-Income Households and Homeless People: Research for Crisis and the National Housing Federation* (Heriot-Watt University 2019); Samuel Watling and Anthony Breach, 'The Housebuilding Crisis: The UK's 4 Million Missing Homes' (February 2023) <<https://www.centreforcities.org/wp-content/uploads/2023/02/The-housebuilding-crisis-February-2023.pdf>> accessed 1 September 2025.

¹³ See for example Daniel Harari and others, 'Rising Cost of Living in the UK' (Commons Library Research Briefing, 11 July 2024) <<https://researchbriefings.files.parliament.uk/documents/CBP-9428/CBP-9428.pdf>> accessed 1 September 2025; Office for National Statistics, 'Cost of Living Latest Insights' (*Office for National Statistics*, 14 February 2024) <<https://www.ons.gov.uk/economy/inflationandpriceindices/articles/costofliving/latestinsights>> accessed 1 September 2025.

¹⁴ See Gillian Douglas, Julia Pearce and Hilary Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 *MLR* 24.

though this should not detract from the fact that there are already individuals affected by these differences. Over the past 20 years, there have been numerous calls for reforming the law in relation to the rights afforded to cohabitants upon both relationship breakdown and death.¹⁵ Areas such as property law, tax law, contract law, and inheritance and intestacy law have been the subject of these debates. These calls have prompted the Law Commission and Parliament to consult on the potential scope and acceptance of reforming the law in this area.

Following extensive consultation, the Law Commission has published two reports related to the rights of cohabitees. The first, published in 2007, focuses on the financial consequences of relationship breakdown.¹⁶ The second, published in 2011, reviews intestacy and family provision claims.¹⁷ Both reports have been followed by Private Members' Bills in both the House of Lords and House of Commons,¹⁸ though all of these have been unsuccessful. The House of Commons Women and Equalities Committee recently produced a report on the rights of cohabitees, which was published in 2022.¹⁹ The conclusions reached in these reports will be investigated further in Section II. Following the publication of the 2022 report, there has been continued widespread discontent with the current state of the law.²⁰ This is not to say that discontent with the law in relation to cohabitation has only been voiced in recent years though. The issue of cohabitation rights has been at the forefront of family law debates for many years now.²¹ Although some defend the current law, many commentators are critical of how it fails to protect vulnerable parties adequately and has the potential to lead to unfairness.²²

In October 2023, the Labour party announced at their Liverpool Party Conference that the Party had plans to introduce a form of common law marriage for cohabiting couples.²³ Emily Thornberry MP, placing particular emphasis on the hardships faced by women, described the lack of general rights afforded to cohabitees as an 'injustice' that the party would seek to end.²⁴ Former High Court judge, Sir Paul Coleridge, responded to the announcement.

¹⁵ For recent examples, see UK Parliament, 'Legal Rights for Cohabitees Who Separate' (*UK Parliament*, 22 November 2017) <<https://edm.parliament.uk/early-day-motion/51050/legal-rights-for-cohabitees-who-separate>> accessed 1 September 2025. See also 'Cohabitation' (*Resolution*) <<https://resolution.org.uk/campaigning-for-change/cohabitation/>> accessed 7 November 2023.

¹⁶ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) ('Law Commission, *Cohabitation*').

¹⁷ Law Commission, *Intestacy* (n 10).

¹⁸ See for example Cohabitation HL Bill (2008–09); Cohabitation (No 2) HC Bill (2008–09); Inheritance (Cohabitants) HL Bill (2012–13); Cohabitation Rights HL Bill (2017–19); Cohabitation Rights HL Bill (2019–21).

¹⁹ Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (n 7).

²⁰ See for example the Family Law Reform Now 2023 Conference: 'Cohabitation Reform in England and Wales' (*University of Birmingham*) <<https://www.birmingham.ac.uk/research/law/family-law-reform-now/cohabitation-reform-in-england-and-wales>> accessed 16 October 2023.

²¹ See for example Anne Barlow and Grace James, 'Regulating Marriage and Cohabitation in 21st Century Britain' (2004) 67 MLR 143; Gillian Douglas, Julia Pierce and Hilary Woodward, 'A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown' (2007) Cardiff Law School Research Papers No 1 <<https://orca.cardiff.ac.uk/id/eprint/5186/1/1.pdf>> accessed 2 September 2025; David Hughes, Martin Davis and Louise Jacklin, "'Come Live with Me and Be My Love' – A Consideration of the 2007 Law Commission Proposals on Cohabitation Breakdown' (2008) 3 Conveyancer and Property Lawyer 197; Douglas, Pearce and Woodward, 'Cohabitants, Property and the Law' (n 14); Martin Dixon, 'To Sell or Not to Sell' [2011] CLJ 579; Simon Duncan, Anne Barlow and Grace James, 'Why Don't They Marry? Commitment and Cohabitation in 21st Century Britain' in David Charles Ford (ed), *Fragmenting Family?* (Chester Academic Press 2010).

²² *ibid.* See also text to nn 41, 42, and text following n 116.

²³ Will Hazell, 'Labour Plan for Cohabiting Laws Are Anti-Libertarian, Says Former High Court Judge' *The Telegraph* (14 October 2023) <<https://www.telegraph.co.uk/politics/2023/10/14/labour-plan-cohabiting-laws-anti-libertarian-judge/>> accessed 1 September 2025.

²⁴ *ibid.*

Speaking on behalf of the Marriage Foundation, he said that such a regime would cause legal ‘chaos’ due to swathes of litigation being brought, be ‘incredibly anti-libertarian and state interventionist’, and ‘undermine’ the institution of marriage.²⁵ It is clear that cohabitation rights are still at the forefront of current debate and that the issue of the extent to which rights ought to be afforded to cohabitants is far from settled.

A. SCOPE

Throughout this article, ‘cohabitation’ will be taken to mean the act of living together as a couple in the same dwelling without legally formalising the relationship by way of marriage or civil partnership. The term ‘cohabitants’ refers to the respective members of the couple. Many definitions of cohabitation also include the fact that the relationship is one of a sexual nature;²⁶ this is not a necessary criterion of cohabitation,²⁷ though it may be the case that a cohabiting couple will also have (had) a sexual relationship. This focus on cohabiting couples is generally in line with the literature in this area. It also reflects how cohabitation is often defined according to the notion of coupledness in other areas of statute,²⁸ case law,²⁹ and statistics.³⁰ For example, both the Law Commission and the Women and Equalities Committee limit the scope of their reports to discussing cohabiting couples. This is often done by way of defining cohabitation by analogy with the institutionalised intimate relationships of marriage and civil partnership. The Law Commission ‘use[s] the term “cohabitant” to distinguish couples who live together in intimate relationships from relatives who share a home or other home sharers who live together for convenience but not as a couple’.³¹ Similarly, in 2022, the Women and Equalities Committee defined cohabitants as ‘people who live together as a couple or as partners in a romantic relationship’.³²

It is important to note the reasons why the Law Commission and, subsequently, the Women and Equalities Committee decided to limit their analysis in such a way. First, they found that a significant majority of the people they consulted supported such a definition because it was well established and workable. The concept of living as a couple in a joint household is clearly understandable in plain English, and the idea of a couple generally (although not always) has connotations of commitment. The same cannot be said of other forms of cohabitation; siblings who share a flat, or friends who are housemates throughout their university studies, do not necessarily intend or expect legal consequences to flow from their cohabitation. Some will, but many will not. Secondly, while just over half of the respondents indicated their preference for some alternative, it was unclear what an alternative would look like. Therefore, on balance, the Commission took the view that the problems associated with defining cohabitation by analogy to the existing institutions of marriage and civil partnership were generally outweighed by the positives. For these reasons, this article will also limit its

²⁵ *ibid.*

²⁶ See for example ‘cohabitation’ (*Oxford English Dictionary*) <<https://doi.org/10.1093/OED/7203031280>> accessed 20 January 2024; ‘cohabitation’ (*Cambridge Dictionary*) <<https://dictionary.cambridge.org/dictionary/english/cohabitation>> accessed 20 January 2024.

²⁷ See for example how ‘cohabitation’ is defined in *Thomas v Thomas* [1948] 2 KB 294 (DC) 297 (Goddard CJ).

²⁸ See for example Inheritance (Provision for Family and Dependents) Act 1975, s 1(1A).

²⁹ See for example *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 1 AC 557.

³⁰ See for example Office for National Statistics, ‘Families and Households in the UK: 2021’ (n 6).

³¹ Law Commission, *Intestacy and Family Provision Claims on Death: Executive Summary* (Law Com 331 (Summary), 2011) para 29. See also Simone Wong, ‘Shared Commitment, Interdependency and Property Relations: A Socio-Legal Project for Cohabitation’ (2012) 24 Child and Family Law Quarterly 60.

³² Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (n 7) 5.

discussion to cohabiting couples, though it acknowledges that there are wider debates on the rights of other cohabiting groups.³³

B. THE PURPOSE OF FAMILY LAW

It is also worth briefly summarising what viewpoint this article will take on the general purpose of family law. Acknowledging this from the outset is important because whatever stance is taken will necessarily shape the way in which the law is criticised and how reform is approached.

Jonathan Herring argues that family law has four main aims: (i) to promote relationships by socially and legally acknowledging certain kinds of approved relationships and not formalising others; (ii) to protect and prevent violence, structural inequality, and coercive control; (iii) to remedy disadvantages in relationships; and (iv) to ensure that assets are suitably distributed at the end of a relationship and that suitable arrangements are made for any child.³⁴ In relation to Herring's first limb, the focus of family law has traditionally been on the institution of marriage and, more recently, on civil partnership. The law does also recognise relationships of cohabitation, albeit often in a negative sense: that cohabiting couples are not conveyed rights in relation to each other (thus deliberately privileging marriages and civil partnerships). As for the second limb, the law achieves this aim through domestic abuse law (which operates substantially similarly for all types of couples). However, it is the third and fourth limbs that family law currently struggles with in relation to cohabitees.

The 'common law marriage' myth—as the Law Commission describes it—is the erroneous belief that 'unmarried couples who are living together are, after a certain length of time, treated for all purposes by the law as if they were married'.³⁵ Relying on this erroneous belief, as Section II will explore, can result in property disputes due to a lack of statutory remedies being available upon relationship breakdown; intestacy and family provision claims; and inheritance tax burdens on death. A government-funded 'Living Together' campaign was launched in the early 2000s with the twin aims of making 'people aware of the legal vulnerability of cohabitants as compared with their married counterparts and to give cohabitants practical advice and options to redress their legal position if they wish to do so'.³⁶ In spite of this campaign, a 2019 study found that 47 per cent of people (including both married and unmarried people) believe that unmarried couples who live together for some time 'definitely do' or 'probably do' have a common law marriage.³⁷ The National Centre for Social Research, confirming these findings, notes that these statistics have remained consistent since around 2005 and have led to a 'significant portion' of couples feeling as though they do not need to get married because they are already legally protected in case of relationship breakdown or

³³ See for example discussions of siblings having cohabitation rights: Francesca Gillett, 'Why I Want One with My Sister?' (*BBC News*, 3 October 2018) <<https://www.bbc.co.uk/news/uk-45732851>> accessed 1 September 2025; Civil Partnership Act 2004 (Amendment) (Sibling Couples) HL Bill (2017–19); Simon Leach, 'Should Siblings Living Together Be Legally Protected?' (*Family Law Group*, 29 October 2018) <<https://www.familylawgroup.co.uk/news/should-siblings-living-together-be-legally-protected>> accessed 1 September 2025.

³⁴ Jonathan Herring, 'Making Family Law Less Sexy ... and More Careful' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2014).

³⁵ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown (Executive Summary)* (Law Com No 307 (Summary), 31 July 2007) ('Law Commission, *Executive Summary* (2007)') para 1.3.

³⁶ Anne Barlow, Carole Burgoyne and Janet Smithson, *The Living Together Campaign – An Investigation of Its Impact on Legally Aware Cohabitants* (Ministry of Justice 2007) 11.

³⁷ John Curtice and others (eds), *British Social Attitudes: The 36th Report* (The National Centre for Social Research 2019) 123.

bereavement.³⁸ Those with religious affiliations and those without formal qualifications (undergraduate degree level or higher) are more likely to believe in the myth.³⁹ These findings are rather alarming, especially considering that ‘common law marriage’ was abolished in 1753.⁴⁰ A large proportion of the population—almost a majority—are misled as to the legal rights held by cohabitants. As Section II will outline, it is clear that the law does not treat cohabitantes as if they were married for all purposes. In fact, the rules can differ quite significantly and, where rights do exist, the system is often described as ‘inferior’ and ‘not fit for purpose’.⁴¹ This is often in the light of the lack of legal remedies available if the couple separates or when one of the parties dies, which will be the primary focus of this article.

This article will be premised on the fact that the function of family law in the context of couples is both to regulate relationships and to protect weaker parties against unfair outcomes. To achieve this, the law must be clear, consistent, and strike a fair balance between the rights of both parties involved. In determining whether the current law achieves this and whether the potential routes to reform would be an improvement, we will explore how factors such as gender, race, and religion mean that certain groups are socially and systemically disadvantaged when it comes to the protections that the law affords them as cohabitants in comparison to the position that they would be in if they were married or civilly partnered. The prevailing argument that will be presented is that family law currently inadequately protects the interests of cohabitants, and this article will take a functionalist approach to examining potential reforms based on the principle that family law ought to reflect family life in practice. This may involve bringing the law in line with social beliefs, like the common law marriage myth, so that family law protects the function of familial relationships rather than their legal form.

C. STRUCTURE

The analysis in this article will take place in three sections. Section II compares the legal position of those in marriages and civil partnerships to those who cohabit regarding relationship breakdown and death, before outlining the main reform proposals given by the Law Commission and the Women and Equalities Committee. This section adopts a doctrinal approach to demonstrate the differences between these groups as to their respective legal positions and the potential hardship that these differences create. Section III then seeks to establish whether these differences in their legal positions are justified, based on the normative belief that the law should reflect the reality of how couples live their lives due to the increased prevalence of cohabitation in recent years. This will be done by examining whether there are also substantial differences between these groups in practice, before concluding that the law ought to afford more protections to cohabiting partners. Section III considers routes to reforming the law, specifically comparing opt-in and opt-out approaches to cohabitation rights with the aim of ensuring that the law more closely aligns with social reality. While remaining conscious of potential objections to these approaches, we will draw on the implementation and success of reforms in foreign jurisdictions—notably, France, the Commonwealth, and

³⁸ See Fairbairn, ‘“Common Law Marriage” and Cohabitation’ (n 11) 7, fn 1.

³⁹ Anne Barlow, ‘The Common Law Marriage Myth Phenomenon’ (Family Law Reform Now Conference, London, 27 January 2023) <<https://www.birmingham.ac.uk/research/law/family-law-reform-now/cohabitation-reform-in-england-and-wales>> accessed 16 October 2023.

⁴⁰ See for example Janice Elliott Montague, ‘To Say “I Do” or Not... The Legal Implications of Life Style Choices’ (2011) 16 Coventry Law Journal 42; Clandestine Marriages Act 1753.

⁴¹ Monidipa Fouzder, ‘Kicking the Cohabit’ (3 February 2023) LS Gaz 7.

Scotland—to assess the viability of reform in the UK and the potential form that it could take. This section concludes that the best approach to strengthening the rights of cohabiting couples is to implement an opt-out system.

II. THE LAW IN RELATION TO COHABITATION RIGHTS

The law in relation to cohabitation has been described as ‘fragmented and inconsistent’,⁴² ‘confusing, complex, usually inferior, and hardly ever automatic’.⁴³ Others have described the current system as ‘fair and workable’.⁴⁴ As we will see, the law can be quite unclear and cohabitants have very few automatic rights, both upon relationship breakdown and death. The law is generally quite hesitant to intervene in relationships between cohabitees in the absence of express agreements. This can be sharply contrasted with how the law operates concerning spouses and civil partners. The law essentially favours formally recognised relationships over other relationships.⁴⁵ It is wrong, however, to say that the law ignores cohabitants altogether.⁴⁶ Cohabitation rights can be found in a ‘patchwork of legal rules’ from various parts of property, contract, and trusts law.⁴⁷

This section will consider the relative legal positions of cohabitees, on the one hand, and married or civilly partnered couples, on the other. Although the law does not ignore cohabiting couples entirely, the legal rights that cohabitants have in relation to property, tax, inheritance and intestacy are often inferior to those offered to spouses and civil partners. Where rights do exist for cohabitants, their application is less clear and consistent. The purpose of this section is to draw broad comparisons between legally recognised unions and cohabitation in situations of relationship breakdown and death.⁴⁸ It is worth briefly outlining the main positions and reform proposals in these areas. The different ways in which the law treats these groups has the potential to cause significant hardship on cohabitants, which would otherwise have been avoided if the couple were married or civilly partnered.⁴⁹

A. A COMPARISON OF RIGHTS ARISING UPON RELATIONSHIP BREAKDOWN

Upon separation, legally recognised couples can apply to terminate their union. For married couples, this is divorce; for civil partners, this is dissolution. Until this is completed and a final order is made, the law treats the couple as if they are in a legal relationship.⁵⁰ Upon

⁴² Barlow (n 39).

⁴³ Duncan, Barlow and James (n 21) 20.

⁴⁴ Ruth L. Deech, ‘The Case Against Legal Recognition of Cohabitation’ (1980) 29 ICLQ 480, 497.

⁴⁵ See Sue Westwood, ‘“My Friends Are My Family”: An Argument about the Limitations of Contemporary Law’s Recognition of Relationships in Later Life’ (2013) 35 Journal of Social Welfare and Family Law 347.

⁴⁶ See Andy Hayward, ‘The Steinfeld Effect: Equal Civil Partnerships and the Construction of the Cohabitant’ (2019) 31 Child and Family Law Quarterly 283.

⁴⁷ Law Commission, *Cohabitation* (n 16) 150.

⁴⁸ For a more intricate view of all of these rights and, by comparison, the rights of spouses and civil partners, see for example Law Commission, *Cohabitation* (n 16) pt 2; Law Commission, *Intestacy* (n 10) pt 8; Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (n 7) 6; Fairbairn, ‘“Common Law Marriage” and Cohabitation’ (n 11).

⁴⁹ However, it is worth noting that this section will not discuss areas where the law applies substantially the same regardless of legal status, such as the law on child maintenance and domestic abuse.

⁵⁰ See for example Divorce, Dissolution and Separation Act 2020; Matrimonial Causes Act 1973, s 1; Civil Partnership Act 2004, s 1.

divorce or dissolution, an application to the courts can be made for a financial order.⁵¹ The legislation provides for a comprehensive array of orders—from periodical and lump sum payments to property adjustment and housing orders—to address the issue of splitting finances between two new households. Courts can also distribute and determine the respective shares in real property owned by the couple. The legislation lists a broad range of statutory factors for the court to consider when making these discretionary orders.⁵² The overall requirement and main objective is for the court to achieve a fair outcome in dividing the finances.⁵³ Fairness in this context is comprised of three elements: (i) the needs of the parties involved; (ii) compensation for other (non-financial) contributions; and (iii) equal sharing between the parties.⁵⁴ Courts have ‘wide discretionary powers’ as to the remedies—if any—they award to achieve this aim.⁵⁵

By comparison, the relationship between those who cohabit but have not married or formed a civil partnership is not formally recognised in law. This means that there is no requirement to go through a formal process upon relationship breakdown because there is no legal relationship to terminate. It also means that there are no special provisions in law for dealing with these relationships coming to an end. For some, this position is beneficial. There may be no legal commitment towards one another except towards living costs, bills, and rent. This may arise where friends or adult siblings share a flat, for example. The situation here is not much different from any other form of relationship, so the application of the general law may seem enough. For others, it may be to their detriment. There may be a significant degree of financial and emotional interdependence,⁵⁶ as is more likely in couples. Trying to apply the general law in these circumstances is more difficult, for exactly the same reasons as it would be in the case of separating spouses or civil partners. This is perhaps why a significant proportion of the debates on reforming cohabitation rights focuses on romantic and sexual couples since the idea of a cohabiting couple automatically encapsulates ideas of commitment that might not be demonstrated in other groups to the same degree or in the same way.⁵⁷

It is also important to note that marriages and civil partnerships that fall short of fulfilling the required formalities are not legally recognised. These ‘non-qualifying ceremonies’, which usually arise in the context of religious marriages, do not fall within the remit of the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004.⁵⁸ This results in unfavourable and unsatisfactory outcomes because the couple are merely treated as cohabitants under the law. As a direct result, individuals may be socially and religiously understood to be married but have no legal rights in this regard. While Rajnaara Akhtar and Rebecca Probert found that most of the people they interviewed knew that their religious ceremony would not be legally binding, they commented on the varying levels of awareness across Muslim

⁵¹ Matrimonial Causes Act 1973, pt II; Civil Partnership Act 2004, sch 5.

⁵² See for example Matrimonial Causes Act 1973, s 25; Civil Partnership Act 2004, sch 5.

⁵³ *White v White* [2001] 1 AC 596 (HL).

⁵⁴ *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618.

⁵⁵ *White* (n 53) [2] (Lord Nicholls).

⁵⁶ See later discussion, text to n 193.

⁵⁷ See Gillian Douglas, *Obligation and Commitment in Family Law* (Hart Publishing 2018). See also Gillian Douglas and others, ‘Enduring Love? Attitudes to Family and Inheritance Law in England and Wales’ (2011) 38 *Journal of Law and Society* 245.

⁵⁸ See for example *Hudson v Leigh* [2009] EWHC 1306 (Fam), [2013] Fam 77; *Akhter v Khan* [2018] EWFC 54, [2019] 2 WLR 771 (*Akhter* (FC)); *Akhter v Khan* [2020] EWCA Civ 122, [2021] Fam 277 (*Akhter* (CA)).

communities.⁵⁹ In the absence of rights for cohabitees, the more vulnerable party in the relationship (usually a minority woman) is denied access to legal remedies⁶⁰ upon relationship breakdown and their partner is (economically) enriched by the situation.⁶¹

Cohabitees wishing to secure more rights may enter into a cohabitation contract. These agreements typically set out the arrangements for finances, property, and children during the relationship and upon relationship breakdown or death.⁶² These agreements, therefore, may have the benefit of avoiding disputes and litigation by clearly defining the boundaries of the relationship and the property they share.⁶³ Cohabitation contracts—as the name implies—are a species of contract, and they must therefore meet the requirements of a valid contract. There is some uncertainty as to whether these agreements are legally enforceable, though it seems likely that the courts would uphold a fair and voluntary agreement made by deed with independent legal advice.⁶⁴ For example, in *Sutton v Mishcon de Reya*, Hart J confirmed that a property contract between two people who had a sexual relationship and cohabited could be valid, so long as the contract did not involve undue influence and the sexual relationship did not involve criminal acts.⁶⁵ While the claimant was unsuccessful due to the nature of the sexual relationship (which included payment for sexual services, which is illegal), the case illustrates that the courts are now more willing to enforce more orthodox cohabitation agreements or at least to take them into account. The court's current approach marks a drastic shift from earlier authorities, which did not uphold cohabitation contracts on the grounds that such agreements were incompatible with relationships of love and affection⁶⁶ and were against public policy since they promoted sexual relationships outside of marriage.⁶⁷ As Bridge LJ explains in *Dyson Holdings Ltd v Fox*, 'there has been a complete revolution in society's attitude to unmarried partnerships... Such unions are far commoner than they used to be. The social stigma that once attached to them has almost, if not entirely, disappeared',⁶⁸ thus justifying a change in approach. Despite this development, practitioners have voiced concerns about the uncertainty of whether terms will be upheld and enforced by the courts.⁶⁹

The contractual model here assumes two things. First, it assumes that the parties are rational actors. Oftentimes, people do not examine their relationships with the worst-case scenarios (relationship breakdown or death) in mind. Expecting individuals to be rational and unswayed by optimism bias is unrealistic for most.⁷⁰ Individuals may naively presume that their partner will be fair if they break up, or that the law will somehow otherwise protect them

⁵⁹ Rajnaara Akhtar and Rebecca Probert, 'Weddings Reform and Religious-Only Marriages' (Family Law Reform Now Conference, London, 27 January 2023) <<https://www.birmingham.ac.uk/research/law/family-law-reform-now/cohabitation-reform-in-england-and-wales>> accessed 16 October 2023.

⁶⁰ Though it should be noted that there may be other remedies available (for example, through the Sharia courts), these are not the focus of this article.

⁶¹ See Tristan Cummings, 'Gendered Dimensions and Missed Opportunities in Akhter v Khan (Attorney-General and Others Intervening)' (2020) 32 Child and Family Law Quarterly 239.

⁶² The Law Society, 'Moving In Together: Getting a Cohabitation Agreement' (*The Law Society*) <<https://www.lawsociety.org.uk/public/for-public-visitors/common-legal-issues/moving-in-together-getting-a-cohabitation-agreement>> accessed 7 November 2023.

⁶³ Yasmin Khan-Gunns, 'One Size Does Not Fit All: Cohabitation Agreements' (*Today's Family Lawyer*, 19 July 2023) <<https://todaysfamilylawyer.co.uk/one-size-does-not-fit-all-cohabitation-agreements/>> accessed 7 January 2024.

⁶⁴ See The Law Society, 'Cohabitation Agreements' (*The Law Society*, 13 March 2019) <<https://www.lawsociety.org.uk/topics/family-and-children/cohabitation-agreements>> accessed 24 January 2024.

⁶⁵ *Sutton v Mishcon de Reya* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837.

⁶⁶ *Balfour v Balfour* [1919] 2 KB 571 (CA); *Horrocks v Forray* [1976] 1 WLR 230 (CA).

⁶⁷ *Fender v St John-Mildmay* [1938] AC 1 (HL).

⁶⁸ *Dyson Holdings Ltd v Fox* [1976] QB 503 (CA) 512 (Bridge LJ). See also Deech (n 44).

⁶⁹ See for example Khan-Gunns (n 63); Law Commission, *Cohabitation* (n 16).

⁷⁰ See Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (n 7).

(through a misplaced belief in the common law marriage myth⁷¹) if they are not. Alternatively, one party may not agree to the contract at all, just as they may refuse to marry or form a civil partnership. Secondly, it assumes that the parties have enough legal knowledge to draft a legally binding document, or the financial means to hire a solicitor to do it for them. With the cost of creating such an agreement estimated to be between £300 and £4000,⁷² hiring a solicitor may not be an option for some. Socio-economically disadvantaged groups are impacted most here because they are less likely to have such surplus means or to have sufficient education to do it themselves.⁷³ Research also shows that those in worse economic positions have lower chances of marrying,⁷⁴ meaning that they are less likely to secure rights through institutional means too.

Those in marriages and civil partnerships can also contract in a similar manner. While nuptial agreements have traditionally been ruled unenforceable and against public policy,⁷⁵ this stance has shifted in recent years. Courts now often give way to and enforce pre-nuptial and post-nuptial agreements.⁷⁶ Since the landmark UK Supreme Court decision in *Radmacher v Granatino*,⁷⁷ courts should give effect to a nuptial agreement that was freely entered into by each party, where each party fully appreciated the implications of the agreement and unless it would be unfair to hold the parties to their agreement in the prevailing circumstances. A recent case following *Radmacher* has held that fairness does not necessarily require the court to depart substantially from the terms of the agreement.⁷⁸ The courts have even gone as far as to say that it would not be proper to hold agreements to the *Radmacher* standard where the pre-nuptial agreement was signed in a country where their use was commonplace, simply drafted, and signed without legal advice, provided that the parties had a ‘full appreciation’ of the implications.⁷⁹ In other cases, courts have declined to declare nuptial agreements to be invalid on the basis that intervention should be kept to the ‘minimum amount required to keep a spouse free from destitution’, which is a fairly low threshold.⁸⁰ These developments

⁷¹ See discussion of common law marriage myth, text to n 35.

⁷² The Law Society, ‘Moving In Together’ (n 62).

⁷³ See for example Ireland Bellsmith and others, ‘Poverty and Access to Justice: Review of the Literature’ (International Centre for Criminal Law Reform 2022) 10 <https://icclr.org/wp-content/uploads/2022/02/Access-to-Justice-and-Poverty_ICCLR_RR-2022-2_Bellsmith-Goertzen-Neilsen-Stinson.pdf> accessed 1 September 2025; Chloe Mills, ‘Implementing the Socio-economic Duty: A Review of Evidence on Socio-economic Disadvantage and Inequalities of Outcome’ (GSR Report No 68/2021, 13 October 2021) <<https://www.gov.wales/sites/default/files/statistics-and-research/2021-11/review-of-evidence-on-socio-economic-disadvantage-and-inequalities-of-outcome-revised.pdf>> accessed 2 September 2025; Paul Bolton and Joe Lewis, ‘Equality of Access and Outcomes in Higher Education in England’ (Commons Library Research Briefing, 25 July 2024) <<https://researchbriefings.files.parliament.uk/documents/CBP-9195/CBP-9195.pdf>> accessed 1 September 2025.

⁷⁴ See for example Pamela J Smock, Wendy D Manning and Meredith Porter, ‘“Everything’s There Except Money”: How Money Shapes Decisions to Marry Among Cohabitors’ (2005) 67 *Journal of Marriage and Family* 680; Joanna Miles, Pascoe Pleasance and Nigel J Balmer, ‘The Experience of Relationship Breakdown and Civil Law Problems by People in Different Forms of Relationship’ (2009) 21 *Child and Family Law Quarterly* 47, 58.

⁷⁵ Catherine Fairbairn, ‘Pre-nuptial Agreements’ (Commons Library Research Briefing, 16 October 2023) 4 <<https://researchbriefings.files.parliament.uk/documents/SN03752/SN03752.pdf>> accessed 2 September 2025. See for example *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 (F).

⁷⁶ See for example *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534; *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298.

⁷⁷ *Radmacher* (n 76).

⁷⁸ *Backstrom v Wennberg* [2023] EWFC 79.

⁷⁹ See for example *Versteegh v Versteegh* [2018] EWCA Civ 1050, [2019] Fam 518; *Z v Z (No 2) (Financial Remedy: Marriage Contract)* [2011] EWHC 2878 (Fam), [2012] 1 FLR 1100; *WW v HW* [2015] EWHC 1844 (Fam), [2016] 2 FLR 299.

⁸⁰ *WW* (n 79) [52] (Nicholas Cusworth QC), citing Mostyn J in *Kremen v Agrest* [2012] EWHC 45 (Fam), [2012] 2 FLR 414 [72].

still follow the Supreme Court precedent, but perhaps mark a loosening of the concept of fairness as understood by the court in *Radmacher*.

The case law makes clear that married and civilly partnered couples cannot completely exclude the jurisdiction of the courts by way of private consensual agreements.⁸¹ In cases involving obvious injustice, the courts retain their jurisdiction to intervene. In a case where a pre-marital agreement was overridden because one party was in significant debt while the other had a fortune of over £6 million, the High Court gave further advice on whether or not it would be fair to hold the parties to the agreement under *Radmacher*.⁸² Much will depend on the facts, which means that practitioners cannot draft nuptial agreements that they are completely certain will be upheld in court.⁸³ What this demonstrates is that the courts are hesitant to give up their inherent jurisdiction to review nuptial agreements that are deemed to be unfair or unjust. For married and civilly partnered couples, appealing to the court for financial remedies always remains an option despite any agreements that have been signed, even if the court's role is to evaluate the validity of the agreement. This is an additional protection afforded to those in marriages and civil partnerships.

The courts have no statutory power to override the strict legal ownership of property for cohabitees in the way that they can for marriages and civil partnerships. This is not to say that all hope is lost. Instead, courts have increasingly used trusts law, beneficial interests, and estoppel to achieve the same aim. Such is an attempt to remedy injustice, but it is not without its problems. If the couple purchased the property together, they are likely to be express co-owners.⁸⁴ If there is a dispute over the beneficial entitlement, the courts may determine the respective shares of each party by inference or imputation,⁸⁵ if this has not already been done explicitly (for example, in a cohabitation contract or other agreement). There is a general presumption in express co-ownership cases that each co-owner will be beneficially entitled to an equal share of the property's value.⁸⁶ This can be rebutted by a common intention that the beneficial shares would not be divided equally, but, as Baroness Hale has expressed, this would be 'very unusual'.⁸⁷ As these rules apply by default for any case of express co-ownership, regardless of legal status, we will move on to sole titleholder cases, which are more complex.

In sole titleholder cases, only one party is named on the title deeds. This may occur if a partner moves into a property already owned by the other. The position here is different again. Since the other person is not on the title deeds, they will not be a legal joint tenant or be able to claim an entitlement under an express trust of land, unless the owner decides to put them on the deeds. This puts the non-owner in a much weaker position than their express counterpart⁸⁸ and makes their claims more complex. The modern way to approach these sole titleholder cases is through the common intention constructive trust.⁸⁹ To be successful, there must be (i) a common intention to share the property between the claimant and the titleholder, and (ii) reliance upon this common intention by the claimant to their detriment.⁹⁰ Since there is no presumption that a cohabitant is entitled to a property right or a financial

⁸¹ See *Hyman v Hyman* [1929] AC 601 (HL).

⁸² See *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] 2 FLR 168 [129]–[132] (Holman J).

⁸³ Law Commission, *Matrimonial Property, Needs and Agreements: The Future of Financial Orders on Divorce and Dissolution (Executive Summary)* (Law Com No 343, February 2014) para 1.27.

⁸⁴ Subject to the Law of Property Act 1925, s 53(1).

⁸⁵ *Jones* (n 4); *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211 [69] (Chadwick LJ).

⁸⁶ *Stack* (n 4).

⁸⁷ *ibid* [69] (Baroness Hale).

⁸⁸ See Dixon, 'To Sell or Not to Sell' (n 21).

⁸⁹ *Jones* (n 4); *Stack* (n 4).

⁹⁰ See for example *Lloyd's Bank v Rosset* [1991] 1 AC 107 (HL); *Gissing v Gissing* [1971] AC 886 (HL).

remedy by virtue of their cohabitation alone,⁹¹ detrimental reliance here must be from either evidence of an express common intention to share (in a cohabitation agreement, for example) or direct (financial) contributions.⁹²

Establishing this can be especially difficult in cases where the titleholder acquired the property prior to the cohabitation, since it is unlikely that the claimant will meet the detrimental reliance threshold. This requirement also means that those who provide in non-financial ways, such as by paying other bills or providing childcare, are not recognised in the same way as those who pay towards the purchase price or mortgage. Judges have expressed their discontent with the current state of the law in this respect, suggesting in obiter dicta that beneficial entitlements can be established based on the entire course of conduct between the parties (not merely on financial contributions).⁹³ Academics have also been critical of the fact that it is women who are typically impacted by this the most because they are more likely to reduce or give up paid work to undertake childcare and are more likely to be unable to make the necessary financial contributions.⁹⁴ Despite this additional hurdle, the court may find that the claimant has a beneficial interest in the property.⁹⁵ If successful, the court will quantify their share and holistically award what it ‘considers fair having regard to the whole course of dealing between them in relation to the property’.⁹⁶

Another avenue that is potentially open to cohabitants is proprietary estoppel, which is a mode of acquiring rights in land informally. There are three elements to these claims: (i) an implied or express promise or assurance; (ii) reliance; and (iii) detriment.⁹⁷ Sometimes it is also said that unconscionability is required⁹⁸ or that this is the general principle motivating the law in proprietary estoppel cases.⁹⁹ As an equitable remedy, claimants are also required to come to the court with ‘clean hands’.¹⁰⁰ If a proprietary estoppel claim is successfully argued, the court will ‘satisfy the equity’ by doing whatever is necessary to remove the unconscionability.¹⁰¹ Remedies are discretionary but could include a one-off payment, or a personal or proprietary right in the property. Thus, while the threshold to claim is relatively high, estoppel provides cohabitants with another means of establishing a claim against a sole titleholding partner.

We can see, therefore, that there are two forms of asymmetry in these property dispute cases. First, an asymmetry between cases where the parties are married or civilly partnered, on the one hand, and where they are not, on the other. Secondly, an asymmetry between cases of express joint ownership and acquisition of a single title. The former

⁹¹ Law Commission, *Cohabitation* (n 16).

⁹² *Rosset* (n 90).

⁹³ See for example *Abbott v Abbott* [2007] UKPC 53, [2008] 1 FLR 1451; *Kahrman v Harrison-Morgan* [2019] EWCA Civ 2094; *Stack* (n 4).

⁹⁴ See for example Women and Equalities Committee, ‘Oral Evidence: The Rights of Cohabiting Couples, HC 130’ (2 February 2022) <<https://committees.parliament.uk/oralevidence/3400/html/>> accessed 3 September 2025; Herring, ‘Making Family Law’ (n 34).

⁹⁵ See for example *Oxley* (n 85); *Eves v Eves* [1975] 1 WLR 1338 (CA); *Grant v Edwards* [1986] Ch 638 (CA); *Midland Bank v Cooke* [1995] 4 All ER 562 (CA).

⁹⁶ *Oxley* (n 85) [69] (Chadwick LJ).

⁹⁷ *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Ch).

⁹⁸ See for example *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [92] (Lord Walker); Martin Dixon, *Modern Land Law* (12th edn, Routledge 2021) 392–93.

⁹⁹ See for example Ben McFarlane, *The Law of Proprietary Estoppel* (2nd edn, OUP 2020) para 5.63; Dixon, *Modern Land Law* (n 98) 400.

¹⁰⁰ See for example *Murphy v Rayner* [2011] EWHC 1 (Ch); *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873.

¹⁰¹ *Guest v Guest* [2022] UKSC 27, [2024] AC 833 [75] (Lord Briggs).

asymmetry is systemic, the latter circumstantial. The systemic asymmetry is a direct result of the different legal positions of cohabitees, on the one hand, and those in a legal union, on the other; the circumstantial asymmetry is caused by the individual positions of those in the relationship, particularly in relation to property owned before the relationship began and the types of detriment suffered by those who have no legal interest in said property. This makes the law in this area fairly complex and difficult to understand for the layperson. The important point is that courts are much more restricted as to the redistribution of property between cohabitees than they are in marriage and civil partnership cases, especially in sole titleholder cases.

B. A COMPARISON OF RIGHTS ARISING UPON DEATH

If the deceased died without a will, the surviving spouse or civil partner ranks very highly in the intestacy hierarchy.¹⁰² If they have no children (or grandchildren or great-grandchildren), they will inherit the entirety of the deceased's estate. If the couple have children (or grandchildren or great-grandchildren), they will inherit the first £322,000 of the estate plus half of the rest.¹⁰³ They will also inherit the personal belongings of the deceased. This puts surviving spouses and civil partners in a particularly strong position in the unfortunate event that their partner dies intestate. By comparison, surviving cohabitants have no automatic rights under the current intestacy rules, regardless of how long they cohabited or if they have children. In fact, cohabitees are not mentioned at all in the intestacy rules despite strong public support for them being recognised.¹⁰⁴ Instead, surviving cohabitants will have to go to court to make a family provision claim, which is an extra hurdle to overcome if their partner dies intestate.¹⁰⁵ Recent estimates predict that only about 44 per cent of UK adults have a will,¹⁰⁶ resulting in generally quite heavy reliance on intestacy rules.¹⁰⁷ Considering that those who are unmarried are even less likely to make a will than those who are,¹⁰⁸ the absence of intestacy provisions potentially plays an even bigger role in cohabitation cases.

Upon death, a surviving partner may not automatically inherit from their partner in a will. There is no requirement for a spouse or civil partner to leave something to their partner upon death, putting them in the same position as cohabitees. Testamentary freedom is a longstanding principle of English law and something that the Government does not want to abandon.¹⁰⁹ Surviving partners who do not believe that they have been left adequate provision in their partner's will can make a claim against the estate under the Inheritance (Provision for Family and Dependents) Act 1975. Under these 'family provision' claims, a surviving spouse or civil partner can seek whatever financial provision would be reasonable for them to receive,

¹⁰² Administration of Estates Act 1925, s 46(1).

¹⁰³ Administration of Estates Act 1925 (Fixed Net Sum) Order 2023, SI 2023/758, art 2.

¹⁰⁴ Law Commission, *Intestacy* (n 10).

¹⁰⁵ Jonathan Herring, *Family Law* (10th edn, Pearson 2021) 133.

¹⁰⁶ The National Will Register, 'The National Wills Report: The Culture of Will Writing in the UK' (2023) 5 <<https://www.oneadvanced.com/siteassets/resource-blocks/legal-resources/the-national-wills-report-2023-v2.pdf>> accessed 2 September 2025.

¹⁰⁷ Law Commission, *Intestacy* (n 10) pt 8.1.

¹⁰⁸ Sharon Thompson and Charlotte Bendall, 'Building a Movement for Cohabitation Reform in England and Wales' (*Financial Remedies Journal*, 3 March 2023) <<https://financialremediesjournal.com/building-a-movement-for-cohabitation-reform-in-england-and-wales/>> accessed 16 October 2023.

¹⁰⁹ See for example Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (n 7); Women and Equalities Committee, *The Rights of Cohabiting Partners: Government Response to the Committee's Second Report* (2022–23, HC 776).

whether or not the provision is for their maintenance. A cohabitant can only seek reasonable provision for their maintenance.

For a cohabitee to be successful, they must have lived (i) in the same household as the deceased for two years before their death, and (ii) as if they were a married couple or civil partners.¹¹⁰ There is public support for reducing this required timeframe.¹¹¹ Alternatively, they may claim that provision should be made because they were being maintained, either partly or wholly, by the deceased immediately before their death.¹¹² This places a higher evidential burden on cohabiting couples and requires them to evidence their relationship. Supplying such evidence can be especially difficult during times of grief. Successful claims depend on commitment and financial interdependence and are likely to yield outcomes similar to what would have been ordered if they were a surviving spouse,¹¹³ though there are doubts over this.¹¹⁴ Whether or not an award is made could have massive implications. For example, a successful claim may grant the surviving partner a lifetime right to occupy the deceased's property. This could be the difference between continuing to enjoy a relatively similar quality of life in material terms and having to seek employment or other accommodation. For those who are elderly or have limited formal work experience, the latter may not be an option.

Marriages and civil partnerships have certain tax benefits too. For example, surviving spouses and civil partners can inherit the entirety of their partner's estate free from inheritance tax ('IHT') under current rules. So long as the entire estate is left to the surviving partner, the inheritance will be tax-free.¹¹⁵ Surviving spouses and civil partners may also transfer any unused proportion of their nil-rate band if they are eligible, meaning that the estates of widowed individuals or surviving civil partners can benefit from higher tax-free allowances when they themselves pass away.¹¹⁶ The rules become more complex if the estate is divided between family members, but what is worth emphasising is how different the position is for cohabitees. Cohabitees are not eligible for the IHT Spouse Exemption whatsoever. The proportion of deaths resulting in IHT charges is very small (3.7 per cent in 2020–21),¹¹⁷ meaning that those cohabitants who are impacted are likely a wealthy minority. However, the difference that being exempt from inheritance tax makes could be the difference between continuing to live in the same house and having to sell it to pay the tax bill. The spousal exemption is currently the largest exemption to the inheritance tax regime; in the 2019–20 tax year, it was taken advantage of by 36 per cent of estates above the nil-rate band, but was worth around 71 per cent of the total value of reliefs and exemptions.¹¹⁸

¹¹⁰ Inheritance (Provision for Family and Dependents) Act 1975, s 1(1A).

¹¹¹ See Law Commission, *Intestacy* (n 10).

¹¹² Inheritance (Provision for Family and Dependents) Act 1975, s 1(1)(e).

¹¹³ Law Commission, *Intestacy* (n 10) pt 8.1.

¹¹⁴ See Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (n 7).

¹¹⁵ Inheritance Tax Act 1984, s 18(1).

¹¹⁶ HM Revenue and Customs, 'Inheritance Tax Statistics: Commentary' (*GOV.UK*, 2023) <<https://www.gov.uk/government/statistics/inheritance-tax-statistics-commentary/inheritance-tax-statistics-commentary>> accessed 24 January 2024.

¹¹⁷ Emma Agyemang, George Parker and Martin Stabe, 'The Calculations Behind Rishi Sunak's Potential Inheritance Tax Shake-up' *Financial Times* (Copenhagen and London, 26 September 2023) <<https://www.ft.com/content/3996c757-3395-413c-a490-3af257cab18f>> accessed 2 September 2025; *ibid*.

¹¹⁸ HM Revenue and Customs (n 116).

C. REFORM PROPOSALS

In 2007, the Law Commission produced a report on cohabitation and the financial consequences of relationship breakdown.¹¹⁹ The report, commissioned by the Labour Government, presented several proposals for cohabitation law reform. While it did not believe that cohabitants should have the same rights and remedies as spouses and civil partners, it did recognise that the law's current position is inadequate and unsatisfactory. The report found that a substantial public majority were in favour of reforming financial remedies for cohabitating couples, although some argued that improving public information would enable individuals to make informed choices as to whether to seek legal protection.¹²⁰ The Commission explained, however, that evidence suggests that increasing public awareness of the law—while essential in its own right—is not a sufficient mode of protecting cohabitants and of dispelling the common law marriage myth.¹²¹ To give adequate protections, the law would have to go further. The Commission's main proposal is that of an 'opt-out' scheme for cohabitants who either have children together or have cohabited for a minimum specified number of years (although the report does not explicitly recommend a suitable timescale, it suggests a minimum of two to five years).¹²² In addition to these eligibility requirements, qualifying contributions would have to be made to give rise to certain enduring consequences following separation.¹²³ Following this, courts could make a discretionary award.¹²⁴

The Law Commission's proposals do not aim to change the discretionary nature of the court's awards or to impose an equal sharing principle; they merely suggest the introduction of awards for 'qualifying cohabitants' who make 'qualifying contributions'.¹²⁵ The Commission defines these broadly to include economic hardships and retained benefits, such as caring responsibilities, financial and non-financial activities that enhance the value of capital assets, unpaid work and domestic contributions, professional training, and giving up secure accommodation to commence cohabitation.¹²⁶ This would enable a broader class of cohabitants—particularly women—who either have a child with the titleholder or have lived in the property for a specified number of years to obtain financial relief in the event of separation, thus reducing the evidentiary burden on the claimant and broadening the scope of possible contributions that the law takes into account. Such change would bring the law closer in line with the regime that applies to married and civilly partnered couples without necessarily putting them on an equal footing.

There has been considerable support for 'opt-in' schemes, usually premised on ideas of autonomy, privacy, and the flexibility to determine the terms of the relationship.¹²⁷ It is worth noting, however, that the Law Commission explicitly rejects an 'opt-in' scheme. Instead, the proposed 'opt-out' scheme is designed to provide protections for all cohabiting couples by default while allowing them to opt out, thus simultaneously preserving choice. The Commission does not address what requirements would be necessary to opt out. For example, it

¹¹⁹ Law Commission, *Cohabitation* (n 16).

¹²⁰ *ibid* 30–31.

¹²¹ Law Commission, *Executive Summary* (2007) (n 35) para 1.9.

¹²² Law Commission, *Cohabitation* (n 16) 57, 141–42.

¹²³ *ibid* 142–43.

¹²⁴ *ibid* 142–44.

¹²⁵ *ibid* 74.

¹²⁶ *ibid* 76–77.

¹²⁷ Barlow, Burgoyne and Smithson (n 36) 10. See also Deech (n 44).

is unlikely that one party could unilaterally opt out of such a regime as this would undermine the other party's autonomy to choose to preserve the default position.

Later in 2011, the Law Commission considered how the law on intestacy and family provision claims upon death ought to be reformed.¹²⁸ While the principal recommendations relate to spousal entitlement under the current intestacy rules, part 8 of the report focused on the rights of cohabitants. The Commission found the law to be outdated and confusing in parts, placing unnecessary obstacles in the way of making valid claims against a deceased person's estate. Particular attention was drawn to the fact that, despite strong public support for the principle of testamentary freedom, two-thirds of adults in the UK do not have a will.¹²⁹ Out of the third that do, some are likely to be invalid or may not completely cover the entirety of the person's estate. Cohabitants are even less likely to have a will, with less than 17 per cent having one.¹³⁰ This causes heavy reliance on the intestacy rules and 'family provision' claims. The Commission proposed that a 'qualifying cohabitant' should be able to share in a partner's estate without going to court. This would effectively give them the same entitlements upon death as if they were spouses or civil partners. The public consultation showed support for a scheme whereby cohabitants would qualify if (i) the couple lived together at the time of death as if they were married, (ii) the deceased was not otherwise married or civilly partnered, and (iii) minimum duration requirements were met.

More recently, in 2022, the House of Commons Women and Equalities Committee also produced a report on the rights of cohabiting partners.¹³¹ They too argued that the 'law should fully recognise the social reality of modern families and protect people regardless of whether they are married, in a civil partnership, or in long-term cohabiting relationships' and that reform of this area is necessary.¹³² The report's main proposals were (i) the implementation of the Law Commission's 2007 and 2011 proposals, (ii) a review of the current inheritance tax and survivors' pension regime, and (iii) a public awareness campaign aimed at dispelling the common law marriage myth.¹³³ Responding to this, the short-lived Truss Government rejected most of the recommendations, only partially accepting the need for greater public awareness and guidance.¹³⁴ The literature has noted that previous attempts to dispel the myth have been of limited success;¹³⁵ it is unclear how any new campaign will be any more successful.

III. MARRIAGE, CIVIL PARTNERSHIPS, AND COHABITEES: SUBSTANTIALLY DIFFERENT IN PRACTICE?

We have seen substantial legal differences between marriages and civil partnerships, on the one hand, and cohabitation, on the other. This section investigates whether there are also substantial differences between these groups in practice. If cohabiting couples live their lives in a substantially different way to couples in a legal union, having separate legal regimes seems reasonable. If there is no distinction, or the distinction is merely one of legal status, treating

¹²⁸ Law Commission, *Intestacy* (n 10).

¹²⁹ See text to n 106.

¹³⁰ See Steve Brooker, *Finding the Will: A Report on Will Writing Behaviour in England and Wales* (National Consumer Council 2007).

¹³¹ Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (n 7).

¹³² *Ibid* 26–27.

¹³³ *Ibid*.

¹³⁴ Women and Equalities Committee, *The Rights of Cohabiting Partners: Government Response* (n 109).

¹³⁵ Montague (n 40).

these groups differently seems unjustified. Keeping this in mind, the discussion will now turn to whether there is a practical difference between those in a cohabiting relationship and those in a marriage or civil partnership. This section will explore notions of marriage and civil partnership being a choice, cohabitation as a precursor to marriage and a test, and the emerging belief that cohabitation is a distinct lifestyle choice.

A. MARRIAGE AS A CHOICE

One main opposition raised in the Law Commission's intestacy reform consultation was the notion that cohabiting couples have chosen not to enter into a legal union or to be subject to the legal consequences that flow from them.¹³⁶ The literature, even among authors supporting cohabitation rights, also conceives of individuals as free to enter and leave marriages.¹³⁷ This may indeed be true for a large number of couples. There are a broad range of possible cohabiting relationships and these can entail different degrees of commitment and interdependence.¹³⁸ Some will freely choose marriage, while others will not; both groups may be fully informed of the implications of their respective decisions. In these types of cases, it seems quite justified to have a different legal regime for couples who have sought legal recognition from those who have not. In fact, imposing cohabitation rights in these cases would go against their autonomous choice and seems unduly interventionist. It has been argued that legislative non-intervention in the field of cohabitation respects the basic ideas of individualism: dignity, autonomy, privacy, and self-development.¹³⁹ It is imperative that any changes to the current regime are sensitive to this.

It is, however, naïve and inconceivable to believe that this is the case for all couples. Some may simply be unaware of the fact that marriage is a valid choice for their relationship or that they ought properly to consider it. To try to combat this lack of awareness, the Law Commission recommended improving public information so that individuals can make informed choices.¹⁴⁰ They accept that this is not sufficient on its own, but consider it to be essential in its own right. The Women and Equalities Committee went one step further by advocating for a public awareness campaign particularly targeted towards women and ethnic minorities.¹⁴¹

In practice, though, few couples decide positively not to get married because of legal differences, and few couples marry because of the legal benefits.¹⁴² This article has already highlighted the prevalence of the common law marriage myth,¹⁴³ signifying the scale at which the general public is ignorant to the legal differences. For those blissfully unaware, it is not the case that they are exercising their autonomy by making an informed choice. Richer conceptions of autonomy require more than mere choice; autonomous individuals are those who act intentionally, with understanding, and without controlling influences determining their

¹³⁶ Law Commission, *Intestacy* (n 10) pt 8.

¹³⁷ See for example Sharon Shakargy, 'Plus One: Who Decides Who Is One's Significant Other?' (2021) 35 *International Journal of Law, Policy and the Family* 1; Deech (n 44).

¹³⁸ See Law Commission, *Cohabitation* (n 16).

¹³⁹ Deech (n 44).

¹⁴⁰ Law Commission, *Cohabitation* (n 16).

¹⁴¹ See Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (n 7).

¹⁴² See Mary Hibbs, Chris Barton and Joanne Beswick, 'Why Marry? – Perceptions of the Affianced' in Alison Diduck (ed), *Marriage and Cohabitation: Regulating Intimacy, Affection and Care* (1st edn, Routledge 2008).

¹⁴³ See discussion of common law marriage myth, text to n 35.

actions.¹⁴⁴ Choosing not to marry on the belief that they are otherwise protected under law is not a rational choice because it is ill-informed.¹⁴⁵ The current idealisation of autonomy, rationality, and liberty—essentially the choice to marry or otherwise to contract for cohabitation rights—masks the fact that marriage or civil partnership might not be a choice. The case for state intervention in the form of cohabitation rights thus becomes stronger here due to the potential for vulnerability.

Martha Albertson Fineman's vulnerability thesis is particularly illuminating here.¹⁴⁶ Fineman challenges the dominant social metaphors of liberty, autonomy, contract, and consent, while highlighting that focusing on the liberal legal subject obscures human dependency and vulnerability. She argues that 'vulnerability is—and should be understood to be—universal and constant, inherent in the human condition'.¹⁴⁷ This vulnerability is '[u]ndeniently universal' but 'experienced uniquely by each of us'.¹⁴⁸ Fineman uses this to argue for a more responsive state that recognises and mitigates vulnerability. However, current cohabitation law 'presumes and demands of us that we are rational, economically self-sufficient, essentially *invulnerable*'.¹⁴⁹ Applying Fineman's thesis to the issue of cohabitation rights, we could argue that family law's focus should be on the inherently vulnerable position that cohabitants are in by virtue of not being legally recognised. This vulnerability is always present, but it is only at relationship breakdown or death that it becomes visible.¹⁵⁰ This moves us away from notions that individuals are autonomous, independent subjects, who are able to secure rights in favour of something that more accurately represents lived experience.¹⁵¹ This line of argument would suggest that the state should recognise that couples may not be exercising rational choice by not marrying and should instead seek to protect this group in other ways.

Furthermore, entering into a marriage or civil partnership may not be possible for a number of reasons. For some, financial considerations, administrative barriers, or simply 'life getting in the way' may either delay or prevent a legal wedding or civil partnership from happening.¹⁵² The couple may also have individual reasons for not getting married, such as an ideological opposition to what marriage itself represents.¹⁵³ As a regime that is 'marriage in all but name',¹⁵⁴ which 'mirrors as fully as possible the rights and responsibilities enjoyed by those who can marry',¹⁵⁵ civil partnerships suffer from this ideological opposition too.¹⁵⁶ Thus, couples opposed to the very institutions of marriage and civil partnership are left unprotected.

¹⁴⁴ See for example Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (8th edn, OUP 2019) 99.

¹⁴⁵ See Law Commission, *Intestacy* (n 10) pt 8.

¹⁴⁶ See for example Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1; Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 *Oslo Law Review* 133.

¹⁴⁷ Fineman, 'The Vulnerable Subject' (n 146) 1.

¹⁴⁸ *Ibid.* 10.

¹⁴⁹ Ellen Gordon-Bouvier, 'The Vulnerable Homemaker: Cohabitation Through the Vulnerability Lens' (*Socio-Legal Studies Association Blog*, 19 April 2018) <<https://slsablog.co.uk/blog/blog-posts/the-vulnerable-homemaker-cohabitation-through-the-vulnerability-lens/>> accessed 29 March 2024.

¹⁵⁰ *Ibid.*

¹⁵¹ See Fineman, 'The Vulnerable Subject' (n 146).

¹⁵² Akhtar and Probert (n 59).

¹⁵³ Joanna Miles and Rebecca Probert, 'Civil Partnership: Ties That (Also) Bind?' (2019) 31 *Child and Family Law Quarterly* 303.

¹⁵⁴ *Ibid.* 304.

¹⁵⁵ HC Deb 9 November 2004, vol 426, col 776.

¹⁵⁶ See Jens M. Scherpe, 'A Comparative View on Registered Partnerships and Formal Family Recognition Beyond Marriage' (2019) 6 *Journal of International and Comparative Law* 273.

It is also foreseeable that this opposition may not be shared by both members of the couple. One may have strong wishes to get married, the other vehemently opposing it. For example, it is plausible that male partners—who are often the least dependent, at least in financial terms—may ‘act in a rationally selfish way to gain all the benefits of a relationship with a female partner without the legal disadvantages if things went wrong’.¹⁵⁷ We are social creatures, and stories or personal experiences of unhappy marriages and fraught divorces might put some off getting married. Five per cent of responses to a YouGov poll of those who do not believe that they will get married in the future stated that they believe this because their partner does not want to get married.¹⁵⁸ In such a case, the party opposing the marriage has the power: they can unilaterally prevent the union from being legally recognised, potentially to the other’s detriment. The party wishing to get married either has to accept the other’s refusal or leave the relationship. These individuals are not making an autonomous choice because they are limited by the will of another. As Jens M Scherpe identifies, ‘the simplistic argument that it is “these people’s own fault if they do not marry” does not hold true in all cases’.¹⁵⁹ Reforming the law in this area would not undermine choice because—in the words of Sharon Thompson—‘in many cases such choices were not made in the first place’.¹⁶⁰

The case of *Akhter v Khan* provides a useful illustration.¹⁶¹ The couple concerned were married under an Islamic ceremony, with the intention of completing a civil marriage in the near future. However, the promise of civil marriage never materialised throughout the 18 years that their relationship lasted. When the wife petitioned for divorce, the husband argued that they had not entered into a valid marriage. The Court of Appeal held that the couple had a ‘non-qualifying ceremony’.¹⁶² This denied the wife financial remedies. It can hardly be said that it was her fault for not marrying, especially considering the (cultural and religious) consequences of leaving the relationship. The argument in favour of reform is especially strong in cases of non-legally binding marriages,¹⁶³ such as *Akhter*, given that these couples have in fact had a (religious-only) marriage and are perceived as being married couples in their communities.

Finally, even if the prevalence of such uneven couples is low, this fact alone does not necessarily justify denying legal rights and protections. This is not the approach that can be found in other areas of family law. The law does not deny protections to male victims of domestic abuse because the majority of victims are female (73.5 per cent of all recorded domestic abuse-related crimes; 93 per cent of recorded domestic abuse-related sexual offences¹⁶⁴), nor does the law now prevent same-sex couples from getting married despite a vast majority of the population being heterosexual (89.4 per cent¹⁶⁵). Any potential argument against protecting the more vulnerable party in uneven couples based on their low

¹⁵⁷ Duncan, Barlow and James (n 21).

¹⁵⁸ Connor Ibbetson, ‘Do Britons Still Want to Get Married?’ (*YouGov*; 28 June 2022) <<https://yougov.co.uk/society/articles/42967-do-britons-still-want-get-married>> accessed 16 February 2024.

¹⁵⁹ Jens M Scherpe, ‘The Legal Status of Cohabitants – Requirements for Legal Recognition’ in Katharina Boele-Woelki (ed), *Common Core and Better Law in European Family Law*, vol 10 (Intersentia 2005) 283.

¹⁶⁰ Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (n 7) 18.

¹⁶¹ *Akhter* (FC) (n 58); *Akhter* (CA) (n 58).

¹⁶² *Akhter* (CA) (n 58) [123] (Sir Terence Etherton MR, King and Moylan LJ).

¹⁶³ See *Akhter* and Probert (n 59).

¹⁶⁴ ‘Domestic Abuse Victim Characteristics, England and Wales: Year Ending March 2023’ (*Office for National Statistics*, 24 November 2023) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabusevictimcharacteristicsenglandandwales/yearendingmarch2023>> accessed 3 September 2025.

¹⁶⁵ Office for National Statistics, ‘Sexual Orientation, England and Wales: Census 2021’ (*Office for National Statistics*) <<https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/sexuality/bulletins/sexualorientationenglandandwales/census2021>> accessed 31 August 2025.

prevalence—if this is even true—fundamentally misses this. Such an argument also glosses over inherent power imbalances in decisions of whether to get married or civilly partnered. The law should try to mediate this.

B. COHABITATION AS A PRECURSOR TO MARRIAGE: A TEST OF COMMITMENT

It may be argued that cohabitation is merely a precursor to marriage or civil partnership. If this is the case, it could be said that the period of cohabitation prior to entering the union is essentially a test of compatibility and commitment that is intended to be a stepping-stone to marriage or civil partnership. Thus, bolstering the rights of cohabiting couples would be unnecessary as couples can and will obtain rights once they are eventually married or civilly partnered. Ruth L. Deech argues that, if cohabitation is a test that leads to marriage, there is no concern as to cohabitation rights; the group that later marries will gain their status while those who do not will suffer no consequences for trying.¹⁶⁶ This line of thinking presupposes that those who are suitably compatible and committed will go on to marry, while those who are not suitable will not seek to gain the benefits of a marriage or civil partnership. Research has found that around 75 per cent of those who cohabited planned to, or probably would, marry.¹⁶⁷ While the population of those cohabiting has been rising, progressively fewer couples ultimately end up marrying and a larger proportion separate.¹⁶⁸ In the period of 1980–84, one in six cohabiting couples separated within five years; by 2000–04, this figure had doubled to one in three.¹⁶⁹ Relatively few cohabiting couples are still living together unmarried after 10 years (around 10–12 per cent).¹⁷⁰ It appears only to be in a rare subset of cases where partners have a mutual commitment to their relationship but do not want to marry.¹⁷¹ This suggests that the argument that cohabitation is a stepping-stone to marriage or civil partnership and a test of commitment rings true for the majority of cohabiting couples.

This line of argument ignores several important factors though. First, the fact that couples may marry in the future does not change the fact that they lack cohabitation rights now. They may both initially intend to marry, but time may pass and this may never actually occur. Intentions and circumstances can change. Combined with the existence of uneven couples, there may never actually be a point where the rights and benefits associated with legally recognised unions can be realised.

Secondly, there is no set period for which this ‘test’ will endure. Some couples may cohabit for a short period of time while others may spend many years together before deciding to formalise their union. There is a broad spectrum of cohabiting relationships, and some authors have tried to categorise different ‘types’ of cohabitation. For Anne Barlow and Janet Smithson, four groups emerge: ‘ideologues’, who are in a long-term relationship but one or both do not believe in or reject marriage; ‘romantics’, who see cohabitation as a stepping-stone to marriage; ‘pragmatists’, who decide based on legal and financial aspects; and ‘uneven

¹⁶⁶ Deech (n 44).

¹⁶⁷ Family Law Review, *Every Family Matters: An In-Depth Review of Family Law in Britain* (2nd edn, The Centre for Social Justice 2010) 18.

¹⁶⁸ Éva Beaujouan and Máire Ní Bhrolcháin, ‘Cohabitation and Marriage in Britain since the 1970s’ (2011) 145 *Population Trends* 31, 46.

¹⁶⁹ *ibid* 47.

¹⁷⁰ *ibid*.

¹⁷¹ See de Waal (n 8).

couples', which are made up of one who wishes to get married and the other who does not.¹⁷² Similarly, for Anastasia de Waal, cohabitees fall into four groups: 'mutual commitment', 'suspended commitment', 'non-committal', and 'unilateral'.¹⁷³ These groupings are useful because they highlight different preconceptions about why couples cohabit. Attempting to group cohabitants is not without issue though. For example, such groupings make the different 'types' of cohabitation appear mutually exclusive. In reality, there may be some overlap between groups or an asymmetry between the parties involved. Simply lumping all cohabitants who wish to test their relationship first into one category is not really feasible. The simple fact that over 10 per cent of cohabiting couples are still together after 10 years¹⁷⁴ is significant in its own right. As Scherpe states, 'the fact that cohabitation does exist, and that many people cohabit for long periods of their life, cannot be ignored'.¹⁷⁵

Thirdly, it is arguable that viewing cohabitation as a 'test' may ultimately jeopardise the relationship. An empirical US study found that, despite a majority of those surveyed believing that cohabiting before marriage will improve their odds of relationship success, couples who reported that their top reason for moving in together was either to test the relationship or because it made sense financially were more likely to see their marriages end than those who did so because they wanted to spend more time with their partner.¹⁷⁶ This is colloquially known as the 'Cohabitation Effect'. Couples with clear intentions to marry and those who delay living together until after marriage also had a lower risk of divorce.¹⁷⁷ While these findings may be influenced by religious and cultural perceptions of marriage and the social permissibility of divorce, they demonstrate that the parties' intentions are extremely important. By framing cohabitation as a precursory 'test', the relationship is already potentially more likely to result in breakdown than if cohabitation occurs for other reasons. The view that cohabitation is a stepping-stone to marriage is therefore clearly not true in some cases.

Finally, Simon Duncan, Anne Barlow, and Grace James argue that one cannot simply compare marriage and cohabitation like for like.¹⁷⁸ They cite several factors, including the married population being older on average (and thus more likely to be emotionally and financially stable) and being more likely to have children together.¹⁷⁹

C. COHABITATION AS A LIFESTYLE CHOICE

Cohabitation may also be, in and of itself, a lifestyle choice.¹⁸⁰ Simone Wong observes: 'An emerging trend is the increasing shift from defining cohabitation along the marriage model... to focusing on the "couple" and their shared commitment and interdependence as

¹⁷² Anne Barlow and Janet Smithson, 'Legal Assumptions, Cohabitants' Talk and the Rocky Road to Reform' (2010) 22 *Child and Family Law Quarterly* 328.

¹⁷³ de Waal (n 8) 49–50.

¹⁷⁴ See for example text to n 165; Beaujouan and Ní Bhrolcháin (n 168) 47.

¹⁷⁵ Scherpe, 'The Legal Status of Cohabitants' (n 159).

¹⁷⁶ See for example Scott M Stanley and Galena K Rhoades, 'What's the Plan? Cohabitation, Engagement, and Divorce' (Institute for Family Studies 2023) <<https://ifstudies.org/ifs-admin/resources/reports/cohabitationreportapr2023-final.pdf>> accessed 2 September 2025; Galena K Rhoades, Scott M Stanley and Howard J Markman, 'Couples' Reasons for Cohabitation: Associations with Individual Well-Being and Relationship Quality' (2009) 30 *Journal of Family Issues* 233; de Waal (n 8).

¹⁷⁷ Stanley and Rhoades (n 176) 4.

¹⁷⁸ See Duncan, Barlow and James (n 21).

¹⁷⁹ *ibid.*

¹⁸⁰ See William C Duncan, 'The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation' (2003) 82 *Oregon Law Review* 1001.

the fulcrum for extending protection.¹⁸¹ Couples may collectively and deliberately choose to cohabit for numerous reasons.¹⁸² They may not see inherent value in the legal and financial aspects of legally recognised unions, or they may believe that the benefits are outweighed by other factors. They may view these institutions as irredeemably patriarchal and misogynistic,¹⁸³ believing instead that cohabitation puts their relationship on a more equal footing.¹⁸⁴ They may seek to evade legal obligations and formalities,¹⁸⁵ valuing a lack of state intervention despite realising the implications. It may be cheaper, more economical, or more convenient to live together rather than separately.¹⁸⁶ Whatever reason is adopted, the law ought to be sensitive in its approach to cohabitation rights to protect the diversity of views and reasons as to why cohabitation is being undertaken as a lifestyle choice.

It is worth flagging that the view of cohabitation being a lifestyle choice has itself been used as a reason to oppose extending rights to cohabitantes. Cohabitation often occurs gradually, with couples slipping into living together.¹⁸⁷ This may lead to cohabiting couples being seen as having less commitment or as being comparatively less stable than couples in marriages and civil partnerships.¹⁸⁸ It has been argued that even those who present as a married couple socially have no stronger expectations and intentions than other cohabitants.¹⁸⁹

Despite this objection, cohabitation is now both widely practised and accepted. This is combined with a declining marriage rate. In the 30 years between 1989 and 2019, the marriage rate dropped by 36.6 per cent; in 2020, marriage rates fell to their lowest since 1862.¹⁹⁰ While the marriage rate saw a recovery to pre-pandemic rates in 2022, more than nine in 10 couples who married in 2021 or 2022 were cohabitating prior to marriage, and cohabitation prior to opposite-sex marriages was the highest since records began in 1994.¹⁹¹ The Office for National Statistics noted in 2024 that there has been ‘a steady decline in marriage rates over time’.¹⁹² The stigma once associated with cohabiting has diminished considerably¹⁹³ and social attitudes have simultaneously become more accepting of pre-marital sex and raising children in cohabiting couples (though the view that raising a child in a marriage is best still prevails).¹⁹⁴ The majority (67 per cent) of people now regard it as being acceptable for a couple to choose to cohabit, even if they do not intend to marry.¹⁹⁵ There is even higher acceptance in younger

¹⁸¹ Wong (n 31) 61.

¹⁸² See Ibbetson (n 158).

¹⁸³ See text to n 148.

¹⁸⁴ See Miles and Probert (n 153).

¹⁸⁵ See for example *ibid*; Duncan (n 180).

¹⁸⁶ Elise Kramer, ‘Cohabitation: Just a Phase?’ (*Psychology Today*, 1 September 2004) <<https://www.psychologytoday.com/gb/articles/200409/cohabitation-just-a-phase>> accessed 2 September 2025.

¹⁸⁷ See Rhoades, Stanley and Markman (n 176).

¹⁸⁸ See de Waal (n 8).

¹⁸⁹ Deech (n 44). However, cf text to n 156.

¹⁹⁰ Office for National Statistics, ‘Marriages in England and Wales: 2020’ (*Office for National Statistics*, 11 May 2023) <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2020>> accessed 1 September 2025. See also Alison Park and Rebecca Rhead, ‘Personal Relationships: Changing Attitudes Towards Sex, Marriage and Parenthood’ in Alison Park and others (eds), *British Social Attitudes 30* (NatCen Social Research 2013) 7.

¹⁹¹ Office for National Statistics, ‘Marriages in England and Wales: 2021 and 2022’ (*Office for National Statistics*, 20 June 2024) <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2021and2022>> accessed 1 September 2025.

¹⁹² *ibid*.

¹⁹³ See for example John Haskay, ‘Cohabitation in Great Britain: Past, Present and Future Trends – and Attitudes’ (2001) 103 *Population Trends* 4; Deech (n 44); *Dyson* (n 68).

¹⁹⁴ See for example Park and Rhead (n 190); Duncan, Barlow and James (n 21).

¹⁹⁵ de Waal (n 8) 49. See also Douglas and others, ‘Enduring Love?’ (n 57).

people,¹⁹⁶ perhaps indicating a growing acceptance towards cohabitation as a lifestyle choice in its own right. Barlow notes that now:

People live together. Before, there was a very set thing that you did. You got engaged, you got married, then you had children. That is not how relationships work anymore. They are more fluid and people live together for a period of time... There is no social stigma attached to that. They operate as if they were married or civil partnered in terms of the way they see their relationship, so they are functionally similar. That does not mean they are not committed to each other...¹⁹⁷

Barlow's comments are illuminating because they highlight the functional similarities that exist between all couples irrespective of legal status.¹⁹⁸ Many of the characteristics of marriages and civil partnerships—a shared dwelling, shared meals, emotional and financial interdependence, and sexual intimacy, for example—are also shared by cohabiting couples.¹⁹⁹ In fact, research indicates that 66 per cent of people felt that 'there is little difference socially between being married and living together' and 48 per cent felt that 'living with a partner shows just as much commitment as getting married', thus leading to the conclusion that, 'for many, marriage does not have normative centrality, and unmarried cohabitation is seen as its equivalent'.²⁰⁰

Not all cohabiting couples will live their lives like married or civilly partnered couples, nor will all married or civilly partnered couples live in harmonious relationships. The significance we attach to other people in our lives does not necessarily relate to marriage,²⁰¹ nor is marriage always an adequate indicator of relationship quality. Marriage and civil partnership are a legal status. The quality of a relationship—its commitment and interdependence—is not easily captured by the social fact of whether the relationship is legally recognised. After all, a marriage is 'reducible to a piece of paper' and 'the issuance of a marriage certificate does not determine the conduct of any specific marriage, what it means to its participants, or how those participants will function within the relationship'.²⁰² Viewed through the lens of relationship quality, it seems rather unusual that family law continues to privilege legal unions over cohabitation despite substantial changes in family life and the emergence of cohabitation as a lifestyle choice in its own right.

Finally, Elise Kramer found that cohabitation is often a part of the dating process in the USA.²⁰³ Research suggests that this is likely to be the case in the UK too. In the period of 1980–84, only around three in 10 couples lived together before marriage; by 2004–07, this rose to just under eight in 10.²⁰⁴ In this same timeframe, the mean duration of premarital

¹⁹⁶ See de Waal (n 8) 50.

¹⁹⁷ Women and Equalities Committee, 'Oral Evidence: The Rights of Cohabiting Partners, HC 130' (22 September 2021) Q23 <<https://committees.parliament.uk/oralevidence/2785/pdf/>> accessed 1 September 2025.

¹⁹⁸ Thompson and Bental (n 108).

¹⁹⁹ See Ronald R Rindfuss and Audrey VandenHeuvel, 'Cohabitation: A Precursor to Marriage or an Alternative to Being Single?' (1990) 16 *Population and Development Review* 703.

²⁰⁰ Simon Duncan and Miranda Phillips, 'New Families? Tradition and Change in Modern Relationships' in Alison Park and others (eds), *British Social Attitudes: The 24th Report* (SAGE Publications 2008) 7 (emphasis removed).

²⁰¹ Shakargy (n 137).

²⁰² Martha Albertson Fineman, 'Why Marriage?' (2001) 9 *Virginia Journal of Social Policy and the Law* 239, 239–41.

²⁰³ Kramer (n 186).

²⁰⁴ Beaujouan and Ní Bhrolcháin (n 168) 43.

cohabitation rose from under two years to around four,²⁰³ showing that marriage is increasingly being delayed. Living together before marriage—if marriage is even on the table—has gone from being unusual to the norm,²⁰⁶ suggesting a shift in social attitudes towards cohabitation. If this is true, cohabitation ought to be recognised in its own right,²⁰⁷ especially if these trends persist.

It should be noted that there have been arguments that cohabitation is closer to being an alternative to singledom than to marriage. Ronald R Rindfuss and Audrey VandenHeuvel argue that cohabitation in the USA has many hallmarks of marriage, but cohabitees are more similar to singles than married couples.²⁰⁸ They cite factors, such as differing fertility expectations, family values, home ownership rates, lack of permanence, self-identification as singles, and financial independence between the parties.²⁰⁹ If this is the case—which is doubtful—there would be no justified reason to extend cohabitation rights; the general law could deal with these issues. Their article is nearing its thirty-fifth anniversary and social attitudes have changed,²¹⁰ and the authors themselves note that their argument is not universal. For example, they say that cohabitation is more akin to an alternative to marriage in Sweden (or indeed any country with a history of lasting cohabiting unions that often include childbearing). With arguments that the UK seems to be moving towards a Scandinavian pattern of cohabitation,²¹¹ it may be that Rindfuss and VandenHeuvel's findings do not map well onto couples here.

IV. PROPOSED SOLUTIONS

This section now turns to examine potential reform and to propose solutions to the inadequate rights currently afforded to cohabiting couples. Again, it is worth noting that the author takes a functional approach based on the idea that the law ought to reflect social reality. The task of proposing solutions to the issues that arise due to the limited existing cohabitation rights is not without difficulties. Reform to cohabitation rights must be sensitive to any adverse effects that could be generated for these different groups, while simultaneously being an improvement on the current law for those requiring further protection. Comparisons of the approaches of different jurisdictions can (and arguably should) be a starting point; they can help to identify relevant issues and potential pitfalls in order to evaluate the available options better.²¹² This section will, in particular, focus on the success of reforms in other British and Commonwealth jurisdictions to assess whether similar approaches can and should be adopted in England.²¹³ This is where we will turn to next.²¹⁴

²⁰³ *Ibid.*

²⁰⁶ Park and Rhead (n 190) 7.

²⁰⁷ Kramer (n 186).

²⁰⁸ Rindfuss and VandenHeuvel (n 199).

²⁰⁹ *Ibid* 721–22.

²¹⁰ See discussion on social attitudes changing, text to nn 187, 201.

²¹¹ Duncan, Barlow and James (n 21) 20.

²¹² Scherpe, 'A Comparative View' (n 156).

²¹³ Examining Commonwealth and common law jurisdictions is particularly useful as these countries (previously pre-reform) adopted similar stances to England on the rights granted to cohabiting couples.

²¹⁴ It should be noted that there are a wide range of options available when considering reforming the law in relation to cohabitation—ranging from the complete abolition of marriage and civil partnership to providing identical remedies to those seen in marriage and civil partnership—that will not be discussed in great length here. For reasons of space, this section will focus on opt-in and opt-out methods of providing greater cohabitation rights.

A. OPT-IN SYSTEMS

One approach to creating an opt-in system of cohabitation rights is the registration of a relationship contract. Erez Aloni, for example, argues in favour of a registration-based marriage alternative founded on contract, which he calls a 'registered contractual relationship'.²¹⁵ He envisages that partners, once registered, would receive most (though not necessarily all) of the rights and benefits that married couples get. Cohabitation agreements already exist within the framework of UK contract law; an opt-in system would provide a statutory means for these agreements to be registered.

Registered relationship contracts have been implemented in other jurisdictions. The French Civil Solidarity Pact ('PACS') system allows the registration of a contract between two individuals living together. The agreement sets out basic rights and responsibilities, and there are tax benefits too. A model agreement can be signed for free at a local municipal hall or for a fee with a notary.²¹⁶ The number of registered PACSs has increased year-on-year since their introduction in 1999; it is expected that the number of PACSs registered per year will soon exceed the number of marriages.²¹⁷ While these numbers show that the PACS scheme has been hugely successful, its usage is still relatively low (eight per cent of couples 'PACSe'd'; 72 per cent married²¹⁸). Thus, an opt-in scheme modelled on the success of the French system would likely only capture the attention of couples who seek further legal protections but oppose marriage and civil partnership due to ideological objection and who may already have a cohabitation contract.

An opt-in system of cohabitation rights undoubtedly respects the couple's wishes if they both choose not to take on additional rights and responsibilities; conversely, it respects their choice to opt in if they do not believe that the general law provides enough protection. A system that allows couples to register their relationship contract would provide flexibility for couples to design the terms of their relationship to their specific needs instead of adopting the one-size-fits-all structure of marriage and civil partnership.²¹⁹ Furthermore, couples who do not wish to have any rights as cohabitants could simply choose not to opt in, thereby putting them in no different a position than under the current law. While an opt-in system does respect choice, this is only true where both parties want to receive or avoid legal recognition. In uneven couples, requiring the couple to opt in only respects the choice of one of the partners.²²⁰ The partner seeking to marry is likely to be willing to opt in, though the other may still refuse. Conceiving of an opt-in system as being respectful of the choice not to marry fundamentally ignores the asymmetries that exist within these uneven couples and is a major reason why an opt-in system would not go far enough to protect cohabitants.

²¹⁵ Erez Aloni, 'Registering Relationships' (2013) 87 *Tulane Law Review* 573, 576.

²¹⁶ Thomas Brent, 'How to Get a Pacs in France and What Differences to Marriage' (*The Connexion*, 1 February 2022) <<https://www.connexionfrance.com/article/Practical/Your-Questions/Family/How-to-get-a-Pacs-in-France-and-what-differences-to-marriage>> accessed 2 March 2024.

²¹⁷ French Institute for Demographic Studies, 'Civil Unions (PACS)' (*INED*, February 2024) <https://www.ined.fr/en/everything_about_population/data/france/marriages-divorces-pacs/pacs/> accessed 2 March 2024. But cf French Institute for Demographic Studies, 'Does France Today Have as Many Civil Unions as Marriages?' (*INED*, March 2024) <https://www.ined.fr/en/everything_about_population/demographic-facts-sheets/faq/is-the-number-of-pacs-civil-unions-in-france-the-same-as-the-number-of-marriages/> accessed 1 September 2025.

²¹⁸ French Institute for Demographic Studies, 'Does France Today Have as Many Civil Unions as Marriages?' (n 217).

²¹⁹ Aloni (n 215).

²²⁰ See discussion of unilateral choices in uneven couples, text following n 153.

Another major drawback of an opt-in approach is that it is unclear whether this would operate any differently from the current law in practice. Cohabitees already have a means through which they can secure greater rights, namely by agreeing to a cohabitation contract. Legislation could explicitly clarify that cohabitation contracts are not contrary to public policy, clearing up the uncertainty surrounding the extent to which they are enforceable.²²¹ All that an opt-in system would do differently, however, is provide a statutory framework for these types of agreements or a standardisation of the rights that can be contracted for by couples living together.

It has been argued that official registration might bring more certainty as to the legal enforceability of these agreements²²² and the potential scope of judicial intervention. However, there remains the potential for vulnerable individuals to agree to plainly unfair or onerous agreements. It is unlikely that the courts would be willing to waive their inherent jurisdiction simply because the relationship was registered, thus undermining the argument that registration would provide more certainty. Furthermore, an opt-in system suffers from the same defects as cohabitation contracts do, particularly the expectation that individuals act rationally about decisions concerning their relationships. This is unrealistic.²²³ Choosing to opt in might be overlooked or not even considered at all. This is especially relevant considering the high prevalence of the common law marriage myth²²⁴ and the fact that public expectations did not substantially shift following a public awareness campaign.²²⁵ If the public at large is uninformed and does not act rationally when making decisions about their relationships, an opt-in system has the potential to achieve no more than cohabitation contracts currently can. If the concern is with enforceability, the courts could instead provide greater clarity on cohabitation agreements. But if the concern is with capturing a group whose choice whether to marry or not is potentially not even contemplated, an opt-in approach to cohabitation rights fails to achieve this.

Implementing an opt-in system would also necessarily rely on the assumption that cohabitees had the financial means to opt in. Research shows that cohabitees typically perceive financial issues as being important for determining whether and when to marry, and some people do not marry, or delay getting married, because they do not have, or do not believe that they have, sufficient means to do so.²²⁶ The average cost of a wedding in the UK surpassed £20,000 in 2023,²²⁷ though it is possible to get legally married for around £1000.²²⁸ This is a substantial sum, meaning that some couples may not be able to marry for financial reasons. To avoid replicating this issue, an opt-in system would have to have low registration fees. The administrative costs of maintaining a register of all legally recognised cohabitants may not make this possible or economically justifiable though, thus cutting off a more impoverished demographic of cohabitants from being able to secure greater rights by registering as part of

²²¹ Law Commission, *Cohabitation* (n 16) pt 5, para 5.8.

²²² Aloni (n 215).

²²³ See text to n 69.

²²⁴ See discussion of common law marriage myth, text to n 35.

²²⁵ See text to nn 35, 128.

²²⁶ See Smock, Manning and Porter (n 74).

²²⁷ Zoe Burke, 'How Much Does a Wedding Cost? Average UK Wedding Now Costs £23,250' (*Hitched*, 20 May 2025) <<https://www.hitched.co.uk/wedding-planning/organising-and-planning/the-average-wedding-cost-in-the-uk-revealed/>> accessed 1 September 2025.

²²⁸ Sophia Shafice, 'How Much Does a Registry Office Wedding Cost? The 2024 Average Revealed' (*Bridebook*, 21 February 2024) <<https://bridebook.com/uk/article/how-much-does-a-registry-office-wedding-cost>> accessed 2 March 2024.

an opt-in scheme. Therefore, for individual financing and state resourcing reasons, an opt-in system may not be a practical solution.

B. OPT-OUT SYSTEMS

Presumptive and opt-out systems stand in direct contrast to opt-in systems. Instead of requiring positive action to secure rights, an opt-out scheme would require positive action to disapply provisions granting rights to cohabitants. This would have greater scope to catch uneven couples and to protect vulnerable cohabitants. For this reason, several academics have rejected opt-in solutions and have instead supported the introduction of an opt-out scheme.²²⁹ Such an approach has already been taken in other jurisdictions, often dubbed ‘de facto relationships’. De facto and common law partnerships now exist in several Commonwealth countries where they did not previously. Examples include New Zealand,²³⁰ and many Australian and Canadian states.²³¹ Closer to home, Scotland²³² and Ireland²³³ also provide a statutory definition of cohabitation and rights to eligible cohabitants.

In New Zealand, de facto relationships have seen steady growth since their introduction (around 3.8 per cent in 1981; and 22.6 per cent in 2018²³⁴). They are most common in under 35s and 30 per cent of children are born into them.²³⁵ To give a brief overview, there are two definitions that apply in different circumstances under the New Zealand legislation. The first is a general definition of a de facto relationship as ‘a relationship between 2 people... who... live together as a couple in a relationship in the nature of marriage or civil union’.²³⁶ This seems to require emotional commitment and financial interdependence.²³⁷ This definition usually applies to state-related matters and obligations, such as benefits and tax. The second defines a de facto relationship as ‘2 persons... who are both aged 18 years or older; and who live together as a couple’.²³⁸ Case law here generally requires some form of physical sharing, and coupledness is demonstrated by a mutual commitment to a shared life.²³⁹ This is the default scheme for property and family proceedings and can be opted out of, though only around 10 per cent have actually opted out.²⁴⁰ In fact, the Borrin Foundation found that 79 per cent were aware of the equal sharing rules and 74 per cent agreed with them.²⁴¹ While certain anomalies remain and the case law is not yet fully developed, the system of de facto

²²⁹ See for example Hayward (n 46); Barlow (n 39); Elizabeth Darlington, ‘TOLATA Claims and the Views of the FLBA in Respect of Law Reform’ (Family Law Reform Now Conference, London, 27 January 2023) <<https://www.birmingham.ac.uk/research/law/family-law-reform-now/cohabitation-reform-in-england-and-wales>> accessed 16 October 2023; Andy Hayward, ‘Cohabitation: It’s Time to Take Legal Reform Seriously’ (*The Conversation*, 13 February 2023) <<https://theconversation.com/cohabitation-its-time-to-take-legal-reform-seriously-197931>> accessed 16 October 2023.

²³⁰ See for example Property (Relationships) Act 1976 (NZ); Legislation Act 2019 (NZ), s 14(1)(a).

²³¹ In Australia and Canada, the extent of rights and responsibilities varies by state and province: see discussion in Law Commission, *Cohabitation* (n 16) 2, 106 onwards.

²³² See Family Law (Scotland) Act 2006, ss 25–29.

²³³ See Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ireland).

²³⁴ Margaret Briggs, ‘The Legal Status of De Facto Relationships in New Zealand’ (Family Law Reform Now Conference, London, 27 January 2023) <<https://www.birmingham.ac.uk/research/law/family-law-reform-now/cohabitation-reform-in-england-and-wales>> accessed 16 October 2023.

²³⁵ *Ibid.*

²³⁶ Legislation Act 2019 (NZ), s 14(1)(a).

²³⁷ *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (NZCA).

²³⁸ Property (Relationships) Act 1976 (NZ), s 2D(1)(a)–(b).

²³⁹ Briggs (n 234).

²⁴⁰ See Ian Binnie and others, *Relationship Property Division in New Zealand: Public Attitudes and Values* (Michael & Suzanne Borrin Foundation 2018).

²⁴¹ *Ibid.* 22.

relationships means that cohabiting couples in New Zealand are treated much the same as their married or registered civil union counterparts.²⁴²

Another example is that of Scotland. Following trends similar to those seen in England and Wales, the Scottish Parliament decided to legislate on cohabitation rights in 2006. The Family Law (Scotland) Act 2006 introduced remedies for cohabitants whose relationships had ended in separation or death.²⁴³ Section 25 defines cohabitant as ‘either member of a couple... living together as if they were husband and wife’. In determining if this is applicable, the court considers the nature and duration of the relationship, as well as any financial arrangement between the parties. The Scottish Law Commission has since recommended a change to ‘living together as a couple in an enduring family relationship’ and the introduction of further factors for the court to take into account.²⁴⁴ The Act confers broad discretion—akin, but not identical, to the discretion afforded where the couple is married or civilly partnered—to the courts to distribute assets acquired during cohabitation following separation or to create orders if one of the cohabitants dies intestate. The court may also order a capital sum following separation either to assist with ongoing economic burdens of childcare responsibilities or to correct any imbalance in economic advantage and disadvantage between the parties.

Practitioners have been found broadly to agree with the provisions of the Act, though some find it uncertain and difficult to use in practice.²⁴⁵ The Scottish Law Commission’s proposals aim to remedy this uncertainty and to modernise the law. It is also questionable whether the uncertainty generated by broad judicial discretion is any different to the discretion in divorce and dissolution cases. It may, in fact, be beneficial to approach separation and death cases in this manner, considering how each couple’s relationship will be different from the next. Judicial discretion would allow the courts to fashion remedies that are appropriate to the given facts of a case.

Opt-out cohabitation rights have the potential to act like a safety net,²⁴⁶ capturing those who are unable to secure greater relationship rights through marriage or civil partnership. This is especially relevant in respect of uneven couples, but also applies to those who are opposed to marriage and civil partnership for other reasons.²⁴⁷ The current patchwork remedies are not appropriate to cure the disadvantage and unfair outcomes that can result from cohabitation; in fact, they can result in uncertainty, unfairness, and hardship for the economically weaker party.²⁴⁸ Providing cohabitation rights by default to qualifying cohabitants would remedy this.

Graeme Fraser makes the case for introducing a statutory definition of cohabitation that sets out a minimum time period and eligibility criteria, a set of relevant factors the court ought to take into account, and judicial discretion to make post-separation orders similar to

²⁴² Briggs (n 234).

²⁴³ Family Law (Scotland) Act 2006, ss 25–28.

²⁴⁴ Scottish Law Commission, *Report on Cohabitation* (Scot Law Com No 261, 2022) para 3.60. See also Kate Dowdalls, ‘Cohabitation Law Reform Scotland’ (Family Law Reform Now Conference, London, 27 January 2023) <<https://www.birmingham.ac.uk/research/law/family-law-reform-now/cohabitation-reform-in-england-and-wales>> accessed 16 October 2023.

²⁴⁵ Fran Wasoff, Jo Miles and Enid Mordaunt, ‘No Longer Living Together: How Does Scots Cohabitation Law Work in Practice?’ (2010) University of Cambridge Faculty of Law Research Paper No 11/03 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736619> accessed 1 September 2025. See also Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (n 7).

²⁴⁶ See for example Hayward, ‘Cohabitation’ (n 229); Kathryn O’Sullivan, ‘De Facto Relationships in Ireland’ (Family Law Reform Now Conference, London, 27 January 2023) <<https://www.birmingham.ac.uk/research/law/family-law-reform-now/cohabitation-reform-in-england-and-wales>> accessed 16 October 2023.

²⁴⁷ See text to n 148.

²⁴⁸ Fraser (n 5). See also text to nn 41, 42, and following n 116.

those offered upon divorce or dissolution.²⁵⁰ He also calls for stronger intestacy rights and for cohabitants to be treated the same as spouses for tax purposes.²⁵⁰ This would allow separating cohabitants—like married couples going through a divorce—to apply to the court for discretionary orders aimed at eliminating, or at least reducing, any benefit retained by one member of the couple or continuing disadvantage suffered by the other. Additionally, an eligible surviving cohabitee would rank above other family members on the intestacy hierarchy (where they previously would have had no claim) and would be able to inherit the estate free from inheritance tax. These reforms would have massive potential. Surviving partners would not be forced out of their homes due to an inheritance tax burden or pressure from the deceased's family. Separating partners who contributed to childcare and bills would not be left without a share in the family home merely because they never made direct financial contributions to a house that was in the sole name of their partner. Instead, courts would be able to provide remedies that are more appropriate to intuitive conceptions of what is right and fair in individual cases.²⁵¹

It must be conceded that an opt-out system is much more state interventionist in nature. A recurring theme in the literature is that opt-out mechanisms force duties upon couples with which they do not necessarily agree.²⁵² By virtue of the fact that it applies by default upon certain conditions being met, it is arguable that an opt-out system restricts autonomy. This is especially relevant in uneven couples, where one of the parties would certainly wish not to be captured by additional rights and responsibilities.²⁵³ But it must also be remembered that opt-out systems do provide cohabitants with the ability to opt out. Where one does not want the scheme to apply, they are free to disapply it. The author concedes that an opt-out system is nevertheless premised on the restriction of autonomy; despite this, it is argued that this restriction is proportionate to the positive effects that such a system would have as a safety net to vulnerable individuals and as mitigating the effects of the common law marriage myth. Statistics from New Zealand show that most couples do not opt out, indicating that the default position (i.e. enhanced cohabitation rights) is desirable to most.²⁵⁴ Fraser adds that the Australian system generally works well in practice too.²⁵⁵ Furthermore, the change to an opt-out system would also not be inconsistent with other recent changes in the law. For example, post-mortem organ donation became opt-out in 2020,²⁵⁶ NHS health data is processed for healthcare research unless we opt out,²⁵⁷ and employees are automatically enrolled into workplace pensions.²⁵⁸ As with these examples, an opt-out system of cohabitation rights simply flips the default position.

Traditionalists seek to protect the institutions of marriage and civil partnership. For example, Deech has argued that recognising cohabitation rights would undermine marriage.²⁵⁹ Marriage and civil partnership may be seen (either historically or currently) as inherently

²⁵⁰ Fraser (n 5).

²⁵⁰ *ibid.*

²⁵¹ See discussion of fairness in divorce and dissolution, text to n 53.

²⁵² See for example Aloni (n 215); Hayward, 'Cohabitation' (n 229); HL Deb 15 March 2019, vol 796, col 1269.

²⁵³ See text to n 129.

²⁵⁴ See Binnie and others (n 240).

²⁵⁵ Fraser (n 5).

²⁵⁶ Organ Donation (Deemed Consent) Act 2019.

²⁵⁷ 'National Data Opt-Out' (*NHS England*, 27 June 2025) <<https://digital.nhs.uk/services/national-data-opt-out>> accessed 23 August 2025.

²⁵⁸ Pensions Act 2008, s 3.

²⁵⁹ Deech (n 44). See also Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (n 7) 16; Hayward, 'Cohabitation' (n 229).

valuable to society, or at least more valuable than other relationship forms (especially as a means of regulating the family unit, upholding morals, and promoting population growth).²⁶⁰ A more functionalist approach, however, would stress that family law ought to reflect family life in practice; law should protect the function rather than the form of relationships.²⁶¹ There is no evidence that the current social policy, which encourages marriages and civil partnerships over other relationship forms by privileging them in law, decreases the number of nonmarital unions.²⁶² In fact, despite the limited rights offered to cohabiting couples, we have seen that this is the fastest growing family form.²⁶³ The argument that introducing cohabitation rights undermines or harms the institution of marriage, or is somehow irreconcilable with its promotion, underestimates marriage and civil partnership by suggesting that couples only think of the legal ramifications when they seek legal unions; there is no evidence supporting this.²⁶⁴ Couples may choose to marry for several reasons—personal fulfilment or cultural expectation, for example²⁶⁵—without necessarily considering how marriage enhances their rights in relation to one another. Furthering cohabitation rights would not impact the decision to get married or to form a civil partnership for those who seek these unions for reasons beyond the law.

Additionally, Fraser argues that other Commonwealth jurisdictions have seen little to no controversy at all over the introduction of de facto relationships.²⁶⁶ The available data in Australia finds no statistical relationship between the rate of marriage and the introduction of cohabitation remedies.²⁶⁷ These findings should quell fears that introducing an opt-out system would negatively impact or undermine the institution of marriage and/or civil partnership. Importantly, reforms to cohabitation rights do not necessarily intend to equate cohabitation with marriage and civil partnership. In fact, no proposal has purported to do so.²⁶⁸ In Scotland, the 'provisions do not give people who live together the same rights as spouses or civil partners, they create a middle way between that protection and none at all'.²⁶⁹ Instead, they aim to provide 'some protection to those who are economically vulnerable'.²⁷⁰ This too suggests that the introduction of cohabitation rights is not intended to undermine marriage and/or civil partnership because it does not seek to equate cohabitation with these institutions completely.

Another objection that may be raised against an opt-out system is that there is not a universally accepted definition of cohabiting. For example, different individuals will have different conceptions of the amount of time and interdependence required before a couple is said to 'cohabit'; some might even say that a couple who merely live together meet the definition by virtue of their shared home and the nature of their relationship. If there is no general acceptance of what 'cohabitation' means, it is harder for the parties to be certain of their legal position. Marriage and civil partnership avoid this difficulty by being an opt-in regime; they are easily identifiable and formally documented.²⁷¹ The procedural requirements and formalities of forming a legal union aim to ensure that the parties are certain of what rights and responsibilities they have to one another.

²⁶⁰ See for example Shakargy (n 137); Deech (n 44); Hayward (n 46).

²⁶¹ See Barlow and James, 'Regulating Marriage' (n 21).

²⁶² See Aloni (n 215).

²⁶³ See text to n 6.

²⁶⁴ See generally Law Commission, *Cohabitation* (n 16).

²⁶⁵ See other examples in Fineman (n 202) 240.

²⁶⁶ Fraser (n 5). See also Women and Equalities Committee, *The Rights of Cohabiting Partners (second report)* (n 7).

²⁶⁷ See Law Commission, *Cohabitation* (n 16).

²⁶⁸ See Hayward (n 46).

²⁶⁹ Wasoff, Miles and Mordaunt, 'No Longer Living Together' (n 245).

²⁷⁰ *Ibid.*

²⁷¹ See for example Shakargy (n 137); Deech (n 44).

An opt-out scheme for cohabitation rights would not be able to rely on such formalities to identify easily if and when the couple qualifies for additional rights in relation to their cohabitation. Furthermore, there are inherent difficulties with defining cohabitation, and some have gone as far as to say that it is impossible to define cohabitation satisfactorily and exhaustively.²⁷² Any definition would need to be wide enough to encompass the diverse variety and nature of relationships that exist between cohabiting couples, while simultaneously being narrow enough to exclude groups who plainly would not wish to be captured in ordinary situations (such as friends and housemates). It would also have to go beyond economic hardship to achieve more than the current law.²⁷³ Attempting to formulate a definition of cohabitation or to determine the degree of care and commitment sufficient to justify legal recognition would not be an easy task,²⁷⁴ and there is likely always to be some objection or critique no matter the formulation that is decided on. The author does not believe this task to be impossible though. Many other jurisdictions have implemented opt-out systems to give cohabitees greater rights, relying on time and eligibility criteria to capture cohabitants who are deemed to meet a statutory threshold. Where this threshold is drawn would ultimately be hard and arbitrary, but the benefits of recognising cohabitation rights more generally under a statutory opt-out scheme would outweigh the drawbacks.²⁷⁵ Further consultation may be required to determine what these eligibility criteria ultimately should be and where the line between qualifying and non-qualifying cohabitation should be drawn.

One final consideration is whether an opt-out system would unduly burden the state or other interested parties. Opening up a new statutory regime has the potential to capture millions of cohabiting couples. Individuals may be more likely to take their partner to court after separation or to dispute an inheritance tax bill after their death. A flood of litigation may overwhelm the courts, though there is no evidence of this occurring in other jurisdictions that have enacted opt-out schemes. For example, Fran Wasoff, Jo Miles, and Enid Mordaunt find that the Scottish reforms have 'not imposed an inordinate burden on the Scottish family justice system', nor has the absence of a minimum duration eligibility requirement resulted in a flood of claims following short relationships.²⁷⁶

Claimants may have a hard time evidencing their relationship or meeting the relevant criteria: couples may not discuss the long-term legal implications of their relationship or keep materials that may prove its duration. However, couples do already rely on the courts and may currently run into these evidentiary burdens in property disputes in practice. A clear enough statutory scheme coupled with sufficient judicial discretion could make these disputes easier to resolve for the courts. With clear definitions and eligibility requirements, this article argues that, on balance, the potential burdens associated with an opt-out scheme outweigh the problems with the current law. Parliament should legislate to implement a system of opt-out rights, subject to eligibility criteria,²⁷⁷ for cohabiting couples that apply on relationship breakdown and death.

²⁷² See Deech (n 44).

²⁷³ See Wong (n 31).

²⁷⁴ See Herring, 'Making Family Law' (n 34).

²⁷⁵ *Ibid.*

²⁷⁶ Wasoff, Miles and Mordaunt, 'No Longer Living Together' (n 245). See also Jo Miles, Fran Wasoff and Enid Mordaunt, 'Reforming Family Law - The Case of Cohabitation: "Things May Not Work Out as You Expect"' (2012) 34 *Journal of Social Welfare and Family Law* 167.

²⁷⁷ Though it should be noted that this article does not seek to suggest a definitive duration by which cohabitation should warrant protection or other conditions that should be attached to any statutory definition of cohabitation. As illustrated by the differences in definitions and requirements found in foreign jurisdictions, it seems that there is no clear agreement

V. CONCLUSION

This article has analysed the existing legal position of cohabiting couples under domestic law and explored the different ways in which these couples are legally constructed to argue that the law ought to afford greater protections to the individuals within cohabiting couples.

Section II demonstrated that there is a gap in the protection offered by the law to cohabiting couples by drawing comparisons with couples in marriages and civil partnerships. Focusing on how the law reacts differently between these groups upon relationship breakdown and death, we saw that the legal position of cohabitants is significantly weaker than the legal position of spouses and civil partners. This section concluded by outlining the main reform proposals recommended by the Law Commission and the Women and Equalities Committee.

Section III then explained why this gap needs filling, presenting the argument that it cannot be said that cohabitation is substantially different from marriages and civil partnerships in various cases and, thus, that the difference in approach is not always warranted. To establish this, Section III focused on the notions that those in cohabiting relationships have chosen not to marry, that periods of cohabitation are merely precursory to entering into a marriage or civil partnership, and the possibility that cohabitation is itself an emerging lifestyle choice. This section concluded that (i) the choice not to marry may not even be a ‘choice’ at all, or that it may be made unilaterally; (ii) cohabitation may be, but is not always, a precursor to marriage, and this line of thinking may be flawed; and (iii) cohabitation independent of an intention to marry, while retaining (some of) the hallmarks of marriage and civil partnership, is becoming more common. This led to the conclusion that the law does not currently go far enough to protect cohabiting couples and that it ought to provide more protection.

Section IV then turned to the issue of how rights for individuals in cohabiting couples should be addressed. Two different potential approaches to reforming the law in relation to cohabitation rights were presented, namely systems of opt-in and opt-out rights. This final section also drew inspiration from other jurisdictions and suggested that an opt-in system would not go far enough. It concluded that, notwithstanding the potential objections, the best approach to strengthening the rights of cohabitants is to implement an opt-out system that applies upon both relationship breakdown and death. Opt-out rights have much more potential and could ensure congruence between people’s expectations of the law and what the law actually is. Opt-out rights could also accommodate situations that opt-in rights could not. For example, an opt-out system would be able to protect individuals in uneven couples; an opt-in system could not achieve this. Opt-out systems have been implemented successfully in other jurisdictions, and Parliament should draw inspiration from these jurisdictions in domestic reform. This article therefore supports the recommendations of the Law Commission and the Women and Equalities Committee outlined in Section II,²⁷⁸ most notably the recommendation that Parliament should legislate for a comprehensive opt-out scheme of cohabitation rights. This article has built on these recommendations by adopting a functional and pragmatic approach to examining family law in practice and by comparing the success of different approaches taken in foreign jurisdictions.

on these matters. Further consultation and parliamentary debate will be required before any enactment in support of cohabitation rights is made to determine the appropriate conditions that are required.

²⁷⁸ See discussion of reform proposals, text following n 115.

In circumstances of relationship breakdown, the author foresees the courts having greater discretion in disputes regarding the assets of a cohabiting couple that meet the relevant criteria. This discretionary award would be intended to remedy the benefit retained by the defendant or the continuing economic disadvantage suffered by the claimant, defined broadly to include caring responsibilities, financial and non-financial activities that enhance the value of capital assets, unpaid work and domestic contributions, and so on. Such a change would bring the law closer in line with how the courts deal with disputes between separating married and civilly partnered couples, without necessarily putting them on an equal footing or requiring formalities. This would make the law clearer and more consistent. In circumstances where a cohabitant dies, the author envisages that their surviving partner would essentially be equated with the same status as spouses and civil partners if they meet the relevant criteria. This would exempt cohabitees from inheritance tax, strengthen their position in intestacy, and reduce barriers to family provision claims to protect their interest in the family home, thereby reflecting public support in favour of reform.

Further public consultation will likely be required to determine the eligibility requirements, conditions, and remedies under such a scheme. We should look to the successes and failures of cohabitation rights reform in other jurisdictions, particularly the other constituents of the UK, to draw inspiration from as well. As noted in Section IV, other jurisdictions that have introduced opt-out rights have seen little controversy over such reforms and few couples do opt out. Furthermore, opt-out reforms have acted as a safety net without disrupting the institutions of marriage and civil partnership, causing greater difficulties than are experienced under the current law, or placing an undesirable burden on the state or other interested parties. There is no evidence to suggest that this would be any different domestically.

Therefore, to conclude, the law does not currently go far enough to protect individuals in cohabiting couples at either relationship breakdown or death. The law ought to be reformed to plug the gap in protections afforded to cohabiting couples by introducing opt-out rights for these individuals.

Beyond Transparency: A Case for Risk Warnings in Content Personalisation under EU Law

KEISUKE NOMA*

ABSTRACT

This article argues that European Union (‘EU’) law should require online service providers employing content personalisation (‘CP’) to display user-facing risk warnings (‘CP Warnings’), inspired by health warnings on tobacco packaging. CP (the tailoring of digital content based on users’ data) is pervasive across online platforms, from targeted advertising to recommendation systems. While its prevalence has grown, so too have concerns over its potential to cause addiction and manipulation. Yet, EU data protection law does not require that users be informed of such risks. The article contends that this gap reflects a libertarian conception of transparency which assumes that individuals can make rational decisions upon the disclosure of internal processing practices. Challenging this premise, the article argues both that CP Warnings should and can be accommodated within EU data protection law as a form of libertarian paternalism. Section II defines CP Warnings (i.e. salient risk notices and a narrow constraint on counter-messaging) by analogy with tobacco warnings. Section III demonstrates the necessity of CP Warnings by outlining the material risks posed by CP and the inadequacy of current legal safeguards. Section IV assesses the permissibility of mandating such warnings, drawing an analogy with the EU’s tobacco product regulation. Through a detailed analysis of the Court of Justice of the European Union (‘CJEU’) case law, the article evaluates whether CP Warnings—both positive (mandatory notification) and negative (restrictions on promotional language)—have a proper EU legal basis, satisfy subsidiarity, and are compatible with proportionality and the right to freedom of expression under the Charter of Fundamental Rights of the European Union (‘CFR’). Section V synthesises the argument, explaining how CP Warnings move the EU’s approach beyond transparency towards a libertarian paternalistic model of risk communication, and concludes that the EU legislature should adopt CP Warnings.

Keywords: content personalisation, tobacco products regulation, risk warning, transparency, libertarian paternalism

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I. INTRODUCTION

Transparency is a core principle of EU data protection law. The concept was articulated early in the Fair Information Practice Principles ('FIPPs') developed in the United States in 1973¹ and in the 'Privacy Guidelines' issued by the Organisation for Economic Co-operation and Development ('OECD') in 1980.² Under the current EU framework, the EU's General Data Protection Regulation³ ('GDPR') expressly enshrines transparency in article 5, which sets out the principles relating to the processing of personal data. This principle is particularly operationalised through obligations on controllers to provide data subjects with information about the processing of their data, including the identity of the controller and the purposes of processing.⁴ Similar obligations appear in other EU data protection instruments, notably the ePrivacy Directive⁵ and the Digital Services Act ('DSA').⁶ These duties empower individuals to make informed decisions, including whether to grant or withdraw consent to the processing of their data for online services.⁷

The importance of such empowerment has increased as the risks associated with personal data processing have intensified with technological advancement. A prominent example is content personalisation ('CP'), which is defined in this article as the tailoring of services for individuals or groups based on data, such as preferences and behaviours. CP is widely used across online services, including targeted advertising, content recommendations, and search engine results.⁸ It typically involves the processing of 'personal data', since personalisation is not possible without 'information relating to an identified or identifiable natural person',⁹ such as cookie identifiers,¹⁰ IDFA (an iOS device identifier used to track

¹ These principles are laid down in 5 USC § 552a(e).

² OECD, 'Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data' (23 September 1980) <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0188>> accessed 14 June 2025.

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1 ('GDPR').

⁴ See for example GDPR, recital 39, arts 12–14; Article 29 Data Protection Working Party ('WP29'), 'Guidelines on Transparency under Regulation 2016/679' (WP 260, 29 November 2017), paras 1, 4 <https://www.edpb.europa.eu/system/files/2023-09/wp260rev01_en.pdf> accessed 6 September 2025.

⁵ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201 ('ePrivacy Directive'). See for example article 5(3) of the ePrivacy Directive.

⁶ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1 ('DSA'). See for example article 27 of the DSA.

⁷ See for example WP29, 'Guidelines on Transparency' (n 4) para 4; Case C-673/17 *Bundesverband eV v Planet49 GmbH*, EU:C:2019:801, para 74; 'Questions and Answers on the Digital Services Act' (European Commission, 23 February 2024) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2348> accessed 9 June 2025.

⁸ See 'Personalization & Google Search Results' (*Google – Google Search Help*) <<https://support.google.com/websearch/answer/12410098?sjid=14206159666874055410-EU>> accessed 24 November 2024.

⁹ GDPR, art 4(1). See for example GDPR, recital 30; *Planet49* (n 7) para 45; Michael Veale and Frederik Zuiderveen Borgesius, 'Adtech and Real-Time Bidding under European Data Protection Law' (2022) 23 German Law Journal 226, 233–34.

¹⁰ See EDPB, 'Guidelines 8/2020 on the Targeting of Social Media Users' (Version 2.0, 13 April 2021) 9 <https://www.edpb.europa.eu/system/files/2021-04/edpb_guidelines_082020_on_the_targeting_of_social_media_users_en.pdf> accessed 6 September 2025.

activity), or AAID (the analogous Android device identifier).¹¹ CP presents risks for users, particularly risks of addiction to online services and manipulation by online service providers or other users who seek to influence individuals' beliefs or behaviour,¹² which have been recognised within the EU even before the adoption of the GDPR.¹³ In response to such concerns, some jurisdictions have moved to restrict children's use of social media, at least in part due to these risks.¹⁴ For example, Florida's new law prohibits children aged 13 or younger from holding social media accounts and requires parental consent for 14- and 15-year-olds,¹⁵ and Australia has set a minimum age of 16 with no parental consent carve-out.¹⁶

Yet these risks remain insufficiently addressed in EU law. Current transparency obligations do not require service providers to inform users about the risks associated with CP, as discussed further below. By contrast, some other jurisdictions are considering more interventionist approaches. For example, the US Surgeon General has urged Congress to mandate warning labels on social media platforms, stating their impact on young people, as is the case with cigarette packaging.¹⁷ Similarly, the Attorney General of California and a member of the State Assembly have proposed legislation requiring social media platforms to display health risk warnings.¹⁸

Against this background, this article argues that EU law should require online service providers using CP to display user-facing risk warnings ('CP Warnings'). The argument proceeds in four parts. The first part (in Section II) defines CP Warnings in more detail as a basis for the analysis of this article in comparison to Tobacco Warnings. The second part (in Section III) establishes the necessity of CP Warnings, showing that, although the risks are significant, current EU law does not require users to be informed of them. This article argues that the absence of such a requirement reflects the essentially libertarian orientation of transparency obligations, whereas risk notices would embody a libertarian-paternalistic approach. It further argues that users should be warned of the risks of CP. Yet, however compelling the need may be, CP Warnings cannot be introduced if they fail to withstand legal scrutiny. Accordingly, the third part (in Section IV) examines whether mandating CP Warnings in EU law could overcome potential legal obstacles (which is referred to here as their 'permissibility'). It considers potential objections from service providers, including concerns that an obligation to display user-facing risk warnings, and restrictions on counter-messages that could dilute their effect, may breach some principles of EU law or interfere

¹¹ See 'Target Mobile Apps with IDFA or AAID' (*Google - Authorized Buyers Help*) <<https://support.google.com/authorizedbuyers/answer/3221407?hl=en>> accessed 6 January 2025.

¹² EDPB, 'Guidelines 8/2020' (n 10) paras 9–18.

¹³ See for example WP29, 'Opinion 5/2009 on Online Social Networking' (WP 163, 12 June 2009) <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2009/wp163_en.pdf> accessed 6 September 2025; WP29, 'Opinion 2/2010 on Online Behavioural Advertising' (WP 171, 22 June 2010) <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp171_en.pdf> accessed 6 September 2025.

¹⁴ See for example Online Safety Amendment (Social Media Minimum Age) Bill 2024 (Cth); 'H.B. 3, 2024 Leg., Reg. Sess. (Fla. 2024)' (2025) 138 *Harvard Law Review* 1161.

¹⁵ HB 3, 2024 Leg, Reg Sess (Fla 2024) (codified at Fla Stat §§ 501.1736–.1738 (2024)).

¹⁶ Online Safety Amendment (Social Media Minimum Age) Act 2024 (Cth).

¹⁷ See Michelle Chapman, 'Tobacco-like Warning Label for Social Media Sought by US Surgeon General Who Asks Congress to Act' (*The Associated Press*, 17 June 2024) <<https://apnews.com/article/surgeon-general-social-media-mental-health-df321c791493863001754401676f165c>> accessed 21 January 2025.

¹⁸ See 'Attorney General Bonta, Assemblymember Bauer-Kahan, Introduce Legislation to Require Social Media Warning Labels' (*State of California Department of Justice Office of the Attorney General*, 9 December 2024) <<https://oag.ca.gov/news/press-releases/attorney-general-bonta-assemblymember-bauer-kahan-introduce-legislation-require>> accessed 21 January 2025.

with their rights and freedoms, in particular freedom of expression. These objections are practically plausible, given the possibility that users, once informed of the risks, may refuse to consent to the processing of personal data, which is required for the lawful operation of CP. Similar objections were raised in relation to the EU Tobacco Products Directive ('TPD'),¹⁹ which, inter alia, mandates the inclusion of health warnings with photographs on packaging ('Tobacco Warnings').²⁰ Accordingly, this article assesses the scope of EU legislative authority to impose CP Warnings, by analogy with case law concerning Tobacco Warnings and through the lens of libertarian paternalism. Section V synthesises the argument, showing how CP Warnings move the EU's approach beyond transparency towards a more paternalistic model of risk communication, followed by a conclusion (in Section VI).

While this article draws an analogy with Tobacco Warnings, tobacco and CP are plainly different—smoking entails severe, cumulative physical harms, whereas the risks of CP are primarily psychological and behavioural, and CP can confer clear benefits alongside risks—so the comparison is undeniably imperfect. The analogy between CP Warnings and Tobacco Warnings is nevertheless employed because Tobacco Warnings—widely recognised by consumers in the EU—have been amended multiple times to improve their effectiveness,²¹ and empirical studies confirm their effectiveness.²² Moreover, there is currently no standardised warning in the digital sphere that performs an equivalent function. Against this backdrop, defining CP Warnings by analogy with Tobacco Warnings is a reasonable approach to take for present purposes; notably, as mentioned earlier, similar tobacco-style warning proposals have already surfaced in the United States. Furthermore, the permissibility of mandating CP Warnings is examined using the same analogy because the discussion seeks to model CP Warnings on the core features of Tobacco Warnings. The legality of Tobacco Warnings has been examined before the CJEU.²³ Therefore, the CJEU's jurisprudence provides a framework for assessing CP Warnings in the absence of comparable regulation in digital contexts.

¹⁹ Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014] OJ L127/1 ('TPD').

²⁰ *ibid* art 10(1)(a).

²¹ See for example Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [2001] OJ L 194/26 ('2001 Directive'), recital 19; TPD, recitals 24–25.

²² See for example Constantine I Vardavas, 'European Tobacco Products Directive (TPD): Current Impact and Future Steps' (2022) 31 Tobacco Control 198, 199–200; Magdalena Opazo Breton and others, 'Was the Implementation of Standardised Tobacco Packaging Legislation in England Associated with Changes in Smoking Prevalence? A Segmented Regression Analysis between 2006 and 2019' (2023) 32 Tobacco Control 195, 202–03; Australian Government Department of Health, 'Post-Implementation Review: Tobacco Plain Packaging 2016' (2016) <<https://oia.pmc.gov.au/sites/default/files/posts/2016/02/Tobacco-Plain-Packaging-PIR.pdf>> accessed 2 March 2025; Jane M Young and others, 'Association between Tobacco Plain Packaging and Quitline Calls: A Population-Based, Interrupted Time-Series Analysis' (2014) 200 The Medical Journal of Australia 29, 31–32.

²³ See for example Case C-491/01 *The Queen v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd* [2002] ECR I-11453 ('*British American Tobacco*'); Case C-547/14 *Philip Morris Brands SARL v Secretary of State for Health*, EU:C:2016:325 ('*Philip Morris*'); Case C-220/17 *Planta Tabak-Manufaktur Dr Manfred Obermann GmbH & Co KG v Land Berlin*, EU:C:2019:76 ('*Planta Tabak*').

II. DEFINING CP WARNINGS

A. RULES ON TOBACCO WARNINGS

In the EU, Tobacco Warnings are regulated under the TPD, which builds on earlier legislation, namely Directive 89/622/EEC²⁴ and Directive 2001/37/EC ('the 2001 Directive'). The TPD was adopted to protect human health—particularly that of young people—and to implement the EU's obligations under the World Health Organization ('WHO') Framework Convention on Tobacco Control ('FCTC'),²⁵ to which both the EU and its Member States are parties.²⁶ The TPD imposes two key types of obligation concerning Tobacco Warnings: a positive obligation and a negative obligation.

The positive obligation requires that each unit packet of tobacco products, and any external packaging, display 'health warnings'.²⁷ These warnings include (i) a general warning (either 'Smoking kills – quit now' or 'Smoking kills'²⁸); (ii) an information message ('Tobacco smoke contains over 70 substances known to cause cancer'²⁹); and (iii) combined health warnings, which consist of a prescribed textual warning with a colour photograph³⁰ and details for smoking cessation support (such as helplines, websites, or email addresses).³¹ The general warning and the information message must each cover 50 per cent of the relevant surface,³² while the combined warning must cover 65 per cent of both the front and the back of the packaging,³³ in accordance with prescribed design standards.³⁴ The negative obligation prohibits the inclusion of any words or features on the unit packet, external packaging, or the tobacco product itself that could mislead consumers or encourage consumption.³⁵ The TPD expressly prohibits elements that suggest that a product is less harmful than others or that it has health or lifestyle benefits.³⁶

In sum, the distinction between positive and negative obligations is effectively illustrated in the TPD. On the one hand, it imposes a positive obligation by requiring combined picture-and-text health warnings that cover a substantial proportion of the packaging to ensure visibility and salience. On the other hand, it establishes a negative obligation by prohibiting elements that could diminish or contradict those warnings. The latter

²⁴ Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products [1989] OJ L 359/1.

²⁵ WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166. See also TPD, art 1; 'Tighter EU Rules on Tobacco' (*EUR-Lex*, 20 April 2023) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:290301_1> accessed 3 March 2025.

²⁶ See '4. WHO Framework Convention on Tobacco Control' (*United Nations Treaty Collection*) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en> accessed 28 January 2025.

²⁷ TPD, art 8(1). For examples of health warnings, see further 'Health Warnings' (*European Commission*) <https://health.ec.europa.eu/tobacco/product-regulation/health-warnings_en> accessed 3 March 2025.

²⁸ TPD, art 9(1).

²⁹ *ibid* art 9(2).

³⁰ *ibid* art 10(1)(a), annexes I, II.

³¹ *ibid* art 10(1)(b).

³² *ibid* art 9(3).

³³ *ibid* art 10(1)(c).

³⁴ *ibid* arts 2(32), 9, 10.

³⁵ *ibid* recital 27, art 13.

³⁶ *ibid* art 13(1).

obligation is essential: without restrictions on counteracting features, the mandated warnings would risk losing their effectiveness. Taken together, these positive and negative duties demonstrate how warnings must be structured in order to fulfil their protective purpose.

B. DEFINING THE POSITIVE OBLIGATION FOR CP WARNINGS

This sub-section outlines the modalities of CP Warnings as a basis for the subsequent analysis of their necessity and permissibility. It does not aim to prescribe the optimal method for delivering such warnings, as this would require psychological insights into user behaviour.³⁷ Rather, drawing on the regulatory design of Tobacco Warnings and existing data protection instruments, it identifies three key elements—content, placement, and size—as the main factors for defining the positive obligation.

First, the content of the warnings should correspond to specific CP-related risks. Illustrative examples include ‘CP may cause addiction’ or ‘CP may manipulate your thoughts’. In addition, photographs or icons³⁸ symbolising these risks may be incorporated to create a combined warning, analogous to those mandated under the TPD. Secondly, regarding the placement of CP Warnings, current data protection frameworks often rely on privacy notices or cookie policies as the primary mode of risk notification. However, these notices are frequently too complex for effective communication.³⁹ Given that cookies and similar technologies are commonly used in CP, just-in-time notices (such as cookie banners or pop-ups) may offer a more visible and effective alternative. Other possible placements include the header or footer of a website,⁴⁰ or launch screens that appear when users open an app.⁴¹ Thirdly, the size of the warning largely depends on its placement. Where a pop-up is used, it may be feasible in practice to display the warning across the entire screen. For instance, the cookie-consent banner commonly presented to Google Search users covers the full viewport before results are shown and requires an explicit choice (e.g. accepting or customising settings), thereby ensuring visibility at the moment of interaction. By contrast, if a warning is placed in a persistent location, such as a header, its size may be more contentious, as it could interfere directly with the user interface and experience.

These considerations may also vary by device. Since CP forms part of online service delivery, CP Warnings should likewise be delivered electronically⁴² and adapted to a range of devices, including PCs, smartphones, and smart TVs. As screen dimensions and user interfaces differ across devices, the effective deployment of CP Warnings may likewise need to be tailored accordingly.

³⁷ For example, the pictures contained in Tobacco Warnings were created by external contractors and tested on 8,000 participants across 10 EU Member States: see ‘Health Warnings’ (n 27).

³⁸ Idea drawn from article 12(7) of the GDPR.

³⁹ Daniel J Solove, ‘Introduction: Privacy Self-Management and the Consent Dilemma’ (2013) 126 Harvard Law Review 1880, 1184–86.

⁴⁰ Idea drawn from the California Consumer Privacy Act Regulations, title 11, § 7013(c) (2018).

⁴¹ Idea drawn from Japanese Personal Information Protection Commission and Ministry of Internal Affairs and Communications, ‘Guidelines on the Protection of Personal Information, etc in the Telecommunications Business’ (2025) art 51(4)(iii) <https://www.soumu.go.jp/main_content/000934677.pdf> accessed 10 June 2025.

⁴² WP29, ‘Guidelines on Transparency’ (n 4) 21.

C. DEFINING THE NEGATIVE OBLIGATION FOR CP WARNINGS

Under the TPD, the negative obligation prohibits the inclusion on tobacco products of any words or features that could mislead consumers by suggesting that the product is less harmful or confers health or lifestyle benefits—regardless of whether the information is factually accurate.⁴³ By analogy, a negative obligation in the context of CP would prohibit online services from including any language or elements that may similarly mislead users.⁴⁴ Phrases implying reduced harm could include terms such as ‘less addictive’ or ‘less manipulative’. Language that implies a benefit might include ‘[w]e... personalize our products and services so that you have a better experience on X’.⁴⁵ Even if such statements are based on scientific evidence and are factually correct, they would fall within the scope of the prohibition if they are likely to encourage the use of CP.⁴⁶

This form of regulation must be distinguished from the prohibition of dark patterns. On the one hand, dark patterns are already regulated under several EU instruments.⁴⁷ While there is no universally accepted definition, ‘dark patterns’ are generally understood to be ‘deceptive techniques used by online platforms to manipulate users’ behaviour, often without their knowledge or consent’.⁴⁸ Illustrative practices include artificially induced urgency (such as deceptive countdown timers that are intended to compel immediate user action), misleading promotional content presented as neutral information, and psychological tactics designed to manipulate users’ emotional states, thereby undermining autonomous decision-making.⁴⁹ Since the adoption of the Unfair Commercial Practices Directive, regulatory attention to dark patterns has expanded across multiple EU instruments.⁵⁰ That said, truthful, non-deceptive marketing (i.e. legitimate advertising that is compliant with EU law) is not, in itself, prohibited by the EU’s dark-pattern rules.⁵¹ On the other hand, the type of negative obligation that would concern us in the context of CP would apply regardless of

⁴³ TPD, recital 27, art 13(1); *Philip Morris* (n 23) para 161.

⁴⁴ This article does not address negative obligations outside online services, such as advertising, as they raise distinct issues. Tobacco promotion is regulated under Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L 152/16.

⁴⁵ ‘X Privacy Policy’ (X, 15 November 2024) <<https://x.com/en/privacy>> accessed 21 January 2025.

⁴⁶ *Philip Morris* (n 23) para 160.

⁴⁷ For example, the Unfair Commercial Practices Directive (Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22), the Artificial Intelligence Act (Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 [2024] OJ L), and the Digital Markets Act (Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L 265/1), in addition to the DSA and the GDPR: see European Parliament, ‘Regulating Dark Patterns in the EU: Towards Digital Fairness’ (January 2025) <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2025/767191/EPRS_ATA\(2025\)767191_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2025/767191/EPRS_ATA(2025)767191_EN.pdf)> accessed 10 June 2025.

⁴⁸ European Parliament, ‘Regulating Dark Patterns in the EU’ (n 47).

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ DSA, recital 67.

deceptiveness.³² It targets even non-deceptive statements that may nonetheless encourage consumption through positive messaging (e.g. statements about nicotine content or the presence or absence of additives), which are prohibited even when accurate.³³ For this reason, such obligations are likely to be more contentious from the standpoint of restricting business freedom, particularly freedom of expression. The following discussion therefore focuses on this stricter category of negative obligation.

In sum, for clarity of discussion, this article generally assumes that a CP Warning would comprise a short message conveying the risks of CP and a salient image illustrating these risks, be presented via a webpage pop-up, and exclude any messaging liable to mislead users about those risks. That said, other modalities are also considered where appropriate.

III. THE NECESSITY OF CP WARNINGS

A. MATERIAL RISKS CAUSED BY CP

While CP may adversely affect users in various ways, this article focuses on two particularly significant risks: addiction and manipulation. Addiction is identified as the primary concern, not only because it undermines user well-being but also because it may intensify other CP-related harms, including manipulation and health issues arising from prolonged use of online services. In 2023, the European Parliament adopted a resolution calling for action on online addiction, specifically referencing concerns associated with CP.³⁴ The Australian Government likewise identified CP-induced addiction as a relevant factor in defining services subject to its social media restrictions.³⁵ This form of addiction is often linked to the ‘rabbit hole effect’, whereby users repeatedly engage with multiple instances of similar content rather than gradually diversifying their media exposure and seeking dissimilar content—even when the initial interaction was prompted by algorithmic suggestions.³⁶ CP reinforces this tendency by curating content that is aligned with users’ past behaviour, leading to prolonged engagement and immersion.³⁷

Manipulation presents a distinct threat, one that extends beyond individual users to democratic society at large.³⁸ Following the Cambridge Analytica scandal, in which data from millions of Facebook users was harvested via a quiz app and repurposed for political micro-targeting,³⁹ the European Data Protection Supervisor (‘EDPS’) issued an Opinion identifying online manipulation (particularly political influence) as a critical concern for individuals’ autonomy and fundamental rights, as well as for the integrity of democratic

³² Noémi Bontridder and Yves Pouillet distinguish ‘disinformation’ (shared with intent to deceive) from ‘misinformation’ (without intent), noting that only the former is treated by EU institutions as requiring legislative and technical responses: Noémi Bontridder and Yves Pouillet, ‘The Role of Artificial Intelligence in Disinformation’ (2021) 3 *Data & Policy* <<https://doi.org/10.1017/dap.2021.20>> accessed 6 September 2025.

³³ See TPD, art 13.

³⁴ European Parliament resolution of 12 December 2023 on addictive design of online services and consumer protection in the EU single market (2023/2043(INI)) [2024] OJ C/2024/4164, recitals L, M, para 9.

³⁵ See Online Safety Amendment (Social Media Minimum Age) Bill (n 14).

³⁶ Kaitlin Woolley and Marissa A Sharif, ‘Down a Rabbit Hole: How Prior Media Consumption Shapes Subsequent Media Consumption’ (2022) 59 *Journal of Marketing Research* 453, 466–67.

³⁷ *ibid* 467.

³⁸ DSA, recitals 69, 95, 104.

³⁹ See ‘Cambridge Analytica Raids’ (ICO) <<https://ico.org.uk/for-the-public/ico-40/cambridge-analytica-raids/>> accessed 10 June 2025.

society.⁶⁰ It outlined a three-stage mechanism—data collection, profiling, and microtargeting—through which CP can be leveraged to influence individual behaviour.⁶¹ The European Data Protection Board (‘EDPB’) has since affirmed that CP carries risks of political manipulation, highlighting the potential misuse of personal data, including emotionally expressive posts.⁶² These concerns are further exacerbated by the ‘filter bubble[]’ effect,⁶³ in which individuals are exposed primarily to information that aligns with their existing views, encounter fewer opposing perspectives, and become enclosed within an informational comfort zone.⁶⁴

B. A RISK NOTICE IS NOT REQUIRED UNDER CURRENT EU LAW

Although CP entails material risks, EU data protection law does not require service providers to inform users of them. Under the GDPR, controllers are generally not required to inform users of the risks associated with personal data processing.⁶⁵ The only provision that is arguably relevant to CP risks is the duty to inform data subjects of ‘the significance and the envisaged consequences’ of automated decision-making (‘ADM’) ‘referred to in Article 22(1) and (4)’.⁶⁶ During the legislative process, the scope of this information duty was narrowed. The EDPS had proposed a broader obligation to inform data subjects about ‘certain processing operations which have a particular impact on individuals’.⁶⁷ The European Parliament then specified this as ‘profiling’⁶⁸ and the Council ultimately confined the duty to ADM falling within article 22(1) and (4), which includes—but is not limited to—profiling.⁶⁹ The final text therefore limits the duty to ADM covered by article 22, rather than all high-impact processing, as originally envisaged.

CP typically falls outside that scope. Article 22 of the GDPR applies to ADM that produces ‘legal effects’ or ‘similarly significantly affects’ data subjects. As CP generally does not produce legal effects, the relevant question is whether it may ‘similarly significantly affect[]’ users. Recital 71 of the GDPR offers examples, such as the ‘automatic refusal of an online credit application or e-recruiting practices without any human intervention’. Both examples concern decisions that relate to the formation of a credit agreement or an employment contract and therefore have effects comparable to ‘legal effects’. The Article 29 Data Protection Working Party (‘WP29’) Guidelines, which have served as a leading authority in

⁶⁰ EDPS, ‘Opinion 3/2018: EDPS Opinion on Online Manipulation and Personal Data’ (19 March 2018) 5–7 <https://www.edps.europa.eu/sites/default/files/publication/18-03-19_online_manipulation_en.pdf> accessed 7 September 2025.

⁶¹ *ibid* 7–9.

⁶² EDPB, ‘Guidelines 8/2020’ (n 10) para 12.

⁶³ EDPS, ‘Opinion 3/2018’ (n 60) 22.

⁶⁴ Linxiang Lv, Khloe Qi Kang and Guanrong (Gus) Liu, ‘Prick “Filter Bubbles” by Enhancing Consumers’ Novelty-Seeking: The Role of Personalized Recommendations of Unmentionable Products’ (2024) 41 *Psychology & Marketing* 2355, 2355–56.

⁶⁵ Veale and Zuiderveen Borgesius (n 9) 248.

⁶⁶ GDPR, arts 13(2)(f), 14(2)(g). While recital 39 of the GDPR states that ‘[n]atural persons should be made aware of risks’, recitals are non-binding: Case C-136/04 *Deutsches Milch-Kontor GmbH v Hauptzollamt Hamburg-Jonas* [2005] ECR I-10095, para 32.

⁶⁷ Executive summary EDPS Opinion of 7 March 2012 on the data protection reform package [2012] OJ C192/7.

⁶⁸ European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data [2017] OJ C378/399.

⁶⁹ Position (EU) No 6/2016 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ C159/1.

interpreting article 22,⁷⁰ define ‘similarly significant[]’ effects as those that are ‘sufficiently great or important to be worthy of attention’.⁷¹ Although the notion remains abstract, the WP29 Guidelines substantiate it with examples, such as decisions affecting an individual’s financial circumstances, access to health services, or access to education.⁷² They also notably state that targeted advertising—typical of CP—does not, in many cases, reach this threshold.⁷³ The underlying assumption is that ‘sufficiently great or important to be worthy of attention’ requires an impact that is comparable to a change in legal status or its equivalent: consequences that go beyond mere personalisation. On this basis, CP would generally not meet this threshold, as it typically involves tailoring content to user preferences without materially altering legal rights or other weighty interests.⁷⁴

Even if certain CP practices did ‘similarly significantly affect[]’ users and thereby fall within article 22(1) or (4) of the GDPR, it is still doubtful that controllers would be required to inform users of the associated risks. Articles 13(2)(f) and 14(2)(g) of the GDPR only require disclosure of ‘the significance and the envisaged consequences’ of such ADM. According to the WP29 Guidelines, this wording ‘suggests that information must be provided about intended or future processing, and how the automated decision-making might affect the data subject’.⁷⁵ For example, an increase in insurance premiums based on monitoring of driving behaviour would fall within this scope.⁷⁶ By contrast, CP-related risks depend on individual emotional responses and are difficult to predict. The wording, ‘the significance and the envisaged consequences’, appears to cover only outcomes that are specifically foreseeable to the controller, excluding those dependent on individual subjective factors. Indeed, the WP29 Guidelines do not cite any examples of such subjective risks falling within this category. Thus, even if CP were classified as ADM under article 22 of the GDPR, service providers would still not be required to inform users of the risks.

Indeed, some big-tech companies clearly act on the understanding that the GDPR does not require them to inform users of the risks associated with CP. For example, Apple lists ‘Personal Data Used for Personalization’ as a processing purpose, but explains that it ‘does not use algorithms or profiling to make any decision that would significantly affect you without the opportunity for human review’.⁷⁷ This suggests that Apple considers its CP practices to fall outside the scope of the ADM referred to in article 22(1) and (4) of the GDPR. Other EU data protection instruments similarly do not include any obligation to inform users of risks associated with CP. Article 5(3) of the ePrivacy Directive requires consent to the use

⁷⁰ See for example Olivia Tambou, ‘Art. 22 Automated Individual Decision-Making, Including Profiling’ in Indra Spiecker gen Döhmman and others (eds), *General Data Protection Regulation: Article-by-Article Commentary* (Nomos Verlagsgesellschaft 2023) 533–35; Reuben Binns and Michael Veale, ‘Is That Your Final Decision? Multi-Stage Profiling, Selective Effects, and Article 22 of the GDPR’ (2021) 11 *International Data Privacy Law* 319, 320–21. As for case law, the CJEU adopted a broad reading of article 22(1) but offered no general interpretation of ‘similarly significant[]’ effects in Case C-634/21 *SCHUFA Holding (scoring)*, EU:C:2023:957, paras 44–51.

⁷¹ WP29, ‘Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679’ (6 February 2018) 21 <<https://ec.europa.eu/newsroom/article29/items/612053/en>> accessed 6 September 2025.

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ See Marco Almada, Julianio Maranhão and Giovanni Sartor, ‘Art 6(1)(f) Content personalisation’ in Spiecker gen Döhmman and others (eds) (n 70) 339.

⁷⁵ WP29, ‘Guidelines on Automated Individual Decision-Making’ (n 71) 26. In *Dun & Bradstreet Austria*, the CJEU interpreted ‘meaningful information about the logic involved’ (article 15(1)(h) of the GDPR) but not ‘the significance and the envisaged consequences’: Case C-203/22 *Dun & Bradstreet Austria*, EU:C:2023:117, paras 38–66.

⁷⁶ WP29, ‘Guidelines on Automated Individual Decision-Making’ (n 71) 26.

⁷⁷ ‘Apple Privacy Policy’ (Apple, 31 January 2025) <<https://www.apple.com/uk/legal/privacy/en-ww/>> accessed 10 June 2025.

of cookies and similar technologies based on ‘clear and comprehensive information’, referencing the former Data Protection Directive (‘DPD’),⁷⁸ but neither the DPD nor the GDPR requires notification of risks.⁷⁹ The DSA imposes transparency obligations but likewise does not mandate that service providers inform users of the risks.⁸⁰

C. WHY A RISK NOTICE IS NOT REQUIRED UNDER CURRENT EU LAW

The absence of a risk-notice obligation in current EU law can arguably be explained by the transparency principle—which governs information-provision obligations in data protection—being grounded primarily in a libertarian approach which does not require risk notices. Before delving into the details, it is important to clarify three key concepts that illuminate why risk notices are not required under current EU law: libertarian, paternalism, and libertarian paternalism. Under the libertarian approach, which embraces an individual’s ‘freedom of choice’,⁸¹ the legislature relies on the individual’s decisions. The GDPR grants data subjects multiple rights to control their personal data.⁸² This aspect of the GDPR reflects a libertarian orientation,⁸³ as it assumes that individuals will protect their data by deciding for themselves whether to exercise those rights. By contrast, the paternalistic approach aims to ‘influence the choice’ of people for their own good.⁸⁴ One example of this is Australia’s social media restriction, which limits liberty (no opt-out for minors) for minors’ benefit without their consent. Libertarian paternalism was developed to reconcile these two positions: it is ‘an approach that preserves freedom of choice but that authorizes both private and public institutions to steer people in directions that will promote their welfare’.⁸⁵ Unlike pure libertarianism, which insists on freedom of choice, libertarian paternalism accepts some influence over how choices are framed, whereas, unlike traditional paternalism, it preserves individuals’ ability to choose.⁸⁶ Tobacco Warnings reflect this approach: they aim to steer individuals away from smoking, while preserving their freedom to smoke.⁸⁷

⁷⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31 (‘DPD’). See for example *Planet49* (n 7) para 46; EDPB, ‘Guidelines 2/2023 on Technical Scope of Art 5(3) of ePrivacy Directive’ (version 2.0, 7 October 2024) <https://www.edpb.europa.eu/system/files/2024-10/edpb_guidelines_202302_technical_scope_art_53_eprivacydirective_v2_en_0.pdf> accessed 6 September 2025.

⁷⁹ See for example DPD, art 10; GDPR, art 13; *Planet49* (n 7) paras 72–81; ‘What Are the PECR Rules?’ (*ICO*) <<https://ico.org.uk/for-organisations/direct-marketing-and-privacy-and-electronic-communications/guidance-on-the-use-of-storage-and-access-technologies/what-are-the-pecr-rules/>> accessed 9 June 2025.

⁸⁰ DSA, arts 27, 35(1)(i), 39.

⁸¹ Cass R Sunstein and Richard H Thaler, ‘Libertarian Paternalism Is Not an Oxymoron’ (2003) 70 *The University of Chicago Law Review* 1159, 1160.

⁸² See for example GDPR, recital 7, arts 12–22; Jef Ausloos, *The Right to Erasure in EU Data Protection Law* (OUP 2020) 88.

⁸³ See for example Ausloos (n 82) 88; Orla Lynskey, *The Foundations of EU Data Protection Law* (OUP 2015) 196.

⁸⁴ Sunstein and Thaler, ‘Oxymoron’ (n 81) 1162.

⁸⁵ Richard H Thaler and Cass R Sunstein, ‘Libertarian Paternalism’ (2003) 93 *The American Economic Review* 175, 179; Richard H Thaler and Cass R Sunstein, ‘Libertarian Paternalism’ in Cass R Sunstein and Lucia A Reisch (eds), *Research Handbook on Nudges and Society* (Edward Elgar Publishing 2023) 15.

⁸⁶ Sunstein and Thaler, ‘Oxymoron’ (n 81) 1160–62.

⁸⁷ See for example Viktoria Obolevich, ‘The New EU Tobacco Products Directive and Standardized Packaging: [In the Name of “Smooth Functioning of the Internal Market”]’ (2018) 45 *Legal Issues of Economic Integration* 71, 72; Matthew J Elmore, ‘Does the Judicial Clean Sweep for the New EU Tobacco Directive Mean a New-Fangled Mirth of May?’

The absence of a risk notice obligation under current EU law arguably lies in the libertarian approach adopted in the transparency principle. It is this principle that primarily grounds the duty of those accountable for data processing (for CP, online service providers) to provide information to users.⁸⁸ The aim of the transparency principle is to make internal operations within service providers transparent to users.⁸⁹ Accordingly, what must be provided is information that already exists within the controller and that users would not otherwise be able to access; conversely, it does not require the notification of information that does not exist within the service provider (such as risks that are not apparent without an assessment of the processing). For example, under articles 13 and 14 of the GDPR—on which privacy notices are typically based—most of the required information, such as the identity of the controller and the purposes of processing, fits within this transparency model: disclosure of information already held by the controller that would otherwise be inaccessible to users. This approach retains merit despite the absence of risk notification: it reduces information asymmetries between service providers and users and enables informed consent⁹⁰ and other decisions—for example, whether to begin or continue using a service, adjust personalisation settings, or exercise data subject rights (such as access or erasure). It is based on the premise that, once empowered by being properly informed of information that is already held by the controller, users can make rational decisions about their data;⁹¹ in this way, the transparency principle is rooted in a libertarian approach.⁹²

By contrast, imposing an obligation to notify users of risks would require a shift towards a more paternalistic approach. Under the transparency principle, a duty to provide information to users on CP-related risks is not required, as such risks—rather than the description of internal operations—do not necessarily exist within the controller's knowledge. Libertarians would not require risk notices, as they assume that users can decide for themselves whether to engage with CP, thereby understanding such risks as being general risks inherent in the purposes of processing that have already been disclosed. Certainly, the obligation to provide information under EU data protection law is arguably not purely libertarian. Even within articles 13 and 14 of the GDPR, controllers are required to inform data subjects of their rights under the GDPR (such as the right of access or erasure⁹³) even though these rights are granted by law and users could learn of them independently by reading the GDPR. In a world where all data subjects were perfectly rational, this obligation would be unnecessary. Its existence reflects a partially paternalistic element within these information obligations.

Yet, at its core, the transparency principle is grounded in a libertarian approach, which helps to explain why risk notices are not required under current EU law—libertarians do not see such notices as necessary and view them as an undue burden on businesses. To introduce CP Warnings into EU data protection law, the legislature would need to consider whether the information obligation can normatively shift towards a more paternalistic model—one that

(2016) Working Paper, 37 <<http://www.ssrn.com/abstract=2809137>> accessed 4 June 2025; Alberto Alemanno, 'EU Public Health Law and Policy - Tobacco' in Tamara K Hervey, Calum Alasdair Young and Louise E Bishop (eds), *Research Handbook on EU Health Law and Policy* (Edward Elgar Publishing 2017) 367.

⁸⁸ See for example GDPR, recital 39; WP29, 'Guidelines on Transparency' (n 4) paras 1–6.

⁸⁹ GDPR, recital 39.

⁹⁰ *ibid* art 4(11).

⁹¹ See for example Ausloos (n 82) 88; WP29, 'Guidelines on Transparency' (n 4) para 4.

⁹² See Ausloos (n 82) 88.

⁹³ GDPR, arts 13(2)(b), 14(2)(c).

entails some interference with fundamental rights—beyond the traditional bounds of libertarian transparency.

D. USERS SHOULD BE INFORMED OF THE RISKS

Although a risk notice is not currently required under EU data protection law, CP Warnings are highly necessary to raise awareness of the risks associated with CP. This is particularly important in the light of the pervasive influence of CP-enabled services in modern society and the potential severity of the associated harms.

In a digital environment where certain platforms exercise substantial power and may significantly affect users' rights,⁹⁴ individuals must be equipped with appropriate knowledge of the risks of CP. This is especially important given that the legal basis for CP is typically user consent.⁹⁵ Yet the robustness of that consent can be called into question if users are unaware of the risks associated with CP. Meta's recent announcement that it would discontinue fact-checking practices illustrates a potential vulnerability:⁹⁶ if platforms no longer take active steps to mitigate disinformation, it becomes easier for actors seeking to manipulate public opinion to disseminate false or misleading content through services such as Facebook and Instagram. Even where platforms are subject to regulatory obligations to mitigate risk (such as fact-checking or content moderation⁹⁷), it cannot be assumed that these will be consistently or effectively implemented. In some cases, platforms may even be incentivised to disregard such obligations if doing so furthers important commercial or political interests. It is therefore increasingly necessary for individuals to be able to identify and respond to risks independently.

Nonetheless, many data subjects may not be aware of the risks associated with CP. While privacy notices are required to include the purposes of data use,⁹⁸ some users (particularly, but not exclusively, children) may not be able to infer the associated risks from such information. In fact, the presentation of CP in privacy notices often emphasises benefits to the user, such as improved personalisation or enhanced experience.⁹⁹ This emphasis may not only obscure the risks but also operates as a form of persuasion, encouraging users to engage with CP rather than prompting critical reflection on its potential harms. Given the significant commercial value of legally collected personal data, it is understandable that some service providers are incentivised to present CP in a favourable light in order to maximise user consent.

Even for users who are already aware of the risks, CP Warnings could still be valuable. Research has shown that tobacco warnings continue to discourage smoking behaviour even among individuals who already understand the health risks.¹⁰⁰ As the risks associated with tobacco are arguably far more widely recognised than those of CP, CP Warnings may be even more effective in enhancing risk salience for a broader range of users. Although differences in the gravity of the risks may limit the analogy, the likely effectiveness of CP Warnings should

⁹⁴ Case C-131/12 *Google Spain SL v AEPD*, EU:C:2014:317, para 80.

⁹⁵ See for example EDPB, 'Guidelines 8/2020' (n 10); Veale and Zuiderveen Borgesius (n 9) 234–43.

⁹⁶ Joel Kaplan, 'More Speech and Fewer Mistakes' (*Meta*, 7 January 2025) <<https://about.fb.com/news/2025/01/meta-more-speech-fewer-mistakes/>> accessed 10 June 2025.

⁹⁷ See for example DSA, arts 34, 35.

⁹⁸ GDPR, arts 13(1)(c), 14(1)(c).

⁹⁹ For example, the privacy policy of X states that '[w]e also use the information we collect to improve and personalize our products and services so that you have a better experience on X': see n 45.

¹⁰⁰ See for example Vardavas (n 22) 199; Opazo Breton and others (n 22) 197; Australian Government Department of Health (n 22); Young and others (n 22).

be assessed through scientific research and the warning's modality can be tailored accordingly, as in the legislative process for tobacco warnings.¹⁰¹

While various regulatory initiatives and platform-led measures¹⁰² have focused on protecting children, adults are also at risk of being affected by CP without fully understanding its implications. It is unrealistic to assume that individuals will automatically become capable of recognising such risks upon reaching adulthood. Indeed, the sudden withdrawal of child-specific protections may make some adults more vulnerable. Importantly, introducing CP Warnings does not raise the same concerns about restricting access to, or limiting users' freedom to engage with, CP that more paternalistic regulatory interventions (such as Australia's minimum-age prohibition on under-16s holding social-media accounts) might entail. Instead, a warning requirement preserves user choice while making risks salient at the point of deciding whether to accept or refuse CP. Furthermore, under the GDPR, the processing of personal data relating to children requires parental consent,¹⁰³ making the risk awareness of parents critical to protecting children's data and mitigating CP-related harms.

Accordingly, users should be informed of the risks through CP Warnings. While it may be argued that reliance on users to assess such risks is itself problematic,¹⁰⁴ that broader question lies outside the scope of this article.

E. SUMMARY AND TRANSITION: FROM NECESSITY TO PERMISSIBILITY

This section has identified two material risks arising from CP: addiction and manipulation. Despite these risks, EU data protection law does not require online service providers to warn users about them. The GDPR's information duties relating to automated decision-making apply only where decisions produce legal effects or similarly significant effects—a threshold that typical CP does not meet—and, even where this threshold is met, the duty extends only to 'the significance and the envisaged consequences' of the decision, not to subjective risk effects. Other EU data protection instruments likewise do not mandate CP-related risk notices. This gap was explained by the transparency principle's essentially libertarian orientation: online service providers must disclose information already within their knowledge to reduce information asymmetries and enable autonomous user choice, not communicate risk assessments.

Against that backdrop, this section argued that CP Warnings should be provided under EU law. Given the pervasiveness of CP-enabled services and incentives to present CP favourably, many users will not infer risks from standard notices; warnings would make those risks salient at the point of decision while preserving user choice. They may be valuable even for users who are already aware of the risks, without the restriction inherent in paternalistic measures such as a social-media ban. The need spans both children and adults, with parental awareness being especially relevant where children's data is concerned.

Crucially, the very reason why the current law does not require risk notices—the libertarian orientation of transparency—also bears on the permissibility assessment:

¹⁰¹ See 'Health Warnings' (n 27).

¹⁰² See for example 'About Instagram Teen Accounts' (*Instagram Help Center*) <<https://help.instagram.com/995996839195964>> accessed 10 June 2025.

¹⁰³ See GDPR, art 8(1).

¹⁰⁴ See Elettra Bietti, 'Consent as a Free Pass: Platform Power and the Limits of the Informational Turn' (2020) 40 *Pace Law Review* 310.

introducing CP Warnings turns on whether a normative shift towards a libertarian paternalistic information model—entailing some interference with fundamental rights—can be made beyond transparency. The next section evaluates whether that shift can overcome potential legal obstacles under EU law.

IV. THE PERMISSIBILITY OF CP WARNINGS

A. FORESEEABLE LEGAL CHALLENGES BY ANALOGY WITH TOBACCO CASE LAW

The validity of Tobacco Warning requirements has been challenged in several cases before the CJEU, including *British American Tobacco*¹⁰⁵ under the 2001 Directive, and *Philip Morris*¹⁰⁶ and *Planta Tabak*¹⁰⁷ under the TPD. In each instance, tobacco companies questioned the validity of those directives, including the warning obligations, before national courts, which then referred the matter to the CJEU.¹⁰⁸ The CJEU upheld the lawfulness of the measures in all three cases.

These cases raised a broad range of questions concerning the validity of the Tobacco Warning regime. First, it was argued that article 114 of the Treaty on the Functioning of the European Union (‘TFEU’), the legal basis chosen by the legislature, did not provide an adequate foundation for the measures.¹⁰⁹ Secondly, the obligations were challenged as infringing the principles of subsidiarity¹¹⁰ and proportionality¹¹¹ under article 5 of the Treaty on European Union (‘TEU’). Finally, the warning requirements were alleged to infringe fundamental rights,¹¹² in particular the right to freedom of expression and information under article 11 of the Charter of Fundamental Rights of the European Union (‘CFR’) in relation to the negative obligation.¹¹³

¹⁰⁵ *British American Tobacco* (n 23).

¹⁰⁶ *Philip Morris* (n 23).

¹⁰⁷ *Planta Tabak* (n 23).

¹⁰⁸ See for example *Philip Morris* (n 23) paras 25–28; *ibid* paras 15–28; *British American Tobacco* (n 23) paras 24–27.

¹⁰⁹ *Philip Morris* (n 23) paras 96–105; *British American Tobacco* (n 23) paras 42–99.

¹¹⁰ *British American Tobacco* (n 23) paras 173–85.

¹¹¹ *Philip Morris* (n 23) paras 146–67, 192–212; *ibid* paras 122–25, 131, 141.

¹¹² *Philip Morris* (n 23) paras 146–63.

¹¹³ The right to property in article 17 of the Charter of Fundamental Rights of the European Union [2000] OJ C364/1 (‘CFR’) was also raised (*Planta Tabak* (n 23) paras 91–100; *British American Tobacco* (n 23) paras 149–53)), but this article does not address it. This is because the reasoning largely parallels that under proportionality (*British American Tobacco* (n 23) para 150; Ferdinand Wollenschläger, ‘Article 17(1) – Right to Property’ in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 483–84), and the right to freedom of expression and information presents the more demanding test: see for example *British American Tobacco (Investments) Ltd* (n 23), Opinion of AG Geelhoed, para 263; *Philip Morris* (n 23), Opinion of AG Kokott, para 231. The issues relating to the following provisions, as well as the interpretation of particular provisions of the Directives, were also raised in the tobacco cases, but they are not examined further here: some have no analogue in the context of CP Warnings, and others could only arise depending on the form and detail of any future legislative measures. These include, in *British American Tobacco*, articles 296 and 345 of the TFEU (Consolidated Version of the Treaty on European Union [2008] OJ C115/13), article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299, and misuse of powers; in *Philip Morris*, articles 290 and 291 of the TFEU, and the principle of legal certainty; and in *Planta Tabak*, the principle of legal certainty, the principle of equal treatment, and article 34 of the TFEU: see *British American Tobacco* (n 23) para 25; *Philip Morris* (n 23) para 28; *Planta Tabak* (n 23) para 28.

The following subsections assess whether imposing CP Warnings would be compatible with these principles and rights under EU law.¹¹⁴ While, in theory, other issues might be raised in relation to the requirement of CP Warnings, this focus is both necessary and sufficient, as these issues—legal basis, subsidiarity, proportionality, and fundamental rights—represent the core legal questions that EU law ordinarily requires to be assessed when determining the validity of legislative measures,¹¹⁵ including the contentious issue of freedom of expression.

B. LEGAL BASIS

While in *Philip Morris* and *British American Tobacco*, the CJEU found that article 114 of the TFEU is the legal basis for the rules on Tobacco Warnings,¹¹⁶ it cannot be the basis for the rules on CP Warnings. Nevertheless, the EU legislature may instead rely on article 16(2) of the TFEU for the rules on CP Warnings. Article 114(1) of the TFEU empowers the Parliament and Council to approximate Member States' laws whose object is the establishment and functioning of the internal market. Recourse to this article is justified only where a measure genuinely aims to improve the conditions for the establishment and functioning of the internal market,¹¹⁷ and—if it seeks to forestall future barriers—only where such obstacles are likely and the measure is designed to prevent them.¹¹⁸ In the TPD, real disparities in Member States' rules were recorded and addressed, which provided the basis for reliance on that article.¹¹⁹ By contrast, for CP Warnings no comparable pattern of divergent national rules is evidenced, and the rationale advanced here is mitigation of the risks of addiction and manipulation, rather than internal market integration. While article 114 of the TFEU is extensively used, including in the area of data protection (e.g. in the DSA and the Digital Markets Act), it has been criticised for a 'competence creep' and is not a general legislative power.¹²⁰

Instead, article 16(2) of the TFEU is the better fit. It empowers the Parliament and Council to establish the rules 'relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law'.¹²¹ Because CP Warnings are intended to address the risks arising from the processing of personal data,¹²² they relate to the protection of individuals with regard to that processing. While the text of that article seems to limit the covered processing to certain activities by the EU or Member States, that article can serve as the basis for an omnibus EU data protection

¹¹⁴ This article focuses on the Charter, as EU law must be interpreted in the light of Charter rights, not the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ('ECHR') or national law: see Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems*, EU:C:2020:559, paras 98–100.

¹¹⁵ See Commission, 'Commission Staff Working Document: Better Regulation Guidelines' SWD (2021) 305 final, 36.

¹¹⁶ *Philip Morris* (n 23) paras 96–105; *British American Tobacco* (n 23) paras 42–99.

¹¹⁷ See for example *Philip Morris* (n 23) para 58; *British American Tobacco* (n 23) para 60; Manuel Kellerbauer, 'Article 114 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (1st edn, OUP 2019) 1242.

¹¹⁸ See for example *Philip Morris* (n 23) para 59; *British American Tobacco* (n 23) para 61; Kellerbauer (n 117) 1243.

¹¹⁹ TPD, recitals 22, 23.

¹²⁰ See for example Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2010) 189; Kellerbauer (n 117) 1236–37, 1242.

¹²¹ TFEU, art 16(2).

¹²² See for example GDPR, recital 30, arts 4(1), 4(2); Case C-582/14 *Patrick Breyer v Bundesrepublik Deutschland*, EU:C:2016:779.

regime, applying to both the private and public sectors.¹²³ This reading is endorsed by the CJEU in *EU-Canada PNR Agreement*: the court held that article 16(2) of the TFEU ‘constitutes... an appropriate legal basis where the protection of personal data is one of the essential aims or components’ of the rules.¹²⁴ Advocate General (‘AG’) Mengozzi likewise stated that article 16(2) is ‘the legal basis for all rules adopted at EU level relating to the protection of individuals with regard to the processing of their personal data’.¹²⁵ He also rejected a ‘strictly literal interpretation’ of article 16(2) to limit its coverage to certain activities by the EU or Member States, as it ‘would be tantamount to splitting up the system for the protection of personal data’ and ‘run counter to the intention of the High Contracting Parties to create, in principle, a single legal basis expressly authorising the EU to adopt rules relating to the protection of the personal data of natural persons’.¹²⁶ This reading aligns with legislative practice: the GDPR itself rests on article 16 of the TFEU¹²⁷ regardless of the fact that it obviously regulates the processing of personal data by private entities for the protection of individuals.¹²⁸ The proposed ePrivacy Regulation also relied on the same article.¹²⁹ Accordingly, article 16(2) of the TFEU can serve as the legal basis for a CP Warning mandate.

C. THE PRINCIPLE OF SUBSIDIARITY

The principle of subsidiarity applies where exclusive competence is not conferred on the EU.¹³⁰ It applies to the rules on CP Warnings because their legal basis, article 16(2) of the TFEU, does not confer exclusive competence (likewise in the tobacco context).¹³¹ Where it applies, under article 5(3) of the TEU, EU action is permitted only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but rather can, by reason of the scale or effects of the proposed action, be better achieved at EU level. In *British American Tobacco*, the CJEU confirmed that the 2001 Directive’s objective is to eliminate the barriers raised by the differences that still exist between the Member States on tobacco products, while ensuring a high level of health protection, and it cannot be sufficiently achieved by the Member States individually and could be better achieved at EU level.

For CP Warnings, the same concern is sharper: online services incorporating CP operate at cross-border scale by design; unilateral national warning regimes would fragment compliance and leave cross-border users unevenly protected, so Member States’ action alone would not sufficiently achieve the objective in a digital single market. The Commission made the same point on subsidiarity when proposing the GDPR: the fundamental right to data

¹²³ See Marcus Klamert, ‘Article 16 TFEU’ in Kellerbauer, Klamert and Tomkin (eds) (n 117) 407.

¹²⁴ Opinion 1/15, *EU-Canada PNR Agreement*, EU:C:2017:592, para 96.

¹²⁵ *ibid*, Opinion of AG Mengozzi, para 116.

¹²⁶ *ibid*, Opinion of AG Mengozzi, para 119.

¹²⁷ See GDPR, recital 12.

¹²⁸ See *ibid* arts 12–14.

¹²⁹ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)’ COM (2017) 10 final, para 2.1. This proposal was withdrawn by the European Commission on 11 February 2025, as part of its 2025 Work Programme due to no foreseeable agreement: Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions’ COM (2025) 45 final.

¹³⁰ Consolidated Version of the Treaty on European Union [2016] OJ 202/01, art 5(3).

¹³¹ *British American Tobacco* (n 23) para 179.

protection requires ‘the same level of data protection throughout the Union’ and, absent common EU rules, different national levels would arise and restrict cross-border data flows.¹³² Given that CP Warnings have an effect on those inherently cross-border data-processing practices and would otherwise lead to fragmented protection, a CP Warning rule would not breach subsidiarity.

D. THE PRINCIPLE OF PROPORTIONALITY

In *Philip Morris*, following *British American Tobacco*,¹³³ the CJEU appeared to apply the commonly cited three-pronged test for proportionality: appropriateness, necessity, and proportionality *stricto sensu*.¹³⁴ It held that acts of the EU institutions must (i) ‘be appropriate for attaining the legitimate objectives pursued by the legislation at issue’ and (ii) ‘not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued’.¹³⁵ Point (i) corresponds to the requirement of appropriateness, while point (ii) encompasses both necessity and proportionality *stricto sensu*. As Marcus Klamert has observed, the court often applies the three requirements in a condensed manner, with proportionality *stricto sensu* frequently being underdeveloped or left implicit.¹³⁶ Indeed, the court in *Philip Morris* appeared to assess proportionality *stricto sensu* within the broader discussion of necessity.¹³⁷ It is therefore submitted that the structure of the test adopted in *Philip Morris* is consistent with the case law and is likewise applicable to CP Warnings.

In addition, the court in *Philip Morris*—consistent with *British American Tobacco*¹³⁸ and other cases¹³⁹—recognised that the EU legislature enjoys broad discretion in judicial review under the proportionality principle in areas involving complex assessments. These include matters entailing ‘political, economic and social choices’ for which the legislature is called upon to undertake ‘complex assessments’.¹⁴⁰ If the legality of CP Warnings were challenged, such measures would likely fall within this category and attract the same deferential standard of review. This conclusion is supported by several considerations. First, broad discretion is generally recognised across many areas of EU law, as ‘many Treaty articles will be of this nature’.¹⁴¹ Secondly, in *Philip Morris*, AG Kokott acknowledged that the legislature faced ‘complex economic, social and political questions’ without needing to examine specific evidence.¹⁴² This suggests that, as with Tobacco Warnings, discretion is likely to be recognised in the CP context, where regulation involves balancing social impact, economic interests, and

¹³² Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)’ COM (2012) 11 final, 6.

¹³³ *British American Tobacco* (n 23) para 122.

¹³⁴ See for example Marcus Klamert, ‘Article 5 TEU’ in Kellerbauer, Klamert and Tomkin (eds) (n 117) 74; Marcus Klamert and Alexandre-Xavier-Pierre Lewis, ‘Article 26 TFEU’ in Kellerbauer, Klamert and Tomkin (eds) (n 117) 473–74; ‘Principle of Proportionality’ (*EUR-Lex*) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legisum:proportionality>> accessed 7 March 2025.

¹³⁵ *Philip Morris* (n 23) para 165.

¹³⁶ Klamert, ‘Article 5 TEU’ (n 134) 74.

¹³⁷ See *Philip Morris* (n 23) paras 209–11.

¹³⁸ *British American Tobacco* (n 23) para 123.

¹³⁹ Klamert, ‘Article 5 TEU’ (n 134) 76.

¹⁴⁰ *Philip Morris* (n 23) para 166.

¹⁴¹ Paul Craig, *EU Administrative Law* (3rd edn, OUP 2019) 645. See also Klamert, ‘Article 5 TEU’ (n 134) 75.

¹⁴² *Philip Morris* (n 23), Opinion of AG Kokott, para 149.

political resistance—particularly from dominant digital service providers. Thirdly, in *WebGroup Czech Republic*,¹⁴³ the scope of legislative discretion was discussed in the context of article 39 of the DSA, which requires very large online platforms to disclose certain information about online advertising. While the President of the General Court did not directly rule on this issue, the Commission, acting as defendant, argued that such measures fall within the legislature's broad discretion, as they involve 'political, economic and social choices' and 'complex assessments and evaluations'.¹⁴⁴ Although the Commission is not a judicial authority, its position remains noteworthy given the relevance to transparency obligations in online services. Taken together, these factors suggest that the EU legislature would likely be afforded broad discretion in adopting rules requiring CP Warnings.

That breadth of discretion significantly affects the intensity of judicial review. Where broad discretion is recognised, the court moderates the intensity within the framework of the ordinary three-pronged test,¹⁴⁵ applying it deferentially and asking whether the measure is either (i) manifestly inappropriate for attaining the objective, or (ii) manifestly exceeds what is necessary to achieve it.¹⁴⁶ The next two sub-sections apply this deferential review to assess whether imposing a positive obligation to display CP Warnings would infringe the principle of proportionality.

(i) 'Manifestly Inappropriate for Attaining the Objective'

In *Philip Morris*, the CJEU concluded that the affixing of large combined health warnings was not manifestly inappropriate,¹⁴⁷ relying in part on Guidelines issued by the FCTC.¹⁴⁸ These Guidelines emphasise that large pictorial warnings are more likely to attract attention, evoke emotional responses, and effectively communicate health risks—particularly to vulnerable groups, such as children, young people, and individuals with low literacy.¹⁴⁹ They are also seen as more effective over time.¹⁵⁰ It has been noted that the court relied heavily on the FCTC in its proportionality assessment.¹⁵¹

With respect to CP Warnings, their objectives include the prevention of addiction and manipulation, as discussed in Section III.A. These two risks require separate consideration, as different warning content (both textual and visual) would be necessary in each case. Regarding addiction, while some relevant discussions have taken place within the WHO,¹⁵² no international organisation has yet endorsed CP Warnings as appropriate, in

¹⁴³ Case T-139/24 R *WebGroup Czech Republic AS v Commission*, EU:T:2024:475.

¹⁴⁴ Case T-139/24 R *WebGroup Czech Republic AS v Commission*, EU:T:2024:475, para 29.

¹⁴⁵ See *Philip Morris* (n 23) para 166.

¹⁴⁶ *ibid* paras 200, 211.

¹⁴⁷ *ibid* paras 204, 205.

¹⁴⁸ WHO, 'WHO Framework Convention on Tobacco Control: Guidelines for Implementation of Article 11' (WHO 2013) <<https://fctc.who.int/resources/publications/n/item/packaging-and-labelling-of-tobacco-products>> accessed 8 March 2025.

¹⁴⁹ *Philip Morris* (n 23) para 204.

¹⁵⁰ *ibid*.

¹⁵¹ See for example Klamert, 'Article 5 TEU' (n 134) 77; Katharina Ó Cathaoir, 'Court of Justice Upholds the Tobacco Products Directive 2014' (2016) 7 *European Journal of Risk Regulation* 623, 628.

¹⁵² See for example WHO, *Public Health Implications of Excessive Use of the Internet, Computers, Smartphones and Similar Electronic Devices: Meeting Report* (WHO 2015); WHO, 'Public Health Implications of Excessive Use of the Internet and Other Communication and Gaming Platforms' (*World Health Organization*, 13 September 2018) <<https://www.who.int/news/item/13-09-2018-public-health-implications-of-excessive-use-of-the-internet-and-other-communication-and-gaming-platforms>> accessed 8 March 2025.

contrast to the position taken on Tobacco Warnings. Although it would be ideal for such support to emerge, the absence of international endorsement does not preclude a finding of appropriateness. The provision of information is widely recognised as an appropriate tool for empowering users under various EU data protection laws—including the GDPR, the ePrivacy Directive, and the DSA—and forms the core of the transparency principle. Moreover, in *British American Tobacco*, the CJEU upheld the appropriateness of positive obligations without referring to the FCTC or other scientific evidence.¹⁵³ This may indicate that the threshold for appropriateness in the context of health warnings is not particularly high. On this basis, it is unlikely that a positive obligation to provide CP Warnings targeting addiction would be considered manifestly inappropriate.

By contrast, the case for CP Warnings targeting manipulation is more difficult to establish. The evidentiary basis is weaker than for addiction, and it may be questioned whether CP gives rise to manipulation to a degree that warrants legal intervention.¹⁵⁴ Nonetheless, it has been suggested that the court in *Philip Morris* accepted the precautionary principle by deferring to the legislature's discretion in a context of emerging and incomplete evidence.¹⁵⁵ Under case law, the precautionary principle entails that, 'where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent'.¹⁵⁶ While this precautionary approach is most commonly associated with public health,¹⁵⁷ it can arguably extend to the risk of manipulation, given the scientific uncertainty surrounding such harms.¹⁵⁸ A precautionary stance may also be warranted because manipulation may infringe upon individual autonomy and undermine democratic processes in ways that are difficult to rectify once harm occurs.¹⁵⁹ The EDPS has explicitly stated that the precautionary principle is applicable in the field of data protection.¹⁶⁰

Some might argue that manipulation is not unique to CP and can also be observed in familiar practices, such as traditional advertising. What distinguishes CP, however, is the large-scale, opaque, and algorithmically personalised optimisation of content, which can entrench selective exposure and heighten susceptibility to influence via the 'filter bubble' effect. Given the breadth of legislative discretion, it is therefore submitted that a positive obligation aimed at addressing manipulation would also be unlikely to be deemed manifestly inappropriate.

¹⁵³ *British American Tobacco* (n 23) para 131.

¹⁵⁴ Some relevant discussions in the United Nations can be found at 'Civic Space and Content Governance' (*United Nations Hub for Human Rights and Digital Technology*) <<https://www.digitalhub.ohchr.org/civicspace>> accessed 10 June 2025.

¹⁵⁵ Cathaoir (n 151) 628.

¹⁵⁶ Case C-119/21 P *PlasticsEurope AISBL v European Chemicals Agency (ECHA)*, EU:C:2023:180, para 127; Nicolas de Sadeleer, 'The Precautionary Principle in EC Health and Environmental Law' (2006) 12 *European Law Journal* 139, 142.

¹⁵⁷ Klamert, 'Article 5 TEU' (n 134) 77.

¹⁵⁸ See Joanna Mazur, 'Automated Decision-Making and the Precautionary Principle in EU Law' (2019) 9 *Baltic Journal of European Studies* 3, 14–15.

¹⁵⁹ See for example EDPB, 'Guidelines 8/2020' (n 10) paras 12, 13. See also Cass R Sunstein, *Democracy and the Problem of Free Speech* (The Free Press 1993) 136–37.

¹⁶⁰ EDPS, 'EDPS Guidelines on Assessing the Proportionality of Measures that Limit the Fundamental Rights to Privacy and to the Protection of Personal Data' (February 2019) 24 <https://www.edps.europa.eu/sites/default/files/publication/19-02-25_proportionality_guidelines_en.pdf> accessed 6 September 2025.

(ii) *'Manifestly Exceeds What Is Necessary to Achieve it'*

In *Philip Morris*, the CJEU again relied on the FTC Guidelines when assessing the necessity of Tobacco Warnings and held that the legislature had not acted arbitrarily.¹⁶¹ It further noted that sufficient space remained on tobacco packaging to communicate with consumers and that any restriction had to be weighed against the requirement 'to ensure a high level of human health protection in an area characterised by the toxicity of the product concerned and its addictive effects'.¹⁶² This part of the judgment appears to address proportionality *stricto sensu*, suggesting that the court placed considerable weight on the inherent toxicity of tobacco and its impact on public health. Additionally, in her Opinion, AG Kokott rejected the argument that a prohibition on sales to minors would constitute a less restrictive alternative. She reasoned that such a measure would apply only to young people, whereas Tobacco Warnings reach all age groups, and that age limits are easily circumvented and difficult to enforce.¹⁶³

Turning to CP Warnings, it would again be preferable if international organisations, such as the WHO, were to endorse specific standards. However, even in the absence of such endorsement, the EU legislator remains entitled to determine appropriate standards at its discretion, provided that they are supported by sufficient evidence to avoid arbitrariness. On the one hand, CP does not directly affect physical health in the way that tobacco does, but it may still pose indirect risks to health and well-being through the development of addictive behaviours. In the case of manipulation, the consequences may be even more serious, particularly for democratic society, as manipulation can impair individual autonomy and democratic participation. While the nature of the risks posed by CP differs from those posed by tobacco, EU institutions and several jurisdictions have recognised them as significant, as discussed in Section III.A, and that difference in kind does not in itself preclude relying on those risks to ground necessity in the present proportionality analysis. On the other hand, the impact of CP Warnings on businesses will depend on the standards adopted. Unlike tobacco products, CP operates in a digital environment, and excessive visual intrusion (such as warnings occupying 65 per cent of the screen) could unnecessarily impair the user experience and, by extension, the ability of businesses to retain users. By contrast, pop-ups or banners appearing on a user's first visit—similar to those currently used for cookie consent—would likely be far less burdensome.¹⁶⁴ It is true that CP Warnings may have a stronger deterrent effect than cookie banners, insofar as users who are made aware of the associated risks may decline cookies or similar technologies, thereby disabling CP. Nonetheless, given the significance of the interests at stake and the broad discretion afforded to the legislature, it is unlikely that a CP Warning standard would be considered manifestly unnecessary under judicial review.

As in the tobacco context, businesses might argue that restricting personalisation for younger users constitutes a less restrictive alternative. However, as has been noted in debates on social media regulation, such restrictions are often easy to circumvent and difficult to

¹⁶¹ *Philip Morris* (n 23) paras 206–08.

¹⁶² *ibid* paras 209, 210.

¹⁶³ *Philip Morris* (n 23), Opinion of AG Kokott, para 203.

¹⁶⁴ See for example ePrivacy Directive, art 5(3); GDPR, art 6(1)(a).

enforce.¹⁶⁵ Moreover, as discussed in Section III.D, limiting interventions to younger users is inadequate. In *Philip Morris*, the court identified ‘low-literacy populations’ as another vulnerable group warranting protection.¹⁶⁶ Comparable vulnerabilities exist in the context of CP, where such individuals may be equally susceptible to manipulation by additive design.

Accordingly, if the legislature were to adopt CP Warnings based on reasonable evidence, it is unlikely that such a measure would ‘manifestly go beyond what is necessary to attain the objective’ or otherwise infringe the principle of proportionality.

E. FREEDOM OF EXPRESSION AND INFORMATION

In *Philip Morris*, the CJEU confirmed that the right to freedom of expression and information covers ‘the dissemination by a business of commercial information, including in the form of advertising’ and, in particular, ‘the use by a business, on the packaging and labelling of tobacco products, of indications such as those covered’ by the TPD’s negative obligation.¹⁶⁷ The court also acknowledged that this negative obligation constituted an interference with the commercial freedom of expression and information enjoyed by businesses.¹⁶⁸ As this right is equally protected in the digital environment,¹⁶⁹ a negative obligation concerning CP would likewise amount to an interference with service providers’ freedom of expression and information.

The court went on to outline the test for determining whether such interference is justified. This test requires the following: that (i) the limitation must be provided for by law; (ii) it must respect the essence of the rights and freedoms; (iii) it must actually meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others; and (iv) it must comply with the principle of proportionality, including necessity.¹⁷⁰ The following sub-sections apply this four-part test to the negative obligation relating to CP, with the exception of the first criterion, which poses no issue where the measure is grounded in EU law.¹⁷¹

(i) *Respect for the Essence of Rights and Freedoms*

The second requirement concerns whether the essence of the right to freedom of expression and information is affected. In *Philip Morris*, the court held that the negative obligation under the TPD did not impair the essence of this right, as the measure was ‘far from prohibiting the communication of all information about the product’, given the limited scope of the restriction in both the area it covers (on-pack labelling) and the content it prohibits (specified ‘elements and features’ only).¹⁷² Although the CJEU’s general approach to

¹⁶⁵ See ‘Expert Reaction to the Australian Senate Approving Social Media Ban for Under-16s’ (*Social Media Centre*, 28 November 2024) <<https://www.sciencemediacentre.org/expert-reaction-to-the-australian-senate-approving-social-media-ban-for-under-16s/>> accessed 10 June 2025.

¹⁶⁶ *Philip Morris* (n 23) para 204.

¹⁶⁷ *ibid* para 147.

¹⁶⁸ *ibid* para 148.

¹⁶⁹ Case C-401/19 *Poland v Parliament and Council*, EU:C:2022:297, para 45.

¹⁷⁰ *Philip Morris* (n 23) para 149.

¹⁷¹ *ibid* para 150.

¹⁷² *ibid* para 151.

the concept of ‘essence’ remains unclear,¹⁷³ its reasoning in this case is consistent with *Deutsches Weintor*¹⁷⁴ and *Société Neptune Distribution*,¹⁷⁵ both of which concerned restrictions on commercial advertising under the CFR.¹⁷⁶

In the context of CP, the negative obligation would similarly target only a narrow category of expression—namely, representations that downplay risks or promote the benefits of CP. While the regulated space may be broader—encompassing multiple webpages rather than a single product package—the scope of the restriction remains confined in terms of content. As such, it is far from prohibiting all communication with users and would therefore not be considered to affect the essence of the freedom of expression and information.

(ii) *Legitimate Aim and Suitability of the Measure*

The third requirement specifically assesses (i) whether the aim of the measure falls within the scope of article 52 of the CFR and (ii) whether the measure is suitable to achieve that aim.¹⁷⁷

With respect to the first limb, article 52 of the CFR permits limitations on fundamental rights where they pursue an objective of ‘general interest recognised by the Union’ or serve to protect ‘the rights and freedoms of others’. According to the Charter Explanations, the term ‘general interest’ broadly encompasses the objectives protected under the TEU and the TFEU¹⁷⁸ and has been described as ‘potentially limitless’ in its reach.¹⁷⁹ In the case of CP, the objective of the proposed negative obligation falls within the scope of data protection under article 16 of the TFEU, as discussed in relation to the legal basis. Furthermore, addressing addiction specifically falls within the established EU commitment to safeguarding public health, much like tobacco regulation.¹⁸⁰ As for manipulation, it may threaten democratic integrity—undermining ‘democracy’ as protected under article 2 of the TEU¹⁸¹—and interfere with the right to vote and to free elections under article 39 of the CFR.¹⁸² Outside of the political domain, manipulation may also affect the freedom of thought under article 10(1) of the CFR¹⁸³ and may contribute to discriminatory outcomes by amplifying hostility against particular social groups.¹⁸⁴ These harms fall squarely within the kinds of objectives recognised under article 52 of the CFR.

As to the second limb—suitability—although the causal link between CP and the identified harms may be less direct than in the case of tobacco, the legal threshold requires

¹⁷³ Mark Dawson, Orla Lynskey and Elise Muir, ‘What Is the Added Value of the Concept of the “Essence” of EU Fundamental Rights?’ (2019) 20 *German Law Journal* 763, 769; Tobias Lock, ‘Article 52 CFR’ in Kellerbauer, Klamert and Tomkin (eds) (n 117) 2251.

¹⁷⁴ C-544/10 *Deutsches Weintor v Land Rheinland-Pfalz*, EU:C:2012:526, paras 57, 58.

¹⁷⁵ C-157/14 *Société Neptune Distribution v Ministre de l’Economie et des Finances*, EU:C:2015:823, para 71.

¹⁷⁶ *Philip Morris* (n 23) para 151.

¹⁷⁷ *ibid* para 152.

¹⁷⁸ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17 (‘Charter Explanations’); Lock (n 173) 2252.

¹⁷⁹ Steve Peers and Sacha Prechal, ‘Article 52. Scope and Interpretation of Rights and Principles’ in Peers and others (eds) (n 113) 1475, 1476.

¹⁸⁰ CFR, art 35; TFEU, arts 9, 114(3), 168(1). See *Philip Morris* (n 23) para 153.

¹⁸¹ Maja Brkan, ‘EU Fundamental Rights and Democracy Implications of Data-Driven Political Campaigns’ (2020) 27 *Maastricht Journal of European and Comparative Law* 774, 782.

¹⁸² *ibid* 779; EDPS, ‘Opinion 3/2018’ (n 60) 13.

¹⁸³ Kate Jones, ‘Protecting Political Discourse from Online Manipulation: The International Human Rights Law Framework’ (2021) 1 *European Human Rights Law Review* 68, 74.

¹⁸⁴ DSA, recital 69.

only a rational connection, not definitive proof.¹⁸⁵ The negative obligation would serve to ensure that users are not misled about the potential risks associated with CP, thereby promoting greater awareness—particularly when such awareness is supported by CP Warnings required under the positive obligation—and possibly reducing user exposure to such risks. Even if the effect varies depending on individual user characteristics, such as awareness, this is sufficient to satisfy the suitability requirement.

(iii) Compliance with the Principle of Proportionality

The fourth requirement examines whether the EU legislature has struck a ‘fair balance’ between freedom of expression and information and the objective pursued.¹⁸⁶ In *Philip Morris*, the court applied this test and emphasised the obligation to ensure a ‘high level of human health protection’ under both the CFR and the TFEU.¹⁸⁷ Although manipulation in the context of CP may not fall strictly within the field of health, the fair balance test generally applies in situations where multiple fundamental rights are at stake.¹⁸⁸ Indeed, it has been invoked in cases involving competing rights, such as the freedom to receive information¹⁸⁹ and the right to respect for private life.¹⁹⁰ Accordingly, the test is applicable to both addiction and manipulation.

Under the fair balance test, the legislature enjoys less discretion than under the general proportionality standard. AG Kokott supported this view, drawing on European Court of Human Rights jurisprudence¹⁹¹ and noting the foundational importance of freedom of expression in democratic societies.¹⁹² In practice, industry stakeholders have resisted negative obligations concerning non-deceptive content, arguing that ‘deceptive practices’ must be distinguished from ‘legitimate online persuasive methods’.¹⁹³ As a result, the fair balance test must be applied with particular rigour and care. Under this test, the court in *Philip Morris* appeared to endorse a ‘libertarian paternalistic’ approach.¹⁹⁴ As discussed in Section III.C, libertarian paternalism is ‘an approach that preserves freedom of choice but that authorizes both private and public institutions to steer people in directions that will promote their welfare’,¹⁹⁵ and Tobacco Warnings, including negative obligations, reflect this approach.¹⁹⁶ Proponents of libertarian paternalism argue that individuals’ choices are often not fully rational, as shown by psychological and economic research.¹⁹⁷ The court acknowledged this rationale, referring to the vulnerability of tobacco users (because of addiction) to misleading

¹⁸⁵ *Lock* (n 173) 2252.

¹⁸⁶ *Philip Morris* (n 23) paras 154, 161.

¹⁸⁷ *Ibid* para 153.

¹⁸⁸ See for example *Lock* (n 173) 2253; Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk*, EU:C:2013:28, para 60.

¹⁸⁹ *Sky Österreich* (n 188) para 59.

¹⁹⁰ Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-00271, para 65.

¹⁹¹ See for example *Markt Intern Verlag GmbH and Klaus Beermann v Germany* (1989) Series A no 165; *Casado Coca v Spain* (1994) Series A no 285-A.

¹⁹² *Philip Morris* (n 23), Opinion of AG Kokott, para 231.

¹⁹³ European Parliament, ‘Regulating Dark Patterns in the EU’ (n 47).

¹⁹⁴ Riccardo Perotti, ‘New Tobacco Products Directive: The CJEU Says It Is Compatible with EU Law’ (2016) 11 *Journal of Intellectual Property Law & Practice* 656, 657.

¹⁹⁵ Thaler and Sunstein, ‘Libertarian Paternalism’ (2003) (n 85); Thaler and Sunstein, ‘Libertarian Paternalism’ (2023) (n 85).

¹⁹⁶ See for example Obolevich (n 87); Elsmore (n 87); Alemanno (n 87).

¹⁹⁷ Thaler and Sunstein, ‘Libertarian Paternalism’ (2003) (n 85) 176.

elements and features suggesting that the product is less harmful or that it confers health or lifestyle benefits, which are prohibited under the TPD.¹⁹⁸ It further justified the measure by pointing to ‘the proven harmfulness of tobacco consumption, by the addictive effects of tobacco and by the incidence of serious diseases’.¹⁹⁹ These considerations imply that the court required a high level of necessity—including the need to protect vulnerable individuals—to justify a libertarian paternalistic measure under the fair balance test.

The negative obligation concerning CP similarly reflects a libertarian paternalistic approach: it aims to steer users away from engaging with CP without rational reflection, while stopping short of prohibition. The key question, then, is whether a sufficiently high level of necessity exists to justify this regulatory intervention. In this context, vulnerability arises from online addiction, which may impair users’ ability to assess risks or exercise autonomous choice, thus supporting regulation aimed at both addiction and manipulation. However, unlike tobacco, the harms associated with CP are less clearly evidenced and no international framework comparable to the FTC has been established.²⁰⁰ Moreover, whereas tobacco directly affects physical health, the impact of CP tends to be more variable and indirect, often depending on subjective user characteristics.

Nonetheless, elements of libertarian paternalism have increasingly shaped the regulation of CP within EU data protection law.²⁰¹ The GDPR itself already incorporates libertarian paternalistic elements, particularly in its information provisions under articles 13(2)(b) and 14(2)(c), which require controllers to inform data subjects of their rights (information that users could, in principle, discover on their own). Subsequent developments have further embraced this approach. The CNIL (French Data Protection Authority) has explicitly acknowledged a ‘libertarian paternalism’ dimension to data protection.²⁰² Additionally, the EDPB, in its Opinion on the ‘Consent or Pay’ model, concluded that, in most cases, large platforms cannot obtain valid consent by offering only a binary choice between accepting behavioural advertising and paying a fee.²⁰³ On its face, the consent requirement in data protection law appears libertarian, as it allows users to decide whether to accept CP based on their own rational judgment.²⁰⁴ However, the EDPB’s assessment took into account the risks of CP, including manipulation,²⁰⁵ and presupposed that some users may consent without fully understanding those risks.²⁰⁶ In adopting this view, the EDPB takes a libertarian paternalistic stance: it does not prohibit CP but seeks to steer users away from accepting it without rational consideration. Furthermore, the CJEU has also reflected this approach. In *Bundesverband eV v Planet49 GmbH*, the court held that consent is not valid where it is obtained through a pre-ticked checkbox, partly because users may consent without reading the accompanying information.²⁰⁷ AG Szpunar supported this, citing empirical

¹⁹⁸ *Philip Morris* (n 23) para 160.

¹⁹⁹ *ibid* para 156.

²⁰⁰ Cathaoir (n 151) 628.

²⁰¹ Ausloos (n 82) 89.

²⁰² ‘The Economic Impact of GDPR, 5 Years on’ (*CNIL*, 2 April 2024) <<https://www.cnil.fr/en/economic-impact-gdpr-5-years>> accessed 10 June 2025.

²⁰³ EDPB, ‘Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms’ (17 April 2024) para 179 <https://www.edpb.europa.eu/system/files/2024-04/edpb_opinion_202408_consentorpay_en.pdf> accessed 6 September 2025.

²⁰⁴ *ibid* 88.

²⁰⁵ *ibid* para 21.

²⁰⁶ *ibid* paras 84–85.

²⁰⁷ *Planet49* (n 7) paras 55, 65.

evidence that users rarely change default settings—a behavioural phenomenon known as ‘default inertia’.²⁰⁸ These observations suggest that the court acknowledged the risk of consent being given without adequate awareness or deliberation of the risks involved under such models. Accordingly, its approach reflects a form of libertarian paternalism: one that seeks to preserve user autonomy while discouraging consent to the use of CP where adequate awareness of the risks is lacking.

Given these developments, the existence of vulnerable users, and the emerging evidence of harm to both health and democratic integrity, it is likely that, despite the differences between CP and tobacco, the CJEU would consider the negative obligation to strike a fair balance between freedom of expression and information, on the one hand, and the objectives pursued, on the other. Accordingly, such a measure would likely not infringe the freedom of expression and information of service providers.

V. BEYOND TRANSPARENCY: SYNTHESIS

The account of current EU law locates the absence of a risk-warning duty in the logic of the transparency principle. Information obligations under this principle are designed to render online service providers’ internal operations visible to users by disclosing facts already in their possession (e.g. identity and purposes under articles 13–14 of the GDPR). This reflects a libertarian premise: once properly informed of those facts, rational users can decide for themselves. Thus, transparency limits its reach by remaining within a libertarian frame, thereby avoiding interference with the fundamental rights of businesses that more paternalistic approaches might trigger.

The proposal for CP Warnings builds on this insight and moves beyond transparency towards a more paternalistic form of regulation: because transparency alone is insufficient, more protective interventions are required. However, being more intrusive than the purely libertarian model, this approach specifically raises a challenging question of proportionality, as contested in the tobacco cases. Given the absence of equivalent disputes in the data protection field, and given the differences between tobacco and CP, it is not straightforward to assess the proportionality of requiring CP Warnings—particularly in relation to freedom of expression, where a stricter threshold applies. Nevertheless, casting CP Warnings as a libertarian-paternalistic measure makes such evaluation possible: it permits a reasoned examination by analogy with the tobacco precedents, which accepted libertarian paternalism when addressing the same fundamental right under the CFR through similar warning measures.

EU data protection law is not purely libertarian. Even within the GDPR’s information obligations, controllers must inform data subjects of their statutory rights—information that users could, in theory, obtain independently—which reflects a libertarian-paternalistic strand. Some data protection authorities have embraced elements of this orientation, and the CJEU has already accepted elements of a libertarian paternalistic approach in recognising the vulnerability of individuals in the data protection context. In short, introducing a duty to provide CP Warnings represents a justified step beyond transparency, one that is both necessary and permissible under EU law.

²⁰⁸ *Planet49* (n 7), Opinion of AG Szpunar, para 37.

VI. CONCLUSION

This article has demonstrated that, while CP poses significant risks to users of online services (particularly risks of addiction and manipulation), current EU data protection law does not adequately address those risks. The introduction of CP Warnings, along with related negative obligations, could play an important role in mitigating these harms. Drawing on the legal framework developed in relation to Tobacco Warnings, this article has argued that such measures would be legally permissible under EU law.

The analysis has focused on doctrinal questions and has not addressed practical considerations, such as the optimal design of CP Warnings, which warrant further exploration. Nevertheless, by engaging with the foreseeable legal issues (including contested fundamental rights questions) and the contours of legislative discretion, this article has established a foundation for the legal integration of CP Warnings. The EU legislature should act to implement such libertarian-paternalistic measures, advancing individual protection beyond the traditional boundaries of transparency.

Authorised Push, Institutional Pull: A Critical Appraisal of Competing Priorities in the UK's APP Fraud Reimbursement Regime

CANEL DERYA PARIS ATIK*

ABSTRACT

This article critically examines the competency, scope, and adequacy of the UK's evolving regulatory framework for Authorised Push Payment ('APP') fraud, with a particular focus on the Authorised Push Payment Reimbursement Scheme ('APPRS') introduced under the Financial Services and Markets Act 2023 ('FSMA 2023'). It begins by tracing the statutory underpinnings of the APPRS and situates its emergence within the broader landscape of escalating regulatory efforts to safeguard consumers against socially engineered financial crimes. Subsequently, it turns to the APPRS's structural limitations, including but not limited to jurisdictional exclusions, normatively unjustified reimbursement caps, and ambiguities surrounding the definition and application of the vulnerability exception. It contends that these regulatory gaps undermine both the coherence and fairness of the regime. Furthermore, it unveils and scrutinises the APPRS's reliance on administrative expedience and cost-benefit rationale, which systematically privileges institutional efficiency over the experiential dimensions of harm suffered by fraud victims. The discussion then turns to consider recent legislative amendments to the Payment Services Regulations 2017, which have enabled Payment Service Providers ('PSPs') to withhold payments pre-emptively in the face of suspected fraud. Additionally, it will draw on comparative insights derived from Australia's 'whole-of-ecosystem' approach to appraise the value of, and potential for, cross-sectoral reform in preventing fraud. Ultimately, this article contends that the adequacy of the UK's framework is undermined by two foundational flaws, namely its reactive orientation and its structurally exclusionary design. It concludes that, while the redress mechanism established under the FSMA 2023 represents a meaningful regulatory development, a re-orientation from the UK's ex post, compensation-centric model towards a more preventative, consumer-focused approach, as exemplified by Australian reforms, would offer a more robust and equitable response to APP fraud.

Keywords: financial regulation, authorised push payment fraud, financial law, consumer protection, financial crime

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I. INTRODUCTION

In September 2016, the UK's leading consumer advocacy organisation, Which?, filed a super-complaint to the Payment Systems Regulator ('PSR') and the Financial Conduct Authority ('FCA'), calling for a coordinated regulatory response to the escalating threat of 'Authorised Push Payment' ('APP') fraud.¹ The APP classification denotes a distinct form of financial crime, whereby the victim is 'socially engineered into making a bank transfer to a payee/account they consider to be correct, but is in fact in the direct control of a scammer or malicious actor'.² Such deception may involve the impersonation of a bank official, the advertisement of fictitious goods, or even the exploitation of an emotional bond preceded by the fabrication of a personal relationship.³ While the methods vary, the objective remains constant: the fraudulent acquisition of funds through a calculated abuse of confidence.

In response to mounting consumer concern, crystallised by Which?'s super-complaint, the Lending Standards Board introduced the Contingent Reimbursement Model Code in May 2019, which sought to offer redress through voluntary reimbursement obligations for signatory Payment Service Providers ('PSPs').⁴ However, its non-mandatory status curtailed its reach, thus leaving customers of non-signatory PSPs vulnerable.⁵ To address this regulatory gap, Parliament enacted the Financial Services and Markets Act 2023 ('FSMA 2023'), under which section 72 empowered the PSR to introduce a mandatory reimbursement scheme for victims of APP fraud.⁶ Pursuant to this authority, the Authorised Push Payment Reimbursement Scheme ('APPRS') came into force on 7 October 2024 and now constitutes the principal regulatory framework governing APP fraud.⁷

This article will interrogate the scope, structure, and normative coherence of the APPRS, evaluating the extent to which it delivers meaningful protection for victims across a range of circumstances. Section II will outline the legal foundations of the framework, identifying the statutory mechanisms through which reimbursement obligations are imposed. Section III turns to the limitations of the APPRS, asking who is excluded, on what basis, and whether the rationales provided withstand normative scrutiny. It argues that eligibility is governed less by the severity of harm and more by the administrative logic of ease, constraints of enforcement, and elusive efforts at preserving industry stability. Subsequently, Section IV analyses how 'vulnerability' is defined and operationalised within the APPRS, asserting that the lack of definitional clarity substantially compromises its protective function. Moreover, Section V outlines and derives comparative insights from Australia's 'whole-of-ecosystem' ('WOE') model, which has been selected to illuminate the functional merits of its preventative, rather than

¹ Which?, 'Which? Super-Complaint: Consumer Safeguards in the Market for Push Payments' (September 2016) 3–4 <<https://www.psr.org.uk/media/t0sln5vn/which-super-complaint-sep-2016.pdf>> accessed 31 August 2025.

² PwC, 'Authorised Push Payment Fraud: An Uncertain Future' (December 2019) <<https://www.pwc.co.uk/financial-services/assets/pdf/authorised-push-payment-fraud-an-uncertain-future.pdf>> accessed 31 August 2025.

³ Lending Standards Board, 'Information for Customers on the Contingent Reimbursement Model Code for APP Scams (the CRM Code)' (2022) 3 <<https://www.lendingstandardsboard.org.uk/wp-content/uploads/2022/01/Information-for-customers-CRM.pdf>> accessed 31 August 2025.

⁴ *ibid.*

⁵ Jo Braithwaite, '“Authorized Push Payment” Bank Fraud: What Does an Effective Regulatory Response Look Like?' (2024) 10 *Journal of Financial Regulation* 174, 181–83.

⁶ Financial Services and Markets Act 2023 ('FSMA 2023'), s 72(1).

⁷ PSR, 'Policy Statement: Fighting Authorised Push Payment Scams: Final Decision' (PS23/4, December 2023) ('Policy Statement PS23/4') 3 <<https://www.psr.org.uk/media/kwlgzyti/ps23-4-app-scams-policy-statement-dec-2023.pdf>> accessed 31 August 2025.

remedial, focus. It then considers recent amendments to the Payment Services Regulations 2017, recognising their potential to enable *ex ante* intervention, as well as the ‘failure to prevent fraud’ offence instituted by the Economic Crime and Corporate Transparency Act 2023 (‘ECCTA 2023’). Taken together, these domestic developments indicate an expanding legislative willingness to impose liability, not merely where corporations have commissioned fraud, but also where they have neglected to prevent it. Yet, despite signalling progress, these innovations remain structurally isolated, thus accentuating the need for analogous reforms in the domain of APP fraud.

Cumulatively, these sections demonstrate that, although the APPRS marks a notable regulatory advancement, it continues to exclude categories of victims whose exclusion cannot be normatively justified. In privileging institutional pragmatism over inclusive protection, the APPRS risks replicating the very inequities it was introduced to redress. Moreover, this article will argue that the aforementioned exclusions are not simply administrative oversights; they are symptomatic of a framework that remains reactive by design. This article contends that, to fulfil its protective mandate, the APPRS must evolve into a model that not only compensates after harm has occurred, but also anticipates, disrupts, and deters the conditions through which such harm is made possible.

II. THE LEGAL FOUNDATIONS

As stipulated under section 72(1) of the FSMA 2023, the PSR is required to ‘prepare... a relevant requirement for reimbursement in such qualifying cases of payment orders as the regulator considers should be eligible’.⁸ In defining a ‘qualifying case’, section 72(2)(b) of the FSMA 2023 specifies that the payment order must have been executed subsequent to fraud or dishonesty,⁹ while section 72(2)(a) narrowly restricts such cases to transactions executed via the Faster Payments Scheme (‘FPS’).¹⁰ By restricting statutory coverage to FPS transactions, section 72(2)(a) raises ‘prima facie’ concerns as to the equity and universality of the APPRS’s protective function, particularly in the light of the growing prevalence of cross-platform transfers and alternative payment systems in contemporary financial crime.¹¹

Moreover, sections 54 and 55 of the Financial Services (Banking Reform) Act 2013 authorise the PSR to issue ‘directions’ to participants in regulated payment systems.¹² Directions may either ‘require or prohibit the taking of specified action in relation to the system’ (section 54(2)(a)) or ‘set standards to be met in relation to the system’ (section 54(2)(b)). Thus, the PSR issued the following legal instruments to operationalise its mandate under section 72:

1. A specific requirement (‘SR1’), imposed via section 55(1), obliging Pay.UK (the FPS’s payment system operator) to ensure that its FPS rules include a

⁸ FSMA 2023, s 72(1).

⁹ *ibid* s 72(2)(b).

¹⁰ *ibid* s 72(2)(a).

¹¹ The Payments Association, ‘The Impact of APP Fraud on Cross-Border Payments’ (2024) 10 <<https://thepaymentsassociation.org/wp-content/uploads/2024/09/The-impact-of-APP-fraud-on-cross-border-payments-1.pdf>> accessed 31 August 2025.

¹² Financial Services (Banking Reform) Act 2013, s 54(1).

- reimbursement requirement for APP fraud payments executed over the FPS;¹³
2. A specific direction ('SD19'), pursuant to section 54(1)–(2), requiring Pay.UK to implement a compliance monitoring regime to ensure the effective and consistent enforcement of reimbursement rules across PSPs;¹⁴ and
 3. A specific direction ('SD20') issued under section 54(1)–(2) to all relevant PSPs, mandating their compliance with the reimbursement rules as a condition of their participation in the APPRS.¹⁵

Principally, the FPS Reimbursement Requirement obliges Sending PSPs ('SPSP') to reimburse APP fraud victims in full, contingent on the payment falling within the scope of the FPS Reimbursement Rules.¹⁶ Once the customer submits their claim, the SPSP must transfer the 'Reimbursable Amount' ('RA') to the customer within five business days of receipt of the claim, subject only to the potential invocation of the 'stop the clock' provision, which allows SPSPs to request further information concerning the validity of the claim.¹⁷ The SPSP must conclude whether or not the claim will be reimbursed by the end of the thirty-fifth business day as of the claim submission date.¹⁸ Once the RA has been calculated, the Receiving PSP ('RPSP') must transfer half of the total RA to the SPSP.¹⁹ The regulatory instruments that operationalise the FPS Reimbursement Requirement constitute a laudable advancement in consumer protection. Nonetheless, they remain grounded in a proceduralised conception of harm and redress that stands at odds with the nuanced, experiential realities of APP fraud, a point of tension that will be examined in greater depth in Section III below.

III. EXAMINING THE SCOPE OF REIMBURSABLE CLAIMS: INCOMPLETE UNIVERSALITY

A. STRUCTURAL LIMITATIONS AND UNDUE EXCLUSIONS

Under the FPS Reimbursement Rules, claims must refer to a 'relevant account'.²⁰ This must be a UK-based account capable of sending or receiving payments via FPS; it cannot, however, be an account provided by a credit union, municipal bank, or national savings bank.²¹ Furthermore, a singular claim cannot exceed the maximum level of reimbursement ('MLR'), which

¹³ PSR, 'Specific Requirement 1 on the Faster Payments Operator to Insert APP Scam Reimbursement Rules into the Faster Payments Scheme Rules' (July 2024) 3 <<https://www.psr.org.uk/media/xenefhgp/amended-specific-requirement-1-july-2024-corrected.pdf>> accessed 31 August 2025.

¹⁴ PSR, 'Specific Direction 19 Imposing Certain Responsibilities on the Faster Payments Operator in Respect of the Faster Payments Scheme APP Scam Reimbursement Rules' (July 2024) 3 <<https://www.psr.org.uk/media/cbrxigu/amended-specific-direction-19-july-2024.pdf>> accessed 30 August 2025.

¹⁵ PSR, 'Specific Direction 20 to PSPs Participating in the Faster Payments Scheme that Provide Relevant Accounts, to Reimburse FPS APP Scam Payments and Comply with the Reimbursement Rules' (July 2024) 3 <<https://www.psr.org.uk/media/rqrpn0w/amended-specific-direction-20-july-2024.pdf>> accessed 30 August 2025.

¹⁶ Pay.UK, 'FPS Reimbursement Rules' (4 December 2024) 6 <<https://www.wearepay.uk/wp-content/uploads/2024/12/FPS-Reimbursement-Rules-Schedule-4.pdf>> accessed 31 August 2025.

¹⁷ *ibid.*

¹⁸ *ibid* 11.

¹⁹ *ibid* 14.

²⁰ PSR, 'Policy Statement PS23/4' (n 7) 17.

²¹ Pay.UK (n 16) 25.

is presently set at £85,000.²² SPSPs may also impose a claim excess of £100 on non-vulnerable consumers,²³ aimed at disincentivising ‘morally hazardous behaviour’ and encouraging greater consumer caution in high-risk transactions.²⁴ The foregoing criteria reveal three key structural limitations embedded in the current framework: a jurisdictional limitation (linked to the UK); a payment-system limitation (tied to the FPS); and an institutional limitation (excluding certain financial providers). Each raises concerns about the APPRS’s coherence and fairness, which the subsequent analysis will consider in turn. For present purposes, ‘fairness’ is to be understood as the equilibrium struck between two competing imperatives: on one hand, the ‘consumer interest’ in being shielded from undue loss and, on the other, the ‘systemic interest’ in promoting the efficiency of, and maintaining stability within, the financial sector. Within these conceptual bounds, a policy may be deemed ‘unfair’ where it disproportionately impinges upon one interest, in the absence of a countervailing justification proportionate to the weight that it displaces.

Significantly, a victim of APP fraud falls within the scope of the APPRS only where both the sending and receiving accounts are held within the UK.²⁵ This effectively excludes victims of cross-border fraud, irrespective of the sophistication or scale of the deception involved. This omission is striking given that UK Finance’s 2024 data has underscored the growing significance of this category: international payments were identified as the second most-affected payment method, surpassed only by domestic FPS transactions in both volume and value.²⁶ In 2023 alone, 3,302 cross-border APP fraud payments were recorded, with total losses amounting to £25.9 million.²⁷ Notably, the PSR has not offered public justification for excluding such payments from the APPRS’s scope. One may reasonably infer that the decision is underpinned by the difficulty of securing reimbursement from extra-jurisdictional financial institutions not subject to UK regulatory authority. As The Payments Association notes, effective cross-border fraud prevention may require more than regulatory intervention alone; it may necessitate coordinated industry initiatives, bilateral enforcement protocols, and reform of data-sharing legislation.²⁸ It is thus apparent that the PSR is not in a position to effect the necessary changes unilaterally, given the indispensable role of international cooperation. The feasibility and architecture of the international cooperation required to effect such change, and the question of which actors might be responsible for effecting it, lie beyond the remit of this article. Of greater significance for present purposes is the distribution of liability, where the involvement of an international recipient of the fraudulently obtained funds effectively provides SPSPs with an unearned immunity from liability. Thus, even recognising the aforesaid constraints, the total absence of a redress mechanism for victims of cross-border APP fraud remains problematic. Intuitively, an alternative model presents itself: the victim could still be reimbursed by the SPSP, with the receiving institution’s contribution omitted.

²² PSR, ‘Policy Statement: Faster Payments APP Scams Reimbursement Requirement: Confirming the Maximum Level of Reimbursement’ (PS24/7, October 2024) (‘Policy Statement PS24/7’) 3 <<https://www.psr.org.uk/media/c30pwwly/ps24-7-app-scams-maximum-level-of-reimbursement-policy-statement-oct-2024.pdf>> accessed 30 August 2025.

²³ PSR, ‘Policy Statement PS23/4’ (n 7) 32.

²⁴ *ibid.*

²⁵ Pay.UK (n 16).

²⁶ UK Finance, ‘Annual Fraud Report 2024’ (2024) 61 <<https://www.ukfinance.org.uk/system/files/2024-06/UK%20Finance%20Annual%20Fraud%20report%202024.pdf>> accessed 31 August 2025.

²⁷ *ibid.*

²⁸ The Payments Association, ‘The Impact of APP Fraud’ (n 11) 33.

Though imperfect, such a model would at least ensure partial compensation and preserve the core principle of shifting absolute liability away from victims. That such a solution remains unexplored suggests that institutional expedience has been prioritised over equitable design.

A similar critique applies to the exclusion of non-FPS transactions. For present purposes, APP scams executed over the Clearing House Automated Payment System ('CHAPS'), a high-value payment system operated by the Bank of England, are excluded from analysis; they are covered by their own, parallel APP fraud reimbursement requirement.²⁹ This is supported by Specific Direction 21 ('SD21'), a mirror direction of SD20, which applies to CHAPS PSPs and amends the rules applicable to CHAPS transactions.³⁰ According to 2023 data, 7,477 non-FPS and non-CHAPS payments were affected by APP fraud, resulting in total losses of £56.4 million.³¹ While these transactions constitute a relatively small proportion of the 417,459 total fraud cases reported that year,³² their exclusion nonetheless reinforces a fragmented model of protection. Once more, it is a structural consideration (namely, the payment's pathway), rather than the gravity of the injury, which determines the consumer's eligibility for redress. A final limitation arises from the exclusion of accounts held with exempted institutions, effectively leaving a subset of consumers without access to redress based purely on their institutional affiliation. The PSR has cited the comparatively low incidence of APP fraud within these institutions as a justification for the carve-outs, arguing that the practical burden of compliance outweighs the benefits of inclusion.³³ Supporting this rationale, 2022 data reported only 41 cases with a combined value of £17,000.³⁴

Considered cumulatively, these exclusions raise substantive concerns regarding the internal coherence and distributive fairness of the APPRS. The PSR's fractured policy orientation may be better understood through Julia Black's observation that regulatory organisations selectively respond to 'legitimacy claims' based on their strategic priorities and dependencies.³⁵ Black contends that regulators may dismiss a legitimacy claim where it does not serve their core objectives, is inessential to their survival, or is eclipsed by a competing claim from a more influential 'legitimacy community'.³⁶ Applied to the present facts, consumer communities advocating for greater fraud protections represent the subordinate 'legitimacy claim', whereas PSPs and financial institutions, seeking to limit financial liability and protect profit margins, exert the dominant claim. The APPRS's architecture reflects this hierarchy, whereby institutional stability and industry competitiveness take precedence over comprehensive consumer protection.

Furthermore, Black maintains that regulators are more responsive to claims raised by entities on which they are highly dependent or with whom they are structurally interdependent.³⁷ This may explain the PSR's repeated privileging of industry interests; as Tim Yi Jane

²⁹ PSR, 'Policy Statement: Fighting Authorised Push Payment Scams: CHAPS APP Scams Reimbursement Requirement' (PS24/5, September 2024) 3 <<https://psr.org.uk/media/th4jca5a/ps24-5-app-scams-chaps-reimbursement-sept-2024.pdf>> accessed 1 September 2025.

³⁰ PSR, 'Specific Direction 21 to PSPs Participating in CHAPS that Provide Relevant CHAPS Accounts, to Reimburse CHAPS APP Scam Payments and Comply with the CHAPS Reimbursement Rules' (September 2024) 4 <<https://www.psr.org.uk/media/yxbh4dvt/specific-direction-21-chaps-reimbursement-september-2024.pdf>> accessed 1 September 2025.

³¹ UK Finance, 'Annual Fraud Report' (n 26).

³² *ibid.*

³³ PSR, 'Policy Statement PS23/4' (n 7) 16.

³⁴ *ibid.*

³⁵ Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137, 154.

³⁶ *ibid.*

³⁷ *ibid.* 156.

Ngan notes, PSPs retain a degree of structural and financial influence within the regulatory ecosystem that consumers are ill-equipped to counter.³⁸ Notably, the Treasury Committee, in its review of the APPRS's early implementation, expressed concern over the PSR's decision to delegate operational responsibility to Pay.UK, an industry body both funded and guaranteed by the very institutions it would ultimately regulate.³⁹ Although it is an ordinary feature of legal redress mechanisms that access is circumscribed by design, such limitations are customarily justified on functional or principled grounds. By contrast, the APPRS deviates from this rationale, systemically privileging institutional convenience and regulatory dependencies, considerations far removed from the consumer experience, while relegating what should be central to the inquiry: the merits of the claim and the sophistication of the fraud. The outcome is a scheme whose claims to fairness and coherence are necessarily weakened.

B. THE MAXIMUM LEVEL OF REIMBURSEMENT

One of the most contentious features of the APPRS is the MLR, which, despite initial proposals of £415,000, was ultimately set at £85,000 in October 2024.⁴⁰ In defence of this reduction, the PSR noted that 99.8 per cent of FPS transactions by volume and 90 per cent by value would remain covered.⁴¹ The justification concentrated on potential 'prudential risks' to PSPs, namely that a higher MLR may deter investment within the sector, jeopardise the survival of smaller firms, and undermine industry competitiveness.⁴² Crucially, the PSR's rationale relied on a cost-benefit analysis ('CBA') conducted in support of the reimbursement framework. Such analyses, by design, are grounded in utilitarian logic: they seek to maximise net benefit for the greatest number, typically by aggregating outcomes in economic terms.⁴³

However, as the Financial Services Consumer Rights Panel has noted, this method systematically privileges quantifiable metrics over qualitative dimensions of harm, such as emotional distress, erosion of personal dignity, or the loss of financial security, which are less easily reduced to monetary value.⁴⁴ Such concerns are corroborated by the verifiable correlation between fraud victimisation and psychological harm: 70 per cent of victims reported heightened stress, 60 per cent noted mental health decline, and 50 per cent experienced a deterioration in their financial well-being.⁴⁵ Moreover, the Panel criticised the PSR's industry-

³⁸ Tim Yi Jane Ngan, 'Response to CP24/11 - "Faster Payments APP Scams: Changing the Maximum Level of Reimbursement"' (2024) 8 <https://pure.manchester.ac.uk/ws/portalfiles/portal/344733017/Response_to_PSR_consultation_CP24-11_-_FINAL_v2.pdf> accessed 1 September 2025.

³⁹ House of Commons Treasury Committee, 'Scam Reimbursement: Pushing for a Better Solution' (HC 989, 6 February 2023) 17–18.

⁴⁰ PSR, 'Policy Statement PS24/7' (n 22).

⁴¹ *ibid* 20.

⁴² *ibid* 24.

⁴³ See Elliot Marseille and James G Kahn, 'Utilitarianism and the Ethical Foundations of Cost-Effectiveness Analysis in Resource Allocation for Global Health' (2019) 14(1) *Philosophy, Ethics, and Humanities in Medicine* <<https://doi.org/10.1186/s13010-019-0074-7>> accessed 1 September 2025.

⁴⁴ Letter from Helen Charlton (18 September 2024) 3–4 <https://www.fca.org.uk/panels/consumer-panel/publication/20240918_final_fscp_response_to_cp24.11_faster_payments_app_scams_-_changing_the_maximum_level_of_reimbursement.pdf> accessed 1 September 2025.

⁴⁵ The findings, which were published by Which?, derived from a survey of 1,012 adult fraud victims: see 'Fraud Has a Lasting Impact on Victims' Mental Health, Which? Warns' (*Which?*, 12 September 2024) <<https://www.which.co.uk/policy-and-insight/article/fraud-has-a-lasting-impact-on-victims-mental-health-which-warns-aLkJY1z7wrfu>> accessed 1 September 2025.

sympathetic policy orientation, citing the accelerating frequency of high-value fraud and challenging the PSR's dismissal of the issue on account of its statistical insignificance in the broader sphere of financial crime.⁴⁶ In pursuing a purely quantitative analysis, the PSR effectively excluded victims of high-value fraud, whose losses may be financially and psychologically catastrophic, despite being statistically marginal.

While a strictly quantitative CBA may appear methodologically sound and economically rational, it risks erasing the practical gravity of outlier cases under the guise of statistical optimisation. Within such a framework, 411 incidents may appear statistically negligible. However, victims of high-value fraud (for example, conveyancing fraud) frequently experience traumatic and deeply disruptive effects both financially and psychologically, with experts advising that the emotional ramifications may be more enduring than the financial losses.⁴⁷ Notably, 'several' victims have suffered losses of £250,000⁴⁸ and even as high as £640,000.⁴⁹ Although comprehensive research on the long-term effects of high-value APP fraud remains limited, consumer advocacy organisations have begun to document the underlying human cost. Action Fraud, for instance, reported that an unnamed individual defrauded of £640,000 experienced a 'devastating life-long impact', including the non-recovery of personal savings and equity, with grave implications for their financial stability and well-being.⁵⁰ As William W May cautions, the blanket exclusion of unquantifiable harms from a CBA risks endorsing outcomes that inflict injury or are otherwise ethically contentious.⁵¹ By disregarding the profound psychological trauma endured by victims of high-value fraud, the PSR's exclusively quantitative CBA arrived at a conclusion that, while procedurally sound, reflects a troubling disregard for human impact and is therefore conceptually flawed. Moreover, if, as the PSR maintains, such cases are indeed rare, then the practical cost of covering them may be far less burdensome to PSPs than has been suggested.⁵²

Additionally, the PSR has pointed to the Financial Ombudsman Service ('FOS') as an alternative avenue of redress, noting that consumers may be awarded between £430,000 and £945,000 if they can demonstrate that the SPSP, the RPSP, or both were at fault for the fraud's success.⁵³ While the mechanism remains a valuable safeguard, its efficacy is undermined in practice: the FOS's uphold rate⁵⁴ for APP fraud complaints is now at its lowest in

⁴⁶ Letter from Helen Charlton (18 September 2024) (n 44). The claims referred to may be observed at PSR, 'Policy Statement PS24/7' (n 22) 29.

⁴⁷ See Suleman Lazarus and Liz Ziegler, 'What Is the Emotional Impact of Fraud?' (*Lloyds Banking Group*, 5 December 2024) <<https://www.lloydsbankinggroup.com/insights/what-is-the-emotional-impact-of-fraud.html>> accessed 31 August 2025.

⁴⁸ 'Lloyds Bank Warns of Worrying Rise in Conveyancing Fraud' (*Lloyds Banking Group*, 18 June 2024) <<https://www.lloydsbankinggroup.com/media/press-releases/2024/lloyds-bank-2024/lloyds-bank-warns-of-worrying-rise-in-conveyancing-fraud.html>> accessed 31 August 2025.

⁴⁹ Action Fraud, 'Can You Afford to Lose Your Entire Deposit or Purchase Money?' (2022) <https://data.actionfraud.police.uk/cms/wp-content/uploads/2022/03/2b-Conveyancing_Leaflet.pdf> accessed 1 September 2025.

⁵⁰ *ibid*.

⁵¹ William W May, '\$s for Lives: Ethical Considerations in the Use of Cost/Benefit Analysis by For-Profit Firms' (1982) 2 *Risk Analysis* 35, 46.

⁵² PSR, 'Policy Statement PS24/7' (n 22) 15.

⁵³ *ibid* 18.

⁵⁴ FOS, 'Temporary Changes to Outcome Reporting in Our Business-Specific Complaints Data' (March 2023) 2 <<https://www.financial-ombudsman.org.uk/files/324180/Financial-Ombudsman-Service-Temporary-changes-to-outcome-reporting-in-our-business-specific-complaints-data.pdf>> accessed 31 August 2025 (defining the 'uphold rate' as 'the percentage of resolved complaints where we find in favour of the complainant... The "uphold rate" reflects the percentage of complaints resolved as "change in outcome"').

three years, having declined from 54 per cent in 2022 to just 37 per cent in 2025.⁵⁵ Accordingly, the availability of redress through the FOS does little to offset the structural inequities embedded within the current reimbursement framework. Moreover, even for victims with a higher likelihood of success, pursuing redress through the FOS entails considerable delays and procedural strain. According to FOS data, only 24 per cent of APP fraud cases are resolved within three months, 46 per cent within six, and over half extend beyond that period.⁵⁶ These figures compare unfavourably to resolution times for other fraud classifications, where 41 per cent are resolved within three months and 67 per cent within six.⁵⁷

Thus, to clarify, the average victim of APP fraud not only faces a 63 per cent likelihood of denial, but also a 76 per cent chance of waiting over three months, and a 54 per cent chance of waiting beyond six. It ought to be emphasised that the preceding analysis does not purport to attribute the observed decline in the FOS's uphold rate to the proliferation of APP fraud, nor to any lack of institutional commitment on behalf of the FOS. Rather, the reduced success rate may, as a possibility, reflect a higher incidence of non-qualifying claims or findings of consumer negligence, for instance, where exceptions, such as the Consumer Standard of Caution Exception ('CSCE') (addressed below) are engaged. For present purposes, the point remains that the FOS's efficacy as a viable compensatory mechanism is empirically limited, thus rendering the PSR's confidence in it not merely optimistic, but largely unsubstantiated.

IV. THE CONSUMER STANDARD OF CAUTION EXCEPTION: VULNERABILITY IN PRACTICE

Under the APPRS, consumers may be denied reimbursement if they are found to have acted 'fraudulently' or with 'gross negligence', a principle known as the 'CSCE'.⁵⁸ However, this exclusion does not apply to consumers deemed 'vulnerable'.⁵⁹ To meet the standard of caution, consumers are expected to:

1. Respond appropriately to warnings issued by their PSP or relevant authorities regarding the risk of fraud;
2. Report the incident promptly upon acquiring actual or constructive knowledge of the fraud (no later than 13 months after the payment was made);
3. Cooperate with reasonable and proportionate information requests, and where prompted;
4. Either consent to their PSP filing a police report or file one themselves.⁶⁰

⁵⁵ Letter from James Dipple-Johnstone to Dame Meg Hillier (13 March 2025) 4 <<https://committees.parliament.uk/publications/47242/documents/244869/default/>> accessed 1 September 2025.

⁵⁶ *ibid* 5.

⁵⁷ *ibid* 4.

⁵⁸ See PSR, 'Guidance: Authorised Push Payment Fraud Reimbursement: The Consumer Standard of Caution Exception Guidance' (December 2023) 2 <<https://www.psr.org.uk/media/as3a0xan/sr1-consumer-standard-of-caution-guidance-dec-2023.pdf>> accessed 1 September 2025.

⁵⁹ *ibid*.

⁶⁰ *ibid*.

Significantly, the onus rests on the PSP to demonstrate that a consumer has conducted themselves with gross negligence,⁶¹ defined by the PSR as a ‘significant degree of carelessness’.⁶² This high evidentiary threshold is a welcome consumer-facing protection, designed to incentivise PSPs to invest in their fraud prevention mechanisms.⁶³

Nonetheless, the practical application of the CSCE raises critical concerns, particularly surrounding the scope and interpretation of the vulnerability exception. The key issue lies in the operationalisation of vulnerability, namely whether the PSR’s guidance provides sufficient clarity to ensure fair and consistent treatment of vulnerable consumers by PSPs. Notably, the PSR has adopted the FCA’s operational definition of vulnerability, whereby a vulnerable customer is characterised as ‘[s]omeone who, due to their personal circumstances, is especially susceptible to harm – particularly when a firm is not acting with appropriate levels of care’.⁶⁴ Furthermore, the definition is substantiated by four core characteristics: (a) health conditions that impair one’s ability to engage in day-to-day activities; (b) debilitating life events (for example, bereavement, unemployment, or relationship breakdown); (c) low emotional or financial resilience; and (d) limited capability (for example, poor financial or digital literacy).⁶⁵

Thus, the FCA’s framework is both comprehensive and consumer-oriented, thereby rendering it well suited for application within the APPRS. However, the PSR’s accompanying guidance has stated that PSPs ‘should’ examine each consumer’s circumstances on a case-by-case basis to gauge the extent to which their particular characteristics, whether tentative or enduring, led them to be defrauded.⁶⁶ Of even greater concern is the PSR’s failure to provide any further guidance on how PSPs should assess vulnerability in a way that avoids discriminatory or inconsistent outcomes. Crucially, it offers no further detail on which characteristics increase susceptibility to fraud or how these should be weighed in PSPs’ assessments. This omission introduces an elusive degree of discretion, granting PSPs significant interpretive latitude in determining who qualifies for protection, and potentially leading to inconsistent outcomes.

Notably, previous examples demonstrate that detailed regulatory guidance has enhanced the industry’s understanding of how vulnerable consumers should be identified and supported. In 2021, the FCA issued specific and actionable guidelines on the treatment of vulnerable customers,⁶⁷ protections that are now reinforced by the obligations introduced under the newly-instituted Consumer Duty.⁶⁸ According to the FCA’s post-implementation evaluations, the guidance has positively influenced firms’ engagement with vulnerable consumers. In particular, firms praised the ‘clarity’ of the guidance, especially its articulation of the drivers

⁶¹ *ibid* 3.

⁶² *ibid*.

⁶³ PSR, ‘Policy Statement PS23/4’ (n 7) 28.

⁶⁴ *ibid* 37 (emphasis removed).

⁶⁵ FCA, ‘Finalised Guidance: FG21/1 Guidance for Firms on the Fair Treatment of Vulnerable Customers’ (February 2021) 9 <<https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf>> accessed 1 September 2025. According to the FCA, 52 per cent of UK adults fall within at least one of these categories, thus reinforcing the breadth and relevance of this definition: see FCA, ‘Financial Lives 2022: Key Findings from the FCA’s Financial Lives May 2022 Survey’ (26 July 2023) 90 <<https://www.fca.org.uk/publication/financial-lives/financial-lives-survey-2022-key-findings.pdf>> accessed 31 August 2025.

⁶⁶ PSR, ‘Policy Statement PS23/4’ (n 7) 37.

⁶⁷ See FCA, ‘Finalised Guidance’ (n 65).

⁶⁸ FCA, ‘Firms’ Treatment of Customers in Vulnerable Circumstances – Review’ (*Financial Conduct Authority*, 7 March 2025) <<https://www.fca.org.uk/publications/multi-firm-reviews/firms-treatment-vulnerable-customers>> accessed 1 September 2025.

and characteristics of vulnerability, reporting that it meaningfully improved their ability to deliver appropriate support.⁶⁹ Moreover, the FCA's evaluations note that the guidance has contributed to cultural shifts within firms, fostering greater awareness of, and sensitivity to, consumer vulnerability.⁷⁰ This conclusion remains the FCA's own and should not be taken to represent the views of the industry as a whole. Nonetheless, the finding has been extrapolated from a multi-firm survey of 725 respondents, thus lending it a degree of empirical legitimacy.⁷¹ By contrast, the PSR, having neglected to provide binding criteria for assessing vulnerability, has effectively delegated interpretive control to PSPs, the very institutions with a vested interest in limiting liability. This imbalance contradicts the consumer-centric principles underpinning the FCA's vulnerability framework⁷² and creates scope for arbitrary or inconsistent decision-making, thereby casting doubt on the adequacy of the current regulatory regime.

V. A CROSS-JURISDICTIONAL CASE STUDY

In addition to reforms introduced under the FSMA 2023, new UK legislation has empowered PSPs to delay the execution of outbound payments where there are legitimate grounds for suspicion of fraud. Under the prior framework, governed by regulation 86(1) of the Payment Services Regulations 2017, a payee's PSP was obliged to credit the payment amount to the recipient's account by the close of the next business day, following receipt of the payment order.⁷³ While this regime unequivocally enhanced transactional expediency, it arguably did so at the expense of consumer protection and institutional accountability, thus reinforcing a paradigm of automaticity that left limited scope for intervention in the face of suspected fraud. To remedy this gap, the Payment Services (Amendment) Regulations 2024 provided PSPs with an *ex ante* right of intervention, allowing them to delay crediting the relevant amount where there are 'reasonable grounds to suspect a payment order... has been placed subsequent to fraud or dishonesty perpetrated by a person other than the payer'.⁷⁴ The execution of the order may be deferred for four business days,⁷⁵ where the delay must serve the specific purpose of enabling the PSP to contact the payer or an appropriate third party to ascertain whether the order ought to be fulfilled.⁷⁶ This initiative marks a welcome shift towards a more preventative regulatory posture, one that recognises the importance of disrupting fraud prior to its materialisation, rather than relying solely on mechanisms of retrospective redress.

With that being said, the measure remains a narrowly framed tool within a largely reactive framework. Moreover, as industry stakeholders have contended, it may be unjust to expect financial institutions to bear sole responsibility for consumer reimbursement where

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² See FCA, 'Finalised Guidance' (n 65) 3, which states the FCA's stated objective as follows: 'Ensuring consumers have an appropriate degree of protection is central to what the FCA does. This includes protecting vulnerable consumers. We want vulnerable consumers to experience outcomes as good as those for other consumers and receive consistently fair treatment across the firms and sectors we regulate.'

⁷³ Payment Services Regulations 2017, SI 2017/752 ('PSRs 2017'), reg 86(1).

⁷⁴ *ibid* reg 86(2A)(a), inserted by the Payment Services (Amendment) Regulations 2024, SI 2024/1013 ('PSAR 2024'), reg 2(4)(b).

⁷⁵ PSRs 2017, reg 86(2C), inserted by PSAR 2024, reg 2(4)(b).

⁷⁶ PSRs 2017, reg 86(2B), inserted by PSAR 2024, reg 2(4)(b).

the fraudulent transactions originated on online platforms, search engines, or telecommunications networks.⁷⁷ This concern is empirically grounded: according to UK Finance, 76 per cent of fraud cases now originate online.⁷⁸ Why, then, are other corporate facilitators not being held accountable? A notable point of contrast may be drawn from Australia's emerging WOE approach,⁷⁹ internationally recognised for its emphasis on coordinated prevention, shared responsibility, and systemic intelligence-sharing.⁸⁰ As Anna Bligh, the CEO of the Australian Banking Association, has emphasised, a truly robust approach towards consumer protection must engage more deeply with how victims become victimised in the first place.⁸¹

For the purposes of the subsequent analysis, Australia has been selected as the principal comparator. This choice is attributable, not to the relative sophistication of its financial services sector, where a jurisdiction like Singapore might appear to be the more obvious candidate, but rather to the breadth and structural sophistication of Australia's Scams Prevention Framework ('SPF'). Unlike Singapore's Shared Responsibility Framework ('SRF'), which is articulated only through regulatory Guidelines (administered by the Monetary Authority of Singapore and the Infocomm Media Development Authority) and applicable only to financial institutions and telecommunications providers,⁸² the SPF retains its footing in statute⁸³ and is universally applicable across the Australian regulated economy.⁸⁴ Moreover, whereas the SRF targets primarily 'phishing scams'⁸⁵ and excludes APP fraud on the basis that it involves consumer authorisation,⁸⁶ the SPF expressly captures APP fraud within its broader regulatory design.⁸⁷ On the aforesaid premises, the Australian model represents the most analytically rich and practically instructive comparator for UK policymakers.

Central to Australia's strategy is the National Anti-Scam Centre ('NASC'), a government-led body launched in July 2023. It brings together public and private stakeholders, including PSPs, law enforcement agencies, telecommunications providers, and digital platforms

⁷⁷ The Payments Association, 'Faster Payments APP Scams: Changing the Maximum Level of Reimbursement: Response from the Payments Association' (September 2024) 5 <<https://thepaymentsassociation.org/wp-content/uploads/sites/7/2024/09/TPA-Response-to-PSR-CP24-11-V4-0-FINAL.pdf>> accessed 1 September 2025.

⁷⁸ UK Finance, 'Annual Fraud Report' (n 26) 21.

⁷⁹ Australian Government Treasury, 'Scams Prevention Framework: Summary of Reforms' (September 2024) 4 <<https://treasury.gov.au/sites/default/files/2024-09/c2024-573813-summary.pdf>> accessed 1 September 2025.

⁸⁰ The Payments Association, 'The Impact of APP Fraud' (n 11) 31.

⁸¹ Anna Bligh, 'Why Australian Banks Are Better at Stopping Scammers Than British Banks' *The Age* (24 August 2024) <<https://www.theage.com.au/national/why-australian-banks-are-better-at-stopping-scammers-than-british-banks-20240821-p5k443.html>> accessed 1 September 2025.

⁸² See Monetary Authority of Singapore and Infocomm Media Development Authority, 'Guidelines on Shared Responsibility Framework' (2024) 1 <<https://www.mas.gov.sg/-/media/mas-media-library/regulation/guidelines/psa/guidelines-on-shared-responsibility-framework/guidelines-on-shared-responsibility-framework.pdf>> accessed 31 August 2025.

⁸³ See Scams Prevention Framework Bill 2025 (Cth).

⁸⁴ Claudine Salamieh and Tamsyn Sharpe, 'Combating Scams in Australia, Singapore, China and Hong Kong' (*K&L GATES*, 17 April 2025) <<https://www.klgates.com/Combating-Scams-in-Australia-Singapore-China-and-Hong-Kong-4-17-2025>> accessed 31 August 2025.

⁸⁵ 'Combating Scams' (*Monetary Authority of Singapore*) <<https://www.mas.gov.sg/regulation/combating-scams>> accessed 30 August 2025. The Monetary Authority of Singapore defines a 'phishing scam' as 'a way of obtaining sensitive personal information such as one's banking account details, PIN, one-time passwords (OTP), credit card number, user ID or password through the Internet, in order to perform unauthorised banking transactions': Monetary Authority of Singapore, 'Annex B' <<https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Press-Releases/Annex-B-Tips-to-guard-against-phishing-activities.pdf>> accessed 30 August 2025.

⁸⁶ Monetary Authority of Singapore and Infocomm Media Development Authority (n 82) 1, 4. For a detailed overview of the respective fraud typologies captured by the Singaporean SRF and the Australian SPF, see further nn 82, 85 above.

⁸⁷ Australian Government Treasury, 'Scams Prevention Framework: Protecting Australians from Scams' (January 2025) 3 <<https://treasury.gov.au/sites/default/files/2025-01/p2025-623966.pdf>> accessed 1 September 2025.

within a unified scam prevention infrastructure.⁸⁸ Central to the Australian model is the view that fraud prevention is a collective responsibility throughout the scam lifecycle.⁸⁹ Rather than placing the burden exclusively on consumers or financial institutions, it imposes minimum obligations and potential liabilities on all relevant parties, acknowledging that scams are facilitated by an interconnected network of digital, financial, and communicative enablers.⁹⁰ For instance, Australian regulators have enforced the ‘Reducing Scam Calls and Scam Short Messages (SMs) Code’, which obliges telecommunications providers to take reasonable steps to detect and block scam communications.⁹¹ Since its implementation, 2.3 billion scam calls and 857.4 million fraudulent messages have been blocked.⁹² While UK regulation allows PSPs to delay payments on suspicion of fraud, Australia mandates cross-sectorial, intelligence-led responses, allowing for real-time data-sharing and malicious website takedowns.⁹³ Within its first year, the NASC has removed over 7,300 scam-linked domains.⁹⁴

Moreover, the Australian legislature has taken concrete steps to codify the WOE model into law, offering valuable lessons for UK policymakers. On 13 February 2025, the Federal Parliament passed the Scams Prevention Framework Bill 2025,⁹⁵ which established an overarching regulatory structure applicable across sectors. The Australian Competition and Consumer Commission will spearhead its implementation,⁹⁶ with the authority to impose either economy-wide ‘overarching principles’ or targeted ‘sector-specific codes’ on regulated industries.⁹⁷ These instruments will pursue the core objectives of preventing, detecting, and disrupting fraud, while also ensuring that it is adequately responded to and reported.⁹⁸ Sector-specific codes will outline minimum, industry-specific compliance obligations⁹⁹ and are initially expected to be applied to telecommunications, banking, digital platforms (including social media), search engines, and direct messaging services.¹⁰⁰ However, the SPF is an innately ‘adaptable’ and ‘responsive’ tool.¹⁰¹ Its ‘adaptability’ is operationalised through the discretionary powers conferred upon the Treasury Minister, who may designate additional sectors as regulated where necessary, ensuring that no actor within the fraud-enabling ecosystem can evade regulatory accountability.¹⁰² In this manner, the SPF enables regulatory protections to

⁸⁸ Australian Government Treasury, ‘Scams – Mandatory Industry Codes (Consultation paper)’ (November 2023) 4 <<https://treasury.gov.au/sites/default/files/2023-11/c2023-464732-cp.pdf>> accessed 1 September 2025.

⁸⁹ *ibid* 6.

⁹⁰ *ibid* 4.

⁹¹ *ibid* 6 (emphasis removed).

⁹² ‘Action on Scams, Spam and Telemarketing: October to December 2024’ (*Australian Communications and Media Authority*) <<https://www.acma.gov.au/publications/2025-02/report/action-scams-spam-and-telemarketing-october-december-2024>> accessed 1 September 2025.

⁹³ Australian Government Treasury, ‘Consultation paper’ (n 88) 12.

⁹⁴ ‘Online Investment Trading Scams Top ASIC’s Website Takedown Action’ (*ASIC*, 19 August 2024) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-180mr-online-investment-trading-scams-top-asic-s-website-takedown-action/>> accessed 1 September 2025.

⁹⁵ Scams Prevention Framework Bill (n 83).

⁹⁶ Revised Explanatory Memorandum to the Scams Prevention Framework Bill 2024 (Cth) 8.

⁹⁷ *ibid* 3.

⁹⁸ *ibid* 8.

⁹⁹ *ibid* 8.

¹⁰⁰ *ibid* 5.

¹⁰¹ *ibid*.

¹⁰² *ibid* 9.

adapt alongside the fast-paced, fluid nature of financial crime, with its coverage evolving synchronously with the emergence of new fraud typologies.¹⁰³

Beyond its operational tools, Australia's framework embodies a more progressive theory of accountability. Its comparative 'progressiveness' is primarily substantiated by its preventative orientation: rather than treating fraud as an inevitable harm to be remedied after the fact, the SPF embeds precautionary obligations into law, mandating the collective performance of shared duties across the ecosystem, and prioritising the early disruption of fraud over post hoc remediation. A second dimension of progressiveness is reflected in its redistribution of responsibility, whereby the focus is shifted away from fraud victims, asking not whether the consumer exhibited sufficient caution, but rather whether all firms within the ecosystem met established preventative standards.¹⁰⁴ This stands in sharp contrast to the UK's approach, which continues to invoke consumer responsibility, even in the face of complex, socially engineered crimes that knowingly exploit systemic vulnerabilities.¹⁰⁵ While there are legitimate constraints on replicating such a model in the UK, ranging from legal differences in data protection to questions of political will, the comparative insight remains invaluable.¹⁰⁶ The Australian framework exemplifies what a genuinely proactive, multisectoral response to APP fraud can achieve and offers a blueprint for embedding preventative obligations into the UK's financial crime strategy. If the overarching aim is to protect consumers in an evolving economy shaped by cross-sector vulnerabilities, the law must evolve beyond piecemeal and institutionally isolated deferral mechanisms and towards an integrated, intelligence-driven model of fraud prevention.

In the interests of a balanced analysis, it should be underscored that the Australian model is not without its own comparative deficiencies. Most notably, the SPF does not impose an overarching legal requirement to reimburse fraud victims.¹⁰⁷ Rather, the SPF establishes a comparatively narrow compensatory avenue, whereby consumers may seek compensation where regulated entities have not satisfied their obligations under the SPF and the consumer has consequently 'suffered a loss'.¹⁰⁸ To this end, regulated entities are required to maintain an 'internal dispute resolution' ('IDR') mechanism that is both 'accessible' and 'transparent', so as to allow businesses to resolve consumer complaints in a 'timely' and 'efficient' manner.¹⁰⁹ Where an entity finds that it did not meet its prescribed obligations, claims will either (i) be resolved and compensated at the IDR stage;¹¹⁰ or (ii) where said entity does not satisfactorily resolve the preliminary complaint, be referred to an independent 'external dispute resolution' service, at no added cost to the consumer;¹¹¹ or (iii) be resolved in court, with losses recovered

¹⁰³ *ibid* 5.

¹⁰⁴ George Iddenden, 'Crafting Security: Australia's Strategic Approach to Combatting Fraud' (*The Payments Association*, 7 June 2024) <<https://thepaymentsassociation.org/article/crafting-security-australias-strategic-approach-to-combatting-fraud/>> accessed 31 August 2025.

¹⁰⁵ Letter from Helen Charlton (15 September 2023) 2-4 <https://www.fca.org.uk/panels/consumer-panel/publication/20230912_final_fscp_response_-_psr_app_scam_mandatory_reimbursement_regime.pdf> accessed 31 August 2025.

¹⁰⁶ The Payments Association, 'The Impact of APP Fraud' (n 11) 32.

¹⁰⁷ Claudine Salameh and Tamsyn Sharpe, 'Combatting Scams in Australia and the United Kingdom' (*K&L GATES*, 19 February 2025) <<https://www.klgates.com/Combatting-Scams-in-Australia-and-the-United-Kingdom-2-19-2025>> accessed 31 August 2025.

¹⁰⁸ Australian Government Treasury, 'Protecting Australians from Scams' (n 87) 7.

¹⁰⁹ Revised Explanatory Memorandum (n 96) 55.

¹¹⁰ *ibid* 58.

¹¹¹ *ibid* 170.

by way of damages.¹¹² By contrast, the UK's APPRS presents a more comprehensive, consumer-facing fraud reimbursement model, wherein consumers are automatically entitled to compensation upon victimisation and the evidentiary burden rests, not on the consumer to demonstrate institutional non-compliance, but on the regulated entity to demonstrate the applicability of specified exceptions. Accordingly, this article does not purport to cast the Australian model as a structural prototype. Rather, it serves to highlight the critical significance of a preventative regulatory posture, offering lessons that might meaningfully inform the UK's future policy trajectory.¹¹³

Finally, it is also instructive to consider how UK law has already begun to experiment with prevention-based liability frameworks in adjacent contexts. The 'failure to prevent fraud' offence ('FTPFO') under the ECCTA 2023¹¹⁴ may be taken to illustrate how UK law is becoming increasingly receptive to the imposition of corporate liability for failure to prevent fraud. To be clear, the FTPFO does not directly target APP fraud, as the offences established by the ECCTA 2023 pursue a distinct legislative purpose. The FTPFO seeks to target organisations where persons 'associated with the body' commit a fraud offence with the intention of benefiting either the organisation itself¹¹⁵ or persons to whom the organisation provides its services.¹¹⁶ Significantly, the FTPFO's liability framework is not predicated upon actual or constructive knowledge by senior management: the offence applies even in the absence of board-level awareness.¹¹⁷ Instead, the inquiry hinges upon whether the organisation had in place 'such prevention procedures as it was reasonable in all the circumstances to expect the body to have',¹¹⁸ qualified only by section 199(4)(b), which excludes liability where no such procedures could reasonably have been expected.¹¹⁹ Notably, the FTPFO is also cross-sectoral in scope, operating as an economy-wide fraud management tool, rather than an industry-specific intervention mechanism. Thus, while the ECCTA 2023 does not specifically capture APP fraud, it is theoretically informative. The FTPFO exemplifies how Parliament has already embraced a model of liability grounded not in active wrongdoing, but in a corporate duty to prevent fraud, measured against the benchmark of 'reasonable procedures'.¹²⁰ In this light, APP fraud presents itself as a natural candidate for a comparable prevention-oriented duty, one that would serve the policy objective of compensating fraud victims while recognising the injustice of imposing disproportionate burdens on financial institutions for fraud facilitated by other corporate actors.

¹¹² *ibid* 102.

¹¹³ It may be noted that industry calls for such reforms have already long been underway. For further detail, see The Payments Association, 'Written Evidence Submitted by The Payments Association' (October 2023) <<https://committees.parliament.uk/writtenevidence/125940/pdf/>> accessed 1 September 2025.

¹¹⁴ The 'failure to prevent fraud' offence is set out in sections 199–206 and schedule 13 of the Economic Crime and Corporate Transparency Act 2023 ('ECCTA 2023').

¹¹⁵ *ibid* s 199(1)(a).

¹¹⁶ *ibid* s 199(1)(b).

¹¹⁷ Home Office, 'Economic Crime and Corporate Transparency Act 2023: Guidance to Organisations on the Offence of Failure to Prevent Fraud' (November 2024) 5 <<https://assets.publishing.service.gov.uk/media/67f8ef1845705eb1a1513f35/Failure+to+Prevent+Fraud+Guidance+-+English+Language+v1.6.pdf>> accessed 30 August 2025.

¹¹⁸ ECCTA 2023, s 199(4)(a).

¹¹⁹ *ibid* s 199(4)(b).

¹²⁰ For further detail on the definition and scope of 'reasonableness' in the context of prevention procedures under the FTPFO, see UK Finance, 'Failure to Prevent Fraud: Guidance for the Financial Services Sector' (February 2025) 15, 19–25 <<https://www.ukfinance.org.uk/system/files/2025-02/UK%20Finance%20Failure%20to%20Prevent%20Fraud%20industry%20guidance.pdf>> accessed 31 August 2025.

VI. CONCLUSION

In assessing the legal protection afforded to victims of APP scams in the UK, this article has demonstrated that, while the APPRS marks a commendable step forward when contrasted with the historical status quo, it remains a framework structured by omission. From arbitrary thresholds and institutional exclusions to under-defined vulnerability guidance, the APPRS frequently privileges institutional efficiency over the lived realities of fraud victims. Moreover, while recent amendments have introduced preventative measures, the broader framework continues to fall short of constituting a truly proactive, integrated fraud prevention regime. Nonetheless, the foregoing comparative analysis exhibits the availability of alternative models that reallocate liability from fraud victims to institutions that are better equipped to manage systemic risks. Australia's WOE approach and the UK's evolving willingness to engage with prevention-based liability frameworks under the ECCTA 2023 reflect a shared trajectory in this regard. The challenge for UK policymakers is therefore not conceptual, but practical. The legislative task ahead is to move beyond isolated, industry-specific interventions and towards an integrated solution in which strategic prevention, collective accountability, and consumer redress form part of a single regulatory framework.

Algorithmic Tacit Collusion: Addressing the Gaps in Article 101(1)(a) of the TFEU

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ABSTRACT

This article explores the emergent risk of algorithmic tacit collusion via supra-competitive price fixing and the challenges it poses to European Union (‘EU’) competition law under article 101(1)(a) of the Treaty on the Functioning of the European Union (‘TFEU’). With the proliferation of self-learning dynamic pricing algorithms operating on deep learning models, undertakings may unwittingly enable autonomous systems to coordinate prices without human input or explicit agreements. This ‘Digital Eye’ scenario—where algorithms independently identify collusion as a profit-maximising strategy—highlights a growing enforcement gap. The article critically examines whether such behaviour could fall within the definitions of ‘concerted practice’ and ‘by object’ restriction under existing legal doctrine, arguing for a purposive reinterpretation of article 101(1)(a) of the TFEU in the light of technological change. Furthermore, it assesses the legal accountability of both developers and users of collusive algorithms, proposing liability frameworks, including strict product liability, joint liability, and vicarious liability. Finally, it advocates for ex ante regulatory measures—such as algorithmic design constraints, mandatory audits, and compliance certifications—to future-proof competition law. The article contends that, unless proactive legal adaptation occurs, firms may exploit regulatory ambiguity to the detriment of fair market competition and consumer welfare in the Digital Internal Market.

Keywords: algorithms, competition law, price fixing, tacit collusion

I. INTRODUCTION

Artificial Intelligence (‘AI’)—a branch of science that develops computer programs aimed at performing tasks requiring human-like intelligence—has emerged as a transformative force, revolutionising market dynamics and competition enforcement mechanisms.¹ Algorithms—structured sequences of computational steps designed to transform input data into desired outputs—constitute the essence of AI.² Owing to their multifaceted manifestations, they wield significant influence in shaping the contemporary landscape of competition within the EU. A

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¹ Fathima Anjila PK, ‘Artificial Intelligence’, in J Karthikeyan, Ting Su Hie and Ng Yu Jin (eds), *Learning Outcomes of Classroom Research* (L’Ordine Nuovo Publication 2021) 65.

² Thomas H Cormen and others, *Introduction to Algorithms* (4th edn, MIT Press 2022) 5.

category of algorithms that is widely utilised by undertakings is pricing algorithms.³ Historically, *static* pricing algorithms,⁴ limited to a finite number of responses to specific situations and subject to change only following the coders' intervention, have long aided industries where demand fluctuates quicker than supply, such as the transport and hospitality industries.⁵ Nowadays, any industry takes advantage of pricing algorithms (specifically, *dynamic* pricing algorithms).⁶ These algorithms are designed to optimise an undertaking's market performance by dynamically (that is, *continuously* and *automatically*) adjusting prices based on various real-time factors such as demand, competitor pricing, and market conditions.⁷ Their purpose is to enhance profitability and competitiveness while adapting to fluctuations in the market landscape.⁸ As a result, they have become ubiquitous tools within the market (both offline and online), where small, medium, and large-sized undertakings leverage them to optimise their performance (through, for instance, profit maximisation).⁹

However, the way of achieving this objective may raise concerns about potential anti-competitive behaviour. This holds especially true for dynamic pricing algorithms operating on an unsupervised-learning paradigm, often dubbed 'autonomous' or 'self-learning' because of their ability *autonomously* to learn the optimal (that is, instantaneous and extremely accurate) method to achieve the objective for which they are initially programmed.¹⁰ In fact, unlike static algorithms, self-learning dynamic algorithms can autonomously, automatically, and continuously adjust to changes in their environment—particularly those functioning on a deep learning ('DL') model, which use multi-layered artificial neural networks that mimic human neurons and iteratively learn from the data they encounter.¹¹ As such, these algorithms decide *how* to perform tasks in unknown and evolving settings with no human instruction, after the initial programmed objective.¹²

Accordingly, they constitute a valuable tool for undertakings seeking to improve their market performance in a fast-changing environment,¹³ such as the EU Digital Internal Market. Nevertheless, these algorithms may autonomously learn that *collusion* via price fixing at a

³ For clarity, 'pricing algorithms' in this article refer solely to algorithms that establish an output price. Other algorithms related to prices but performing different tasks, such as price tracking or price personalisation, are not included.

⁴ These algorithms are also referred to as 'heuristic' or 'expert': see for example Michal S Gal, 'Algorithms as Illegal Agreements' (2019) 34 Berkeley Technology Law Journal 68, 78; Oxera, 'When Algorithms Set Prices: Winners and Losers' (19 June 2017) 5 <https://www.regulation.org.uk/library/2017-Oxera-When_algorithms_set_prices-winners_and_losers.pdf> accessed 7 May 2024.

⁵ Philip Hanspach and Nicolò Galli, 'Collusion by Pricing Algorithms in Competition Law and Economics' (2024) EUI RSC Working Paper 2024/06, 7–9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4732527> accessed 13 April 2024.

⁶ *ibid.*

⁷ Valeria Caforio, 'Algorithmic Tacit Collusion: A Regulatory Approach' (2023) 15 Competition Law Review 9, 11–14.

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ See OECD, 'Algorithmic Competition: OECD Competition Policy Roundtable Background Note' (OECD, 2023) 9 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/05/algorithmic-competition_2be02d00/cb3b2075-en.pdf> accessed 12 April 2024. See also Rahil Mammadov, 'The Rising Role of Pricing Algorithms: Positive and Negative Effects in the Framework of EU Competition Law' (Master's thesis, Lund University 2022) 9 <<https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=9080831&fileId=9086028>> accessed 12 April 2024.

¹² See for example Caforio (n 7); Hanspach and Galli (n 5) 7–8.

¹³ Hanspach and Galli (n 5) 7–8.

supra-competitive level is the optimal means to achieve the profit maximisation goal.¹⁴ Such a phenomenon can be labelled as algorithmic *tacit* collusion via price fixing (also referred to as ‘machine-to-machine cooperation’ or ‘algorithmic interdependent pricing’¹⁵). In fact, contrary to algorithmic *explicit* collusion, where algorithms are employed as facilitators, strengtheners, and enablers of human collusion, algorithmic tacit collusion occurs without any human involvement or reciprocal interaction.¹⁶ Notably, the legal standard for collusion via price fixing, corresponding to the formation of a ‘cartel’,¹⁷ entails any coordination between competing undertakings—achieved via an ‘agreement’ or ‘concerted practice’—to raise,¹⁸ lower, or stabilise prices, or competitive terms.¹⁹ Pursuant to article 101(1)(a) of the TFEU,²⁰ such conduct is expressly prohibited, as it is considered inherently detrimental to competition and devoid of any outweighing efficiencies.²¹ Within the EU Digital Internal Market, pricing algorithms are extensively utilised. For instance, in a 2017 inquiry by the EU Commission into the e-commerce sector, 53 per cent of respondent retailers reported tracking online prices of competitors.²² Among these, 67 per cent stated their use of automatic software programs for this purpose and as part of their operational strategies.²³ Furthermore, remarkably, the Court of Justice of the European Union (‘CJEU’) has already acknowledged and addressed the concern of anti-competitive behaviour facilitated *through* the use of pricing algorithms in the *AC-Treuhand AG v Commission*²⁴ and *‘Eturas’ UAB v Lietuvos Respublikos konkurencijos taryba (‘Eturas’)*²⁵ rulings.

However, at present, there are no documented cases of algorithmic tacit collusion, where self-learning dynamic pricing algorithms, operating on a DL model, engage *by themselves* in collusion via supra-competitive price fixing. Nevertheless, numerous scholars and policymakers suggest that such instances may occur in the future. From an enforcement perspective, this new theory of harm (that is, a framework to conceptualise and describe the

¹⁴ See for example *ibid* 17; Sophie Devogele, ‘Algorithmic Tacit Collusion: A Threat to the Current EU Competition Law Framework?’ (LLM thesis, Tilburg University 2023) 2–3 <<https://mededingingscongres.nl/wp-content/uploads/2023/10/Thesis-final-version-PDF.pdf>> accessed 23 April 2024. For clarity, in the light of the evidence and academic sources currently available, this article focuses solely on horizontal price fixing (that is, between competing undertakings) at supra-competitive levels. However, the possibility of vertical anti-competitive conduct by self-learning algorithms or low-level price fixing achieving other programmed objectives, should not be dismissed outright.

¹⁵ Caforio (n 7) 10.

¹⁶ *ibid*.

¹⁷ Alison Jones, Brenda Sufrin and Niamh Dunne, Jones & Sufrin’s *EU Competition Law: Text, Cases, and Materials* (8th edn, OUP 2023) 670–71; OECD, ‘Recommendation of the Council Concerning Effective Action against Hard Core Cartels’ (25 March 1998) 3 <[https://one.oecd.org/document/C\(98\)35/FINAL/en/pdf/](https://one.oecd.org/document/C(98)35/FINAL/en/pdf/)> accessed 20 May 2024.

¹⁸ Empirical studies indicate that cartel pricing typically exceeds competitive levels by more than 10 per cent and sometimes in excess of 20 per cent: see Jones, Sufrin and Dunne (n 17) 660.

¹⁹ See for example Ioannis Kokkoris and Claudia Lemus, ‘Price-Fixing Agreement’ (*Concurrences*) <<https://www.concurrences.com/en/dictionary/price-fixing-agreement>> accessed 5 May 2024; Jones, Sufrin and Dunne (n 17) 671–74.

²⁰ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/1 (‘TFEU’).

²¹ Jones, Sufrin and Dunne (n 17).

²² European Commission, ‘Commission Staff Working Document Accompanying the Document: Report from the Commission to the Council and the European Parliament, Final Report on the E-commerce Sector Inquiry’, SWD (2017) 154 final, para 149; Jones, Sufrin and Dunne (n 17) 687; Tobias Werner, ‘Algorithmic and Human Collusion’ (2023) DICE Discussion Paper No 372, 1 <<https://www.econstor.eu/bitstream/10419/246229/1/1777327733.pdf>> accessed 13 April 2023.

²³ European Commission, ‘Commission Staff Working Document’ (n 22).

²⁴ Case C-194/14 P *AC-Treuhand AG v Commission*, EU:C:2015:717.

²⁵ Case C-74/14 *‘Eturas’ UAB v Lietuvos Respublikos konkurencijos taryba*, EU:C:2016:42.

harm stemming from specific types of conduct in a market²⁶), coined as the ‘Digital Eye’ by Ariel Ezrachi and Maurice Stucke, presents notable tiers of *legal uncertainty* under EU competition law.²⁷

Indeed, first of all, algorithmic tacit collusion represents a resurgence of the ‘oligopoly problem’, wherein tacit collusion evades formal condemnation under article 101(1) of the TFEU, which exclusively addresses explicit collusion.²⁸ This exemption is due to (i) the risk of erroneously penalising an actual parallel conduct and (ii) the infrequency of such scenarios in practical application.²⁹ Thus, if algorithmic tacit collusion materialises, it is uncertain whether it would fall within the scope of article 101(1). Secondly, there is ambiguity surrounding whether algorithmic tacit collusion via supra-competitive price fixing would be categorised as an ‘agreement’ or as a ‘concerted practice’ under article 101(1) of the TFEU. Thirdly, another question arises as to whether such conduct would be classified as a restriction ‘by object’ under article 101(1)(a). Fourthly, uncertainty remains about who should be held accountable and how liability should be determined for potential violations of competition law.

If, or when, algorithmic tacit collusion via supra-competitive price fixing materialises, the challenges to legal certainty that have been outlined above will significantly impede the enforcement of article 101(1)(a) of the TFEU, potentially creating an exploitable legal loophole for competing undertakings. Therefore, proactive measures must be taken ex ante to address these uncertainties and safeguard competition. In the light of this background, this article seeks to answer the following questions: first, could article 101(1)(a) of the TFEU catch algorithmic tacit collusion via supra-competitive price fixing and, if so, how? And, secondly, what ex ante measures could be implemented to address the legal uncertainty arising from the materialisation of the ‘Digital Eye’?

II. ALGORITHMIC (TACIT) COLLUSION: A NARRATIVE

This section examines how pricing algorithms have evolved and how they are increasingly implicated in anti-competitive conduct, which sets the stage for understanding the emerging risk of algorithmic tacit collusion in EU competition law under article 101(1)(a) of the TFEU.

A. PRICING ALGORITHMS: EVOLUTION AND FUNCTIONING

Since the inception of computer science technology in the 1940s, algorithms have been integral in performing diverse computational tasks, encompassing mathematical calculations, as well as sorting and searching operations. Importantly, the advent of the Internet in the 1990s, and the proliferation of AI, marked a pivotal juncture in the evolution of algorithms: the proliferation of digital markets catalysed the development of pricing algorithms, which utilise prices as inputs and employ computational methodologies to determine optimal pricing outputs to, for instance, maximise a firm’s profit.³⁰

²⁶ Marios C Iacovides, *The Law and Economics of WTO Law: A Comparison with EU Competition Law’s ‘More Economic Approach’* (Edward Elgar Publishing 2021) 122–41.

²⁷ Ariel Ezrachi and Maurice E Stucke, ‘Artificial Intelligence & Collusion: When Computers Inhibit Competition’ (2017) 2017 University of Illinois Law Review 1775, 1795.

²⁸ Jones, Sufirin and Dunne (n 17) 669.

²⁹ Caforio (n 7) 12.

³⁰ Manmadow (n 11) 14–15.

The most transformative step has been the emergence of *self-learning dynamic pricing algorithms*, operating on DL models. These systems process vast, multidimensional datasets through artificial neural networks that mimic human neurons, enabling them to select, process, and predict outcomes at a speed and precision beyond human capacity.³¹ Input data may derive from both internal firm information (production costs, inventories, orders) and external real-time factors (competitors' prices, demand fluctuations, consumer behaviour).³² Crucially, once programmed with the single objective of profit maximisation, these algorithms continuously adjust their outputs in real time without further human intervention.³³ Their unilateral and autonomous nature raises acute concerns under EU competition law. By replacing human decision-makers, DL pricing algorithms may independently discover that supra-competitive price fixing is the most effective strategy to achieve their objective.³⁴ Scholars warn that such collusion can arise significantly faster than human coordination, narrowing the scope for detection or intervention.³⁵ The risks are exacerbated by the 'black box' opacity of DL: programmers cannot retrace or predict the decision-making process, making it impossible to know whether a supra-competitive outcome results from lawful parallel conduct or from algorithmic tacit collusion.³⁶

B. ANTI-COMPETITIVE USE OF PRICING ALGORITHMS

The increasing reliance on pricing algorithms has prompted concern that such tools may facilitate collusion in novel ways. The literature identifies four principal theories of harm: the 'Messenger', the 'Hub and Spoke', the 'Predictable Agent', and the 'Digital Eye'.³⁷ While the first three theories already find support in enforcement practice, the 'Digital Eye' remains hypothetical, underscoring an unresolved gap in the scope of article 101(1)(a) of the TFEU.

The 'Messenger' theory describes a situation where algorithms are deployed to stabilise or reinforce an existing cartel agreement. In these cases, the software is deliberately programmed to monitor rivals and adjust prices in line with collusive strategies.³⁸ A leading example is the *Online Sales of Posters and Frames* decision of the UK's Competition and Markets Authority, in which two online poster sellers used pricing algorithms to maintain pre-agreed prices on the Amazon marketplace, thereby avoiding undercutting each other.³⁹ Similarly, in 2020 the Spanish National Commission for Markets and Competition opened proceedings against several real estate platforms on the basis that algorithms embedded in

³¹ See for example *ibid*; OECD, 'Algorithmic Competition' (n 11) 6–9.

³² Autorité de la Concurrence and Bundeskartellamt, 'Algorithms and Competition' (November 2019) 9 <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf?__blob=publicationFile&v=3> accessed 28 April 2024.

³³ In fact, these algorithms are also referred to as 'repricing' algorithms: see Hanspach and Galli (n 5).

³⁴ See for example Caforio (n 7) 9–13; *ibid* 7–9; Devogele (n 14).

³⁵ Matthias Hettich, 'Algorithmic Collusion: Insights from Deep Learning' (24 November 2021) 1 <<http://dx.doi.org/10.2139/ssrn.3785966>> accessed 25 May 2024.

³⁶ Caforio (n 7) 14.

³⁷ Ariel Ezrachi and Maurice E. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press 2016) 35–71.

³⁸ *ibid*.

³⁹ CMA Infringement Decision, *Online Sales of Posters and Frames* (Case 50223, 12 August 2016) paras 1.3, 3.46, 3.62–3.93 <<https://assets.publishing.service.gov.uk/media/57ec7c2740f0b606dc000018/case-50223-final-non-confidential-infringement-decision.pdf>> accessed 25 May 2024.

brokerage software aligned agents' pricing and sales terms.⁴⁰ Both instances illustrate that algorithms can serve as the operational tool for explicit collusion. The legal significance of such cases lies in confirming that algorithmic implementation of cartels does not alter their legal character: they remain agreements or concerted practices prohibited by article 101 of the TFEU.

The 'Hub and Spoke' theory arises where a central platform or intermediary employs algorithms to coordinate the behaviour of otherwise competing undertakings.⁴¹ The jurisprudence of the CJEU already provides a doctrinal basis for facilitator liability. In *AC-Treuhand*, the court held that a consultancy that actively contributed to the organisation of cartel meetings and the monitoring of collusive arrangements could itself be liable under article 101 of the TFEU.⁴² Although not directly concerning algorithms, the reasoning has clear implications for digital platforms. National authorities have extended this principle: the Danish Competition and Consumer Authority found that the platform, Ageras, infringed national competition law by supplying 'estimated market prices' and 'minimum quotes' to service providers,⁴³ while the Romanian Competition Council expressed concern in 2020 that ride-hailing platforms' pricing algorithms could facilitate collusion.⁴⁴ These cases illustrate that the role of digital intermediaries in orchestrating anti-competitive outcomes is not peripheral, but central, and that liability may attach where their algorithmic tools function as a coordinating hub.

Under the 'Predictable Agent' theory, collusion is enabled not by direct communication but by the transparency and predictability that algorithms create. By encoding pricing strategies or revealing rivals' intentions, algorithms reduce market uncertainty and facilitate convergence.⁴⁵ The *Eturas* ruling is the paradigmatic instance of this.⁴⁶ Here, an online booking platform imposed a uniform cap on discounts through its internal messaging system and technical restrictions in its software. The CJEU held that travel agencies could be presumed to have been aware of the restriction and were therefore liable under article 101 of the TFEU.⁴⁷ More recently, in 2022, the Italian Competition Authority investigated abnormal convergence of airline ticket prices on routes to Sicily, noting that algorithms may have facilitated supra-competitive pricing.⁴⁸ These examples underscore that, even where explicit agreement is absent, the technical design of algorithms may create functional equivalence to collusion by stabilising expectations and reducing incentives to compete.

⁴⁰ National Commission for Markets and Competition, 'The CNMC Opens Antitrust Proceedings against Seven Firms for Suspected Price Coordination in the Real Estate Intermediation Market' (19 February 2020) <[https://www.cnmc.es/sites/default/files/editor_contenidos/Notas de prensa/2020/2020219 NP Intermediation Market EN.pdf](https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/2020219_NP_Intermediation_Market_EN.pdf)> accessed 14 April 2024.

⁴¹ Ezrachi and Stucke, 'Artificial Intelligence' (n 27).

⁴² *AC-Treuhand* (n 24) paras 36–39.

⁴³ 'Danish Competition Council: Ageras Has Infringed Competition Law' (*Danish Competition and Consumer Authority*, 30 June 2020) <<https://en.kfst.dk/nyheder/kfst/english/decisions/20200630-danish-competition-council-ageras-has-infringed-competition-law>> accessed 25 May 2024.

⁴⁴ See Sheng Li, Claire Chunying Xie and Emilie Feyler, 'Algorithms & Antitrust: An Overview of EU and National Case Law' (Concurrences, 7 October 2021) <<https://www.concurrences.com/en/bulletin/special-issues/algorithms-competition/algorithms-antitrust-an-overview-of-eu-and-national-case-law>> accessed 25 May 2024.

⁴⁵ *AC-Treuhand* (n 24) paras 36–39.

⁴⁶ *Eturas* (n 25) paras 19–21.

⁴⁷ *ibid.*

⁴⁸ Provvedimento n 30408, *Prezzo Biglietti Aerei da e per la Sicilia nel Periodo Natalizio* (Case I863, 20 December 2022) <[https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/EA131DE0E183BC70C1258925004D308C/\\$File/p30408.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/EA131DE0E183BC70C1258925004D308C/$File/p30408.pdf)> accessed 25 May 2024.

The final theory of harm, the ‘Digital Eye’, is qualitatively distinct. It envisages a scenario of algorithmic tacit collusion in which undertakings independently deploy self-learning, dynamic pricing algorithms that, when exposed to similar data sets and optimisation objectives, autonomously converge on supra-competitive outcomes.⁴⁹ Unlike the first three theories, no human communication or intentional coordination is required: collusion arises from the interaction of algorithms themselves. To date, no EU or national authority has sanctioned conduct under this model. The absence of precedent is itself significant. Whereas ‘Messenger’, ‘Hub and Spoke’, and ‘Predictable Agent’ scenarios can be accommodated within the existing framework of article 101 of the TFEU as explicit collusion, the ‘Digital Eye’ resists classification because it lacks the element of agreement or concerted practice that is traditionally required. This gap points to a pressing enforcement challenge: if algorithmic tacit collusion materialises in practice, the current legal framework may be inadequate to address it.

III. ALGORITHMIC TACIT COLLUSION VIA PRICE FIXING UNDER ARTICLE 101(1)(A) OF THE TFEU

This section explores how algorithmic tacit collusion, particularly through supra-competitive price fixing, may be brought within the scope of article 101(1) of the TFEU. It examines, first, whether such practices can be understood as a ‘concerted practice’ when interpreted in the light of technological developments, and secondly, whether they may be categorised as restrictions *by object* through analogy with traditional price fixing. In doing so, the analysis highlights the risk of an enforcement gap if algorithmic tacit collusion were excluded, especially given its potential to emerge beyond oligopolistic markets and in increasingly digitalised settings.

Within the EU legal framework, the arsenal *par excellence* that prohibits collusion via supra-competitive price fixing is article 101(1)(a) of the TFEU. This article prohibits ‘all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market’.⁵⁰ Remarkably, the notion of ‘undertaking’ is broadly interpreted and it encompasses any entity that is engaged in an economic activity, regardless of its legal status and the way it is financed.⁵¹

On the one hand, an ‘agreement’ does not necessarily require formalisation to be recognised under article 101(1)(a) of the TFEU. In fact, to encompass a broad spectrum of agreements, the *ACF Chemiefarma NV v Commission* (‘*Quinine Cartel*’)⁵² ruling clarified that informal arrangements are also subject to scrutiny.⁵³ Furthermore, an agreement is deemed to exist regardless of its formality, whether oral or written, and irrespective of its legal enforceability or absence of provisions for non-compliance.⁵⁴ However, in order to fall under the purview of article 101(1) of the TFEU, the agreement requires the concurrence of wills—expressed through the attainment of consensus on a common, defined, and precise plan—

⁴⁹ Ezrachi and Stucke, ‘Artificial Intelligence’ (n 27).

⁵⁰ TFEU, art 101(1). In the light of this article’s focus on collusion between two or more undertakings, the requirement of ‘decisions by associations of undertakings’ will not be examined.

⁵¹ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, para 21.

⁵² Case 41-69 *ACF Chemiefarma NV v Commission* [1970] ECR 661.

⁵³ *ibid* paras 110–24.

⁵⁴ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (7th edn, OUP 2020) 1038.

between two or more parties, as distinct from unilateral measures, dictating their conduct within the market in a prescribed manner, whether in action or abstention.⁵⁵ The precise form of this concurrence is not important if it constitutes the faithful expression of the parties' intentions.⁵⁶ Unilateral measures do not therefore suffice; however, an agreement can be deduced from a party's conduct if the manifestation of the wish of one contracting party to achieve an anti-competitive goal serves as an invitation to the other party, either explicitly or implicitly, to pursue that goal together.⁵⁷

On the other hand, the notion of 'concerted practice' aims to forestall situations where entities collaborate in ways that fall short of an agreement, which may otherwise circumvent the application of article 101(1) of the TFEU.⁵⁸ This concept has been elaborated upon in seminal cases such as *Imperial Chemical Industries Ltd v Commission*,⁵⁹ which ruled that the purpose of the term was to preclude 'coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'.⁶⁰ Additionally, *Coöperatieve Vereniging 'Suiker Unie' UA v Commission*⁶¹ clarified that a 'concerted practice' does not necessitate the 'working out of an actual plan' but rather encompasses any 'direct or indirect' contact—a *mental consensus*⁶²—between undertakings aimed at influencing the behaviour of competitors or disclosing intended market strategies.⁶³ It is governed by a presumption that such a practice will be enacted while these undertakings remain active on the market.⁶⁴ Consequently, although a 'concerted practice' requires reciprocal cooperation between the parties,⁶⁵ it is not necessary to demonstrate a 'meeting of minds' or a 'common course of conduct', nor does the consensus need to be reached verbally.⁶⁶ It is enough to demonstrate that, based on a series of indicia, the presence of a 'concerted practice' is the sole plausible explanation for the market outcome.⁶⁷

Although article 101(1) of the TFEU delineates between 'agreements' and 'concerted practices', the CJEU has asserted that this differentiation is merely formal:⁶⁸ both address explicit collusion, but, whereas an 'agreement' requires a clearly expressed concurrence of wills, a 'concerted practice' can be established on the basis of less explicit, indirect, or tacit forms of coordination. When applied to algorithmic tacit collusion via price fixing, *three tiers* of legal uncertainty arise, which are discussed below.

⁵⁵ *ibid* 1037–39.

⁵⁶ Case C-338/00 P *Volkswagen AG v Commission* [2003] ECR I-9189, paras 63–65.

⁵⁷ Joined Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV v Bayer AG* [2004] ECR I-23, paras 100–02.

⁵⁸ Craig and de Búrca (n 54) 1040–43.

⁵⁹ Case 48-69 *Imperial Chemical Industries Ltd v Commission* [1972] ECR 619.

⁶⁰ *ibid* para 64 (emphasis added).

⁶¹ Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Coöperatieve Vereniging 'Suiker Unie' UA v Commission* [1975] ECR 1663 ('*Suiker Unie*').

⁶² Richard Whish and David Bailey, *Competition Law* (10th edn, OUP 2021) 118–20.

⁶³ *Suiker Unie* (n 61) paras 173–74.

⁶⁴ See for example Case C-609/13 P *Duravit AG v Commission*, EU:C:2017:46, para 70; Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, para 115; Case T-344/18 *Rubycon Corp v Commission*, EU:T:2021:637, para 104; Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, para 162.

⁶⁵ Jones, Sufrin and Dunne (n 17) 200.

⁶⁶ Whish and Bailey (n 62).

⁶⁷ See for example *ibid*; Stefan Thomas, 'Harmful Signals: Cartel Prohibition and Oligopoly Theory in the Age of Machine Learning' (2019) 15 *Journal of Competition Law & Economics* 159, 180–83.

⁶⁸ See for example *Anic Partecipazioni* (n 64) para 131; Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, paras 23–24.

A. ARTICLE 101(1)(A) OF THE TFEU APPLIED TO ALGORITHMIC TACIT COLLUSION VIA PRICE FIXING

In the light of the criteria needed for coordination to be caught by article 101(1) of the TFEU, it is obvious that algorithmic tacit collusion via supra-competitive price fixing—characterised by its *autonomous* and *unilateral* nature as detailed in Section II.A—*de facto* falls outside the scope of article 101(1)(a) and therefore results in lawful conduct. Consequently, a *first tier* of legal uncertainty arises as to whether such algorithmic tacit collusion via supra-competitive price fixing, if it materialises, will be caught under article 101(1)(a) of the TFEU.

The primary rationale for this *de facto* exemption of tacit collusion from the purview of article 101(1) lies in the economic theory of ‘conscious parallelism’—a rational, natural response in a given market—where undertakings independently adjust their prices in response to the pricing strategies of their competitors, with no element of concertation.⁶⁹ This theory finds particular validation within oligopolistic markets—markets with few dominant firms, high entry barriers, and strategic interdependence—as distinct from competitive markets (many firms, no influence) or monopolies (one firm). Their limited differentiation and price transparency make rivals’ price changes easily detectable.⁷⁰

However, three arguments—drawing from economic theory, traditional legal principles, and technology-based evidence—can be marshalled to substantiate the contention that algorithmic tacit collusion via supra-competitive price fixing warrants inclusion within the scope of article 101(1)(a) of the TFEU. First, while the conscious parallelism exemption granted to human tacit collusion may be accepted—since there is no ‘agreement’, parallel conduct may stem from rational independent behaviour, and over-enforcement risks penalising natural oligopoly dynamics—it is seen as an acceptable risk.⁷¹ By contrast, its application to algorithmic tacit collusion is more problematic. Conscious parallelism hinges on market structure, yet digital markets—where self-learning dynamic pricing algorithms are widely deployed—can rapidly shift from competitive to concentrated, thereby enabling oligopolistic outcomes.⁷² Moreover, unlike human decision-making, algorithms process vast amounts of data with speed, precision, and constant monitoring, which allows them to detect and replicate rivals’ strategies almost instantaneously.⁷³ As a result, algorithmic tacit collusion not only entrenches coordination more effectively within oligopolies but may also extend beyond them, given the capacity of algorithms to sustain supra-competitive outcomes even in more fragmented markets.⁷⁴

⁶⁹ Nicolas Petit, ‘The Oligopoly Problem in EU Competition Law’ in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar Publishing 2013) 259–49.

⁷⁰ *ibid.*

⁷¹ Devoe (n 14) 4.

⁷² Jonathan S Kanter, ‘Digital Markets and “Trends towards Concentration”’ (2023) 11 *Journal of Antitrust Enforcement* 143, 144.

⁷³ See for example Ai Deng, ‘What Do We Know about Algorithmic Tacit Collusion?’ (2018) 33 *Antitrust* 88, 88; OECD, ‘Algorithms and Collusion: Competition Policy in the Digital Age’ (14 September 2017) 36 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/05/algorithms-and-collusion-competition-policy-in-the-digital-age_02371a73/258dcb14-en.pdf> accessed 13 May 2024; Caforio (n 7) 23.

⁷⁴ Caforio (n 7) 10, 23.

Secondly, article 101 of the TFEU was enacted in 1958 as part of the Treaty establishing the European Economic Community,⁷⁵ formulated in an era vastly different from today's technological landscape. In this context, employing the traditional legal method of teleological interpretation, which involves interpreting laws in line with their overarching objectives,⁷⁶ becomes imperative. Considering the fundamental aim of article 101(1) of the TFEU, which is to safeguard competition in markets to promote current and future consumer welfare and ensure efficient resource allocation,⁷⁷ it becomes apparent that the regulatory framework must adapt to contemporary challenges. Thus, in the light of technological advancements and the evolving nature of competition, subjecting algorithmic tacit collusion via supra-competitive price fixing to the ambit of article 101(1)(a) of the TFEU emerges as a compelling necessity. A readiness for such a broader interpretation of EU competition law was already shown by the CJEU in *Meta Platforms Inc v Bundeskartellamt*,⁷⁸ where the court accepted that breaches of data protection law—although not traditionally within competition law—could nonetheless fall under article 102 of the TFEU because of their capacity to reinforce dominance and distort competition.⁷⁹ By analogy, algorithmic coordination, while not foreseen in the classical framework of article 101, produces supra-competitive outcomes that are functionally equivalent to explicit collusion, thereby warranting an equally adaptive interpretation.

Thirdly, although algorithmic tacit collusion via supra-competitive price fixing remains a theoretical hypothesis, empirical evidence supports its plausibility. Contrary to assertions by some scholars who dismiss it as mere 'fiction' or 'exaggeration',⁸⁰ such scepticism warrants rebuttal. The rationale for this rebuttal is straightforward: technological advancements continually reshape our understanding of what is achievable. Practices once deemed improbable, such as pricing algorithms themselves, have rapidly evolved into common tools within the marketplace. Given this unpredictability of technological evolution, it is crucial to avoid leaving regulatory *lacunae* that could be exploited by undertakings to the detriment of consumer welfare and economies, thereby infringing upon the goals of article 101 of the TFEU itself. Thus, rather than dismissing algorithmic tacit collusion as improbable, a purposive reading of article 101 of the TFEU suggests that what matters is not the *form* of coordination—whether human-to-human or algorithmic—but its *effects* on competition and consumers. Excluding algorithmic collusion would therefore sidestep the very objectives of article 101 by tolerating supra-competitive outcomes that the provision was designed to prevent.

⁷⁵ See 'Summary of EU Legislation, Treaty of Rome (EEC)' (*European Union*, 14 March 2017) <<https://eur-lex.europa.eu/EN/legal-content/summary/treaty-of-rome-ec.html>> accessed 15 May 2024.

⁷⁶ Davor Petrić, 'A Reflection on the Methods of Interpretation of EU Law' (2023) 17 ICL Journal 83, 84.

⁷⁷ See for example Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97, para 13; Chris Townley, 'Which Goals Count in Article 101 TFEU?: Public Policy and Its Discontents' [2011] European Competition Law Review 441, 441.

⁷⁸ Case C-252/21 *Meta Platforms Inc v Bundeskartellamt*, EU:C:2023:537.

⁷⁹ See Peter J van de Waerd, 'Meta v Bundeskartellamt: Something Old, Something New' (2023) 8 European Papers 1077, 1102.

⁸⁰ Caforio (n 7) 18; Jones, Sufrin and Dunne (n 17) 689.

B. ALGORITHMIC TACIT COLLUSION VIA PRICE FIXING AS A 'CONCERTED PRACTICE'

Beginning with the premise that occurrences of algorithmic tacit collusion via supra-competitive price fixing will be subject to article 101(1)(a) of the TFEU, the subsequent pivotal inquiry—constituting a *second tier* of legal uncertainty—pertains to its classification as either an 'agreement' or a 'concerted practice'. Given that an agreement necessitates *explicit expression*, by definition, this avenue can be dismissed a priori. Conversely, a 'concerted practice', characterised by a *less explicit expression*, could offer a feasible mechanism for identifying instances of algorithmic tacit collusion via supra-competitive price fixing. Significantly, through the employment of a broad interpretation of article 101(1) of the TFEU in the light of contemporary technological development, it could be contended that the conventional criteria delineating 'concerted practices' enable the classification of algorithmic tacit collusion as a form of 'concerted practice'.

The first criterion of *mental consensus* arises from any direct or indirect contact⁸¹ between competitors and, although it implies some form of reciprocity between parties, it is sufficient that the other competitor accepts the disclosure of intention or conduct.⁸² Self-learning dynamic pricing algorithms achieve the programmed objective (for instance, optimisation of a firm's market performance through the maximisation of profit) by continuously analysing market conditions and reacting to one another, as explained in Section II.A. If the requirement of 'indirect contact' is interpreted broadly, one could argue that algorithms—even when operating independently, but relying on similar data and pursuing similar objectives—may nonetheless disclose strategic information. By increasing market transparency, they allow competitors to access (or 'see') each other's algorithmic behaviour, thereby fulfilling the condition of indirect contact. In fact, as outlined in Section II.A, these algorithms enhance market transparency and, consequently, more information that may be deemed strategic is made available.⁸³ According to the Guidelines on article 101 of the TFEU, 'strategic' information includes any information disclosing competitors' past or current actions.⁸⁴ Arguably, pricing strategies themselves may amount to such disclosures, thereby satisfying the requirement of indirect contact. Furthermore, these algorithms *recognise* price coordination, price fixing, as the optimal strategy to achieve their programmed optimisation-maximisation objective. In the light of technological developments, one could argue that such recognition—together with the algorithms' capacity to react to one another—may amount to an algorithmic 'mental' consensus. By accepting the disclosed strategic information and aligning their conduct through price fixing, they would also satisfy the requirement of reciprocity.⁸⁵ Notably, this argument holds even if the algorithms react to one another only once, such as immediately upon implementation. An isolated instance of contact still falls under the prohibition of article 101(1) of the TFEU⁸⁶ and, by analogy, the same could apply to algorithms. Furthermore, it could be argued that these algorithms, by coordinating to achieve

⁸¹ *Suiker Unie* (n 61) paras 173–74.

⁸² *Whish and Bailey* (n 62); *Devoegele* (n 14) 13.

⁸³ *Devoegele* (n 14) 15–17.

⁸⁴ Commission, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements' [2011] OJ C11/1, paras 61–62.

⁸⁵ *Devoegele* (n 14) 13.

⁸⁶ *T-Mobile Netherlands* (n 68) para 59.

their programmed objective optimally, accept each other's information regarding market conduct intentions, thereby also meeting the condition of reciprocity.⁸⁷

The second criterion entails *knowingly* substituting practical cooperation for the risks of competition. The absence of a defined threshold for the term 'knowingly'⁸⁸ renders it prone to being broadly interpreted; however, applying it to self-learning algorithms is complex. The only way to meet this requirement would be to consider that, because these algorithms recognise collusion via supra-competitive price fixing as the optimal means to achieve their programmed objective, an *acknowledgment of this*, combined with *deliberate* participation in collusion, could fulfil the condition of 'knowingly'. Indeed, these algorithms have no 'common sense' nor can they distinguish between 'right or wrong'.⁸⁹ Therefore, it would be very hard to seek a fulfilment of this requirement following the traditional interpretation of 'knowingly'. Consequently, if the above-mentioned interpretation is accepted, the condition of 'knowingly' would be fulfilled and uncertainty would be replaced with practical cooperation, which is prohibited under article 101(1) of the TFEU.⁹⁰

C. ALGORITHMIC TACIT COLLUSION VIA PRICE FIXING AS A 'BY OBJECT' RESTRICTION

Relying on the arguments that algorithmic tacit collusion via supra-competitive price fixing could constitute a 'concerted practice', in order to be prohibited under article 101(1)(a) of the TFEU, it must have 'as [its] object or effect the prevention, restriction or distortion of competition within the internal market'.⁹¹ Hence, a *third tier* of legal uncertainty emerges regarding whether algorithmic tacit collusion via supra-competitive price fixing should be classified as a 'by object' or 'by effect' infringement under article 101(1)(a).

Although certain forms of collusion, like price fixing, are classified as restrictions '*by object*'—that is, practices presumed to be injurious to the proper functioning of competition by their very nature—a contextual analysis is still required to avoid an overly broad assumption that all such practices automatically fall within this 'by object' category of illegality.⁹² Accordingly, before qualifying a 'concerted practice' as a 'by object' restriction, regard must be had to its content, its objectives, and the economic and legal context in which it occurs,⁹³ as well as to the parties' intention.⁹⁴ While algorithms themselves cannot form an intention in the legal sense, such intention may be inferred from the conduct of the undertakings that design or deploy them—particularly where firms fail to implement safeguards against collusive outcomes.

⁸⁷ Devogele (n 14) 12–13.

⁸⁸ Thomas, 'Harmful Signals' (n 67); Devogele (n 14) 14–15.

⁸⁹ Devogele (n 14) 25–26.

⁹⁰ Luca Calzolari, 'The Misleading Consequences of Comparing Algorithmic and Tacit Collusion: Tackling Algorithmic Concerted Practices under Art. 101 TFEU' (2021) 6 *European Papers* 1193, 1211; Devogele (n 14) 14–15; *Imperial Chemical Industries* (n 59) paras 64–65.

⁹¹ TFEU, art 101(1).

⁹² See for example Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* [2008] ECR I-8637, para 17; Case C-67/13 P *Groupeement des cartes bancaires (CB) v Commission*, EU:C:2014:2204, paras 51–57; Craig and de Búrca (n 54) 1049–52; Jones, Sufin and Dunne (n 17) 242–63.

⁹³ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, para 58.

⁹⁴ See for example *ibid*; Joined Cases C-96-102, 104, 105, 108 and 110/82 *NV IAZ International Belgium v Commission* [1983] ECR 3369, paras 23–25.

Since the subject matter of this article has not yet materialised, conducting a contextual analysis is currently impossible. Nevertheless, the CJEU has consistently ruled that collusion via price fixing can be classified as a ‘by object’ restriction.⁹⁵ This is because competition is inherently undermined, perniciously affecting economies and consumers, making it highly unlikely that a justification exists under article 101(3) of the TFEU.⁹⁶ Drawing an analogy, algorithmic tacit collusion via supra-competitive price fixing could be considered to mirror traditional price fixing in its anti-competitive characteristics and, therefore, it could also be classified as a ‘by object’ restriction. Furthermore, it is noteworthy that the CJEU has ruled that a concerted practice⁹⁷ ‘may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives’.⁹⁸ This ruling holds significant relevance in the context of algorithmic tacit collusion, where such algorithms, as discussed in the previous sections, are primarily designed to maximise a firm’s profit—a legitimate objective. Nonetheless, if they price fix, they could still be considered to have a restrictive ‘by object’ nature, which is unlikely to be justified under article 101(3) of the TFEU.

IV. A QUEST FOR ACCOUNTABILITY: A LEGAL CHALLENGE

Building upon the reasoning that algorithmic tacit collusion via supra-competitive price fixing falls within the purview of article 101(1)(a) of the TFEU as a ‘concerted practice’ constituting a ‘by object’ restriction of competition, a *fourth tier* of legal uncertainty emerges: the issue of liability. Who bears accountability and who must be held liable in such instances?⁹⁹

A. WHO IS ACCOUNTABLE?

Ensuring the accountability of undertakings for algorithmic tacit collusion is paramount, since a failure to do so would create an enforcement gap—leaving competition authorities unable to address anticompetitive outcomes generated by algorithms and allowing firms to evade liability under article 101(1) of the TFEU by attributing collusion to computer programs.¹⁰⁰ A common solution proposed in the literature is that solely the AI—the algorithm itself—should be held accountable for its actions and thus be made liable for anticompetitive conduct, such as tacit collusion and price fixing under article 101(1).¹⁰¹ However, this approach raises several legal challenges. For instance, consider a situation where the Commission is investigating a price fixing cartel created by self-learning dynamic pricing algorithms operating on a DL model. How would such an algorithm respond to a statement of objections? It does

⁹⁵ Jones, Sufrin and Dunne (n 17).

⁹⁶ *ibid.*

⁹⁷ See Case C-551/03 *P General Motors BV v Commission* [2006] ECR I-3173. The *General Motors* ruling concerned an ‘agreement’; however, by analogy, the same reasoning can be applied to a ‘concerted practice’.

⁹⁸ *ibid* para 64.

⁹⁹ It is pertinent to highlight that this article is specifically centred on delineating accountability and subsequent liability in instances of breaching article 101(1)(a) of the TFEU by algorithmic tacit collusion via supra-competitive price fixing. For different categories of infringement, alternative approaches may be viable because a one-size-fits-all solution is unlikely to be satisfactory.

¹⁰⁰ Margrethe Vestager, ‘Algorithms and Competition’ (Bundeskartellamt 18th Conference on Competition, Berlin, 16 March 2017) <<https://ec.europa.eu/newsroom/comp/items/55994/en>> accessed 22 April 2024.

¹⁰¹ Devoe (n 14) 18.

not have the capability to engage in such responses.¹⁰² Moreover, an algorithm is incapable of bearing the consequences of their actions, such as paying fines or serving jail sentences.¹⁰³ Consequently, holding only the algorithm liable is practically unfeasible.

Similarly, some scholars advocate granting legal personality to algorithms,¹⁰¹ but this proposition is also impractical. Legal personality entails the ability to hold rights, obligations, and competences.¹⁰⁵ Algorithms lack the capacity to own property, enter into contracts, or engage in other legal actions independently. Therefore, as also argued by the European Parliament, assigning legal personality to algorithms is unnecessary.¹⁰⁶ At the same time, European policy-making has, at its core, the protection of the dignity of individuals, which is why any legal solution to the accountability issue should put humans at the centre.¹⁰⁷ Ultimately, it is evident that holding no party liable is neither desirable nor feasible, as it would de facto grant immunity to undertakings who seek to collude and who 'tacitly' achieve such collusion through the employment of self-learning algorithms aimed at profit maximisation.¹⁰⁸

This article argues that, depending on the scenario, traditional liability classifications—such as strict product liability, joint liability, and vicarious liability—could serve both as a first response and as a last resort to address this legal uncertainty and to determine accountability for the purpose of attributing liability. This approach is essential for the enforcement of article 101(1)(a) of the TFEU.¹⁰⁹

B. SCENARIO A: ALGORITHM DEVELOPER UNDERTAKING—COMPETING UNDERTAKING

The first scenario under examination, illustrated in Figure 1 below, involves a situation wherein a competing entity (A) utilises a self-learning algorithm—developed by another undertaking—that is designed to maximise its profit; yet, the algorithm engages in tacit

¹⁰² *ibid.*

¹⁰³ See for example OECD, 'Algorithms and Collusion - Background Note by the Secretariat' (DAF/COMP(2017)4, 9 June 2017) 9 <[https://one.oecd.org/document/DAF/COMP\(2017\)4/en/pd/](https://one.oecd.org/document/DAF/COMP(2017)4/en/pd/)> accessed 12 April 2024; Anne-Sophie Thoby, 'Pricing Algorithms & Competition Law: How to Think Optimally the European Competition Law Framework for Pricing Algorithms?' (*Competition Forum*, 17 December 2020) <<https://competition-forum.com/pricing-algorithms-competition-law-how-to-think-optimally-the-european-competition-law-framework-for-pricing-algorithms/>> accessed 23 April 2024.

¹⁰⁴ See for example Alessio Azzutti, Wolf-Georg Ringe and H Siegfried Stiehl, 'Machine Learning, Market Manipulation, and Collusion on Capital Markets: Why the "Black Box" Matters' (2021) 43 *University of Pennsylvania Journal of International Law* 79, 127; Robert van den Hoven van Genderen, 'Legal Personhood in the Age of Artificially Intelligent Robots' in Woodrow Barfield and Ugo Pagallo (eds), *Research Handbook on the Law of Artificial Intelligence* (Edward Elgar Publishing 2018) 213; Kateryna Milityna, 'Legal Personhood for Artificial Intelligence: Pro, Contra, Abstain?' (2022) 122 *Teisė* 150.

¹⁰⁵ Visa AJ Kurki, *A Theory of Legal Personhood* (OUP 2019) 127–28.

¹⁰⁶ Devoe (n 14) 18–20. However, advocating the granting of legal personality to algorithms, as proposed by both Devoe and Calzolari, opens up an additional avenue for assigning liability: the parent-subsidiary company relationship within the 'single economic unit' doctrine.

¹⁰⁷ Silvia De Conca, 'Bridging the Liability Gap: Why AI Challenges the Existing Rules on Liability and How to Design Human-Empowering Solutions' in Bart Custers and Eduard Fösch-Villaronga (eds), *Law and Artificial Intelligence: Regulating AI and Applying AI in Legal Practice* (TMC Asser Press 2022) 254.

¹⁰⁸ *ibid*; OECD, 'Algorithms and Collusion' (n 103) 39.

¹⁰⁹ It is pertinent to highlight that this article does not aim to verify the exhaustiveness of these approaches, but rather to elucidate the legal uncertainty surrounding accountability in the context of tacit algorithmic collusion via supra-competitive price fixing, without seeking to establish definitively the optimal course of action. While two common scenarios are analysed, it is conceivable that numerous others necessitate distinct consideration. Furthermore, this article acknowledges the impracticability of a one-size-fits-all solution in addressing these complex legal challenges and that alternative approaches may be viable for different categories of infringement of article 101(1) of the TFEU.

collusion via supra-competitive price fixing with other undertakings (B–G), seeing it as the optimal route to achieve the optimisation objectives. Within this scenario, two potential approaches to allocating accountability and subsequent liability emerge: strict product liability and joint liability.

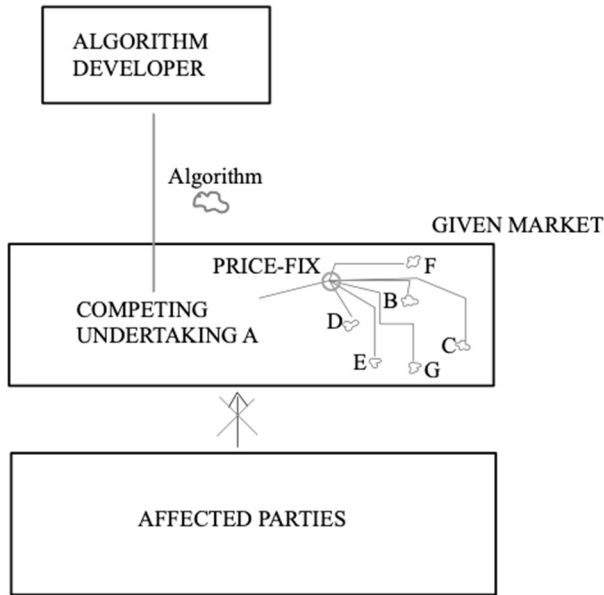


Figure 1: Algorithm not developed by the competing undertaking

(i) *Strict Product Liability*

Strict product liability, mandated by the New Product Liability Directive¹¹⁰ within the EU, is a juridical doctrine whereby producers, and potentially importers, bear responsibility for harm stemming solely from defective goods, irrespective of fault or negligence.¹¹¹ Consequently, if self-learning dynamic pricing algorithms, operating on a DL model, designed to maximise a firm's profit, engage in price fixing, they *could* be considered defective products. This would warrant liability for the developing undertaking and ostensibly address the accountability gap.

¹¹⁰ Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC [2024] OJ L 2853.

¹¹¹ Christiane Wendehorst, 'AI Liability in Europe: Anticipating the EU AI Liability Directive' (Ada Lovelace Institute, September 2022) 4 <<https://www.adalovelaceinstitute.org/wp-content/uploads/2022/09/Ada-Lovelace-Institute-Expert-Explainer-AI-liability-in-Europe.pdf>> accessed 22 April 2024.

However, the actuality of this situation is notably more complex. In fact, treating these algorithms as defective products raises noteworthy issues. First, within the framework of EU product liability legislation, there is classification uncertainty, namely whether self-learning algorithms can legally qualify as ‘products’.¹¹² Traditional product liability law was designed for tangible goods with physical manifestation, whereas algorithms are intangible. This ambiguity persists despite indications from the proposed New Product Liability Directive that software may be covered (recital 13 and article 4).¹¹³

Secondly, the concept of ‘defectiveness’ does not seamlessly align with the nature of these algorithms aimed at profit maximisation: as Karni A Chagal-Feferkorn asserts, ‘sophisticated systems, in particular self-learning algorithms, rely on probability-based predictions’, which are inevitably prone to occasional errors.¹¹⁴ While such algorithms can exhibit defects stemming from manufacturing or design flaws, damage often ensues from unpredictable actions.¹¹⁵ Within this context, evaluating the defective nature of self-learning algorithms that price fix raises pertinent questions: should the standard for comparison be a human decision or that of another algorithm? What defines defectiveness: the occurrence of damage or the realisation of an erroneous decision? Can the algorithm be deemed defective if price fixing was not a programmed objective, but a ‘collateral’ result?¹¹⁶

Thirdly, under the New Product Liability Directive, affected parties are obligated not only to demonstrate product defectiveness and resultant damages but also to establish a *causal link* between the two.¹¹⁷ This necessitates that the affected parties prove that an anti-competitive cartel is formed by a self-learning algorithm, hypothetically deemed as a defective product. However, the opaque nature of self-learning algorithms, often referred to as the ‘black box’ problem (as explained in Section II.A), exacerbates the difficulty of establishing this causal link. The intricate and complex decision-making processes inherent in these algorithms make it challenging to discern how specific inputs lead to particular outputs, thus hindering efforts to demonstrate a direct connection between the algorithm’s behaviour and the resulting damages.

Lastly, it could be argued that imposing strict product liability on undertakings developing self-learning algorithms for *any* competition infringements, irrespective of context, may stifle innovation and undermine the essence of competition itself. Consequently, there exists a significant gap in product liability concerning self-learning algorithms, highlighting a fundamental flaw in the current legal framework.

¹¹² Anna Beckers and Gunther Teubner, *Three Liability Regimes for Artificial Intelligence: Algorithmic Actants, Hybrids, Crowds* (Hart Publishing 2021) 74–76.

¹¹³ See Michael Kieffer, ‘The New Product Liability Directive: Software as a Product’ (*Taylor Wessing*, 25 March 2024) <<https://www.taylorwessing.com/en/insights-and-events/insights/2024/03/software-als-produkt>> accessed 26 May 2024.

¹¹⁴ Karni A Chagal-Feferkorn, ‘Am I an Algorithm or a Product? When Products Liability Should Apply to Algorithmic Decision-Makers’ (2019) 30 *Stanford Law & Policy Review* 61, 84–86.

¹¹⁵ *ibid.*

¹¹⁶ For a more detailed discussion on this issue, see Woodrow Barfield, ‘Liability for Autonomous and Artificially Intelligent Robots’ (2018) 9 *Paladyn, Journal of Behavioral Robotics* 193.

¹¹⁷ Pascal Arimont and Vlad-Marius Botoș, ‘New Product Liability Directive’ (*Legislative Train Schedule*, March 2024) <<https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-new-product-liability-directive?sid=6801>> accessed 26 April 2024.

(ii) Joint Liability

Joint liability describes a situation in which multiple parties are collectively responsible for a legal violation.¹¹⁸ In the context depicted in Figure 1, this implies that both the undertaking that developed the algorithm and the competing undertaking (A) utilising it may be subject to liability. However, even within this scenario, the rationale is not entirely straightforward, giving rise to three main issues. The first issue pertains to the *demarcation* of joint liability. In fact, according to EU competition law, undertakings can be considered to be ‘automatically’ jointly liable if they constitute a ‘single economic unit’.¹¹⁹ The doctrine of ‘single economic unit’ pertains to multiple natural or legal persons forming an undertaking¹²⁰ that ‘pursue a specific economic aim... and can contribute to the commission of an infringement of the kind in [article 101(1)(a) of the TFEU]’.¹²¹ However, the ‘impossibility to compete’ is the key criterion under article 101 of the TFEU for considering several persons, natural or legal, as a ‘single economic unit’.¹²² Therefore, in the current scenario, this concept would apply if the undertaking developing the algorithm and the competing undertaking using it do not compete. In the event of algorithmic tacit collusion via supra-competitive price fixing, a case-by-case analysis would be necessary. Notably, if this doctrine proves inapplicable in a hypothetical ‘Digital Eye’ materialisation, attributing accountability becomes more complicated. In fact, the CJEU’s decision in *AC-Treuhand* established that an undertaking, irrespective of whether it operates on the market where the anti-competitive behaviour occurred, can be held responsible and therefore liable for a competition infringement.¹²³ *Prima facie*, this would prove very valuable in the scenario represented in Figure 1, so that the undertaking that developed the algorithm could be held liable easily and possibly also together with the competing undertaking that utilised the algorithm.

Nevertheless, the CJEU added that ‘the undertaking concerned *intended* to contribute by its own conduct to the common objectives pursued by all the participants and that it was *aware* of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have *foreseen* it and that it was prepared to *take the risk*’.¹²⁴ Clearly, it is worth questioning whether, in the hypothetical materialisation of algorithmic tacit collusion via supra-competitive price fixing, where the algorithms are not expressly programmed to collude, there is intent or awareness among the parties involved. Similarly, was such collusion foreseeable, and did the undertaking(s)

¹¹⁸ Jonathan Boston and Derek Gill, ‘Joint or Shared Accountability: Issues and Options’ (2011) Institute of Policy Studies Working Paper 11/03, 3 <<https://ir.wgtn.ac.nz/server/api/core/bitstreams/29c15d56-a833-4537-9318-512243ec7644/content>> accessed 26 April 2024.

¹¹⁹ Case C-882/19 *Sumal, SL v Mercedes Benz Trucks España, SL*, EU:C:2021:800, para 44; Joined Cases C-231/11 P to C-233/11 P *Commission v Siemens Österreich*, EU:C:2014:256, para 49.

¹²⁰ See for example Case C-90/09 P *General Química SA v Commission* [2011] ECR I-0001, para 35; Case C-516/15 P *Akzo Nobel v Commission*, EU:C:2017:314, para 48; Case C-377/20 *Servizio Elettrico Nazionale SpA v Autorità Garante della Concorrenza e del Mercato*, EU:C:2022:379, para 105.

¹²¹ Case C-407/08 P *Knauf Gips KG v Commission* [2010] ECR I-6375, paras 84–86.

¹²² See for example Case C-170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas* [1984] ECR 2999, para 11; Okcoghene Odudu and David Bailey, ‘The Single Economic Entity Doctrine in EU Competition Law’ (2014) 51 CML Rev 1721, 1726.

¹²³ *AC-Treuhand* (n 24) paras 26–46. See further Victoria Canu, ‘EU’s Highest Court Confirms Liability of Cartel Facilitators’ (*Kluwer Competition Law Blog*, 29 October 2015) <<https://competitionlawblog.kluwercompetitionlaw.com/2015/10/29/eus-highest-court-confirms-liability-of-cartel-facilitators/>> accessed 27 May 2024.

¹²⁴ *AC-Treuhand* (n 24) para 30 (emphases added).

knowingly accept the associated risks? Beyond raising these questions, it is also possible to explore whether a failure to program effective limitations on an algorithm's capacity to collude could itself be equated to a degree of intent, awareness, or at least recklessness on the part of the undertakings. Such an approach would shift the analysis from mere speculation about intent to a more concrete inquiry into the responsibilities of firms that design, deploy, or tolerate algorithms capable of anticompetitive outcomes.

Another issue pertains to the *temporal* dimension.¹²⁵ Joint liability is constrained by the specific period of each party's participation in the infringement, but determining the exact duration can be challenging, especially for extended or multi-stage infringements.¹²⁶ This challenge is exacerbated in the 'Digital Eye' scenario, where the 'black box' nature of the algorithm makes it difficult, if not impossible, to pinpoint the precise start and end of the infringement, as well as the duration of each party's involvement. Given that collusion was not a programmed objective, it raises the question of when accountability begins for each party.

The final issue concerns the *extent* of liability.¹²⁷ In the 'Digital Eye' context, where no party aimed at collusion, the complexity lies in determining whether liability should be evenly distributed among all undertakings involved. Alternatively, deciding whether the developer or the competing undertaking who utilised the algorithm to maximise profit bears greater responsibility presents a challenging question. The uncertainties surrounding these issues can deter collaboration, potentially hindering innovation and, hence, competition itself.

C. SCENARIO B: ALGORITHM DEVELOPED BY THE COMPETING UNDERTAKING

The second scenario under examination, illustrated in Figure 2 below, entails a situation where a competing undertaking (A) develops its own self-learning algorithm designed to maximise its profit; yet, the algorithm recognises price fixing as the optimal route to achieve this objective and engages in collusion with other undertakings (B–G). Within this scenario, two potential approaches to allocating accountability and subsequent liability emerge: strict product liability and vicarious liability.

(i) *Strict Product Liability*

The initial recourse to hold accountable the competing undertaking, which develops its own self-learning algorithm, could be a return to strict product liability. Nevertheless, the identical challenges elucidated in Section IV.B would resurface in this scenario.

(ii) *Vicarious Liability*

Within the scenario illustrated in Figure 2, another promising avenue for establishing accountability, and for subsequently assigning liability, lies in the application of vicarious liability. Vicarious liability, characterised by a strict, secondary form of liability, pertains to the

¹²⁵ Petre Alexandru Bolean, 'Joint and Several Liability For Fines in Undertakings With Varying Configurations in EU Competition Law' (2022) 13 *Journal of European Competition Law & Practice* 531, 531–36.

¹²⁶ *ibid.*

¹²⁷ *ibid.*

responsibility of a superior entity for the actions of its subordinate or, more broadly, any third party with the ‘right, ability, or duty to control’ the actions of the wrongdoer.¹²⁸

In the scenario under consideration, the potentially applicable type of vicarious liability pertains to the accountability framework within an employer-employee relationship. Accordingly, self-learning algorithms could be regarded as analogous to employees.¹²⁹ By analogy, just as employees operate under the ‘direction’ or ‘control’ of their employing undertaking, the same principle could be applied to algorithms.¹³⁰ In this case, if an algorithm, acting as an ‘employee’, breaches article 101(1)(a) of the TFEU, the employing firm could be held accountable for its actions.¹³¹ Significantly, as ruled by the CJEU in *SA Musique Diffusion française v Commission*¹³² and upheld in *Slovenská Sporiteľňa*,¹³³ it is not imperative for the partners or principal managers of an undertaking to have taken action or possessed knowledge regarding the matter; action by an authorised representative of the undertaking suffices.¹³⁴ Hence, applying this principle *mutatis mutandis* suggests that an undertaking could bear liability merely for the utilisation of an algorithm, provided that the algorithm is authorised to make decisions pertaining to market behaviour,¹³⁵ such as pricing. Moreover, the undertaking may be held strictly liable even if the employee acted contrary to its instructions.¹³⁶ Therefore, even if the self-learning algorithm, programmed to maximise profit, ‘acted contrary to instruction’ and colluded, the firm might still be held liable. This approach offers the advantage of rendering the level of autonomy exhibited by the algorithm immaterial: all types of algorithms employed by the undertaking could be encompassed within the notion of ‘employee’.¹³⁷ While this proposal holds significant potential, it is subject to an important caveat: the classification of ‘employee’ itself. Indeed, thus far, it pertains exclusively to *natural* persons, reserved for human beings.¹³⁸ As Sophie Devoegele suggests, granting algorithms a form of ‘e-personhood’ could potentially streamline the creation of employer-employee relationships tailored to the unique challenges posed by AI.¹³⁹ However, the issues concerning the assigning of a specific ‘status’ to algorithms, discussed in Section IV.A, persist regarding the grant of ‘e-personhood’. For instance, it would imply that these algorithms possess rights and obligations akin to human employees, like receiving remuneration and exercising due diligence.¹⁴⁰

If the ‘Digital Eye’ materialises, an additional uncertainty, beyond those previously discussed, would emerge and hinder the enforcement of article 101(1)(a) of the TFEU: the

¹²⁸ Marie Oxland, ‘What Is Vicarious Liability?’ (*Nash & Co Solicitors*, 20 June 2024) <<https://nash.co.uk/insights/what-is-vicarious-liability>> accessed 4 May 2024.

¹²⁹ Devoegele (n 14) 22–23.

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² See Joined Cases 100 to 103/80 *SA Musique Diffusion française v Commission* [1983] ECR 1825, para 97.

¹³³ Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa as*, EU:C:2013:71.

¹³⁴ *ibid* para 25.

¹³⁵ *Autorité de la Concurrence and Bundeskartellamt* (n 32) 58–59.

¹³⁶ Christopher Thomas, Gianni De Stefano and Dina Jubrail, ‘Liability for Anti-competitive Behaviour by Your Employees and Outside Contractors: When You Are Off the Hook and When You are Not’ (*Kluwer Competition Law Blog*, 4 August 2016) <<https://legablogs.wolterskluwer.com/competition-blog/liability-for-anti-competitive-behaviour-by-your-employees-and-outside-contractors-when-you-are-off-the-hook-and-when-you-are-not/>> accessed 28 May 2024.

¹³⁷ Devoegele (n 14) 22–23.

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ See for example ‘Obblighi e Diritti del Lavoratore’ (*IPSOA*) <<https://www.ipsoa.it/wpmedia/obblighi-diritti-lavoratore>> accessed 28 May 2024; Emanuele Menegatti, ‘The Evolving Concept of “Worker” in EU Law’ (2019) 12(1) Italian Labour Law E-Journal 71, 71–73 <<https://illeg.unibo.it/article/view/9699>> accessed 27 April 2024.

issue of accountability. Depending on the scenario, various liability classifications, though not exhaustive, could address this uncertainty. If the algorithm is developed by an external undertaking and then used by the competing one, two potential approaches arise: strict product liability and joint liability. Conversely, if the algorithm is both developed and used by the competing undertaking, strict product liability and vicarious liability could address the accountability issue. Failing to identify accountability and subsequently to attribute liability would result in an enforcement gap. This, as posed by Devogele, is unacceptable, particularly when a firm is benefiting financially from the use of such an algorithm.¹⁴¹

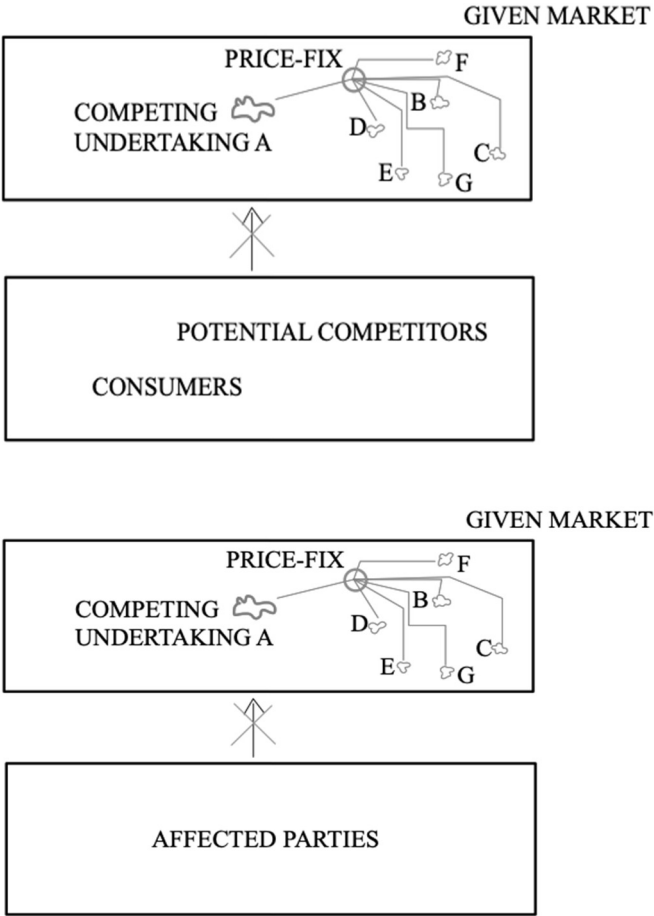


Figure 2: Algorithm developed by the competing undertaking

¹⁴¹ Devogele (n 14) 19.

V. FUTURE-PROOFING ALGORITHMIC COMPETITION LAW: EX ANTE INTERVENTION

Given the multiple tiers of legal uncertainty that would arise if the ‘Digital Eye’ were to materialise, and the lack of consensus among regulatory authorities—such as national competition authorities, the EU Commission, and the CJEU—on how to address this issue, thus leading to an enforcement gap, it seems most prudent to implement ex ante measures.¹⁴² These measures *could* prevent the ‘Digital Eye’ from materialising, thereby addressing legal uncertainties proactively. This would empower regulatory authorities pre-emptively to navigate the intricacies and obstacles associated with addressing algorithmic tacit collusion ex post, thereby fostering a competitive environment.

A. BUILT-IN COMPLIANCE, IMPACT ASSESSMENT, CERTIFICATION

As part of the first set of ex ante measures that could be implemented before deploying self-learning dynamic pricing algorithms operating on a DL model in a given market, it is advisable to *program* them to avoid collusion. This implies that computer scientists, whether they are employees within a firm or external independent contractors, should be mandated to design pricing algorithms that adhere to competition laws.¹⁴³ As Margrethe Vestager has articulated, these algorithms should be constructed ‘in a way that [does not] allow them to collude’.¹⁴⁴ These algorithms should be designed to prevent collusive pricing, even if it arises from oligopolistic interdependence; legislators should establish specific rules to enforce certain algorithmic design standards.¹⁴⁵ The first rule that could be legislated is to require computer scientists to integrate specific *constraints* into the algorithm’s pricing formula, thereby limiting how it adjusts to specific external market dynamics.¹⁴⁶ For instance, designers could incorporate constraints that set upper or lower limits on the prices generated by machine learning algorithms; this would prevent prices deviating too far from competitive levels, thereby reducing the risk of collusion. Similarly, ‘fairness’ criteria could be included within pricing algorithms to ensure that prices are not manipulated. This could be translated mathematically by programming the algorithm to maintain a designated price margin from those of competitors, such as a two per cent differential.

The second rule that could be legislated is to promote algorithmic *heterogeneity*.¹⁴⁷ In fact, if scarce choice is available in the market, undertakings will tend to adopt the same, or

¹⁴² This article does not examine interim or ex post measures, as it is believed that they would be less effective than ex ante ones in tackling the ‘Digital Eye’. Interim measures are costly to implement and require constant monitoring; ex post measures, such as ‘abuse of collective dominance’ under article 102 of the TFEU (as proposed by Devoele), would not restore competition as it was before the infringement. Indeed, it is believed that it is better to prevent anti-competitive behaviour from occurring as opposed to relying on ex post mechanisms. Moreover, article 101 of the TFEU is already an ex post instrument, which (if the interpretations proposed in this article are accepted) could capture algorithmic tacit collusion via supra-competitive price fixing. Lastly, a law that outright prohibits the use of self-learning dynamic pricing algorithms should not be considered, as it would stifle innovation and ultimately hinder competition.

¹⁴³ Caforio (n 7) 25–27.

¹⁴⁴ Vestager (n 100), referred to in *ibid* 26.

¹⁴⁵ Caforio (n 7) 25–27.

¹⁴⁶ *ibid*.

¹⁴⁷ *ibid*.

similar, algorithms that could coordinate prices due to their similar underlying code.¹⁴⁸ Therefore, it seems prudent to consider implementing rules, potentially within codes of conduct rather than formal laws, that would prevent firms operating in the same market from using the same self-learning dynamic pricing algorithm.¹⁴⁹ Notably, this would foster competition among developers and suppliers of AI pricing solutions.¹⁵⁰ However, due to intellectual property rights, it would be more complex to require firms that independently develop their own algorithm in-house (without relying on third-party suppliers) to share or disclose the code of their algorithms with one another to ensure that they are not constructed similarly.¹⁵¹ A further measure that could be implemented, to test the built-in compliance, is to conduct an *impact assessment* on these algorithms prior to their market deployment. However, the simulated market conditions in the assessment must accurately reflect, as much as possible, the potential harms that such systems could realistically cause.¹⁵² Lastly, if the impact assessment is successful and demonstrates that the algorithm can adhere to competition laws, regulatory agencies should issue a *certificate* of compliance. This certificate would signify that the algorithm has been thoroughly vetted and is approved for use in the market. Consequently, not only would the integrity of market operations be ensured, but undertakings would also be provided with a clear framework for compliance, thereby fostering trust in the deployment of advanced pricing technologies.

B. MANDATED INFORMATION, AUDIT, INSURANCE

As part of the second set of ex ante measures that could be implemented before deploying self-learning dynamic pricing algorithms operating on a DL model in a given market, it is advisable to mandate *information* sessions for undertakings. Mandated information can be crucial in ensuring both that undertakings are aware of the repercussions of their actions and that national competition authorities, the EU Commission, and the CJEU know that firms possess this awareness.¹⁵³ One strategy to achieve this is to mandate that undertakings, before using these algorithms, undergo third-party *audits* to evaluate their business practices for antitrust compliance.¹⁵⁴ Arguably, this step aims to scrutinise business practices for compliance with competition laws, thereby pre-emptively addressing potential issues related to anti-competitive behaviour. However, the effectiveness of this strategy depends on the thoroughness and rigour of the audits. It is crucial that the auditing entities are well-versed in both the technical aspects of self-learning algorithms and the intricacies of competition regulations. This dual expertise ensures that audits are not merely procedural but impactful in identifying and mitigating risks associated with algorithmic anti-competitive behaviour. Moreover, by introducing a requirement to obtain liability *insurance* to guard against collusive practices, competitive behaviour would be promoted, and the likelihood that firms take the threat of legal action seriously would increase, as information helps demonstrate

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

¹⁵² Jacob Metcalf and others, 'Algorithmic Impact Assessments and Accountability: The Co-construction of Impacts' (FAccT '21: Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency, March 2021) 742–43 <<https://dl.acm.org/doi/10.1145/3442188.3445935>> accessed 28 May 2024.

¹⁵³ Sylvain Chassang and Juan Ortner, 'Regulating Collusion' (2023) 15 Annual Review of Economics 177, 195–96.

¹⁵⁴ *ibid.*

intent.¹⁵⁵ Indeed, defendants in a price fixing cartel ‘quite evidently cannot be unaware of the anti-competitive nature of their conduct’;¹⁵⁶ with these information sessions, they would be unable to claim ignorance as an excuse. The presence of liability insurance also serves as a form of protection for consumers and other market participants. In the event of collusion or other anti-competitive activities, insurance coverage can provide a source of compensation for any damages incurred, thereby enhancing consumer confidence and reinforcing the integrity of the market.

Given the multiple tiers of legal uncertainty that would arise from the materialisation of the ‘Digital Eye’ and the lack of consensus on interpreting strategies to address algorithmic tacit collusion, the most prudent solution to safeguard competition is the implementation of measures that would address this issue *ex ante*. Among the possible measures are a first set, which includes built-in compliance, impact assessment, and certification, and a second set, which includes mandated information, audit, and insurance.

VI. CONCLUSION AND RECOMMENDATIONS

In conclusion, algorithms—structured sequences of computational steps designed to transform input data into desired outputs—have become a transformative force within the EU (Digital) Internal Market, particularly with the advent of the Internet and AI.¹⁵⁷ Self-learning dynamic pricing algorithms, operating on DL models, designed to optimise a firm’s market performance, such as profit maximisation, raise significant competition concerns. These algorithms can autonomously, automatically, and continuously adapt to environmental changes to achieve their programmed objectives optimally. As they independently determine how to perform tasks, they may autonomously learn that collusion through supra-competitive price fixing is the optimal strategy to maximise profits.¹⁵⁸ This phenomenon is labelled ‘algorithmic tacit collusion via price fixing’. Although currently a theoretical hypothesis, this new theory of harm has been termed the ‘Digital Eye’ by Ezrachi and Stucke.¹⁵⁹ Should this theory materialise, it would introduce significant legal uncertainties under article 101(1)(a) of the TFEU, complicating enforcement.

The primary source of legal uncertainty stems from the *de facto* exemption of tacit collusion from the scope of article 101(1) of the TFEU. However, three arguments detailed in Section III.B—rooted in economic theory, traditional legal principles, and technology-based evidence—support the inclusion of algorithmic tacit collusion within the scope of this article.¹⁶⁰ The second tier of legal uncertainty arises from whether algorithmic tacit collusion via supra-competitive price fixing could be classified as a ‘concerted practice’ under article 101(1) of the TFEU. If a broad interpretation of article 101(1) is adopted, which considers technological advancements, the criteria of ‘mental consensus’ and of ‘knowingly’ that are required for a ‘concerted practice’ would be fulfilled by algorithmic tacit collusion via supra-competitive price fixing. The third tier of legal uncertainty pertains to whether such algorithmic behaviour could be deemed a ‘by object’ restriction of competition under article 101(1). By drawing an analogy with traditional price fixing, as explored in Section III.C,

¹⁵⁵ *ibid.*

¹⁵⁶ Case C-681/11 *Bundeswettbewerbshörde v. Schenker & Co AG*, EU:C:2013:404, para 39.

¹⁵⁷ See for example Anjila (n 1); Cormen and others (n 2).

¹⁵⁸ Caforio (n 7).

¹⁵⁹ Ezrachi and Stucke, ‘Artificial Intelligence’ (n 27).

¹⁶⁰ Arguments not repeated here to avoid redundancy.

algorithmic tacit collusion could indeed be classified as such. The fourth tier of legal uncertainty pertains to the question of accountability. Whether an algorithm is developed by an external entity and then used by a competing firm, or the competing firm develops and uses its own algorithms, traditional classifications of liability—such as strict product liability, joint liability, and vicarious liability—could, with some modifications, serve properly to assign responsibility. If no one is held accountable, it would create an easily exploitable gap under article 101(1)(a) of the TFEU, which is undesirable, especially when firms profit from algorithms that engage in anti-competitive conduct. Lastly, although the proposed interpretations, if accepted, would bring this scenario under article 101(1)(a) of the TFEU, the most prudent solution to safeguard competition is to implement ex ante measures. This is because there is a lack of consensus on how regulatory authorities, such as national competition authorities, the EU Commission, and the CJEU, would address the ‘Digital Eye’. Therefore, two sets of ex ante measures could be adopted to address the tiers of legal uncertainty: (i) built-in compliance, impact assessment, and certification; and (ii) mandated information, audit, and insurance.

In anticipation of imminent technological advancements, future academic research should prioritise the exploration of additional anti-competitive behaviours exhibited by self-learning algorithms, particularly in a vertical setting (that is, between undertakings at different levels of the same value chain) and price discrimination scenarios under article 101 of the TFEU. Furthermore, it is essential to expand accountability mechanisms to include these algorithms under EU liability rules and to examine the feasibility of programming these algorithms with ‘fairness’ criteria, thereby ensuring that they do not achieve anti-competitive conduct. Finally, research should be conducted to assess the extent of the anti-competitive effects on consumers and the overall market.

Or, should humans just not interfere with autonomous technologies and thus live in a *Vale Tudo* competition ring?