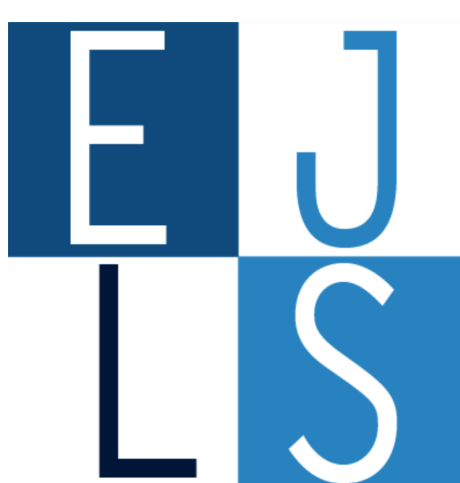




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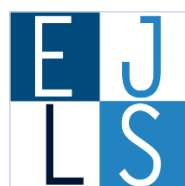
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50 YEARS OF THE EUI LAW DEPARTMENT: FROM *LETHE* TO *EUNOË* AND THE POWER OF LEGAL ACADEMIA

Aikaterini Koinaki*

Midway along the journey of their lives, many law professors, researchers, and fellows have, for fifty years, found themselves on the hills of Fiesole.

In autumn 1976, the EUI opened its doors when some seventy researchers, drawn from the six founding states that had founded the Institute four years earlier, walked into the Badia Fiesolana.¹ The idea preceded the institution by decades. It was proposed at the European Cultural Conference in Lausanne in December 1949 and took legal form when the Convention establishing the European University Institute was signed in Florence on 19 April 1972.² Law was one of four founding departments. Its professors, recruited from different legal cultures for a maximum of eight years, were asked to conduct research and supervise work across borders that most legal

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¹ European University Institute, 'EUI in Time' (EUI 50th Anniversary, 16 March 2026) <<https://www.eui.eu/en/projects/eui-50th-anniversary/timeline>> accessed 11 September 2026.

² Jean-Marie Palayret (ed), *A University for Europe: Prehistory of the European University Institute in Florence (1948-1976)* (Iain L Fraser tr, Presidency of the Council of Ministers, Department of Information and Publishing 1996) 19-21 (recording the European Cultural Conference, Lausanne, 8-12 December 1949, which recommended chairs and exchange programmes in European education, itself building on the Congress of Europe held at the Hague in May 1948); Sarah K St John, *Education and Solidarity in the European Union: Europe's Lost Spirit* (Palgrave Macmillan 2021) ch 5, 132-33 (Convention signed in Florence, 19 April 1972).

education still treated as the edge of the intelligible world.³ This turnover was itself the method's engine, not a defect to be managed in the future. Scholars would be hosted for a few years and then dispersed again to academic institutions all over the world; allowing for what Francis Snyder later described as the *brassage* of ideas and cultures to circulate through the universities in which the Institute's scholars would end up.⁴ Fifty years after that first arrival, the anniversary offers an occasion to pause and take stock.

What distinguishes the Department has never been a single doctrine or method. Its work has been both European and international in focus, reading law against its social, political, economic, and cultural contexts, rather than as a self-sufficient text.⁵ That method marked Mauro Cappelletti's Integration Through Law project. By placing European integration beside American federalism and taking the mutual conditioning of legal structure and political process as its subject, the project situated law within what was fundamentally a political process. Later histories have read the volumes produced by this project as the academic expression of a constitutional vision for Europe and debated how this scholarship was connected to the institutional projects supporting integration in the first place.⁶ In 1995, the

³ Francis Snyder, 'The EUI Law Department and the Europeanisation of Law: An Introduction' in Francis Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart Publishing 2000) 1, 1-2.

⁴ See Snyder (n 3) 2, describing the Department's 'brassage' of ideas and cultures.

⁵ Snyder (n 3) 1-2.

⁶ Bruno De Witte, 'From the Hills of Fiesole – What the European University Institute Did for European Constitutional Law' (iCourts Working Paper Series No 298, 2022) 2-5 <<https://ssrn.com/abstract=4220802>> accessed 11 September 2026, discussing Mauro Cappelletti and David Golay, 'The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration' in Mauro Cappelletti, Monica Secombe and Joseph Weiler (eds), *Integration Through Law: Europe and the American Federal Experience*, vol 1, bk 2 (De Gruyter 1986) 261, 309-15; Rebekka Byberg, 'The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe' (2017) 18 German Law Journal 1531, 1532.

same commitment to context produced the *European Law Journal* – launched as a ‘review of European law in context’ – five of whose six founding editors were then based at the EUI: Renaud Dehousse, Brian Bercusson, Christian Joerges, Joseph Weiler, and, as editor-in-chief, Francis Snyder.⁷ And when that founding generation dispersed, the tradition it had named was carried forward in EU law through, among others, Gráinne de Búrca’s work on constitutionalism and new forms of governance.⁸ The Department’s alumni, dispersed by design, have spent half a century carrying that same method outward into the legal systems of the countries that received them after the Institute.

The Department’s published record further gives a measure of this reach. From the Institute’s first operation in 1976 until September 2026, Cadmus attributes close to seven thousand outputs to the Department of Law across five decades, with articles, chapters, and theses making up much of the repository.⁹ During the second half of the fifty-year period, the volume of recorded research output on Cadmus is considerably higher compared to the first twenty-five years of the Institute’s operation. Comparisons across decades remain qualified, however, because publication and recording

⁷ De Witte (n 6) 5, citing Francis Snyder, ‘Editorial’ (1995) 1 *European Law Journal* 1.

⁸ De Witte (n 6) 6, discussing Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006); Gráinne de Búrca, ‘Rethinking Law in Neofunctionalist Theory’ (2005) 12 *Journal of European Public Policy* 310. See also Mark Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (Cambridge University Press 2011).

⁹ European University Institute, ‘Department of Law (LAW) – Search Results’ (Cadmus – EUI Research Repository) <<https://cadmus.eui.eu/search?scope=dc28c920-0e40-59d6-9e65-6fe8a8f4f14f&f.dateIssued.min=1970&spc.page=1&spc.sf=dc.date.issued&spc.sd=DESC>> accessed 13 September 2026 (showing 6,982 records from 1970 to 2026).

practices changed over the period.¹⁰ So did the number of member states to the EUI, and the researchers welcomed to its cohorts every year. Yet, a living record of the Department's reach, truer than any single archive could keep, is the law classes, institutions, and hundreds of foreign faculties that its alumni have reached, rather than filed in one institution's repository. Beside that record stands the faculty that contributed to and encouraged its production. Over the course of five decades, the Department has had Chairs, among others, in comparative law, constitutional law, EU law, private and transnational law, competition and international economic law, legal theory, labor law, gender law, international law and human rights, and, more recently, in law and technology and in regulatory theory. No editorial can do justice to what each scholar holding them made of those years. Each academic this Department has hosted – as professor, as fellow, as researcher – has left some mark on a discipline, and an honest accounting of those contributions would require at least a volume of its own rather than some paragraphs in an editorial. What these pages offer instead is a shape; the genealogies below trace the journey of legal thought across the fields represented and nurtured in the Institute's corridors.

In 2023, Arnulf Becker Lorca, holding the Chair of International Law in the Department, embarked on a journey to explore the genealogies of the various theoretical strands represented by the Department's faculty over time, as well as the Professors who held the Department's Chairs. The Genealogies were presented in the exhibition 'Tracing the Line of Law' that took place in the Courtyard of Villa Salviati. They are a 'working reconstruction based on available records' and, according to the Law Department's own description,

¹⁰ This was brought to my attention during my discussions with EUI's staff, cautioning that publication and repository-recording practices have changed considerably over the 50-year period, which complicates comparison across decades.

[w]hile every effort has been made to ensure accuracy, some connections may be incomplete or imprecise. The aim is not to represent a definitive lineage, but to offer a visual reflection of the complexity, continuity and richness of academic traditions within the Law community at the EUI.¹¹

In the figures that follow – product of Arnulf Becker Lorca with the support of the Law Department in their finalization – the straight arrows represent a formal succession or institutional handover of a specific academic chair, while the dotted arrows indicate intellectual or thematic connection without direct succession (eg, similar fields, shared research focus).¹²

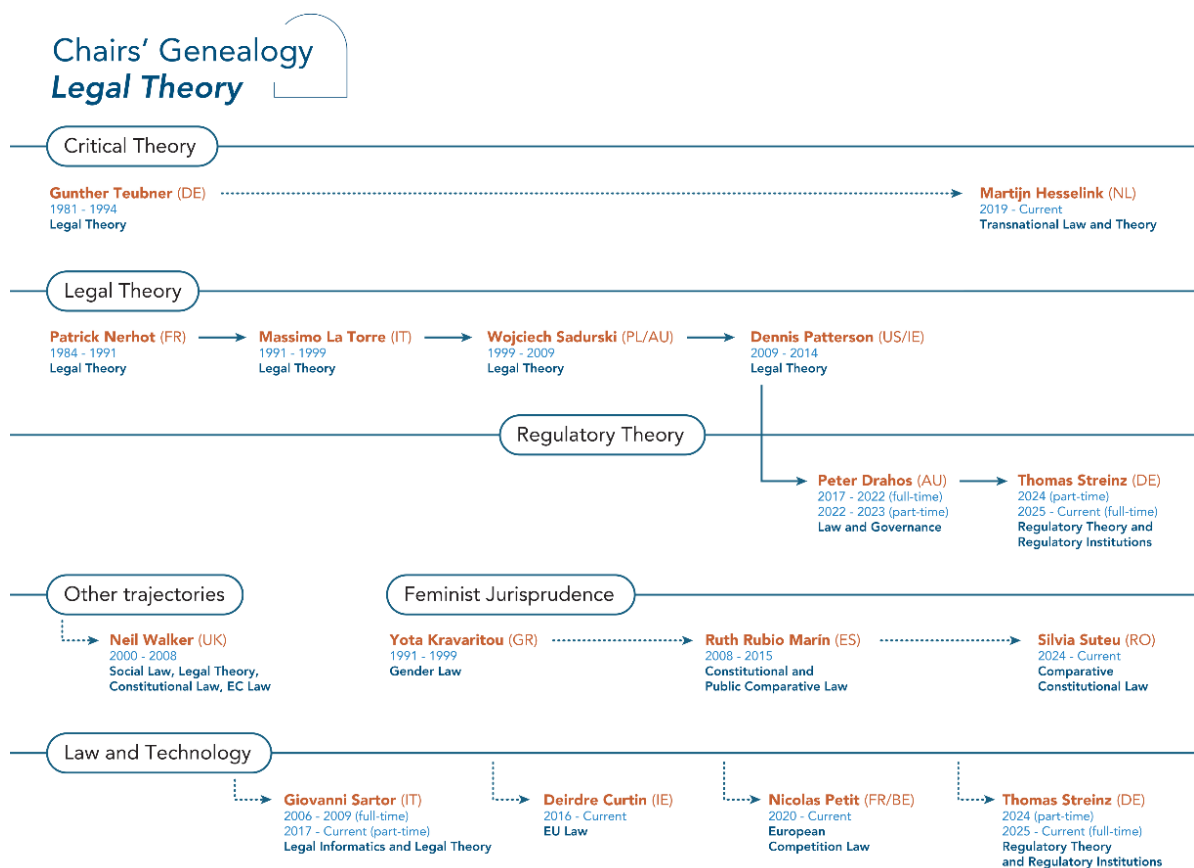


Figure 1. Arnulf Becker Lorca, EUI Law Department, Legal Theory Genealogy.

¹¹ EUI Law Department, Exhibition 'Chair Genealogies - Tracing the Line of Law', Villa Salviati, 2025. Description provided for the visitors of the exhibition.

¹² The genealogies cover the period from 1976 to 2025.

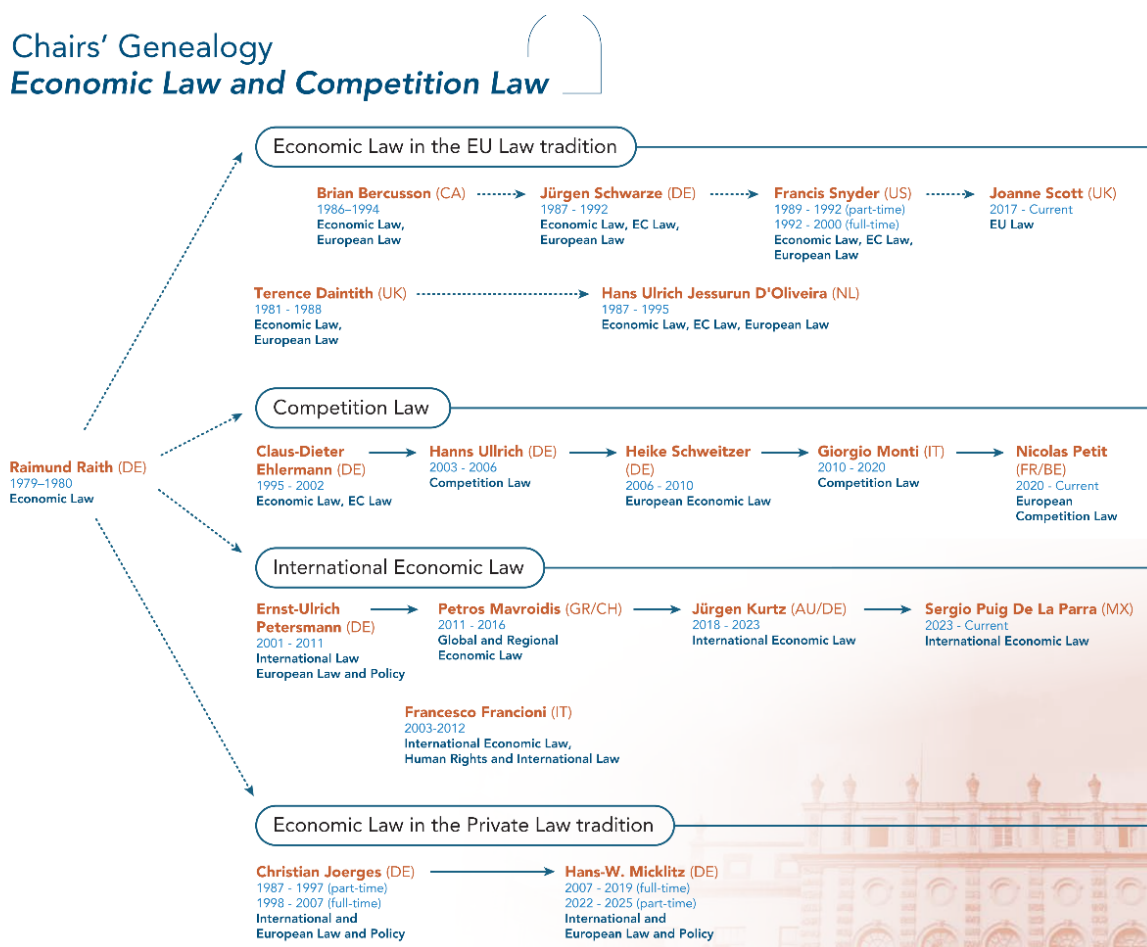


Figure 2. Arnulf Becker Lorca, EUI Law Department, Economic Law & Competition Law Genealogy.

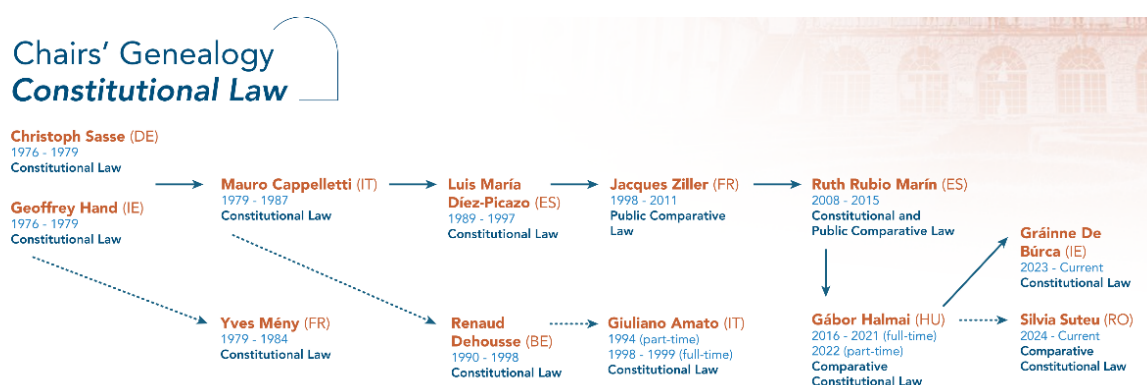


Figure 3. Arnulf Becker Lorca, EUI Law Department, Constitutional Law Genealogy.

Chairs' Genealogy EU Law

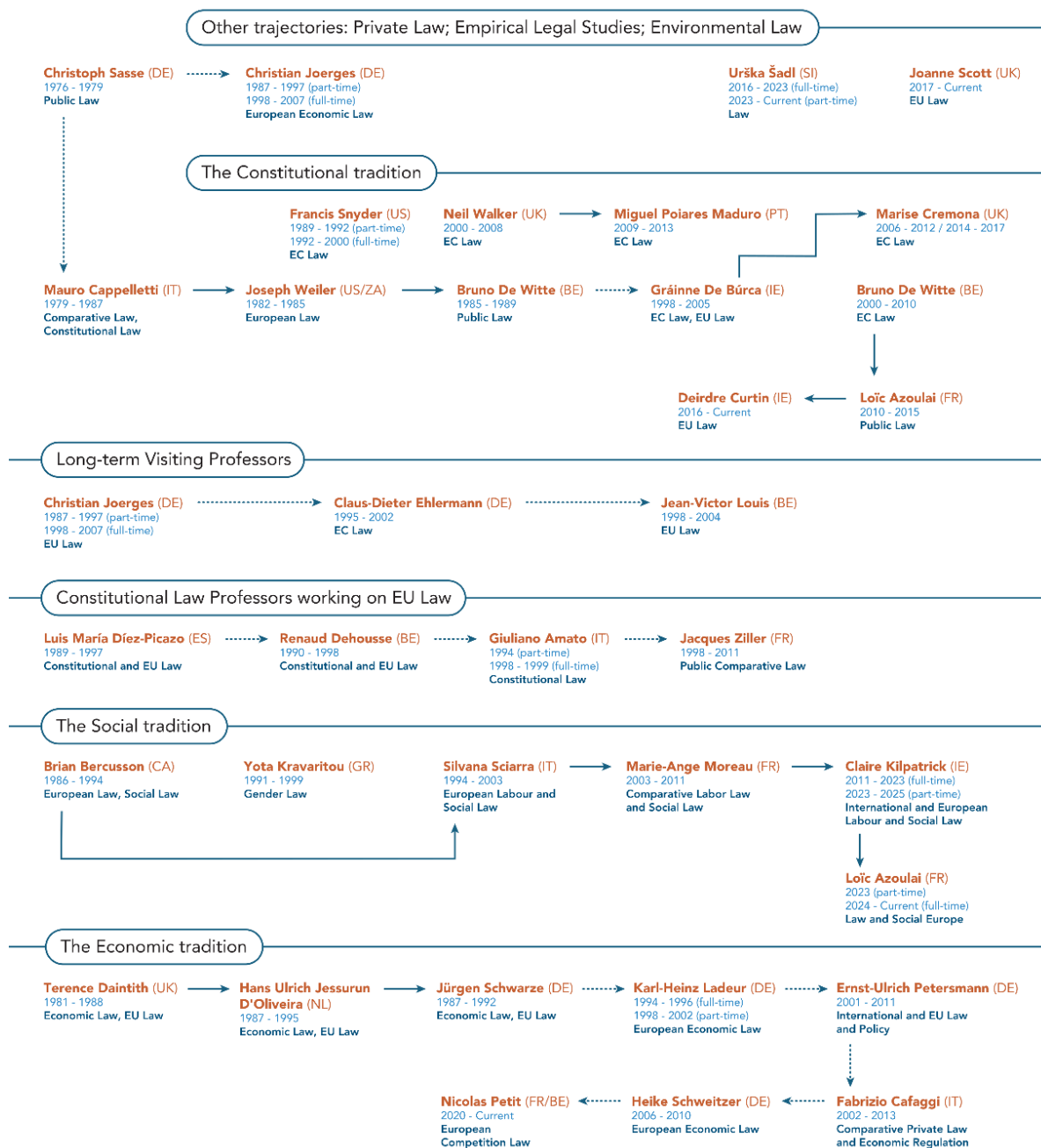


Figure 4. Arnulf Becker Lorca, EUI Law Department, EU Law Genealogy.

Chairs' Genealogy

International Law, International Economic Law, Human Rights

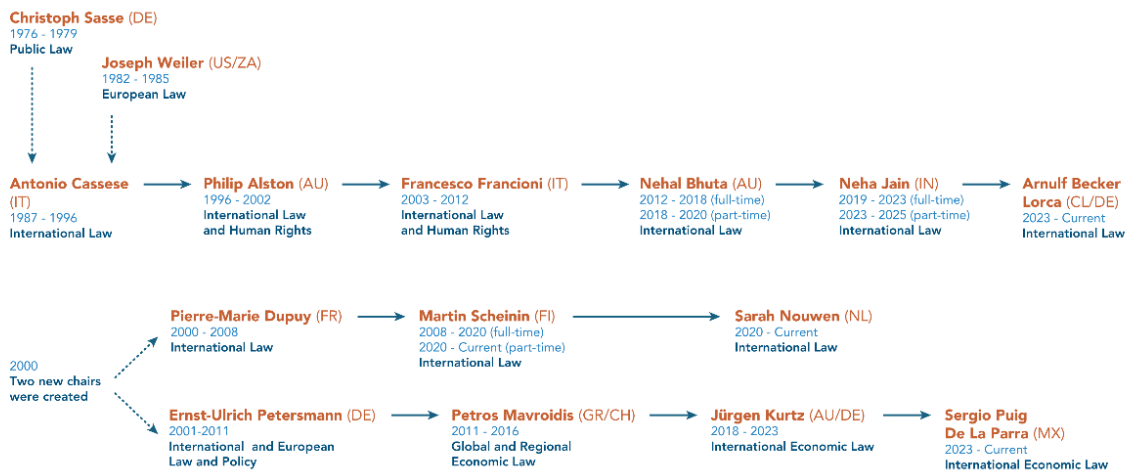


Figure 5. Arnulf Becker Lorca, EUI Law Department, International Law, International Economic Law & Human Rights Genealogy.

Chairs' Genealogy

Comparative Law



Figure 6. Arnulf Becker Lorca, EUI Law Department, Comparative Law Genealogy.

Chairs' Genealogy

Private Law

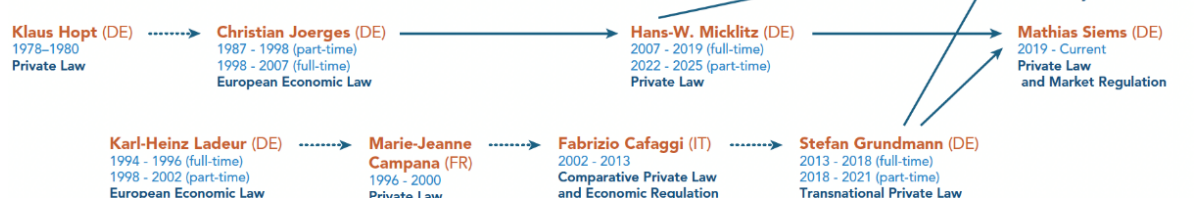


Figure 7. Arnulf Becker Lorca, EUI Law Department, Private Law Genealogy.

The Department also built long-lasting institutions. In 1990, Antonio Cassese and Joseph Weiler founded the Academy of European Law for research and teaching in EU law, international law, and human rights.¹³ In 2001, eleven years after the Academy's founding, Cassese and his fellow editors of the *European Journal of International Law* chose the EUI to also become the founding home of the European Society of International Law, whose secretariat is hosted to date at the Academy of European Law.¹⁴ The rationale behind this choice was simple. It was precisely the Institute's independence as a European institution that would 'underscor[e] the initiative's independence from any single national grouping'.¹⁵

This inheritance includes criticism of legal expertise itself. In his 2006 opening lecture for the academic year, Martti Koskenniemi examined the fragmentation of international law into specialized regimes, each carrying its own institutional purposes and structural bias. His concern was not diversity as such, but the presentation of contestable interests as the neutral work of technical management.¹⁶ In essence, the lecture restated what Antonio Cassese had also noted during his years at the EUI. That scholars who believed they were engaged in 'neutral' science thereby 'implicitly endorsed the existing political and institutional system, both domestically and internationally', and that jurists should instead play the game of

¹³ See European University Institute, 'Academy of European Law' <<https://www.eui.eu/en/academic-units/academy-of-european-law>> accessed 11 September 2026.

¹⁴ European Society of International Law, 'History of ESIL' (ESIL) <<https://esil-sedi.eu/esil-history/>> accessed 11 September 2026; European University Institute, 'European Society of International Law' (European University Institute, 10 September 2026) <<https://www.eui.eu/en/academic-units/academy-of-european-law/esil>> accessed 11 September 2026.

¹⁵ European Society of International Law (n 14).

¹⁶ Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 *European Journal of Legal Studies* 8, 10 and 12, originally delivered as the Opening Lecture of the Academic Year 2006–2007 at the European University Institute, Florence.

interpretation with ‘their cards lying face up on the table’.¹⁷ The approach he later called ‘critical positivism’ held that where the values underpinning the legal structure of the world community conflict, the interpreter must fall back on her own ideological or political leanings and owes a duty to say so explicitly – ie, that the choice is ‘grounded in a personal slant or bias’.¹⁸ Related critiques were indeed developed in both Europe and the United States. Legal and policy expertise has been described as knowledge that ‘knows and it forgets – or refuses to know – its powers and its limits’, translating struggle over social conflicts into the language of technique, masking conflicts as ‘expert disagreements’ – as mere application of a rule or method arising thereunder – and ‘assimilat[ing] [distributive outcomes] as facts rather than contestable choices’.¹⁹

Each of these critiques locates the problem in what jurists or experts believe about their own work, or forget about it. Gunther Teubner located it in how law is built. To him, law is an autopoietic system, closed in its operations even as it remains open to information about its environment; it constructs

¹⁷ Lorenzo Gradoni, ‘Feet on the Clouds, Head against the Ground: Antonio Cassese’s Militant Legal Idealism’ (2024) 35 *European Journal of International Law* 297, 327, quoting Antonio Cassese, ‘Diritto internazionale’ in L Bonanate (ed), *Studi internazionali* (1990) 113, 141.

¹⁸ Gradoni (n 17) 326–27, quoting Antonio Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter* (Hart Publishing 2011) 258–59. See also Megan Donaldson, ‘Legal Innovation through a Biographical Lens: Antonio Cassese and the European Tradition’ (2024) 35 *European Journal of International Law* 259, 264 and 267; Adil Hasan Khan, ‘The Spiritual Exercises of Antonio Cassese and the Re-Forming of a “European Tradition” of International Law’ (2024) 35 *European Journal of International Law* 331, 344 describing critical positivism as ‘a synthesis of two streams of tradition – a formalist positivist training into official life and a natural law training into conscience’. Cassese held the Department’s chair in international law from 1987 to 1996.

¹⁹ David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2018) 3, 5–6.

an ‘internal model of the external world’ and acts on that, so that the reality law works with is one of its own making, and legal doctrine ‘does not produce valid law, it merely produces self-descriptions’ of law’s own operations.²⁰

Across decades, the Department’s faculty has also turned skepticism on the legal discipline’s account of itself. In 1996, Yota Kravaritou – the first woman to hold a chair in the Department – invited the Law Department to discuss what gender did to their own research and fields of expertise, asking, after Kuhn, whether law is ‘a male paradigm par excellence’, an area of knowledge developed by one sex and presenting its experience as common to both.²¹ Nearly twenty years on, Arnulf Becker Lorca’s history of international law followed the field through jurists beyond the West (jurists of the ‘semi-

²⁰ Gunther Teubner, *Law as an Autopoietic System* (Zenon Bankowski ed, Anne Bankowska and Ruth Adler trs, Blackwell, European University Institute Press Series 1993) 19, 70.

²¹ Her point was that ‘the entire terrain of the discipline began to change and can never be the same again’, and that the suspicion of sexual inequality had by then reached even the fields that looked most neutral, such as public international law and tort law. Once the question had been posed, she wrote, ‘it was no longer easy for disciplines such as ours to simply maintain their traditional presuppositions’. Yota Kravaritou, ‘An Introduction and a Bibliography on Feminist Jurisprudence’ (EUI Working Paper LAW No 97/4, European University Institute 1997) 2-3 and 6. Part A of the Working Paper, ‘Basic Questions in Feminist Jurisprudence’, was the introduction presented to the Law Department’s seminar of May 1996 on feminist jurisprudence. See also Yota Kravaritou and others, ‘Droit et Amour en Europe: relations complexes / Love and Law in Europe: Complex Interrelations’ (EUI Working Paper LAW No 2000/2, European University Institute 2000), and within it Kravaritou, ‘L’amour inscrit amplement au droit’ 3-4. In December 1997 Kravaritou convened a conference at Villa Schifanoia of the EUI on Law and Love, published as a collective working paper of the Department. EUI Historical Archives, ‘Yota Kravaritou’, in the exhibition ‘Women for the Unification of Europe’
<https://archives.eui.eu/en/audio_visual/exhibitions/31/exhibition_pages/70>
accessed 15 September 2026.

periphery’), who learned the European tradition in order to argue with it and ended up appropriating and transforming its doctrines, revealing the discipline’s mixed origins as opposed to the Eurocentrism that would previously distort the historical narrative.²² In both cases, the discipline was questioned and asked to treat its most confident self-portrait as a construction. Adding to this, Sarah Nouwen and Arnulf Becker Lorca’s recent exchange on whether international law is dead asks whether the notion of ‘crisis’ might be put to better use, returning to its older perception as a moment of ‘reflection, judgment, and repair’. As Nouwen observed, those most failed by international law continue to invoke it; those violating it are often the ones to pronounce its death the fastest.²³

If a crisis is a moment of repair, the question then turns to what there is to repair with. One answer was provided in this Journal’s first issue, where Philip Allott ends his contribution by asking for a new *bella menzogna*; borrowing Dante’s description of allegory as ‘una veritade ascosa sotto bella menzogna’, a truth hidden beneath a beautiful lie. On his account, promise, property, crime, nations, and states are ‘works of the human imagination trans-substantiated into everyday social reality, fiction made fact’; a reminder that every institution is first a fiction of human imagination before it is made a social fact, and may therefore be imagined otherwise.²⁴ Across the aforementioned accounts lies a shared refusal to treat law as innocent of the choices it helps sustain.

The impact of its faculty’s scholarship is, of course, only one part of the Department’s contribution to legal academia. Its greatest contribution lies in

²² Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge University Press 2014) 22–24, 76, 354.

²³ European University Institute, ‘Is International Law Dead or Alive? Sarah Nouwen and Arnulf Becker Lorca Respond’ (EUI News Hub, 23 June 2026) <<https://www.eui.eu/news-hub?id=is-international-law-dead-or-alive-sarah-nouwen-and-arnulf-becker-lorca-respond>> accessed 11 September 2026.

²⁴ Philip Allott, ‘The Opening of the Human Mind’ (2007) 1 *European Journal of Legal Studies* 82, 83, 90, and 97 n 40 quoting Dante Alighieri, *Convivio* II.1.3.

the reason this faculty was brought to the hills of Fiesole in the first place: not only to develop their own research, but also to guide, challenge, and develop its community of researchers. A thesis is perhaps the most visible of the researchers' contributions – but not the only one. Researchers have further built the department's own intellectual life. Seventeen working groups currently run in the department – most of them convened by researchers themselves –, from international and EU law to legal and political theory, environmental law, the digital public sphere, international economic law and policy, and queer and feminist studies; and the seminars, workshops, book talks, and conferences researchers organize, together with the Department's research projects and interdisciplinary clusters, fill a calendar on which more than a thousand events are recorded since May 1999 alone. Little of that reaches a repository, and most of it is where the 'thinking' actually happens.²⁵ As of September 2026, 853 law PhD theses have been submitted, defended, and become part of the department's legacy.²⁶ To many, this treasure hunt of theory, method, and legal argumentation might resemble a Sisyphean task: Is a text ever complete? Is more research required?

²⁵ European University Institute, 'Research Projects' (EUI Research Hub) <<https://www.eui.eu/research-hub>> accessed 15 September 2026, filtered to Department of Law, type 'Working group', status 'Ongoing' (seventeen groups: Competition Law; Constitutional Law and Politics; Cultural Heritage; Digital Public Sphere; Environmental Law and Governance; EUI Working Group on Palestine; European Union Law; Finance, Innovation and Business Regulation; Human and Fundamental Rights; INFOSOC (Information Society); International Economic Law and Policy; International Law; Legal and Political Theory; Ponte Europa; Private Law; Queer and Feminist Studies; and Law, Rationalism and Complexity), and filtered to Department of Law, status 'Completed' (thirty-nine completed research projects, working groups and interdisciplinary research clusters); European University Institute, 'Events' (EUI) <<https://www.eui.eu/events>> accessed 15 September 2026, filtered to Department of Law for the interval 1 May 1999 to 15 September 2026 (1,002 events). The events figure runs from May 1999 only, that being the earliest date the events database returns; the true fifty-year total is necessarily higher.

²⁶ Information provided by the EUI Law Librarian (7 September 2026).

Should I begin all over again? Others might relate more to the allegory of the people trapped in Plato's cave. And some might be finding themselves during their PhD journey crossing one of the Divine Comedy's canticles.

In Dante's *Divine Comedy*, near the summit of *Purgatorio*, the pilgrim encounters two rivers rising from a single spring. *Lethe* effaces the memory of sin; *Eunoè* restores the memory of the good.²⁷ In the poem, the sequence was itself a mercy. *Lethe's* water was granted only once repentance was complete, so that what it erased had already been faced and answered for, and only afterwards, at the very end of the climb, came *Eunoè's* restoring. A discipline enjoys no such mercy, and, similarly, institutions receive no comparable absolution. What they decline to confront may return as the same failure in another form. Unlike the pilgrim, thus, they cannot afford *Lethe* at all; whereas drinking from *Eunoè* is suggested at every step, holding on to both the practices worth keeping and the ones not to be repeated. Institutions are not necessarily the ones that may fall into *Lethe*. It is their body of experts who may forget the power of legal institutions, drinking their daily *Lethe*, and never quite allowing themselves to know that the rules they might apply so competently are also a choice about who gets what, dressed in the neutral clothing of technique and institutional structure.

What is more, legal education itself can also instill habits of forgetting. Duncan Kennedy has argued that the graded classroom and the hierarchy

²⁷ See Dante Alighieri, *Purgatorio* XXVIII.127–132, where Matelda names the two streams and adds that *Eunoè* does not act unless *Lethe* has been tasted first; the pilgrim drinks of *Eunoè* only in the closing lines of the cantica, XXXIII.136–145. In Greek mythology, *Lethe* was one of the rivers of the underworld of Hades. The word originates from the Greek word 'λήθη' which means forgetting, oblivion, and forgetfulness and belongs to the root of the verb 'λανθάνω (ή λήθω)' which means to forget, to escape notice, to lie hidden. The same root, negated by the alpha privative, yields the word 'αλήθεια' which means truth. It is interesting that in the Greek language truth is built by negating the root of forgetting. 'Eunoè' is Dante's coinage, formed from the Greek 'εὖ' which means good and 'νόος / νοῦς' which means mind, thought, intellect and disposition.

above it reproduce the profession's own ordering long before students meet a client as lawyers.²⁸ The EUI's architecture unsettles parts of that structure through rotating chairs, comparative doctoral research, non-graded requirements to pass classes, and a doctorate awarded, according to EUI's founding Convention, 'for an original piece of research of high quality'.²⁹ These arrangements do not guarantee critical thought, but they make encounters and cross-fertilization across legal traditions, methods, and disciplines difficult to avoid. Hence, the Law Department's *Eunoè*, practiced for fifty years now, is reading the legal rules back into the interest and the struggle they may conceal, so that law can be seen again for what it has always also been – a mobile exercise of power, not merely its record of neutral rules.

Sarah Nouwen and Wouter Werner's reenactment pedagogy, implemented at the Academy's summer school on human rights in 2024, brought a similar encounter into the classroom. Working from International Criminal Court transcripts instead of teaching international criminal law through tidy textbook summaries, students reenacted the *Ongwen* trial from its transcripts, and recovered what the textbooks had excluded: the mistranslations, silences, coffee breaks, and tedium of legal proceedings, including the seventy counts read aloud until the room grew bored (something uncomfortable, given the gravity of the atrocities in question, that the room then had to sit with)

²⁸ Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 *Journal of Legal Education* 591.

²⁹ See Snyder (n 3) 1-2; Convention setting up a European University Institute (signed 19 April 1972) art 14, conferring the power to award a doctorate on research students who have completed a minimum of two years' study at the Institute and submitted 'an original piece of research of high quality'. See also Palayret (n 2) 168, observing that the doctorate 'can in fact be awarded only for personal research or work, but not mark the acquisition of knowledge through specialized teaching, a notion that does not appear in the Convention'.

before the defendant was asked by the judge whether he understands the charges and answered simply, ‘No’.³⁰

An anniversary practices another version of *Eunoè* for the legal discipline and the Law Department’s contribution to it. The Department’s fiftieth-anniversary programme places the aforementioned concerns within its own institutional history, and invites the hundreds of academics who found themselves drinking from its springs over time to remember its genealogy and what most deserves to travel forward:³¹ the disposition to read law in context, to distrust a box before accepting its walls and question the boundaries of a legal field, and to keep open the possibility that one’s governing fictions may be reimaged.

This journal is a younger tributary of the same spring, not yet twenty years old as the Department it grew out of turns fifty – but the obligation runs downstream all the same. The EJLS bears the same obligation to keep open a space in which legal doctrine can be examined together with the histories, interests, and distributions that give it force. Fifty years from now, other researchers will find themselves, midway along the journey of their own lives, on these same hills, and the habit of imagining law otherwise will remain, one hopes, an inheritance worth carrying forward.

³⁰ Sarah MH Nouwen and Wouter G Werner, ‘Embracing Discomfort: From Textbook to Scriptbook in Legal Education’ (University of Cambridge Faculty of Law Legal Studies Research Paper Series, Paper No 13/2025, July 2025) ss 1–2 <<https://ssrn.com/abstract=5343672>> accessed 11 September 2026, forthcoming in Luíza Leão Soares Pereira and Fabio Morosini (eds), *International Law Textbooks*; European University Institute, ‘Acting It Out: A Pioneering Way to Teach Law with Sarah Nouwen and Wouter Werner’ (EUI News Hub, 5 December 2025) <<https://www.eui.eu/news-hub?id=acting-it-out-a-pioneering-way-to-teach-law-with-sarah-nouwen-and-wouter-werner>> accessed 11 September 2026.

³¹ European University Institute, ‘Celebrating the Everyday Life of the EUI Law Department’ (EUI Law Department 50th Anniversary Celebrations, Villa Salviati, 17–18 September 2026) <<https://www.eui.eu/events?id=589141>> accessed 11 September 2026.

IN THIS ISSUE

The issue opens with Bernard Long's 'Vindicating the Rule of Law's Horizontal Dimension: The Case of Harmonised Technical Standards in EU Law'. Long examines the uneasy status of harmonized technical standards in EU law. Although the Court of Justice has recognized them as part of EU law, they remain the copyright-protected property of private standardization bodies and are generally available only for a fee. Long develops an account of the rule of law that extends to relations between private actors and argues that those subject to the legal effects of such standards must be able to know them. This supports their free public availability. The argument takes on particular weight under the AI Act, where technical standards may bear directly on the protection of fundamental rights.

In 'Putting Financial Stability Before Social Rights: The Constitutional Courts in Central and Eastern Europe Judging Austerity Measures' Jan Denka explores how the constitutional courts of Czechia, Poland, and Slovakia have approached conflicts between financial stability and social rights. Focusing on the international standards on austerity that emerged following the 2008 financial crisis, Denka asks whether those standards altered constitutional adjudication or encouraged convergence across the three jurisdictions. The author's analysis finds that the courts engage with international standards selectively and continue to favor financial stability over stronger protection of social rights.

Erskine Apiiyah's 'Eco-Legal Systems Thinking – A Conceptual Framework for Rethinking EU Data Governance' examines the technological and ecological conditions on which contemporary data processing depends. Apiiyah argues that EU data governance remains largely anthropocentric and tends to treat law, technology, and ecology as separate domains. In response, the article develops 'eco-legal systems thinking', or ELST, which reconceives them as interdependent systems. The framework brings into view the infrastructural, material, and ecological conditions that sustain data-

driven technologies. Its purpose is conceptual rather than doctrinal. ELST does not prescribe legal outcomes but seeks to make visible conditions on which EU data governance depends without fully acknowledging them.

Romane Croizet Fontane's 'Filling the Legal Vacuum: European Union's Normative Response to the Cybersecurity of Space Infrastructure?' addresses the gap between the growing cybersecurity risks facing space infrastructure and an international legal framework developed largely before those risks emerged. The article traces the EU's response through horizontal cybersecurity rules, emerging space-specific regulation, soft law, technical standards, and compliance mechanisms. Particular attention is given to the NIS2 Directive, the Cyber Resilience Act, and the proposed EU Space Act. Croizet Fontane also asks whether this developing framework could exert influence beyond the Union through the Brussels Effect and the EU's normative power. Rather than treating such influence as already established, the article identifies the conditions under which a European regulatory model might extend beyond the Union, while remaining attentive to the risk of further fragmentation in international space law.

In 'After the Standard of Civilisation: A Genealogy of Conditional Inclusion in EU Accession' Nuran Akcan traces how the assessment of a candidate's preparedness for EU membership became separated from decisions as to whether its accession negotiations will advance. Using a Foucauldian genealogy, Akcan begins with nineteenth-century practices associated with the standard of civilization, under which evidence of legal and administrative reform did not necessarily establish that a change in legal treatment was warranted. During decolonization, this relationship was displaced, as self-determination became associated with a right to sovereign independence, and UN General Assembly Resolution 1514 rejected unpreparedness as a basis for postponing independence. EU accession requirements later linked domestic preparedness to membership in the European Union. Examining this framework through Türkiye's candidacy, Akcan shows that a candidate may be found to have met particular requirements without that assessment

determining whether negotiations advance. Akcan identifies this separation between the assessment of fulfillment of EU accession requirements and the authority to determine its consequences as a distinct contemporary form of conditional inclusion.

The issue closes with Carolina Paulesu's review of Katharina Pistor's 'The Law of Capitalism and How to Transform It'. Paulesu examines Pistor's account of law as constitutive of capitalism and her proposal for a 'just private law' grounded in the capabilities approach. The review highlights Pistor's analysis of the ways private power appropriates law, while questioning how far legal reform alone can transform structures shaped by material conditions and relations of power. Paulesu also asks whether a framework centered on individual capabilities can adequately capture structural injustices. The review thus tests the transformative promise of Pistor's project against the material conditions that both shape law and limit what legal change can achieve.

CHANGES IN EJLS

During the spring 2026 semester, several changes occurred in the composition of the Journal's Executive Board. We welcomed three new Managing Editors: Johannes Müller, Marina Sáenz, and Fouad Saleh. One of our former Managing Editors, Madalena Simões, took over from Julia Galera Oliva as Head of Section for International Law. Our other Managing Editor, Lukas Schaupp, defended his PhD thesis successfully in May 2026. We thank both Julia and Lukas for their contribution to the journal and wish them all the very best in their future endeavors.

VINDICATING THE RULE OF LAW’S HORIZONTAL DIMENSION: THE CASE OF HARMONISED TECHNICAL STANDARDS IN EU LAW

Bernard Long^{*} 

Harmonised technical standards (HTS) have assumed a vital role in European Union (EU) internal market harmonisation since the advent of the New Approach. Though they now enjoy widespread proliferation and affirmative recognition as part of EU law, HTS remain the copyright-protected intellectual property of the private organisations that produce them and are therefore available only for a fee. In this article, I argue that this curious blurring of private and public interests and functions jars with a fundamental principle of the rule of law, namely the necessity of laws’ free availability. In particular, I develop an account of the rule of law’s horizontal dimension, ie, its application to side-to-side relationships between private actors. I argue that this account justifies the profound normative interest of private parties in freely accessing HTS, which impose obligations on other private parties with whom they interact. I then contend that this recognition strongly supports HTS’ free public availability as a core rule-of-law desideratum. Finally, I demonstrate the urgency of this concern with reference to rights-oriented HTS under the AI Act.

Keywords: rule of law; harmonised technical standards; public availability; internal market; Fuller

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INTRODUCTION

Caligula, the notorious Roman emperor, once acquiesced to public demands for the publication of his laws by having them inscribed in an indecipherably small font at the top of high columns.¹ Though this farce complied in a strained technical sense with the Roman tradition of making laws publicly available to the general populace, it plainly outrages basic modern conceptions of legality and the rule of law. Law is, of course, a normative enterprise; it guides and provides reasons for the behaviour of those subject thereto. In Kelsen's words, 'The legal order [...] is a normative order of human behaviour – a system of norms regulating human behaviour.'² This

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¹ Suetonius, *The Lives of the Twelve Caesars* (Alexander Thomson tr, George Bell & Sons 1909) 280.

² Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967)

4. By normativity, I refer here to law's function of prescribing certain accepted standards of behaviour. In this vein, Kelsen continues, at page 5, "'Norm' is the meaning of an act by which a certain behaviour is commanded, permitted, or authorized." Elsewhere, Raz writes, "A norm is prescribed if it is set by an individual or a group as a norm to guide the behaviour of some other person or persons." Joseph

normativity, in turn, generates a range of derivative requirements, one of the more obvious being that a person must know the rules to which their conduct is subject. Accordingly, the free and public availability of laws is a well-established desideratum of the rule of law.³

The proposition that the demands of the rule of law necessitate laws' publication is a largely incontestable one. Nonetheless, while this principle enjoys a deep pedigree within the Western tradition and is widely accepted, its realisation within modern legal systems – characterised by a far more diverse and multi-level network of sources than those of antiquity – generates points of contention. One such point of contention, which has recently featured prominently in European Union (EU) law, relates to the public availability of harmonised technical standards (HTS). HTS – technical specifications produced by the European Standardisation Organisations (ESOs) pursuant to a request of the European Commission – have played an increasingly central role in EU internal market harmonisation since the advent of the New Approach in the 1980s. These ESOs – CEN, CENELEC

Raz, *Practical Reason and Norms* (Hutchinson 1975) 82, 149–177. For an in-depth theoretical examination of law's normativity, see Stefano Berteau, *The Normative Claim of Law* (Hart 2009). In his opinion on Case C-160/20 *Stichting Rookpreventie Jeugd and Others v Staatssecretaris van Volksgezondheid, Welzijn en Sport* ECLI:EU:C:2022:101 [hereinafter *Stichting Rookpreventie Jeugd*], Advocate General Saugmandsgaard Øe acknowledged this normativity as 'one of the bases of the rule of law.' See Case C-160/20 *Stichting Rookpreventie Jeugd and Others v Staatssecretaris van Volksgezondheid, Welzijn en Sport* ECLI:EU:C:2021:618, Opinion of Advocate General Saugmandsgaard Øe, point 25. See also Case C-169/80 *Administration des douanes v Société anonyme Gondrand Frères and Société anonyme Garancini* ECLI:EU:C:1981:171, para 17; Case C-423/18 *Südzucker AG v Hauptzollamt Karlsruhe* ECLI:EU:C:2019:872, para 55.

³ Laws' public availability is a seemingly ever-present feature of lists of rule of law criteria. See, for example, Lon L Fuller, *The Morality of Law: Revised Edition* (Yale UP 1969) 39, 49–51; John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 270–271; Tom Bingham, *The Rule of Law* (Penguin 2011) 37–38; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 214.

and ETSI – are, however, private, non-profit bodies governed by Belgian or French law and the HTS they produce have therefore traditionally been subject to copyright protection and available only subject to the payment of a fee.⁴ Following the European Court of Justice's (ECJ) judgment in *James Elliott Construction*,⁵ HTS – formerly kept at arm's length from the EU's legal acquis – are now recognised as a fully-fledged form of EU law.⁶ This recognition, however, has generated a seeming inconsistency between HTS' status as a bona fide form of EU law and their continued obscurity behind the ESOs' paywall. Indeed, while the recognition that HTS unambiguously constitute laws ought to seemingly place them on an equal footing with more traditional forms of EU law, such as regulations and directives, there is, in fact, a jarring contrast in the standards of availability of these respective types of EU law. Whereas regulations and directives are freely available in the public domain, HTS remain the intellectual property of private entities and therefore languish behind these entities' paywall.⁷ More recently, the ECJ's *Malamud* judgment has partially disrupted this curious state of affairs by annulling a Commission decision refusing free access to four HTS, *inter*

⁴ Arnaud van Waeyenberghe and David Restrepo Amariles, 'James Elliott Construction: A "New(ish) Approach" to Judicial Review of Standardisation' (2017) 42(6) European Law Review 882, 885.

⁵ Case C-613/14 *James Elliott Construction v. Irish Asphalt Limited* ECLI:EU:C:2016:821 [*James Elliott Construction*]. The case was referred to the ECJ by the Irish Supreme Court and concerned a contract law dispute relating to the supply of rock aggregate which was non-compliant with I.S. EN 13242:2002, a national standard transposing EN 13242:2002. The Court addressed the question of HTS' legal status in relation to its own jurisdiction to issue a preliminary ruling on their interpretation.

⁶ *James Elliott Construction* (n 5) para 40.

⁷ In practice, HTS are sold by ESOs' national members and affiliates on the ESOs' behalf. See, for example, CEN/CENELEC, 'Obtaining European Standards' <<https://www.cencenelec.eu/european-standardization/european-standards/obtaining-european-standards/>> accessed 8 January 2026.

alia in the interests of the rule of law.⁸ Nonetheless, while it is tempting to characterise the *Malamud* judgment as a watershed moment in HTS' public availability, it remains unclear whether the judgment will give way to the free availability of HTS as standard, and it must therefore be assumed that the present status quo – HTS' availability subject to a fee – will abide in one form or another.

In this article, I challenge this status quo, arguing that the exigencies of the rule of law require HTS' free, public availability by default. More precisely, I will move beyond the predominant, vertical conception of the rule of law as concerning relations between the state and private entities and emphasise its oft-overlooked horizontal dimension, ie, its application to 'side-to-side' relations between private parties.⁹ Drawing primarily on Lon Fuller's influential account of the rule of law, I will argue that a core function of law is to engender normative 'interactional expectancies' between private parties or, in other words, that law facilitates normativity in private relationships by making clear the respective obligations which bear on each party. In the case of HTS, for example, a consumer can only make a well-reasoned and informed decision to purchase a product if they can verify the technical requirements with which it purports to conform.¹⁰ As such, I will argue that

⁸ Case C-588/21 P *Public.Resource.Org and Right to Know v Commission and Others* ECLI:EU:C:2024:201 [*Malamud*, in reference to the founder of Public.Resource.Org].

⁹ Brian Z Tamanaha, 'Vertical and Horizontal Dimensions of the Rule of Law' (2024) 73(5) *Emory Law Journal* 1215, 1217.

¹⁰ Consumers are not the only private parties that maintain an interest in freely accessing the content of such obligations. NGOs and activists, for example, seem to have a non-trivial interest in scrutinising the content of relevant HTS. Indeed, it is worth bearing in mind that the appellants in *Malamud* were both non-profit organisations dedicated to promoting transparency and citizens' right to access information. It is equally feasible that environmental activists possess an interest in accessing the content of HTS issued pursuant to legislation such as Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on

the non-free availability of HTS ruptures the rule of law in this horizontal dimension by undermining normativity and precluding consumers from forming reasonable interactional expectations.

To demonstrate the urgency of this concern, I will illustrate my argument in the novel context of rights-oriented HTS under the AI Act. Whereas consumers certainly have an obvious interest in verifying that products comply with requirements in respect of HTS' traditional remit of health and safety, their ability to form normative expectancies in respect of requirements relating to the protection of their fundamental rights plainly means that HTS' free availability assumes an even greater degree of importance. Ultimately, I will argue that this account of the horizontal rule of law justifies HTS' free, public availability on par with the present standards of availability afforded to regulations and directives. While the free availability of directives and regulations is well-established and straightforward, the free availability of HTS is seemingly hampered by the ESOs' proprietary interests therein. Against this, however, the account of the rule of law developed here elevates HTS' free availability above countervailing concerns, including ESOs' intellectual property rights. While I do not suggest that the ESOs' intellectual property rights be ignored, my conclusion here instead justifies urgent policy measures to overcome this impediment. In particular, the importance of HTS' free availability justifies measures such as the Commission fully funding ESOs' HTS production.

The article is structured as follows. In Section I, I provide an overview of the place of HTS in the EU's regulatory regime and in CJEU jurisprudence. This overview will encompass the historical development of HTS within the New Approach, their increasing juridification in the CJEU (culminating in the *James Elliot Construction* case) and, finally, the ECJ's treatment of the question of their free availability. Next, in Section II, I will develop an

packaging and packaging waste. It is therefore necessary to clarify that references throughout this article to consumers' interest in accessing HTS are exemplary, rather than prejudicial to the interests of other relevant private parties.

account of the rule of law's horizontal dimension, drawing on Fuller's seminal work to outline a conceptualisation of law as promoting normative and interactional expectations in private relationships. Based on this account, I will argue that laws' public availability is as vital a desideratum of this horizontal dimension as it is of the rule of law's better-understood vertical guise. Ultimately, I will argue that this conceptualisation justifies certain aspects of the *Malamud* judgments' reasoning, but that it, in fact, indicates even more strongly in favour of free availability as the standard for HTS. Finally, in Section III, I will extend this rationale to HTS under the AI Act, which, by virtue of their protection of fundamental rights, seems to provide a particularly powerful impetus for HTS' future public availability.

I. HARMONISED TECHNICAL STANDARDS IN EU LAW

1. *An overview of HTS*

Before proceeding to the more substantive aspects of this article, it is first necessary to briefly outline HTS' place within the EU legal framework.¹¹

¹¹ This is not, of course, the place to give a full overview of the minutiae of HTS' place within the EU legal acquis and, indeed, others have done so adeptly. See, for example, van Waeyenberghe and Restrepo Amariles (n 4); Carlo Colombo and Mariolina Elia Antonio, 'Harmonized Technical Standards as Part of EU law: Juridification With a Number of Unresolved Legitimacy Concerns? Case C-613/14 *James Elliot Construction Limited v. Irish Asphalt Limited*, EU:C:2016:821' (2017) 24(2) *Maastricht Journal of European & Comparative Law* 323; Zachariah Davies and Arnaud van Waeyenberghe, 'Better Regulation by Standards? Harmonized Technical Standards, Transparency and the Rule of Law' (2025) 62 *Common Market Law Review* 147; Harm Schepel, 'The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law' (2013) 20(4) *Maastricht Journal of European & Comparative Law* 521; Rob van Gestel and Peter van Lochem, 'Private Standards as a Replacement for Public Lawmaking?' in Marta Cantero Gamito and Hans-Wolfgang Micklitz (eds), *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes* (Edward Elgar 2020) 27; Irene Kamara, *Standardizing Personal Data Protection* (Oxford University Press, 2025) 44–76.

HTS originated in the 1980s, with the adoption of the so-called ‘New Approach’, which sought to remove trade barriers and eliminate uncertainty for economic operators within the Union.¹² In particular, the New Approach championed technical standardisation as an effective and efficient means of promoting market integration and ensuring the completion of the internal market.¹³ The current framework for technical standardisation, and in particular HTS, under the New Approach (and its successor, the New Legislative Framework), is set out in Regulation 1025/2012.¹⁴ In accordance with the regulation, a HTS is a technical standard adopted by one or more ESOs on the Commission’s request.¹⁵ Such a request shall specify the essential requirements to be met by the HTS.¹⁶ The Commission is responsible for assessing whether the HTS produced pursuant to its request is compliant therewith.¹⁷ If the HTS fulfils the requirements, the Commission shall publish a reference thereto (though not, crucially, its contents) in the Official Journal of the European Union without delay.¹⁸ In accordance with the

¹² Council Resolution (EC) No 136/01 of 7 May 1985 on a new approach to technical harmonization and standards [1985] OJ C136.

¹³ Commission, ‘Technical harmonization and standards: a new approach’ (Communication) COM (85) 19 final. On the issues with the preceding ‘Old Approach’ – i.e. fragmented, divergent national standards and inert, overly-long legislation – see Schepel (n 11) 522–523.

¹⁴ Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council Text with EEA relevance [2012] OJ L316/12. See also European Commission notice, ‘The ‘Blue Guide’ on the Implementation of EU Product Rules’ (Notice) [2022] OJ C247/1 [‘Blue Guide’].

¹⁵ Regulation (EU) No 1025/2012, art 2(1)(c) and Annex I.

¹⁶ Regulation (EU) No 1025/2012, art 10(1).

¹⁷ Regulation (EU) No 1025/2012, art 10(5).

¹⁸ Regulation (EU) No 1025/2012, art 10(6).

fundamental principles of the New Approach, HTS remain wholly voluntary,¹⁹ though compliance therewith generally confers a presumption of conformity with the essential requirements they cover.²⁰ Nonetheless, alternative methods of demonstrating compliance with essential requirements remain available.²¹

HTS represent a crucial form of co-regulation and provide undoubted benefits.²² Apart from its vital role in market integration, standardisation, as an instance of private regulation, has the obvious advantage of drawing on industry actors' unique technical expertise.²³ This point is recognised by the Commission, with its 2001 white paper on governance noting that co-regulatory measures '[combine] binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise.'²⁴ Elsewhere, technical standardisation is sometimes identified as a more efficient and cost-effective alternative to traditional regulation.²⁵

¹⁹ Regulation (EU) No 1025/2012, Recital 1; Blue Guide (n 14) paras 4.1.2 & 4.1.2.3.

²⁰ Regulation (EU) No 1025/2012, Recital 5; Blue Guide (n 14) para 4.1.2.3.

²¹ Blue Guide (n 14) para 4.1.2.3.

²² See Schepel (n 11) 523, who refers to the New Approach as a 'masterstroke' in pursuing the completion of the internal market.

²³ Mariolina Eliantonio and Caroline Cauffman, 'The Legitimacy of Standardisation as a Regulatory Technique in the EU - A Cross-disciplinary and Multi-level Analysis: An Introduction' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis* (Edward Elgar 2020) 1, 5; Mislav Mataija, *Private Regulation and the Internal Market: Sports, Legal Services, and Standard Setting in EU Economic Law* (OUP 2016) 12.

²⁴ European Commission, 'European governance – A white paper' (Communication) COM (2001) 428 final.

²⁵ Eliantonio and Cauffmann (n 23) 5–6; European Commission, 'Implementing the Community Lisbon. programme: A strategy for the simplification of the regulatory environment' (Communication) COM (2005) 535 final, 7–8.

Finally, the Commission has identified standardisation and related measures as a key expression of the principle of subsidiarity.²⁶

Notwithstanding these apparent benefits, the present system of standardisation also contains a swathe of non-trivial drawbacks. Most obviously, while the standardisation process facilitates the input of industry expertise, it has also been criticised as being unduly influenced by industry interests. Indeed, the Commission itself has noted that,

today's decision-making processes within the European standardization organizations [...] allow an uneven voting power to certain corporate interests: some multinationals have acquired more votes than the bodies that represent the entire stakeholder community.²⁷

These concerns regarding the non-democratic nature of the ESOs' procedures have been highly criticised.²⁸ In addition to this question of 'input legitimacy', scholars have also highlighted potential questions surrounding the current standardisation processes' output and throughput

²⁶ See, for example, European Commission, 'The principle of subsidiarity' (Communication) SEC(92) 1990 final, 13–14.

²⁷ See European Commission, 'An EU Strategy on Standardisation: Setting global standards in support of a resilient, green and digital EU single market' (Communication) COM(2022) 31 final, 6. This is especially a problem with ETSI, whose governance model assigns more votes to parties paying higher subscription fees which generates 'a risk that interested private parties might shape norms and values that ought to be democratically debated, particularly when these concern fundamental rights'. See Gregory Lewkowicz and Ritha Sarf, 'Taking Technical Standardization of Fundamental Rights Seriously for Trustworthy Artificial Intelligence' (2024) 25 *La Revue des Juristes de Sciences Po* 42, 44. ETSI was resultingly omitted from the Commission's draft standardisation request under the AI Act. See Luca Bertuzzi, 'Commission Leaves the European Standardization Body Out of AI Standard-setting' *Euractiv* (7 December 2022).

²⁸ Marion Ho-Dac, 'Considering Fundamental Rights in the European Standardisation of Artificial Intelligence: Nonsense or Strategic Alliance?' in Kai Jakobs (ed), *Joint Proceedings EURAS & SIIT 2023: (Responsible) Standardisation for Smart Systems* (Verlag Günter 2023) 131, 139–142; Davies and van Waeyenberghe (n 11) 155–156.

legitimacy.²⁹ Apart from these legitimacy challenges, another salient drawback of the current standardisation framework – and the one that provides the impetus for the remainder of this article – is that standards, including HTS, remain the copyright-protected intellectual property of the private bodies that produce them and, as such, typically remain accessible only upon payment of a fee.³⁰ This scenario generates a seeming incongruity

²⁹ Output legitimacy refers, as the name implies, to a consequentialist view of the quality of measures' outcomes and, in Scharpf's words, those measures' 'capacity to solve problems'. Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999) 11. On issues of output legitimacy in the context of food safety standardisation, see Dario Bevilacqua, 'Global Food Safety Regulation and the Interplay between Global Standards and WTO Law: How to Close the Legitimacy Gap?' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis* (Edward Elgar 2020) 243. cf Maurizia De Bellis, 'The Legitimacy of Banking and Financial Standards: Representation, Due Process and Regulatory Capture' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis* (Edward Elgar 2020) 180; Marta Cantero Gamito, 'The Legitimacy of Standardisation as a Regulatory Technique in Telecommunications' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis* (Edward Elgar 2020) 222. Throughput legitimacy 'is judged in terms of the efficacy, accountability and transparency of the EU's governance processes along with their inclusiveness and openness to consultation with the people.' Vivien A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 *Political Studies* 2, 2. See, for example, Sabrina Röttger-Wirtz, 'Standardisation of Health Products in Search of Legitimacy: Rethinking Judicial Review' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis* (Edward Elgar 2020) 266.

³⁰ On the copyright protection of standards in both the EU and United States, see Olia Kanevskaia, 'The Saga of Copyrighted Standards: A Perspective on Access to Regulation' in Bartosz Brożek, Olia Kanevskaia & Przemysław Pałka (eds), *Research*

in the standardisation process. Though ESOs are exclusively deputised under EU legislation to perform the quasi-public function of adopting standards in accordance with Commission law and policy objectives, they nonetheless retain their rights as private entities to charge for access to their intellectual property. This curious synthesis of the public and private domains engenders an obvious tension between the commercial interests of the ESOs and the transparency exigencies which usually attach to public functions.³¹ As I will demonstrate later, this tension was brought most conspicuously to the fore in both the General Court's and ECJ's *Malamud* judgments.

Whatever the pros and cons of the current EU standardisation framework, HTS occupy a central role in the internal market. Davies and Van Waeyenberghe point to the 'impressive proliferation' of HTS since the genesis of the New Approach in the 1980s, as well as their extensive reach within the EU economy.³² Estimates by the Commission indicate that over 3,600 HTS have been developed by the ESOs,³³ while HTS are currently

Handbook on Law and Technology (Edward Elgar 2024) 330. Apart from the theoretical focus of this article, this fee-based access model likely establishes a significant financial impediment to access to various stakeholders, such as SMEs and consumers. Regarding difficulties faced by SMEs under the current model, see Small Business Standards, *Involvement of SME associations in standardisation and their relationship with the National Standards Bodies* (2022). Empirical research on the effect of fee-based access on stakeholders is, however, scant and further research in this area is certainly necessary.

³¹ As Kanevskaia writes, the obstacle this model creates to accessing harmonised standards is 'a direct consequence of the choice of the "New Approach" as a technique for regulatory outsourcing.' See Olia Kanevskaia, 'Is it really all about the money? The future of European standardization after PublicResourceOrg' (2025) 16 *European Journal of Risk Regulation* 344, 351.

³² Davies and van Waeyenberghe (n 11) 153.

³³ COM(2022) 31 final (n 27) 1.

applicable in accordance with 38 harmonisation instruments.³⁴ EU institutions also seem open to a future widening of HTS' scope. Whereas HTS have traditionally related to technical requirements for health and product safety, a relatively recent communication by the Commission suggested that HTS ought also 'incorporate core EU democratic values and interests, as well as green and social principles.'³⁵ One particularly prominent example of this emergent, broader conception of HTS' scope is found in the AI Act, which takes the 'unprecedented' step of using HTS to safeguard fundamental rights.³⁶ Nonetheless, the seemingly unimpeachable and growing role of HTS within the EU's harmonisation framework exacerbates concerns about both their legitimacy and, more importantly for present purposes, public availability.

³⁴ European Commission, 'Harmonised Standards' <https://single-market-economy.ec.europa.eu/single-market/european-standards/harmonised-standards_en> accessed 8 July 2025.

³⁵ COM(2022) 31 final (n 27) 4. Less charitably, this widening in scope might be seen as an instance of mission creep, at least until issues with the legitimacy and availability of HTS are resolved.

³⁶ Ho-Dac (n 28) 133-134. See Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L 12.7.2024, art 40(2), according to which the Commission shall issue standardisation requests relating to the requirements contained *inter alia* in art 9, which requires relevant parties to maintain a risk management system for high-risk AI systems. According to art 9(2)(a), the risks covered by this risk management system include risks to fundamental rights. For a detailed consideration of rights-oriented HTS under the AI Act, see Marion Ho-Dac, 'The EU AI Act and the Challenge of Protecting Fundamental Rights' (2025) 62 Common Market Law Review 1299, 1321-1324.

2. The juridification of HTS in CJEU jurisprudence

HTS, as I have said, occupy an uncomfortable middle position between private and public domains. In particular, as Schepel observes, the delegation of a quasi-law-making function jars with the *Meroni* doctrine, which circumscribes the Commission's ability to delegate powers to private parties.³⁷ Accordingly, he further notes, the traditional approach was 'that the only way to ensure the legality of the New Approach was to keep the standardisation system at arm's length from the legal system, and preferably a bit further still.'³⁸ This logic was largely preserved through the standards' voluntary nature and the availability of alternative means of compliance with essential requirements. Nonetheless, in the intervening years, the limited jurisprudence on HTS in the European courts has extinguished the apparent distance between HTS and the EU legal system. Most perspicuously, the ECJ's finding in *James Elliot Construction* largely (though not entirely³⁹) extinguished the apparent notion that HTS existed to some degree outside of the EU legal acquis, unambiguously holding instead that a HTS, by virtue of its legal effects, 'forms part of EU law.'⁴⁰

Much of the case law on standardisation has concerned either national standards or non-harmonised standards.⁴¹ Amongst these, the most relevant for present purposes is *Latchways*, which concerns a technical standard produced by CEN within the framework of a mandate issued by the

³⁷ Schepel (n 11) 523–524. See Case C-9/56 *Meroni v Haute autorité* ECLI:EU:C:1958:7.

On the apparent discord between the *Meroni* doctrine and the new delegatory approach to EU lawmaking, see, for example, Renaud Dehousse, 'Misfits: EU Law and the Transformation of European Governance' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002) 207.

³⁸ Schepel (n 11) 524.

³⁹ The Court remained silent, as I will discuss later, on the public availability of HTS.

⁴⁰ *James Elliot Construction* (n 5) para 40.

⁴¹ Case 45/87 *Dundalk* EU:C:1988:435; Case C-227/06 *Commission v Belgium* EU:C:2008:160; Case C-171/11 *Fra.bo* EU:C:2012:453; Case C-100/13 *Commission v Germany* EU:C:2014:2293.

Commission in accordance with Directive 89/686 and relating to a particular product at issue in the case.⁴² The standard was referred to in the Official Journal of the European Union, though this communication specifically excluded the relevant product from its scope and from a presumption of conformity with the essential requirements of Directive 89/686. The Court acknowledged that its jurisdiction to issue preliminary rulings was limited to provisions of EU law and that the standard at issue did not constitute EU law, *inter alia* because it was not a harmonised standard.⁴³ Accordingly, the Court held that it lacked jurisdiction in the matter.⁴⁴ By implication, however, the fact that the standard's non-harmonised nature was crucial in determining that it lay outside of EU law seemed to indicate that a harmonised standard may, conversely, constitute part of Union law and therefore come within the Court's jurisdiction.

Four years after this initial and important foray into HTS' juridification, the Court issued its seminal judgment in *James Elliott Construction*, which marked the first time a national court had requested the Court to interpret a HTS.⁴⁵ While the minutiae of the case are unimportant for present purposes, the most pivotal aspect of the Court's judgment was its finding that HTS unambiguously constitute part of EU law. In this regard, it outlined various features of the procedure for the adoption of a HTS, namely that its production is 'initiated, managed and monitored by the Commission',⁴⁶ that

⁴² Case C-185/08 *Latchways and Eurosafe Solutions* ECLI:EU:C:2010:619 [*Latchways*].

⁴³ *Latchways* (n 42) para 33.

⁴⁴ *Latchways* (n 42) paras 35–36.

⁴⁵ van Waeyenberghe and Restrepo Amariles (n 4) 883. For commentary, see Colombo and Eliantonio (n 11); Pierluigi Cuccuru, 'The Public and Private Sides of Harmonized Standards: *James Elliott Construction v. Irish Asphalt*' (2019) 19 *German Law Journal* 1399; Kai P Purnhagen, 'Voluntary "New Approach" Technical Standards are Subject to Judicial Scrutiny by the CJEU! – The Remarkable CJEU judgment "Elliott" On Private Standards' (2017) 8 *European Journal of Risk Regulation* 586.

⁴⁶ *James Elliott Construction* (n 5) para 43.

it gives 'concrete form on a technical level' to essential requirements contained in harmonising legislation,⁴⁷ that compliance with the HTS confers a presumption of conformity and that its legal effects are subject to a publication of its reference in the Official Journal of the European Union.⁴⁸ In view of these legal effects, the Court held that a HTS comprises a part of Union law.⁴⁹ It further opined that the availability of alternative means of compliance with essential requirements was not sufficient to extinguish these legal effects.⁵⁰

The Court's finding in this regard is monumental, not least in that it rescues HTS from their former place in a 'legal no man's land' by conclusively affirming them as part of the EU legal acquis and refuting any previous notion that they constituted a merely extra-legal form of co- or self-regulation⁵¹. In spite of the acknowledgement that HTS form part of EU law and are therefore within the European courts' review remit, the *James Elliot Construction* judgment remained conspicuously silent on whether HTS, in view of their newly-recognised status, would enjoy the full trappings of EU law, including the same standards of free publicity as, say, regulations and directives. van Waeyenberghe and Restrepo Amariles argue, for instance, that the recognition of HTS as part of EU law ought logically give way to their free accessibility.⁵² As logical as this contention may seem, however, the *James Elliot Construction* judgment unsatisfactorily left this question entirely open. As such, in the following subsection, I will outline two subsequent cases – *Stichting Rookpreventie Jeugd* and *Malamud* – which more

⁴⁷ *James Elliott Construction* (n 5) para 36.

⁴⁸ *James Elliott Construction* (n 5) paras 38–39, 43.

⁴⁹ *James Elliott Construction* (n 5) para 40.

⁵⁰ *James Elliott Construction* (n 5) para 42.

⁵¹ Rob van Gestel and Hans-W Micklitz, 'European Integration Through Standardization: How Judicial Review is Breaking Down the Club House of Private Standardization Bodies' (2013) 50 *Common Market Law Review* 145, 146–150.

⁵² van Waeyenberghe and Restrepo Amariles (n 4) 890. In this regard, they cite art 15(3) TFEU.

directly addressed the question of HTS' public availability, in order to preface the theoretical framework I defend in Section 4.

3. The CJEU on HTS' public availability

While the Court remained crucially silent on free accessibility in *James Elliott Construction*, this principle was later given more detailed consideration in *Stichting Rookpreventie Jeugd*, which concerned a preliminary ruling on Article 4(1) of Directive 2014/40/EU, which expressly refers to various ISO standards.⁵³

Some salient points from the Court's judgment must be noted. Insofar as the Court was called to consider the free availability of HTS, it acknowledged that the requirement for laws' publication is grounded in the principle of legal certainty. More clearly, it explicitly located the logic of this requirement in law's normativity, affirming that publication is necessary because '[i]ndividuals must be able to ascertain unequivocally what their rights and obligations are' and 'ascertain their position in situations and legal relationships governed by EU law'.⁵⁴

The relationship between normativity, the rule of law and public availability was made even more evident in the opinion of Advocate General Saugmandsgaard Øe, who wrote that one of the rule of law's more vital bases is the principle 'that, in a democratic society, every citizen must have free access to the content of the law'.⁵⁵ He continued that 'the principle of free access to the content of the law must in my view be guaranteed for at least

⁵³ For commentary, see Annalisa Volpato, 'Transparency and Legal Certainty of the References to International Standards in EU Law: Smoke Signals from Luxembourg?: *Stichting Rookpreventie Jeugd* and Others (C-160/20)' *EU Law Live* (1 March 2022). The International Organization for Standardization (ISO) is an international, non-governmental standardisation organisation comprised of representatives of the national standardisation organisations of its member countries.

⁵⁴ *Stichting Rookpreventie Jeugd* (n 2) paras 41, 45.

⁵⁵ Opinion of Advocate General Saugmandsgaard Øe (n 2) point 25.

two reasons. The first derives from the adage that ‘ignorance of the law is no excuse’, which necessarily means that the law cannot be imposed on citizens before they have the opportunity to become aware of it. The second comes from the need, for citizens in the broad sense, to be in a position to consult all of the texts adopted by the public authorities that govern life in society in order to be able to ensure that they are observed and to exercise effectively the rights conferred on them in a democratic society.’⁵⁶

One vital point must be outlined before proceeding. Insofar as the Court referred to the importance of individuals ascertaining their rights, as well as their obligations, it seemed to hint at the rule of law’s horizontal dimension. The horizontal rule of law is even more conspicuous in the second rationale for public availability outlined by Advocate General Saugmandsgaard Øe, which plainly moves beyond a narrow focus on normativity in the sense of obligation and instead acknowledges the right of individuals to ensure that laws are complied with in a general sense (ie, by other parties) rather than merely in their own conduct.

Though the Court hinted at a more encompassing understanding of both the rule of law’s vertical and horizontal dimensions, its judgment nonetheless marginalised the latter in favour of a narrow focus on obligation. This marginalisation is particularly evident in the critical distinction drawn by the Court between HTS which impose obligations on undertakings and those which impose obligations on the general public. With regards to HTS which impose obligations on the public, these, the Court seemed to imply, must be published in full in the *Official Journal of the European Union*.⁵⁷ In contrast, and citing *James Elliott Construction*, it was considered that, in the case of HTS, which impose obligations only on undertakings, accessibility through national standardisation bodies was sufficient.⁵⁸ This distinction, however, has been criticised. Davies and van Waeyenberghe note, for instance, that

⁵⁶ Opinion of Advocate General Saugmandsgaard Øe (n 2) point 26.

⁵⁷ *Stichting Rookpreventie Jeugd* (n 2) para 48.

⁵⁸ *Stichting Rookpreventie Jeugd* (n 2) paras 52–53.

the requirement to publish the contents of HTS which impose obligations on the general public seems to represent a ‘prospective rule’, as no such HTS is presently used.⁵⁹

While *Stichting Rookpreventie Jeugd* represented the ECJ’s first substantial foray into the question of HTS’ potential free availability, the Court’s treatment of the topic is scant and underwhelming. Though the Court’s judgment echoed the Advocate General’s implicit recognition of the rule of law’s horizontal dimension, it disappointingly marginalised this in favour of a narrow focus on obligation and, with it, the rule of law’s more typical vertical dimension. This overemphasis on vertical obligation is typified by the judgment’s identification of a speculative and presently inoperable rule that HTS ought only be publicly available if they impose obligations on the general public. Insofar as the Court affirmed that the present system of publishing a mere reference to a HTS in the *Official Journal of the European Union* continues to suffice in the case of HTS imposing obligations exclusively on undertakings – in other words, all existing HTS – it seemed to establish obligation as the gatekeeper of availability.

Two years after the *Stichting Rookpreventie Jeugd* judgment, the ECJ issued its *Malamud* judgment. The somewhat convoluted history and facts of the case are as follows. In September 2018, the appellants – Public.Resource.Org Inc. and Right to Know CLG – lodged a request for access to four HTS, related to essential safety requirements for toys under Directive 2009/48/EC and to Regulation (EC) No 1907/2006.⁶⁰ This request was based on

⁵⁹ Davies and van Waeyenbergh (n 11) 166. See also Volpato (n 53).

⁶⁰ Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys [2009] OJ L170/1; Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396/1.

Regulation No 1049/2001 and Regulation No 1367/2006.⁶¹ The Commission denied the request based on the first indent of A. 4(2) of Regulation No 1049/2001, which permits institutions to deny access to a document where disclosure would undermine the protection of 'commercial interests of a natural or legal person, including intellectual property'.⁶² Accordingly, the Commission emphasised the copyright protection of HTS and further affirmed that there was no overriding public interest in disclosure of the relevant HTS.⁶³ The General Court upheld the refusal of the appellants' request.⁶⁴

Following the General Court's decision, the case was appealed to the ECJ, where the appellants submitted *inter alia* that the Commission had erred in law by failing to find an overriding public interest within the meaning of

⁶¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43; Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13.

⁶² Regulation (EC) No 1049/2001, art 4(2).

⁶³ Regulation (EC) No 1049/2001, art 4(2). Exceptions under art 4(2) are subject to the absence of 'an overriding public interest in disclosure.'

⁶⁴ Case T-185/19 *Public.Resource.Org and Right to Know v Commission* ECLI:EU:T:2021:445. For a critical commentary on the General Court's *Malamud* decision, see Alexandra Soroiu and Mateus Correia de Carvalho, 'Lawtify Premium: Public.Resource.Org (T-185/19), a Judicial Take on Standardisation and Public Access to Law' (2022) 16 *Review of European Administrative Law* 57. Noteworthy, Soroiu and Correia de Carvalho argue, as I do here, that the pay-for-access model undermines the rule of law, albeit without a detailed theoretical consideration of the rule of law's horizontal dimension (and before the Grand Chamber's judgment).

Article 4(2) of Regulation No 1049/2001.⁶⁵ Furthermore, they argued that the Commission had failed to state reasons for its refusal to find an overriding public interest justifying the availability of the HTS. The Court began by noting that Article 15(3) TFEU and Article 42 of the Charter of Fundamental Rights of the European Union guarantee a right of access to documents of the institutions, bodies, offices and agencies of the Union.⁶⁶ It further noted that Article 4(2) of Regulation No 1049/2001, which governs the exercise of that right, permits institutions to refuse access to a document in the interest of protecting commercial interests, including intellectual property rights, only when there is no overriding public interest in disclosure.⁶⁷

In engaging with the question of whether an overriding public interest existed, the Court first turned to the rule of law. Here, the Court acknowledged the well-established principle that the rule of law – a foundational value of the European Union – demands free access to EU law, so that ‘individuals must be able to ascertain unequivocally what their rights and obligations are’.⁶⁸ Though this language evoked that of the *Stichting Rookpreventie Jeugd* judgment,⁶⁹ the *Malamud* Court went further, continuing, that ‘free access must in particular enable any person whom legislation seeks to protect to verify, within the limits permitted by law, that the persons to whom the rules laid down by that law are addressed actually comply

⁶⁵ For reasons of brevity and precision, I will not engage with the appellants’ other argument, namely that the Commission had erred in its application of the exception laid down in the first indent of Article 4(2) of Regulation No. 1049/2001, as the Court dispensed with this argument in its finding. For a more detailed account of the arguments advanced in the case, see Davies and van Waeyenberghe (n 11) 164–165.

⁶⁶ *Malamud* (n 8) para 66.

⁶⁷ *Malamud* (n 8) para 68.

⁶⁸ *Malamud* (n 8) para 81.

⁶⁹ It is worth noting, however, that the *Stichting Rookpreventie Jeugd* Court did not couch this principle in terms of the rule of law but, rather, legal certainty, which is, of course, a constitutive element of the rule of law.

with those rules.’⁷⁰ It concluded that, by virtue of their legal effects, HTS may specify the rights and obligations of individuals and that access to these specifications ‘may be necessary for them to verify whether a given product or service complies with the requirements of such legislation.’⁷¹

The Court then turned to the dual principles of transparency and openness, linking these concepts to the legitimacy and accountability of democratic systems.⁷² In this regard, it cited the right of access to documents provided for by Article 15(3) TFEU and Article 42 of the Charter, and its implementation by Regulation No 1049/2001.⁷³ The Court ultimately held that, in view of the principles of the rule of law, transparency, openness and good governance, an overriding public interest was present within the meaning of Article 4(2) of Regulation No 1049/2001. Accordingly, it overruled the General Court and annulled the Commission’s decision to refuse the appellants access to the HTS at issue.

Though the *Malamud* judgment took the unprecedented step of making several HTS available to the appellants at no cost, it is vital not to overstate its presently unclear implications. Though the Court annulled the decision to refuse the appellants access to the four requested HTS, it is entirely uncertain – given the narrow scope of the case – whether this will give way to the universal free publication of *all* HTS in the same manner as more traditional forms of EU law.⁷⁴ For example, Davies and van Waeyenberghe posit that, in the aftermath of the *Malamud* judgment, HTS which impose obligations on undertakings may still be subject to the conventional pay-for-access model and be freely available only upon the lodging of a request

⁷⁰ *Malamud* (n 8) para 81.

⁷¹ *Malamud* (n 8) para 82.

⁷² *Malamud* (n 8) para 83.

⁷³ *Malamud* (n 8) para 84.

⁷⁴ This uncertainty is exacerbated by the Court’s hesitancy in engaging with the question of HTS’ copyright protection.

under Regulation 1049/2001.⁷⁵ This would be an outcome of dubious desirability. If free access to HTS is justified by an overriding public interest grounded in the rule of law, it appears incongruous to remove one barrier to access (payment) only to replace it with another (a perfunctory bureaucratic procedure).

Despite these unclear implications, however, it is inarguable that the reasoning in *Malamud* represents a significant departure from that in *Stichting Rookpreventie Jeugd*. The latter Court, despite its cursory reference to the unequivocal ascertainment of rights, ultimately settled on a narrow emphasis on obligation as the gatekeeper of HTS' availability.⁷⁶ This narrow focus evinces a commitment to the rule of law – though the *Stichting Rookpreventie Jeugd* did not use that terminology – in its vertical dimension, understood as 'the top-down relationship between government officials and private actors in relation to how the ruling regime treats citizens and entities on matters of interest to the government itself.'⁷⁷ By conspicuous contrast, the *Malamud* judgment emphasised a dynamic altogether different to this traditional, vertical relationship. Rather, its consideration of publication and the rule of law related, as I have said, to the ability of individuals to 'verify [...] that the persons to whom the rules laid down by [a] law are addressed actually comply with those rules.'⁷⁸ This emphasis is confirmed by the opinion of the Advocate General, Laila Medina, which queried,

[H]ow could a citizen know conclusively whether an undertaking has manufactured its product or provided a service in accordance with HTS, if that citizen is not in a position to know the content of those HTS?⁷⁹

⁷⁵ Davies & van Waeyenberghe (n 11) 167.

⁷⁶ This approach is not without precedent in the CJEU, of course. See, for example, C-161/06 *Skoma-Lux sro v Celní ředitelství Olomouc*, ECLI:EU:C:2007:773, para 38.

⁷⁷ Tamanaha (n 9) 1217.

⁷⁸ *Malamud* (n 8) para 81.

⁷⁹ Case C-588/21 P *Public.Resource.Org and Right to Know v Commission and Others* ECLI:EU:C:2023:509, Opinion of Advocate General Medina, point 63.

She continued, '[C]ustomers [...] are, in reality, the real addresses.'⁸⁰ The acknowledgement that private parties upon whom a HTS imposes no obligations nonetheless maintain an interest in verifying compliance by those subject to its obligations hints at a fuller conception of the rule of law. More perspicuously, the approach adopted by the *Malamud* Court indicates a novel acknowledgement of the rule of law's horizontal dimension, ie, insofar as it applies to side-to-side relationships between private parties. In the next section, I will provide a thorough account of this horizontal dimension of the rule of law – hinted at in the *Malamud* judgment as an overriding interest justifying HTS' free availability – and argue that this account supports HTS' free availability by default.

II. THE RULE OF LAW AND THE PUBLIC AVAILABILITY OF HTS

1. *The rule of law's vertical and horizontal dimensions*

The rule of law is a concept with a deep pedigree in Western politico-legal thought and a firm place in the EU constitutional framework.⁸¹ Nonetheless, the meaning of the rule of law is deeply contested. Shklar, for instance, famously wrote that the concept 'has become meaningless thanks to

⁸⁰ Opinion of Advocate General Medina (n 79) point 63.

⁸¹ E. P. Thompson, for example, identified the rule of law as 'an unqualified social good.' See Edward P Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin 1976) 267. cf Gerald Postema, *Law's Rule: The Nature, Value, and Viability of the Rule of Law* (OUP 2022) 79, who doubts the notion that the rule of law is an *unqualified* social good, i.e. one that can be achieved 'without some loss or cost, or without struggle.' On the historical development of the rule of law, see Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004). Article 2 TEU identifies the rule of law as a foundational value of the Union. See also Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999; Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97; Case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

ideological abuse and general over-use.’⁸² Given the overabundance of divergent and sometimes conflicting accounts of the rule of law, it is necessary here to narrow my scope and seek a generally palatable starting point. To this end, I will begin with perhaps its most intuitive and uncontentious function, that of restraining the arbitrary exercise of power, particularly by governmental authorities.⁸³ This conception has an enviably longstanding pedigree and is succinctly outlined by Plato, who wrote that the rule of law exists ‘where [law] is sovereign over the authorities and they its humble servants’.⁸⁴ In more modern scholarship, this notion is echoed in one way or another by a variety of scholars.⁸⁵ Insofar as the rule of law is conceived of as a bulwark against arbitrary state power, its operation is distinctly vertical, a conceptualisation which has tended to predominate *inter alia* in both historical and contemporary academic discourse and, in light of the Court’s narrow emphasis on obligation as the gatekeeper of public

⁸² Judith N Shklar, ‘Political Theory and the Rule of Law’ in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1, 1.

⁸³ Arbitrary power is not, of course, only wielded by governments. On the ‘private government’ operated by employers over their employees, see Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don’t Talk about It)* (Princeton UP 2017). Similarly, the unprecedented power wielded by so-called ‘tech leviathans’ also poses challenges to traditional conceptions of the rule of law. See Postema (n 81) 263–292; Christian D’Cunha, “A State in the Disguise of a Merchant”: Tech Leviathans and the Rule of Law’ (2021) 27(1–3) *European Law Journal* 109. It might be the case that the chasmic power imbalance in some otherwise horizontal relationships might indicate a third, diagonal dimension of the rule of law. Fully developing this concept is, however, beyond the scope of this article and I will therefore proceed based on the vertical/horizontal dichotomy.

⁸⁴ Plato, *The Laws* (Alfred E Taylor tr, Dent & Sons Ltd. 1934) 101.

⁸⁵ Postema (n 81) 18; Martin Krygier, ‘What’s the Point of the Rule of Law?’ (2019) 67(3) *Buffalo Law Review* 743. See also Brandeis J’s concurring opinion in *Whitney v. California* 274 U.S. 357, 375, in which he wrote that the founders of the United States ‘believed that the final end of the State was to make men free to develop their faculties, and that, in its government, *the deliberative forces should prevail over the arbitrary.*’ (emphasis added).

availability in *Stichting Rookpreventie Jeugd*, ECJ jurisprudence. The predominance of the rule of law's vertical dimension is, of course, intuitively intelligible given that transgressions in this domain often evoke visceral distaste and excoriation. To provide a stark historical example, the Nazi *Führerprinzip*, which made Hitler the 'final arbiter of law',⁸⁶ has abided in public consciousness as a powerful reminder of the importance of the rule of law in safeguarding against despotism.

In its vertical dimension, law's normativity is an intelligising principle for many core rule-of-law desiderata. The well-accepted objectionability of retroactive laws, for instance, is plainly grounded in the obvious impossibility of complying with laws which come into effect only after one has acted.⁸⁷ Prohibiting retroactive laws is therefore vital in shielding citizens from the arbitrary imposition of unforeseeable criminal penalties. In the context of laws' publication, the relevance of this principle is similarly plain. As Raz succinctly noted, if the law is to guide citizens' behaviour, 'they must be able to find out what it is.'⁸⁸ Put simply, the publication of laws is a check on arbitrary rule because it affords citizens foreknowledge of the rules to which their conduct is subject and allows them to order their behaviour to avoid incurring punishment for transgressing them. In contrast, secret or otherwise unavailable laws leave citizens vulnerable to an 'autocratic whim' that they could do nothing to avoid.⁸⁹ Indeed, if we are to take seriously the notion that normativity is an inherent feature of law, it seems irrefutable that

⁸⁶ Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (OUP 2018) 103.

⁸⁷ Though retrospective laws have largely become artefacts of historical tyrannies, the ECJ somewhat recently dealt with the issue, in relation to retrospective amendments to a pension scheme, in Case C-171/18 *Safeway Ltd. v. Newton* ECLI:EU:C:2019:272.

⁸⁸ Raz (n 3) 214. Milton calls this public promulgation's 'success criterion'. See James Milton, 'The Rule of Law and Full-Bodied Promulgation' (2025) 88(3) *Modern Law Review* 502, 507.

⁸⁹ Elizabeth Goitein, *The New Era of Secret Law* (Brennan Center 2016) 16.

non-public laws do not, in truth, constitute laws in any meaningful sense. This position has, of course, been defended by a variety of scholars. For Fuller, a failure to fulfil a basic threshold of any of the eight principles of legality he outlines – including public promulgation – results in something worse than merely bad law. Rather, ‘it results in something that is not properly called a legal system at all’.⁹⁰ Insofar as they sever the vital link between the existence of laws governing human behaviour and the possibility of arranging one’s behaviour to comply therewith, unpublished laws are, as Kutz affirms, ‘nugatory’.⁹¹

In contrast to the clearly vital vertical dimension outlined above, the *Malamud* judgment seemed to evince, as I have outlined, an acknowledgement of the rule of law’s horizontal dimension, namely its application to the ‘side-to-side’ relationship between parties subject to HTS and the general public, including prospective consumers. Though this dimension has received significantly less attention than its vertical counterpart, it too has a longstanding pedigree. One ancient scholar, known as *Anonymous Iamblichus*, wrote,

The first result of conformity to the law is trust, which brings enormous benefits for everyone and is one of the great blessings of the world [...] thanks to their conformity to the law, there is interdependence and trust between [people].⁹²

More recently, Bingham implicitly notes this horizontal dimension in identifying the rule of law’s function of providing a stable foundation for business relationships:

[T]he successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights

⁹⁰ Fuller (n 3) 39.

⁹¹ Christopher Kutz, ‘Secret Law and the Value of Publicity’ (2009) 22(2) *Ratio Juris* 197, 203.

⁹² Robin Waterfield (tr), *The First Philosophers: The Presocratics and Sophists* (OUP 2000) 309–310.

and obligations. No one would choose to do business [...] in a country where the parties' rights and obligations were vague or undecided.⁹³

These perspectives highlight a function of the rule of law distinct from the restraint of arbitrary, vertical power: facilitating order, security, and trust in horizontal relationships.⁹⁴ Because of the normative character of law, an important feature of the bond of trust generated by this horizontal dimension is that, like in its vertical counterpart, the rule of law provides, in Fuller's words, 'dependable guideposts for self-directed action.'⁹⁵ As such, it facilitates trust in private relationships by enabling reasonable reliance on the predictable actions of other parties, both by establishing reasons for these actions and by making these reasons known to all. For Fuller, the 'function of law is to create an orderly interaction among citizens', in part by establishing the aforementioned 'guideposts for self-directed action.'⁹⁶ Inasmuch, then, as there is a normative dimension to the vertical relationship between state and citizen, there is equally a normative set of expectations which operate horizontally between private actors.

This principle finds its fullest expression in Fuller's related notions of reciprocity and interactionism. According to him, the vertical relationship between state and citizen depends upon reciprocal expectations; the state, he opines, says to the citizen, '[t]hese are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.'⁹⁷ Nonetheless, the interactional aspect of horizontal relationships also has indisputably normative implications. Law, Fuller says, can be best described as a 'language of interaction'.⁹⁸ He

⁹³ Bingham (n 3) 38.

⁹⁴ Tamanaha (n 9) 1223-1225.

⁹⁵ Fuller (n 3) 229.

⁹⁶ Fuller (n 3) 229.

⁹⁷ Fuller (n 3) 39-40.

⁹⁸ Lon L Fuller, 'Human Interaction and the Law' (1969) 14(1) *The American Journal of Jurisprudence* 1, 2. Fuller speaks here about customary law, though it seems

continues, ‘To interact meaningfully men require a social setting in which the moves of participating players will fall generally within some predictable pattern.’⁹⁹ From this need for predictability arise ‘interactional expectancies’ which allow individuals to ‘guide their conduct toward one another by these expectancies.’¹⁰⁰

Fuller’s contention is simple; whilst the vertical relationship between state and citizen relies on reciprocal, normative expectations, so too do horizontal relationships between private parties. Inasmuch as I must have ‘dependable guideposts’ in respect of my relationship with public authorities, the rule of law equally requires that I have similarly reliable expectations in my relationships with other private citizens.

2. Laws’ publication as a rule of law criterion

While it is largely incontestable that the publication of laws is vital to the rule of law in its vertical dimension, this article’s focus necessitates a consideration of whether it is an equally essential component of its horizontal dimension. Given that horizontal relationships are characterised by an interaction between private parties (and, in particular, those which lack the plainly coercive power of public authorities), some have argued that the rule of law’s horizontal dimension may involve requirements which differ from those of its vertical operation.¹⁰¹ It is, of course, far beyond the scope of this article to provide a comprehensive list of criteria which are

unnecessary to demarcate this as a separate area in analysing Fuller’s thought. Elsewhere, in *The Morality of Law* (n 3) 234, Fuller writes, ‘But customary law...plays an important, though usually silent role, not only in the interpretation of written law, but in helping to supply the gaps that will always be perceived in any body of enacted law.’ The common law context in which Fuller writes is unmistakable, though his general theoretical treatment of the rule of law ought not be discarded due to this context.

⁹⁹ Fuller, ‘Human Interaction and the Law’ (n 98) 2.

¹⁰⁰ Fuller (n 98) 7-9.

¹⁰¹ See, for example, Tamanaha (n 9) 1228-1229.

necessary for the horizontal rule of law to flourish.¹⁰² Instead, as per this article's focus on the free availability of HTS, I will settle for arguing that the public availability of laws is a vital criterion of the rule of law's horizontal dimension.

For this purpose, let us return to Fuller's account, of which the public availability of laws is an indispensable criterion. From one perspective, Fuller's account is concerned in large part with law-making and therefore seems oriented toward the vertical relationship between state and citizen.¹⁰³ This tendency is supported by Fuller's choice of example in arguing in favour of laws' public promulgation, namely the famous incident involving Caligula, which I cited at the beginning of this article.¹⁰⁴ Balganes, however, critiques the scholarly overemphasis on this aspect of Fuller's thought.¹⁰⁵ He argues, in contrast, that Fuller's 'seemingly vertical account of the interaction between state and individual [...] is in reality parasitic on the existence of a robust body of horizontal expectancies and obligations among individuals, generated entirely through their interactions.'¹⁰⁶

For Fuller, as I have described above, the related notions of reciprocity and interactionism strongly indicate the relevance of his eight famous rule of law criteria, including public promulgation, to horizontal relationships. The law, insofar as it establishes dependable guideposts for action, establishes interactional expectancies in horizontal relationships between private parties. In this context, public promulgation, the second of Fuller's list of eight rules

¹⁰² Though I am concerned here with the somewhat discrete topic of HTS' public availability, it is worth emphasising that the comprehensive operationalisation of the horizontal rule of law – such as through legislative reform – first depends upon a greater theoretical consideration of its essential criteria.

¹⁰³ See, in particular, Fuller (n 3) 39–40.

¹⁰⁴ Fuller (n 3) 93.

¹⁰⁵ Shyamkrishna Balganes, 'Interactional Ordering: Reconstructing Lon Fuller's Theory of Private Law' (2024) 69 *The American Journal of Jurisprudence* 217.

¹⁰⁶ Balganes (n 105) 235–236.

of law criteria, assumes a vital significance.¹⁰⁷, Laws' public availability, as I have outlined, is an essential derivative requirement of law's normativity. If a citizen is to avoid the retribution of the criminal law, for example, they must know in advance what constitutes a criminal offence. Equally, however, if the law is taken to comprise normative 'interactional expectancies' from a horizontal perspective, a citizen must have reasonable foreknowledge of these expectancies (including those bearing on them and those bearing on their fellow citizens). Milton provides the simple, though pertinent, example of a labourer who, having recently moved to a new country, seeks tax advice from a lawyer.¹⁰⁸ On their way to the lawyer's office, the labourer may have to cross the road, which, of course, can only be safely done if they know on which side of the road people in that country drive. The interactional expectancy upon which the labourer relies can only be effective if they have free access to this information.¹⁰⁹ Accordingly, the recognition that law generates normative interactional expectancies between private parties affirms that the public availability of laws is, in fact, a vital criterion of the rule of law's horizontal dimension.

The recognition that the rule of law demands the public availability of laws even in its horizontal dimension allows the previously disparate concepts I have outlined to converge. Inasmuch as laws may impose normative obligations on private parties by the state, they may also generate normative interactional expectations between those private parties and others with whom they interact. Accordingly, while it is well-established that checking governmental power requires that laws be publicised in order to allow private parties to verify and comply with their obligations,¹¹⁰ it is apparent that laws' publication also fulfils an important function in facilitating

¹⁰⁷ Fuller (n 3) 39.

¹⁰⁸ Milton (n 88) 507.

¹⁰⁹ Milton (n 88) 508. Milton's example is plainly somewhat facetious, given that the labourer can reasonably derive this information through observation. In contrast, a consumer cannot discern the content of a HTS by mere observation.

¹¹⁰ Raz (n 3) 214

horizontal interactional expectancies by allowing private parties to verify that those with whom they interact are compliant with their obligations.

In the context of HTS, this recognition seems to justify two important conclusions. Firstly, it opposes the narrow focus on obligation as the gatekeeper of public availability in *Stichting Rookpreventie Jeugd*. In particular, respect for the rule of law's horizontal dimension seems to cause that judgment's distinction between HTS imposing obligations on undertaking and those imposing obligations on the general public to evaporate; since a vertical conception of the rule of law justifies parties' obvious interest in accessing HTS imposing obligations upon them, a recognition of its horizontal dimension acknowledges parties' legitimate interest in accessing HTS which impose obligations on other private parties with whom they interact. Rather, this fuller conception of the rule of law seems to provide justification for aspects of the *Malamud* judgment, insofar as it acknowledged the appellants' legitimate interest in accessing HTS, which impose obligations on other parties.

Secondly, the recognition that the horizontal rule of law necessitates the publication of laws seems to provide vital guidance for resolving the question of HTS' public availability, especially given the presently ambiguous post-*Malamud* landscape. The *Malamud* judgment may, as Davies and van Waeyenberghe speculate, give rise to curious parallel procedures, whereby HTS remain accessible subject to a fee but become freely available upon lodging a request with the Commission. In contrast, however, the CJEU's repeated acknowledgement that HTS constitute laws and the recognition that the horizontal rule of law requires laws' publication (in parallel to its vertical dimension) provides a strong reason for requiring HTS' publication as standard, ie, on the same terms as more traditional forms of EU law, such as directives and regulations.

III. HTS IN THE AI ACT

In the foregoing, I have provided what I consider a cogent argument in favour of HTS' public availability as a requirement of respect for the rule of law's horizontal dimension. This conclusion is, of course, significant in light of the HTS' widespread adoption in EU legislation. Nonetheless, HTS' public availability as a rule-of-law requirement assumes greater urgency given its widening purview, which I will now demonstrate with reference to Regulation 2024/1689, known as the Artificial Intelligence (AI) Act¹¹¹.

The AI Act is a first-of-its-kind piece of legislation, aimed at establishing rules to facilitate innovation in the European AI landscape and the free movement of AI products within the internal market, while protecting health, safety and fundamental rights. The most intriguing aspect of the AI Act, from the perspective of this article, is that it operationalises HTS to address the risks posed by artificial intelligence to fundamental rights.¹¹² Much has, of course, been written on the feasibility of using HTS to accomplish this novel task. Ho-Dac, for instance, questions the political and legal competence of private standardisation bodies to regulate fundamental rights, as well as their expertise in this realm.¹¹³ She further links this point to the challenges to the democratic legitimacy of standardisation bodies discussed earlier. Elsewhere, scholars have noted that methodologies for assessing risks to fundamental rights differ from those for assessing safety risks and accordingly questioned whether standards can encompass both.¹¹⁴ Leaving aside these issues, let us instead focus on the implications of including fundamental rights protection in HTS for their future public availability.

¹¹¹ Artificial Intelligence Act (n 36).

¹¹² See Ho-Dac (n 36).

¹¹³ Ho-Dac (n 28) 141.

¹¹⁴ See, for example, Marco Almada and Nicolas Pettit, 'The EU AI Act: Between the Rock of Product Safety and the Hard Place of Fundamental Rights' (2025) 62 *Common Market Law Review* 85, 106.

In the previous section, I argued that respect for the horizontal rule of law justifies the availability of HTS to private individuals. However, since a consumer has a vital interest – based on interactional expectancies and the horizontal rule of law – in knowing that manufacturers are compliant with essential safety requirements, they clearly have an even more pressing interest in ensuring the protection of their fundamental rights. Rights occupy a special place within politico-legal systems, elevating the interests they protect above others and identifying these interests as particularly vital and meritorious. As Mahlmann writes, '[t]he things protected by rights are taken (rightly or wrongly) to be important, precious, even of existential concern to human beings.'¹¹⁵ He continues, '[t]he goods that human rights protect are a mirror image of what makes human beings human.'¹¹⁶ This unique status is confirmed in the EU context by Article 2 of the Treaty on European Union (TEU), which identifies respect for human rights, like the rule of law and human dignity, as a foundational Union value. In the context of the AI Act, the High-level Expert Group on Artificial Intelligence's report, *Ethics Guidelines for Trustworthy AI*, refers to fundamental rights as 'reflecting special moral entitlements'.¹¹⁷ In light of HTS' scope having been expanded to address risks to the exalted notion of rights, it is intuitive that their public availability assumes an even greater urgency. I do not, of course, wish to diminish the importance of the interactional expectancies which relate to HTS' traditional purview of health and safety. Neither do I intend to suggest that only HTS which relate to fundamental rights ought to be freely available, any more than only directives and regulations relating thereto ought to be freely available. Nonetheless, the interactional expectancies citizens bear in relation to the protection of their fundamental rights plainly surpass in importance those relating to HTS' previously limited

¹¹⁵ Matthias Mahlmann, *Mind and Rights: The History, Ethics, Law and Psychology of Human Rights* (CUP 2023) 204.

¹¹⁶ Mahlmann (n 115) 279.

¹¹⁷ High-Level Expert Group on Artificial Intelligence, 'Ethics Guidelines for Trustworthy AI' (8 April 2019) 37.

scope of health and safety. As such, the increased scope of HTS under the AI Act further supports their free availability as a rule-of-law desideratum.

A brief, final word is necessary. If I am correct in my conclusion that HTS ought to be freely available in all cases, the Commission will need to address ESOs' copyright interests in the HTS they produce. On the one hand, my examination here has justified HTS' free availability in line with the demands of the rule of law, a foundational and indispensable EU value. As such, this conclusion implies that the apparent 'tension' between HTS's availability and their copyright protection is not one between competing interests of commensurate value.¹¹⁸ Rather, given that free availability is firmly justified by the rule of law, HTS' copyright protection ought to be viewed as a challenge to be surmounted in ensuring free availability, rather than a value to be balanced therewith.

This contention leaves open a variety of avenues, which I will now consider. Firstly and most straightforwardly, it is unfeasible for reasons of law, policy and practicality to merely extinguish ESOs' intellectual property interests.¹¹⁹ From a legal perspective, it must be acknowledged that, however detrimental to HTS' accessibility, ESOs' intellectual property interests therein are nonetheless a legal right.¹²⁰ To revoke or abolish this right would therefore represent a radical and probably undesirable measure. From the perspective of policy and practicality, the inability of ESOs to recoup the

¹¹⁸ Davies and van Waeyenberghe (n 11) 171-172.

¹¹⁹ This position is somewhat similar to one endorsed by Advocate General Medina in her *Malamud* opinion, in which she argued that HTS, as a part of EU law, are incapable of being subject to copyright protection. See Opinion of Advocate General Medina (n 79) points 72-78.

¹²⁰ Kanevskaia (n 31) 349.

cost of producing HTS would plainly remove any incentive to do so, thereby causing the present standardisation system to collapse.¹²¹

A second avenue would be for the Commission to cease delegating HTS' production to the ESOs and instead establish dedicated in-house bodies for this purpose. This possibility is beset by a variety of challenges. First, the establishment of such a body would represent an enormous undertaking from a financial and administrative perspective, and would also likely cause a substantial delay in HTS production during the transitional period. Second, bringing HTS production within the remit of an EU public body would presumably extinguish one of the present system's primary benefits, ie, the input of industry expertise in the production of standards.

Leaving aside these two possible avenues, then, the most feasible resolution seems to be that suggested by Davies and van Waeyenberghe.¹²² Specifically, they argue that, in contrast to its current partial funding, the Commission ought to fully compensate ESOs for the loss of revenue which would result from HTS' free availability. This solution seems intuitively feasible, as the financial impact of this compensation appears at least tolerable given what is at stake. While a full analysis has yet to be conducted, figures noted in Advocate General Medina's *Malamud* opinion indicate that CEN generates €2 million annually from the sale of HTS.¹²³ Given that the current

¹²¹ Davies and van Waeyenberghe (n 11) 169, drawing on CEN's financial reports, argue that the loss of HTS licence revenue would lead to an 'unsustainable annual deficit'. Conversely, others have argued that the loss of revenue from the sale of HTS would be relatively trivial. See Soroiu and Correia de Carvalho (n 64) 74; Rossana Ducato, 'Why Harmonized Standards Should Be Open?' (2023) 54 IIC – International Review of Intellectual Property and Competition Law 1173, 1177. Ultimately, even if the revenue generated from the sale of HTS is a small part of ESOs' overall revenue, it seems obvious that the loss of this revenue will remove any incentive for these organisations to continue producing HTS.

¹²² Davies and van Waeyenberghe (n 11) 172.

¹²³ Opinion of Advocate General Medina (n 79) point 99.

subsidisation of ESOs amounts to €17 million annually¹²⁴, and assuming that the €2 million figure for CEN is approximately replicable for CENELEC and ETSI, Davies and van Waeyenberghe note that the cost of fully funding standardisation activities would amount to a 35% increase in relative terms, which they describe as ‘significant’.¹²⁵ Nonetheless, they opine, an overall annual cost of €23 million would constitute a ‘good deal’ given the importance of HTS as a regulatory instrument.¹²⁶ While HTS’ growing importance as a regulatory technique likely justifies this expense, I go further still and argue that an annual cost of approximately €23 million is trifling if it secures vital rule of law interests, particularly the free availability of HTS. Regardless of how it is achieved, it is imperative that all HTS be freely and publicly available by default to ensure respect for the rule of law.

CONCLUSION

HTS have become an important tool for ensuring internal market harmonisation within the EU. Given this widespread proliferation, their widening scope and, not least, their unequivocal recognition by the CJEU as part of EU law, HTS’ present obscurity behind the paywalls of ESOs engenders a problematic blurring of private and public functions. In particular, the present system seems to intuitively jar with the well-established principle that laws’ public availability is an indispensable criterion of the rule of law. Though recent CJEU jurisprudence, especially the *Malamud* judgment, has made some inroads into resolving this dilemma, the future of HTS’ public availability remains ambiguous. In this article, however, I have demonstrated that a fuller theoretical conception of the rule

¹²⁴ Davies and van Waeyenberghe (n 11) 172.

¹²⁵ Davies and van Waeyenberghe (n 11) 172.

¹²⁶ Alternatively, Kanevskaia suggests that the cost of licencing HTS could be delegated to national authorities, given that it is national standardisation authorities which conduct the sale of HTS in practice. See Kanevskaia (n 31) 350. I remain largely agnostic, in the absence of further economic research, regarding whether free access ought to be funded at the national or supranational level.

of law can provide a robust normative justification for HTS' free availability. More specifically, acknowledgement of the rule of law's horizontal dimension highlights how parties who are not directly subject to obligations deriving from HTS nonetheless maintain a vital interest in their public availability. More than merely justifying the CJEU's decision in *Malamud*, this account of the rule of law supports HTS' free availability by default. Opposing the curious two-tier system of accessibility which might arise post-*Malamud*, the recognition that HTS generate normative interactional expectancies in horizontal relationships suggests that they ought to enjoy the same standards of free publicity as more traditional forms of EU law. This is especially true given the broadening scope of HTS. Inasmuch as it is vital that citizens have access to HTS to verify that manufacturers comply with the essential health and safety requirements they contain, it is intuitively even more significant that they be able to verify compliance with requirements to protect fundamental rights. While this contention raises issues regarding ESOs' copyright interests in the HTS they produce, it is imperative that the Commission find a suitable workaround to facilitate the free availability of HTS, such as by providing additional compensatory funding to ESOs.

PUTTING FINANCIAL STABILITY BEFORE SOCIAL RIGHTS: THE CONSTITUTIONAL COURTS IN CENTRAL AND EASTERN EUROPE JUDGING AUSTERITY MEASURES

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In the aftermath of the 2008 financial crisis, international organisations (the Council of Europe, the United Nations, and the European Union) contributed to the emergence of standards on the implementation of austerity measures. This development surged primarily in response to national policies aimed at safeguarding financial stability in Western and Southern Europe, raising questions about protecting social rights. In this article, I endeavour to establish whether the proliferation of these international standards has led to a shift in the approaches of the Central and Eastern European (CEE) constitutional courts to austerity measures and to the potential unification of approaches at the constitutional level across the region. I test this hypothesis through a qualitative analysis of case law from three CEE countries (Czechia, Poland, and Slovakia). Through this study, I also seek to contribute to the existing literature by tracing human rights

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developments within EU member states that have remained on the margins of constitutional debates on austerity. The research reveals no significant shift in these approaches, as evidenced by similar practices of selective engagement with international standards and a tendency to prioritise financial stability over social rights.

Keywords: austerity measures; social rights; constitutional review; international standards

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I. INTRODUCTION

National parliaments and governments can easily leverage the pressure to maintain balanced budgets to justify reductions in public spending at the expense of realising social rights. This might occur both in adopting annual budgets and amending legislative acts in health care, social security, education, housing, and remuneration.¹ It is therefore essential to investigate how constitutional courts, as judicial bodies responsible for oversight of the enforcement of human rights standards, have navigated the tension between the authorities' efforts to ensure financial stability on the one hand, and upholding social rights on the other. The implementation of austerity measures in response to the 2009 Eurozone crisis in Western and Southern Europe has attracted scholarly attention.² However, unsurprisingly, the jurisprudence from Central and Eastern Europe (CEE) remains largely understudied.³ The national economies in CEE were not affected by the

¹ On the erosion of the 'European social model' see generally eg Colm O'Cinneide, 'Austerity and the Faded Dream of a 'Social Europe' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014) 169, 181-188.

² eg Mariana Canotilho, Teresa Violante and Rui Lanceiro, 'Austerity Measures Under Judicial Scrutiny: The Portuguese Constitutional Case-Law '(2015) 11(1) *European Constitutional Law Review* 155; Margot E. Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21(4) *European Law Journal* 521; Despina Anagnostopoulou, 'The Impact of the Austerity Measures to Confront the Economic Crisis on the EU Objectives and EU Values '(2016) 3(2) *International Journal of Diplomacy and Economy* 144; Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2018); Nikolaos A. Papadopoulos, 'Austerity Measures in Greece and Social Rights Protection under the European Social Charter: Comment on GSEE v. Greece case, Complaint No. 111/2014, European Committee of Social Rights '(2019) 10(1) *European Labour Law Journal* 85.

³ cf Michał Krajewski, 'The Constitutional Quandary of Social Rights: Questions in Times of the Polish Illiberal Turn '(2023) 21(1) *International Journal of*

2008 financial crisis (and the subsequent Eurozone crisis) in the same way as those of other countries, such as Greece, Italy, and Spain.⁴ Quite the contrary, in several Polish regions, the value of gross domestic product per inhabitant rose in 2009.⁵ Nonetheless, even Poland had to enter the EU's Excessive Deficit Procedure in this period.⁶ This indicates that, despite being less affected by the crisis, the CEE states still had to implement various austerity measures at the national level, which raises the question of how these changes influenced the enjoyment of social rights in these countries.

One of the aftermaths of the 2008 financial crisis was the proliferation of statements, reports, and other documents on safeguarding social rights amid the financial stability measures, adopted within international organisations, which could support domestic authorities.⁷ Although these (usually non-binding) instruments were a response to policies in countries whose populations were significantly affected by the crisis, many of them express generally applicable standards that were not formulated so explicitly before 2008 and might matter for constitutional courts operating beyond the Western and Southern European contexts. The actual influence of these

Constitutional Law 156; Kálmán Pócza, Márton Csapodi, Gábor Dobos and Attila Gyulai, 'Central and Eastern European Constitutional Courts in 'Comparative Perspective 1990–2020' in Kálmán Pócza (ed), *Constitutional Review in Central and Eastern Europe. Judicial-Legislative Relations in Comparative Perspective* (Routledge 2024), 313–315.

⁴ Eurostat, 'Economic recovery of EU regions after 2008' (23 October 2009) <<https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20191023-1>> accessed 11 September 2026.

⁵ Eurostat (n 4).

⁶ eg Council Decision (EU) 2009/589/EC on the existence of an excessive deficit in Poland [2009], L 202/46; Krajewski (n 3) 173–174; Paweł Chmielnicki and Karol Strzała, 'The Reaction of the Legislature to the Initiation of an Excessive Deficit Procedure. The Example of Poland in 2004–2008 and 2009–2015' (2023) 178(5) *Przegląd Sejmowy* 49.

⁷ The documents will be further discussed in Section III.

international developments on the domestic case law from the CEE states remains unclear.

This article tests the hypothesis that the proliferation of international standards led to a shift in the CEE constitutional courts' approaches to austerity measures and to the potential unification of approaches at the constitutional level across the region. To explore this, I conduct a qualitative analysis of case law from three CEE countries (Czechia, Poland, and Slovakia). I focus on the research question of how the constitutional courts resolved the problem of social rights protection during the review of various austerity measures and whether international standards have infiltrated their case law. However, one possible finding is that the courts studied may not have incorporated these international standards, which could also provide a way for national judges to address this issue. This study can thereby determine how the standards (primarily initiated by international actors, such as the European Committee of Social Rights and the UN Committee on Economic, Social and Cultural Rights) affected the courts in CEE.

The rationale for selecting the CEE countries involves several important factors. Poland is chosen for the study for three primary reasons. Firstly, the Polish economy, measured by GDP, was the least affected in the region by the 2008 crisis.⁸ This situation has left the country on the margins of constitutional debates over austerity. Secondly, the Polish Constitutional Tribunal (PCT) repeatedly incorporated international standards into its

⁸ At that time, the term 'green island' was coined in multiple debates. eg Zbigniew Polanski, 'Poland During the Crisis: A 'Green Island' Approaching the Euro Area?' in Jens Hölscher (ed), *Poland and the Eurozone. Studies in Economic Transition* (Palgrave Macmillan 2014) 165; Gavin Rae, 'Poland – The Green Island Sinking into a Sea of Red' (2013) 14(1) CESifo Forum 17; Bozena Leven, 'Avoiding Crisis Contagion: Poland's Case' (2011) 44(3) *Communist and Post-Communist Studies* 183.

interpretation of constitutional provisions.⁹ The emergence of new documents on austerity could prompt a question: whether the PCT will leverage their potential in its review of austerity measures. Thirdly, in the years from 2015 to 2022, the seats on the Polish Tribunal were gradually filled with judges elected by the parliamentary majority led by the PiS (Prawo i Sprawiedliwość, engl. Law and Justice) party.¹⁰ The process (called the ‘constitutional crisis’) has been characterised by several irregularities in appointment procedures.¹¹ It has resulted in a shift in the case law, which has been criticised for its politicisation and anti-European stance.¹² This makes

⁹ eg Leszek Leszczyński, ‘International Standards of Human Rights in Polish Constitutional Regulations and Practice’ (1995) 29(3) *The International Lawyer* 685; Aleksandra Kustra, ‘The Polish Constitutional Tribunal and the Judicial Europeanization of the Constitution’ (2015) 35 *Polish Yearbook of International Law* 193; Piotr Czarny and Monika Florczak-Wątor, ‘Precedents and Case-Based Reasoning in the Case Law of the Constitutional Tribunal of the Republic of Poland’ in Monika Florczak-Wątor (ed), *Constitutional Law and Precedent International Perspectives on Case-Based Reasoning* (Routledge 2022) 162, 175–182.

¹⁰ For some time, all seats were taken by judges chosen at the initiative of the single party. The complete list of judges (alongside the dates of their terms) is available at <<https://trybunal.gov.pl/o-trybunale/sedziowie-trybunalu>> accessed 11 September 2026.

¹¹ eg Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press 2019); Marta Derlatka, ‘Constitutional Court and the Constitutional Crisis in Poland’ (2019) 15 *Toruńskie Studia Polsko-Włoskie* 7; Marcin Wiącek, ‘Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle’ in Armin von Bogdandy et al. (eds), *Defending Checks and Balances. Taking Stock of Europe’s Actions* (Springer 2021) 15; *Xero Flor w Polsce sp. z o.o. v Poland* App No 4907/18 (ECtHR, 7 May 2021); Case C-448/23 *European Commission v Republic of Poland* ECLI:EU:C:2025:975.

¹² eg Adam Ploszka, ‘It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional’ (2023) 15 *Hague Journal on the Rule of Law* 51; Aleksandra Gliszczynska-Grabias and Wojciech Sadurski, ‘The Judgment That Wasn’t (But Which Nearly Brought Poland to a Standstill)’ (2021) 17(1) *European Constitutional Law Review* 130;

the Polish case particularly worth exploring, as it can further reveal how the development of international standards on austerity measures was addressed by the court that has, in recent years, supposedly been more restrained in moving beyond the national perspective.

Juxtaposing Poland with Czechia and Slovakia can also reveal whether similar changes in the constitutional review of austerity are evident in CEE countries whose economies were affected by the aftermath of the crisis for several years.¹³ Admittedly, there are other notable differences in the countries' development since the disintegration of the Eastern Bloc.¹⁴ Among other things, Czechia and Slovakia have also been affected, with varying intensity, by infringements of rule-of-law principles.¹⁵ Although attempts to undermine judicial independence occurred in each of the countries, they were particularly far-reaching in Poland.¹⁶ The existing

Tímea Drinóczi and Agnieszka Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary. The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2022).

¹³ Eurostat (n 4).

¹⁴ eg Mitchell Orenstein, 'Transitional Social Policy in the Czech Republic and Poland' (1995) 3(2) *Czech Sociological Review* 179; Geoffrey Evans and Stephen Whitefield, 'Economic Ideology and Political Success: Communist-Successor Parties in the Czech Republic, Slovakia and Hungary Compared' (1995) 4(1) *Party Politics* 565.

¹⁵ eg James E. Moliterno and Peter Čuroš, 'Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious' (2021) 22(7) *German Law Journal* 1159, 1172-1179; Peter Čuroš, 'Fast-track Democratic Backsliding in Slovakia' (*Verfassungsblog*, 6 September 2024) <<https://verfassungsblog.de/fast-track-democratic-backsliding-in-slovakia/>> accessed 11 September 2026; Max Steuer, 'Rule of Law Minimalism and the Fear of 'Politics': The Slovak Constitutional Court amidst the Illiberal Surge' (2026) 39 *International Journal for the Semiotics of Law* 103.

¹⁶ The persistent systemic issues with judicial independence are evident in the extensive case law of the CJEU and the ECtHR. eg *Wałęsa v Poland* App No 50849/21 (ECtHR, 23 November 2023); Case C-619/18 *European Commission v Republic of Poland* ECLI:EU:C:2019:531.

differences can potentially contribute to the development of varied approaches to austerity measures.

The three selected countries are still the most similar, as they share numerous characteristics that are ‘not central to the study’, thereby making the analysis plausible.¹⁷ Each of them adheres to the Kelsenian model of constitutional review, with its constitutional acts enumerating multiple social rights.¹⁸ There has also been a practice of referencing each other's case law among the three constitutional courts.¹⁹ Notably, these courts have developed methods for assessing the constitutionality of restrictions on social rights.²⁰ Furthermore, sharing a post-communist legacy and, eventually, becoming members of the European Union in 2004 reflect discernible historical

¹⁷ Ran Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’ (2005) 53(1) *American Journal of Comparative Law* 125, 133–139.

¹⁸ See generally Wojciech Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2014), 3–44. The frameworks of constitutional acts will be outlined below in Section IV.

¹⁹ However, the number of references varies between the countries. eg Joanna Krzeminska-Vamvaka, ‘Courts as Comparatists: References to Foreign Law in the Case-law of the Polish Constitutional Court’ (2012) 5 *Jean Monnet Working Paper*; Ada Paprocka, ‘An Argument from Comparative Law in the Jurisprudence of the Polish Constitutional Tribunal’ (2018) 8 *Adam Mickiewicz University Law Review* 237; Jana Ondřejková, Kristina Blažková and Jan Chmel, ‘The Use of Foreign Legal Materials by the Constitutional Court of the Czech Republic’ in Giuseppe Franco Ferrari (ed), *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems* (Brill 2019); Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013) 174–191.

²⁰ eg Adam Ploszka, ‘The Right to Subsistence Minimum and Its Role in the Protection of People Living in Extreme Poverty – the Polish Experience’ (2018) 24 *Comparative Law Review* 225; Ladislav Vyhnánek, ‘Proporcionálně či jinak? Problém ústavního přezkumu zásahů do sociálních práv’ (2014) 22(3) *Journal of Jurisprudence and Legal Practice* 203; Zuzana Zelenajová, ‘Riešenie kolízie práv druhej generácie v rozhodovacej činnosti Ústavného súdu Slovenskej republiky’ (2016) 24(3) *Journal of Jurisprudence and Legal Practice* 377.

trends.²¹ The similarities among Poland, Czechia, and Slovakia allow for the identification of patterns typical of states with comparable constitutional frameworks.

The findings of the study are based solely on case law from the three CEE countries, which is one of the limitations that should be explicitly acknowledged. While similar practices may exist across the region, some courts may have approached standards regarding austerity measures differently. Additionally, it is important to note that the relevant judgments only indicate how the courts reviewed the legislation that was challenged before them. This study does not encompass case law from ordinary and administrative courts, as the centralised Kelsenian model of constitutional review is what makes the comparison valid. Bearing these limitations in mind, the study reveals new findings on the impact of the international standards on the constitutional courts in CEE.

The paper is structured as follows. In Section II, I present the conceptual framework, elucidating the term ‘austerity measures’. In Section III, I investigate the emergence of international standards for the safeguarding of social rights amid austerity measures. This examination seeks to identify prevailing approaches that can serve as potential reference points for constitutional courts. In Section IV, I focus on the statements adopted by the three constitutional courts, namely the Czech Constitutional Court (*Ústavní soud*, the CCC), the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*, the PCT) and the Slovak Constitutional Court (*Ústavný súd*, the SCC), when reviewing austerity measures. This includes the various structures of argumentation identified in the relevant case law, discernible patterns of judicial treatment in comparable cases, and the role of international standards in constitutional review of austerity measures conducted by the three courts. In the concluding section, I summarise the key findings of the study.

²¹ See generally Frank Schimmelfennig and Ulrich Sedelmeier, *The Europeanization of Central and Eastern Europe* (Cornell University Press 2005).

II. THE ESSENCE OF ‘AUSTERITY MEASURES’

The term ‘austerity measures’ is commonly used in economic literature.²² This general notion of diversified cuts in public spending has also infiltrated public discourse since the 2008 financial crisis.²³ Moreover, the term also began to be widely adopted by legal scholars to address domestic deficit-reduction policies arising from the Eurozone crisis.²⁴ However, there is no indication that the term ‘austerity measures’ or equivalent expressions in national languages have been used extensively by members of the judiciary in CEE states. Judges generally rely on legal rules and principles rather than economic concepts. Yet, it is indeed noted that, in many European jurisdictions, courts have faced the challenge of reviewing ‘austerity

²² eg John Fender, *Austerity. When Is It a Mistake and When Is It Necessary?* (Agenda Publishing 2020); Sarah Brown, Alexandros Kontonikas, Alberto Montagnoli, Mirko Moro, and Luisanna Onnis, ‘Life Satisfaction and Austerity: Expectations and the Macroeconomy’ (2021) 95 *Journal of Behavioral and Experimental Economics*; Alberto Alesina, Carlo Favero and Francesco Giavazzi, ‘Effects of Austerity: Expenditure- and Tax-based Approaches’ (2019) 33(2) *Journal of Economic Perspectives* 141; Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press, 2013); Robert Pollin, ‘Austerity Economics and the Struggle for the Soul of US Capitalism’ (2013) 80(1) *Social Research* 749.

²³ eg Guardian staff and agencies, ‘Argentina: Violent Protests as Senators Back Austerity Measures of President Milei’ *The Guardian* (13 June 2024) <<https://www.theguardian.com/world/article/2024/jun/13/argentina-violence-protests-president-milei-buenos-aires-austerity-economy-measures>> accessed 11 September 2026; Benjamin Mueller, ‘What Is Austerity and How Has It Affected British Society?’ *New York Times* (24 February 2019) <<https://www.nytimes.com/2019/02/24/world/europe/britain-austerity-may-budget.html>> accessed 11 September 2026. See generally: Suman Gupta, *Political Catchphrases and Contemporary History: A Critique of New Normals* (Oxford University Press 2022), 105–133.

²⁴ Stanka Setnikar Cankar and Veronika Petkovšek, ‘Austerity Measures in the Public Sector in Slovenia and Other Selected European Countries’ (2013) 13(4) *Croatian and Comparative Public Administration* 1093; Anagnostopoulou (n 2).

measures’.²⁵

The question arises about the criteria used to classify any policy as ‘austerity’.²⁶ The very concept of ‘austerity measures’ is infrequently defined in legal research papers. While many scholars likely acknowledge this notion as intersubjectively communicative, some offer explanatory remarks. For example, Mariana Canotilho, Teresa Violante, and Rui Lanceiro argue that this term refers to ‘legislation directly adopted as a means to cope with the reduction of the budget deficit, and that has a direct impact on individual constitutional rights and freedoms’.²⁷ Marija Bartl and Markos Karavias have recourse to the work by economist Mark Blyth, who defines ‘austerity’ as ‘a form of voluntary deflation in which the economy adjusts through the reduction of wages, prices and public spending to restore competitiveness, which is (supposedly) best achieved by cutting state’s budget, debts and deficits’.²⁸ The austerity measures may also be reduced to ‘policies aimed at alleviating an economic crisis through the rearrangement of public spending’, such as ‘reduction of welfare benefits and the stalling, and often retrogression, of the realization of human rights’.²⁹ These examples illustrate that varied definitions are presented in legal literature, which might make it

²⁵ Manuel López-Escudero, ‘Judicial Protection Against Austerity Measures in the EU’ in Cristina Izquierdo-Sans, Carmen Martínez-Capdevila and Magdalena Nogueira-Guastavino (eds), *Fundamental Rights Challenges. Horizontal Effectiveness, Rule of Law and Margin of National Appreciation* (Springer 2021) 189–210; Canotilho et al. (n 2) 155–183; Thom Dyke, ‘Judicial Review in an Age of Austerity’ (2011) 16(3) *Judicial Review* 202; Anastasia Poulou, ‘Austerity and European Social Rights: How Can Courts Protect Europe’s Lost Generation?’ (2014) 15(6) *German Law Journal* 1145.

²⁶ The exact meaning of this term can be the subject of dispute; eg Veronique de Rugy, ‘Is Austerity the Answer to Europe’s Crisis?’ (2013) 33(2) *Cato Journal* 245.

²⁷ Canotilho et al. (n 2) 158.

²⁸ Marija Bartl and Markos Karavias, ‘Austerity and Law in Europe: An Introduction’ (2017) 44(1) *Journal of Law and Society* 1; Blyth (n 22) 2.

²⁹ Michael George Marcondes Smith, ‘Equality Restricted: The Problematic Compatibility between Austerity Measures and Human Rights Law’ (2023) 25(2) *Health and Human Rights Journal* 177, 178.

difficult to determine which measures should be classified as ‘austerity’.

For this study, I determine the unique features of these measures to avoid any doubt about the extent of the legal issues addressed in the present research. With regard to the sample definitions and the context in which this term is used in the legal scholarship, the term ‘austerity measures’ will, therefore, refer to: (1) legislative measures, (2) aimed at protecting financial stability of the respective state, (3) through reducing public expenditures and/or increasing taxes and charges, and (4) affecting social rights of individuals residing in a specific country.

If the measure under judicial review fulfils all four criteria, it can be labelled as an ‘austerity measure’. These characteristics are therefore crucial for selecting relevant judgments in the three case law databases from Poland, Czechia and Slovakia. To bridge the gap between economic and legal terminology, it is necessary to include judgments that refer to the national equivalent terms to ‘social rights’ (Polish: *prawa socjalne*, Czech: *sociální práva*, Slovak: *sociálne práva*) and contain ‘financial’ or ‘budgetary’ arguments. Significantly, it should be noted that, depending on the circumstances, political actors may use other expressions like ‘financial stability’. These arguments can be based, for example, on the need to reduce ‘deficit’ or ‘debts’ as well as ‘protecting the budget’. At times, legislative motives may not be explicitly revealed in parliamentary proceedings but are discussed before the constitutional courts. Still, it should be clear, based on the circumstances presented in the relevant cases, that regulations are expected to have financial implications. For this reason, the research concentrates on cases in which these issues were discussed.

Notably, while ‘austerity measures’ are frequently associated with spending limits, there are also ‘tax-based’ austerity measures.³⁰ Imposing new tax

³⁰ See also Alberto Alesina, Carlo Favero and Francesco Giavazzi, *Austerity: When It Works and When It Doesn't* (Princeton University Press 2019) 3–5.

obligations might also affect individuals' socio-economic conditions.³¹ Nevertheless, not every tax increase will adversely affect their social rights, and not every tax-based measure can be deemed an 'austerity'. For example, increasing taxes on low-wage earners can negatively affect their right to an adequate standard of living, but proportionate tax increases on public limited companies will not necessarily have the same effect.³² However, as I will show later, the case law of the selected constitutional courts focuses on 'cut-based' austerity measures, which can be considered a limitation of the study.

The definition of 'austerity measures' still encompasses a wide range of other legislative measures, including those that are not necessarily classified as 'extraordinary' or 'crisis-related'. In this article, I therefore use this term to refer to legislation adopted not only in response to the 2008 financial crisis but also to measures aimed at protecting financial stability during less turbulent times. This clarification should be considered when discussing relevant international standards and the case law of the three constitutional courts examined.

III. RELEVANT INTERNATIONAL STANDARDS

Since austerity measures inherently affect social rights, the key issue becomes reconstructing the standards for their implementation to take into account binding international treaties (the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the European Social Charter, the European Union primary law). These standards are often expressed in a somewhat ambiguous manner. For

³¹ See also UN Committee on Economic, Social and Cultural Rights [CESCR] 'Statement on Tax Policy and the International Covenant on Economic, Social and Cultural Rights' E/C.12/2025/1 (17 March 2025).

³² The UN Committee on Economic, Social and Cultural Rights takes the view that the implementation of any tax system cannot have a 'detrimental impact' on the enjoyment of the right to an adequate standard of living ('especially for disadvantaged and marginalized groups'). See generally CESCR (n 31) [6].

example, Article 4 of the ICESCR allows states to impose limitations on social rights ‘solely for the purpose of promoting the general welfare in a democratic society’. This general clause can create uncertainty about which measures are compatible with the treaty. Nevertheless, I argue that certain standards regarding austerity can still be identified based on several international human rights acts adopted within international organisations, particularly the Council of Europe, the United Nations, and the European Union (later referred to as ‘core standards’), which are relevant to CEE states as members of these organisations. This category therefore encompasses legal provisions contained in the binding treaties. What is important is that the catalogues of social rights developed within these acts have been supported by statements, reports, decisions, and other documents that proliferated in the aftermath of the 2008 financial crisis. The latter resources constitute what can be referred to as ‘auxiliary standards’.³³ While these sources are generally not binding on all states, I will demonstrate that they can still be useful for legal interpretation and be applied alongside the ‘core standards’.

These standards are, to a large extent, common across all three CEE countries covered in the study, although there are some variations, which will be noted later. International standards are meant to enable state authorities to navigate more thoughtfully between protecting financial stability and safeguarding social rights. However, they differ in both their importance and legal relevance between binding ‘core standards’ and non-binding ‘auxiliary

³³ As to the differentiation between the ‘core standards’ and ‘auxiliary standards’, I do not refer to any particular typology proposed in legal literature. However, it is important to acknowledge that the category of standards (or norms) that are not formally binding is already well known in discussions of international law. See generally eg Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press 2003).

standards' that can still have some impact on the state authorities. Accordingly, it is worth exploring the particularities of these standards.³⁴

1. *The Council of Europe*

The protection of social rights within the Council of Europe is based on standards arising from the European Social Charter (ESC) and the European Convention on Human Rights (the Convention).³⁵ Although the latter treaty concerns mostly civil and political rights, the European Court of Human Rights (ECtHR) has repeatedly recognised the protection of social rights under the Convention.³⁶ This has been made possible partly through a judicial interpretation of Article 1 of Protocol 1, which guarantees the 'right to peaceful enjoyment of possessions'.³⁷ Based on this provision, the

³⁴ This section also includes standards set out by the European Union. Bearing in mind that the character of the EU system is best reflected by the term 'supranational', in this section, I use the adjective 'international' to refer to all the standards developed within international organisations, including the EU.

³⁵ European Social Charter (opened for signature 18 October 1961, entered into force 26 February 1965) 529 UNTS 89; Revised European Social Charter (opened for signature 3 May 1996, entered into force 1 July 1999) ETS No 163; Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (European Convention on Human Rights); The Charter reveals a discrepancy among the CEE states. Poland and Czechia ratified the 1961 Charter but, as of now, have abstained from ratifying the 1996 revised Charter. Nonetheless, this circumstance is of lesser importance, since, despite considerable revisions, the wording of the limitation clause remained unchanged. On the ratification status see <<https://www.coe.int/en/web/european-social-charter/signatures-ratifications>> accessed 11 September 2026.

³⁶ Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 25.

³⁷ eg *Béláné Nagy v Hungary* App No 53080/13 (ECtHR, 13 December 2016), paras 70–126; *Moskal v Poland* App No 10373/05 (ECtHR, 15 September 2009), paras 49–76; *Kjartan Ásmundsson v Iceland* App No 60669/00 (ECtHR, 12 October 2004), paras 39–45; *Gaygusuz v Austria* App No 17371/90 (ECtHR, 16 September 1996), paras 33–52.

ECtHR established that, to some extent, social benefits and pensions are protected.³⁸ Some endeavours have also been made as to Article 2 (right to life),³⁹ Article 3 (prohibition of torture),⁴⁰ and Article 8 (right to respect for her private life).⁴¹ Yet, despite several significant judgments, social rights are recognised under the Convention only in a limited way.⁴²

Very few specific criteria for implementing austerity measures can be derived from the ECtHR case law. Even in the aftermath of the 2008 financial crisis, the Court acknowledged a wide ‘margin of appreciation’ available to domestic authorities, generally accepting austerity as pursuing the ‘legitimate aim’, unless the measures are ‘unanswerably disproportionate’.⁴³ The problem of the flexibility granted to national

³⁸ See also Clare Ovey and Robin C. A. White, *The European Convention on Human Rights* (Oxford University Press 2006) 353–355.

³⁹ eg *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* App No 47848/08 (ECtHR, 17 July 2014), paras 130–147; *Mehmet Şentürk and Bekir Şentürk v Turkey* App No 13423/09 (ECtHR, 9 April 2013), paras 79–109.

⁴⁰ eg *Paposhvili v Belgium* App No 41738/10 (ECtHR, 13 December 2016), paras 172–206; *R.R. v Poland* App no 27617/04 (ECtHR, 26 May 2011), paras 148–162; *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), paras 283–321, 362–368.

⁴¹ eg *McDonald v the United Kingdom* App no 4241/12 (ECtHR, 20 May 2014), paras 46–59; *Yordanova and others v Bulgaria* App no 25446/06 (ECtHR, 24 April 2012), paras 100–144.

⁴² On this issue see also Liam Thornton, ‘The European Convention on Human Rights: A Socio-Economic Rights Charter?’ in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Publishing 2014) 227–256; Viljam Engström, ‘The Political Economy of Austerity and Human Rights Law’ (2016) 1 Institute for Human Rights Working Paper 1, 9–11.

⁴³ Ifigeneia Intzioglou, ‘The European Court of Human Rights and Austerity Measures in the Eurozone: An Ally against Human Rights Violations or Merely a Bystander’ (2019) 4 LSE Law Review 1, 1–28; Dimitrios Koufopoulos, ‘Austerity Measures at the European Court of Human Rights: Can the Court Establish a Minimum of Welfare Provisions?’ (2019) 25(4) European Public Law 535.

authorities can be illustrated by the case of *McDonald v the United Kingdom*. The applicant invoked Article 8. The Court argued that even the decision to reduce the care package for persons with disabilities might be deemed ‘necessary in a democratic society’.⁴⁴ This approach leaves the High Contracting Parties with high autonomy, which is only partially convincing. While it is understandable that the ECtHR might seek to avoid being inundated with social rights claims, many individuals in vulnerable situations may find it difficult to seek protection before the Court.

Only in the most extreme cases can rights holders effectively rely on the provisions of the Convention, such as in the *N.K.M. v Hungary* case, in which imposing a 98% tax on the upper bracket of a civil servant’s severance was declared a violation of Article 1 of Protocol No. 1.⁴⁵ Although some other austerity measures implemented in CEE were challenged before the ECtHR, these efforts were mostly unsuccessful, for example, in cases concerning Bulgarian and Lithuanian pensioners who also invoked Article 1 of Protocol No. 1 in connection with limitations imposed on their pensions. Still, the Court ultimately found no violations of the Convention.⁴⁶ Another unsuccessful litigation was the proceedings concerning crisis-related reductions in Czech judges’ salaries (no violation of Article 6 and Article 1 of Protocol No. 1).⁴⁷ These examples demonstrate that the ECtHR has generally acknowledged a wide discretion of domestic authorities in adopting legislation safeguarding financial stability.

The ESC, which enumerates numerous social rights, seems more relevant to assess austerity measures. According to Article 31 of the 1961 Charter

⁴⁴ *McDonald v the United Kingdom* App no 4241/12 (ECtHR, 20 May 2014), paras 56–58.

⁴⁵ *N.K.M. v Hungary* App no 66529/11 (ECtHR, 14 May 2013), paras 7–18, 32–76.

⁴⁶ eg *Mockiene v Lithuania* App. no. 75916/13 (ECtHR, 4 July 2017), paras 34–49; *Valkov and Others v Bulgaria* App. nos. 2033/04 et al. (ECtHR, 25 October 2011), paras 84–101.

⁴⁷ *Kubát and Others v the Czech Republic* App. nos. 61721/19 and others (ECtHR, 22 June 2023), paras 80–97.

(respectively: Article G of the revised Charter), social rights cannot be subject to any restrictions or limitations not specified in the Charter except when prescribed by law, and necessary in a democratic society for the protection of public interest, national security, public health, or morals. The wording of these core standards might seem vague, and it might even be interpreted as leaving the states a wide discretion in terms of adopting austerity measures.⁴⁸ Neither the 1961 Charter nor the 1996 revised Charter explicitly sets out more specific provisions.

There are, however, several bodies within the Council of Europe that have been actively involved in establishing auxiliary standards in the aftermath of the 2008 financial crisis, such as the European Committee of Social Rights (ECSR) in deciding on complaints concerning austerity measures implemented by state authorities.⁴⁹ The Committee found violations of provisions contained in the ESC in cases concerning Greece.⁵⁰ The justifications for the Committee's decisions provide significant developments of standards on austerity, for example, the one adopted on 23 March 2017. While acknowledging a margin of appreciation of the State, the Committee states that the legislature is not 'totally free of any constraints in its decision-making'.⁵¹ It was also underlined that measures 'must ensure proportionality between the goals pursued and their negative consequences

⁴⁸ Despite the vague wording of this provision, this kind of interpretation does not seem to prevail in the practices of the ECSR, which acknowledges only 'a certain margin of appreciation for the legislature in defining the public interest' in austerity cases: Karin Lukas, *The Revised European Social Charter. An Article by Article Commentary* (Edward Elgar 2021) 349–350.

⁴⁹ See Papadopoulos (n 2).

⁵⁰ eg *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece* The European Committee of Social Rights App No 78/2012 (7 December 2012); *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v Greece* The European Committee of Social Rights App No 79/2012 (7 December 2012).

⁵¹ *Greek General Confederation of Labour (GSEE) v Greece* The European Committee of Social Rights App No 111/2014 (23 March 2017) [85].

for the enjoyment of social rights'.⁵² It is, therefore, reasonable to expect that state authorities can provide evidence of 'real examination or consideration of possible alternative and less restrictive measures', 'genuine consultation' as well as 'thorough balancing analysis of the effects of the legislative measures', which would consider the effects on the most vulnerable groups.⁵³ Moreover, the ineffectiveness of austerity measures can be significant for their assessment.⁵⁴ It is also essential that such measures do not constitute discrimination.⁵⁵ These auxiliary standards had been derived in the process of interpretation of the core standards contained in the ESC.

In addition to the activities of the ECSR, in 2012 the Parliamentary Assembly adopted a resolution entitled '[a]usterity measures – a danger for democracy and social rights'. This document contains instructions that can be used by domestic policymakers, which mainly concentrate on the 'democratisation' of austerity (for example, by launching public debates, consultations with citizens, and referenda), reflecting on the long-term effects of measures, and raising taxes on higher income categories as a possible alternative to reducing expenditures.⁵⁶ Further details were presented in the 2013 Issue Paper by the Commissioner for Human Rights. This document lists actions that governments can take when responding to economic crises, including providing transparency, establishing channels for meaningful social dialogue and citizen participation, and conducting *ex-ante* and *ex post facto* human rights and equality impact assessments (with monitoring and oversight provided by courts).⁵⁷ What is common to the 2012 resolution and the 2013

⁵² GSEE (n 51) [87].

⁵³ GSEE (n 51) [90].

⁵⁴ GSEE (n 51) [92].

⁵⁵ GSEE (n 51) [170].

⁵⁶ Council of Europe (the Parliamentary Assembly), 'Resolution. Austerity Measures – A Danger for Democracy and Social Rights', 1884 (26 June 2012) para 10.

⁵⁷ Council of Europe (the Council of Europe Commissioner for Human Rights) 'Safeguarding Human Rights in Times of Economic Crisis' (November 2013), 39–

issue paper is a combination of requirements that should be met in the process of adopting austerity measures.

These developments of the Council of Europe's bodies demonstrate that what is 'necessary in a democratic society' does not solely depend on the assessment of authorities implementing austerity measures. The standards developed in the aftermath of the 2008 financial crisis manifest an approach of significant limitations on austerity, as, according to them, the measures implemented by state authorities should comply with the rigorous guidelines described in the relevant documents. However, neither the resolutions adopted by the Parliamentary Assembly nor the papers issued by the Commissioner for Human Rights are legally binding.⁵⁸ The studied countries are not formally bound by the ECSR's decisions on Greece, either.⁵⁹ Although these are still non-binding 'auxiliary standards', they have been expressed by prominent bodies within the Council of Europe system, which might imply the need to rethink the interpretation of the 'core standards', especially those contained in both the 1961 Charter and the 1996 revised Charter.⁶⁰ Nevertheless, the enforcement of these standards before the ESCR is significantly limited. As of now, Poland and Slovakia have not yet ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Czechia did so in 2012).⁶¹

49 <<https://rm.coe.int/safeguarding-human-rights-in-times-of-economic-crisis-issue-paper-publ/1680908dfa>> accessed 11 September 2026.

⁵⁸ See the Statute of the Council of Europe, 5 May 1949 (amended); Resolution (99) 50 on the Council of Europe Commissioner for Human Rights (adopted by the Committee of Ministers on 7 May 1999 at its 104th Session).

⁵⁹ Andrea Spagnolo, 'They Are not Enforceable, but States Must Respect Them: An Attempt to Explain the Legal Value of Decisions of the European Committee of Social Rights' (2022) 7(3) *European Papers* 1495.

⁶⁰ The role of the ECSR in shaping the standards might further develop, especially since this body has actively addressed the impact of the cost-of-living crisis on the enjoyment of social rights, see ESCR, 'Social Rights and the Cost of Living Crisis' (2025).

⁶¹ See the ratification status (n 35).

These recent international developments could still influence how austerity measures are reviewed by constitutional courts.

2. *The United Nations*

Each state covered in the study is a party to the ICESCR, recognising an extensive catalogue of social rights.⁶² Under Article 2(1) of this treaty, they are obligated ‘to take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights’. The Covenant also includes a limitation clause framed in rather general terms. Under Article 4, the rights may be subjected to limitations determined by law, only in so far as this may be compatible with the nature of the rights, and solely for the purpose of promoting the general welfare in a democratic society. It is, however, not fully clear whether ‘resource-motivated reductions’ constitute limitations within the meaning of Article 4(1) or should be evaluated only under Article 2(1).⁶³ The wording of the core standards under the Covenant might again leave considerable ambiguities.

The ICESCR does not explicitly mention ‘austerity measures’. However, the Covenant has been supported by the activity of the Committee on

⁶² International Covenant on Economic, Social and Cultural Rights (opened for signature 19 December 1966, entered into force 3 January 1976) 993 UNTS 3 (‘ICESCR’). However, among the three countries only Slovakia has ratified its 2008 Optional Protocol, which establishes an international procedure for protecting the rights it contains. On the ratification status see <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4> accessed 27 July 2026.

⁶³ eg Aoife Nolan, Nicholas J. Lusiani and Christian Courtis, ‘Two Step Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights’ in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2015) 136; Amrei Müller, ‘Limitations to and Derogations from Economic, Social and Cultural Rights’ (2009) 9(4) Human Rights Law Review 557.

Economic, Social and Cultural Rights (CESCR).⁶⁴ National courts can therefore leverage the evolving ‘doctrine of non-retrogression’ in examining austerity measures.⁶⁵ The essence of this notion could be reduced to ‘prohibition on backward steps’.⁶⁶ Within this doctrine, the Committee further discussed the austerity measures in its 2016 statement.⁶⁷ Significantly, this document does not preclude retrogressive measures if unavoidable.⁶⁸ However, the measures should be ‘necessary and proportionate’, which is explained by the fact that the ‘adoption of any other policy or failure to act would be more detrimental to economic, social and cultural rights’.⁶⁹ The Committee provides further guidelines by stating that these measures cannot result in discrimination, should mitigate inequalities that can grow in times of crisis, ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected, and should not affect the minimum core content of the rights protected.⁷⁰ The Committee also provides a test for austerity measures affecting the right to social security, according to which many elements must be considered when examining such measures, including presence of ‘reasonable justification’ for specific

⁶⁴ On the Committee see generally Malcom Langford and Jeff A. King, ‘Committee on Economic, Social and Cultural Rights. Past, Present and Future’ in Malcolm Langford (ed), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (Cambridge University Press 2008), 478–482.

⁶⁵ Sandra Liebenberg, ‘Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-Economic Rights Doctrine of Non-Retrogression’ (2021) 37(2) South African Journal on Human Rights 181.

⁶⁶ See for critical remarks Ben T.C. Warwick, ‘Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights’ (2019) 19(3) Human Rights Law Review 467, 468.

⁶⁷ UN Committee on Economic, Social and Cultural Rights ‘Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights’ E/C.12/2016/1 (22 July 2016); note the Committee issued a statement, not a general comment, in this instance.

⁶⁸ CESCR (n 67) [4].

⁶⁹ CESCR (n 67) [4].

⁷⁰ CESCR (n 67) [4].

measures, a ‘comprehensive examination’ of potential alternatives, ‘genuine participation of affected groups in examining the proposed measures and alternatives’ and ‘an independent review of the measures at the national level’.⁷¹ According to the 2016 statement, the states should ensure that conditions attached to obtaining external loans under international financial assistance do not ‘unreasonably reduce its ability to respect, protect and fulfil the Covenant rights’.⁷² These auxiliary standards complement the framing of the core standards.

Some standards regarding austerity measures were also indicated in the letter addressed in 2012 by the Chairperson of the Committee, acknowledging that it may be ‘inevitable’ to adopt certain measures in the wake of economic and financial crises, while emphasising that policies must meet certain requirements.⁷³ Austerity measures must be (1) temporary, not exceeding the period of the crisis; (2) necessary and proportionate; (3) non-discriminatory and not disproportionately affecting the disadvantaged and marginalised; and (4) ensuring the protection of the core content of the rights at all times.⁷⁴ These guidelines correspond to the above Committee’s statement.

Notably, the ‘core standards’ in the ICESCR, which are legally binding for the parties to the treaty, are framed in general terms (such as ‘the maximum of its available resources’, ‘the purpose of promoting the general welfare in a democratic society’), even stirring debate over which provisions austerity

⁷¹ CESCR (n 67) [4].

⁷² CESCR (n 67) [4].

⁷³ The Chairperson of the UN Committee on Economic, Social and Cultural Rights, ‘Letter addressed to States Parties to the International Covenant on Economic, Social and Cultural Rights’ (16 May 2012) <<https://www2.ohchr.org/english/bodies/cescr/docs/lettercescrtosp16.05.12.pdf>> accessed 11 September 2026. See also Diane A. Desierto, ‘Austerity Measures and International Economic, Social, and Cultural Rights’ in Evan J. Criddle (ed), *Human Rights in Emergencies* (Cambridge University Press 2016) 248–50.

⁷⁴ This expression means ‘the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights’.

measures should be evaluated under.⁷⁵ The ‘auxiliary standards’ set out in the deliberations of the Committee’s members are not legally binding.⁷⁶ Yet, they matter insofar as they reveal how the Committee might evaluate the implementation of the ICESCR during the monitoring procedures (in the concluding observations) and in the complaints procedures (under the Optional Protocol).⁷⁷ This situation may justify the necessity for domestic courts to consider the relevance of these auxiliary standards and include them in the process of judicial interpretation.

3. *The European Union*

Deriving standards on austerity measures from EU law might appear surprising, because EU institutions are closely associated with strong support for austerity policies as a response to the crisis in the Eurozone.⁷⁸ Notwithstanding, the importance of fundamental social rights is confirmed in the Treaty on European Union.⁷⁹ Social rights – as ‘solidarity’ rights – are also recognised in Title IV of the 2000 EU Charter of Fundamental Rights

⁷⁵ ICESCR (n 62).

⁷⁶ On the nature of non-binding instruments see generally Max Lesch and Nina Reiners, ‘Informal Human Rights Law-Making: How Treaty Bodies Use ‘General Comments’ to Develop International Law’ (2023) 12(2) *Global Constitutionalism* 378.

⁷⁷ As mentioned earlier, among the three countries only Slovakia has ratified the Optional Protocol to the ICESCR. On the role of the CESCR see generally Langford and King (n 64) 477.

⁷⁸ On this issue see also Anna Elomäki, ‘Austerity and its Alternatives in the European Parliament: from the Eurozone Crisis to the COVID19 Crisis’ (2024) 22 *Comparative European Politics* 371; Merve Biten, Theresa Kuhn and Wouter van der Brug, ‘How does Fiscal Austerity Affect Trust in the European Union? Analyzing the Role of Responsibility Attribution’ (2023) 30(6) *Journal of European Public Policy* 1033; Oscar Bajo-Rubio and Antonio G. Gómez-Plana, ‘A Multi-Country Analysis of Austerity Policies in the European Union’ (2022) 45(1) *The World Economy* 4.

⁷⁹ Consolidated Version of the Treaty on European Union [2020] OJ C202/1 Art. 6(1).

(adapted in 2007), which currently has ‘the same legal value as the Treaties’.⁸⁰ Under Article 52(1) of the EU Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must: (1) be provided for by law, (2) respect the essence of rights and freedoms, (3) be subject to the principle of proportionality, (4) be made only if necessary, (5) genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Yet, under Article 51, the provisions of the EU Charter are ‘addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’ and ‘do not establish any new power or task’ for the Union.⁸¹ The discretion of the EU member states in implementing austerity measures has therefore never been clear-cut.

Long before the 2008 financial crisis, the European integration process was already accompanied by initiatives aimed at protecting social rights, such as the 1989 Community Charter of the Fundamental Social Rights of Workers

⁸⁰ The Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

⁸¹ In this regard, one caveat should be made. Poland was the only country in CEE that adopted Protocol No 30, in which it was declared that the EU Charter ‘does not extend the ability’ of the CJEU, or any Polish courts or tribunals, ‘to find that the laws, regulations or administrative provisions, practices or action’ of the domestic authorities are ‘inconsistent with the fundamental rights’ reaffirmed in the Charter EU, and ‘nothing in Title IV of the Charter creates justiciable rights applicable to Poland’ unless Poland ‘has provided for such rights in its national law’. This provision can have an adverse effect on Polish judicial bodies that seek to refer to standards derived from the EU Charter. Nevertheless, Slovakia and Czechia did not join this initiative, see Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, Official Journal 115, 09/05/2008, 0313 – 0314. It is noteworthy to mention the unsuccessful efforts to extend the application of Protocol No. 30 to Czechia, see European Parliament ‘Resolution on the Draft Protocol on the Application of the Charter of Fundamental Rights of the European Union to the Czech Republic’ 2016/C 055/33 (22 May 2013).

and the 1994 White Paper on European Social Policy.⁸² Consequently, the EU's support for austerity amid the crisis suggests that the European Social Model was 'jeopardised'.⁸³ The fragility of EU standards seems to arise, *inter alia*, from the fact that member states have flexibility regarding the realisation of social rights in 'national laws' and 'national practices'.⁸⁴ Indeed, adopting specific welfare models is a competence of the member states.⁸⁵ Neither the Community Charter of the Fundamental Social Rights of Workers nor the EU Charter of Fundamental Rights comprehensively addresses the limitations on austerity in case of a threat to the financial stability, which, inevitably led to serious negligence, such as in Greece, exacerbated by the requirements set out by the so-called 'Troika' (the European Commission, the European Central Bank, and the International Monetary Fund) for safeguarding financial stability through the implementation of austerity measures at the national level.⁸⁶ In practice, EU institutions navigated

⁸² The Commission of the European Communities, 'European Social Policy: A Way Forward for the Union: A White Paper' (27 July 1994) COMC(94) 333; See also George M. Kraw, 'The Community Charter of the Fundamental Social Rights of Workers' (1990) 13 *Hastings International and Comparative Law Review* 467.

⁸³ Klaus Busch, Christoph Hermann, Karl Hinrichs and Thorsten Schulten, 'Euro Crisis Austerity Policy and the European Social Model. How Crisis Policies in Southern Europe Threaten the EU's Social Dimension' (2023) <<https://library.fes.de/pdf-files/id/ipa/09656.pdf>> accessed 11 September 2026.

⁸⁴ References to these two categories can be found several times in Chapter IV of the Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

⁸⁵ See also Article 153 of the Treaty on the Functioning of the European Union, Official Journal 115, 09/05/2008, pp. 0114 – 0116.

⁸⁶ eg Salomon (n 2); Theodoros Papadopoulos and Antonios Roumpakis, 'The Greek Welfare State in the Age of Austerity: Anti-social Policy and the Politico-economic Crisis' (2012) 24 *Social Policy Review* 205; Alexander Kentikelenis, Marina Karanikolos, Aaron Reeves, Martin McKee and David Stuckler, 'Greece's Health Crisis: From Austerity to Denialism' (2014) 383 *Lancet* 748; Gisela Hirschmann *Accountability in Global Governance: Pluralist Accountability in Global Governance* (Oxford University Press 2020) 151–180.

between supporting social rights and safeguarding the financial stability of member states, repeatedly prioritising the latter.

The general acceptance of austerity measures as an adequate response to the financial crisis was reflected in the judgment C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* of the Court of Justice of the European Union (CJEU) on the temporary salary-reduction measures imposed on the Portuguese judges.⁸⁷ In this case, the Court ruled that the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU read in conjunction with Article 47 of the EU Charter, does not preclude austerity measures and emphasised that the salary reductions in Portugal were applied to ‘various public office holders and employees performing duties in the public sector’.⁸⁸ The CJEU did not, however, assume that the EU institutions and member states are exempt from realising obligations associated with fundamental rights, which can be illustrated by the 2016 *Ledra Advertising Ltd and Others* judgment.⁸⁹ In this case, it was underlined, in the context of the stability support programme for Cyprus, that the European Commission was bound by requirements stemming from the EU Charter.⁹⁰ Yet, considering, among other things, ‘the objective of ensuring the stability of the banking system in the euro area’, the CJEU did not declare measures adopted by the Commission as ‘a disproportionate and intolerable interference impairing the very substance’ of the right to property.⁹¹ In another case (*Eugenia Florescu and Others*) resolved in 2017, when examining national legislation alongside the provisions of the EU Charter, the CJEU acknowledged that member states ‘have broad discretion when adopting economic decisions’ unless the legislation imposes ‘a disproportionate and

⁸⁷ Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117.

⁸⁸ *Associação Sindical dos Juízes Portugueses* (n 87) [48, 52].

⁸⁹ Joined Cases C8/15 P to C10/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)* ECLI:EU:C:2016:701.

⁹⁰ *Ledra* (n 89) [67].

⁹¹ *Ledra* (n 89) [74].

excessive burden on the persons concerned'.⁹² The CJEU has certainly adopted a somewhat reserved approach to reviewing austerity policies.⁹³

Nevertheless, despite the acceptance of austerity measures in the aftermath of the 2009 Eurozone crisis, over the last decade, the importance of social rights has resurged in the activities of the EU institutions. This is reflected primarily in the establishment of the European Pillar of Social Rights.⁹⁴ Some auxiliary standards concerning austerity measures are now outlined in the 2018 non-binding opinion issued by the European Economic and Social Committee. This document is an outcome of the critique aimed at previous policies supported by the EU, which is even apparent from its name: '[l]essons learned for avoiding the severity of austerity policies in the EU'.⁹⁵ It recommends that 'future crises in the European Union should be managed by striving for a better balance between fiscal and social objectives' and states that other issues should be 'taken on board'.⁹⁶ The opinion lists examples of 'income and wealth inequalities, poverty reduction, a strong and competitive business sector, inclusive growth and employment, climate change, the participation of women in the labour market and corruption'.⁹⁷ The document also supports a statement that 'human beings and human life take

⁹² Case C-258/14 *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others* [57-58], the judgment concerned, inter alia, prohibition of combining of a net public-sector retirement pension with income from activities carried out in public institutions under certain circumstances.

⁹³ See also Isabel Staudinger, 'The Court of Justice's Self-restraint of Reviewing Financial Assistance Conditionality in the Chrysostomides Case' (2021) 6 *European Papers* 177.

⁹⁴ The European Commission, The Communication 'Launching a Consultation on a European Pillar of Social Rights', COM(2016) 127 final.

⁹⁵ The European Economic and Social Committee [EESC], 'Lessons learned for avoiding the severity of austerity policies in the EU' ECO/401 – EESC-2017-02368-00-01-AC-TRA (14 February 2018).

⁹⁶ EESC (n 95) [1.13].

⁹⁷ EESC (n 95) [1.13].

precedence over deficits’.⁹⁸ While this recommendation does not unambiguously resolve the potential conflict between protecting financial stability and safeguarding social rights, it demonstrates that substantial reductions in expenditures cannot be justified by the need to reduce deficits alone. In light of this opinion, member states should consider the long-term consequences of austerity measures.

There is certainly a noticeable trend to re-acknowledge the importance of social rights in the EU’s institutional activities.⁹⁹ However, the recent initiatives contribute only to the development of the auxiliary standards. Since the 2008 financial crisis, the European Union has not seen formal changes to the ‘core standards’ in the EU primary law. The development of stricter standards on austerity is best illustrated by the above (non-binding) 2018 opinion, which can still be used as an auxiliary tool by member states. This document refers to austerity measures more thoroughly than the CJEU in its interpretation of the ‘core standards’ expressed in the EU Charter. These new approaches discernible at the EU level might still influence member states to review the implementation of austerity measures more rigorously.

4. The Approaches in the Development of International Standards

The juxtaposition of the above international standards raises questions of similarities and differences. Two major approaches arising from the activities of international actors can be identified, which is also supported by the fact that the respective bodies cross-reference each other’s standards of protection.

The first main approach to austerity measures emphasises that states should be given extensive freedom to find adequate methods to ensure financial stability. This way of thinking influenced the actions of the so-called Troika

⁹⁸ EESC (n 95) [1.13].

⁹⁹ See also: the La Hulpe Declaration on the Future of the European Pillar of Social Rights (16 April 2024).

in the wake of the Eurozone crisis, and it was also reflected in the case law of the ECtHR and the CJEU to some extent. Although this view does not overtly challenge the existence of social rights, it assumes that it is incumbent on states to safeguard their financial interests best, and that the allegation of a social rights infringement can only be justified in extreme cases. This approach gained popularity among EU member states as a response to the 2008 financial crisis. It might be attributed to the fact that the core standards in international human rights acts are framed in rather general terms without detailed criteria for imposing austerity measures.

The negative domestic experiences of implementing crisis-related austerity measures in Greece and other countries have questioned the above assumptions and heightened the need to seek alternatives. Several international bodies support imposing substantial restrictions on the implementation of austerity measures (such as the UN Committee on ESC Rights, the European Committee of Social Rights and the Council of Europe Commissioner for Human Rights) by treating austerity as a ‘last resort’. The essence of these standards amounts to the prohibition of excessive interference in social rights, non-discrimination and the principle of equality, public dialogue in the implementation process, and consideration of long-term effects on society as well as the interests of the most vulnerable. This significantly reduces the domestic authorities’ discretion in implementing such measures and reinforces the protection of social rights.

This second emerging approach is primarily supported by ‘auxiliary standards’– institutional initiatives framed within non-binding documents (such as the 2012 resolution by the Council of Europe Parliamentary Assembly, the 2016 statement by the UN Committee on Economic, Social and Cultural Rights and the 2018 opinion by the European Economic and Social Committee). Yet, these views can matter for the interpretation of the ‘core standards’ by both the international bodies and the domestic courts. The non-binding nature of these sources may suggest that constitutional courts will generally be less inclined to consider them when adjudicating

specific cases. So far, this approach has not infiltrated the case law of the CJEU and the ECtHR. However, there is undoubtedly a shift in how international actors, especially expert bodies (the CESCR and the ECSR), approach austerity measures.

Enforcing the auxiliary standards in practice remains challenging. They could be applied by international bodies, such as the European Committee of Social Rights and the Committee on Economic, Social and Cultural Rights. However, CEE states have generally failed to accept the international complaints procedure.¹⁰⁰ Of the three countries presented in this article, only Czechia accepted the procedure before the ECSR, and only Slovakia accepted the one before the CESCR. Nevertheless, as of mid 2026, there is no evidence that these procedures have been used to review austerity measures. There is, however, potential for constitutional courts of the three countries to incorporate these developments in the interpretation of both international human rights law and constitutional provisions.

IV. JUDICIAL REASONING IN THE PRACTICES OF THE CONSTITUTIONAL COURTS

The question arises about the position of the constitutional courts in Poland, Czechia, and Slovakia towards austerity measures, in particular their judicial ‘responses’ to the proliferation of international standards. As previously mentioned, while the term ‘austerity measures’ is prevalent in English, the selection of cases for this research is based on key expressions used by judges in CEE (references to budgetary allocations, financial stability, and the protection of social rights). I have therefore mapped rulings issued by constitutional courts that are publicly available in databases, focusing on

¹⁰⁰ See generally Adam Ploszka and Jan Denka, ‘Economic and Social Rights in Central and Eastern Europe – Insights from the Perspective of the UN Human Rights System’ (2025) 85(3) *Heidelberg Journal of International Law* 863, 870–878.

cases representative of each court's approach.¹⁰¹ The analysis covers a wide range of relevant judgments from different periods, including those prior to the 2008 financial crisis, allowing me to identify practices from times when international standards were less developed. The scope of this research is broad as it is not limited to a narrow timeframe. Instead, it includes various available cases from the establishment of constitutional courts in Czechia and Slovakia (1993), and from the 1989 democratic transition in Poland.¹⁰² Consequently, the wide scope of this research illustrates how these courts have approached austerity measures over the last decades.

Given the extensive number of cases, I concentrate on judgments that illuminate how these courts have addressed the possibility of striking a balance between divergent goals when assessing austerity measures in their argumentation structures (social rights in juxtaposition to financial stability and similar values). When examining them, I try to determine what conclusions the courts usually arrive at after applying these structures to specific cases. I also explore how they address the developments of international standards on austerity measures.

1. Poland

The 1997 Polish Constitution contains a separate subchapter entitled '[e]conomic, social and cultural freedom and rights' (Articles 64–76), which includes, *inter alia*, the right to social security, the right to health care, and

¹⁰¹ The relevant databases are The Czech Constitutional Court Judgments and Resolutions <<https://nalus.usoud.cz/Search/Search.aspx>>, Online Judgments Portal of the Polish Constitutional Tribunal <<https://ipo.trybunal.gov.pl/>>, The Collection of Judgments and Resolutions of the Constitutional Court of the Slovak Republic <https://www.ustavnysud.sk/sk/rozhodovacia_cinnost/zbierka-nalezov-a-uzneseni> accessed 11 September 2026. While the Czech and Polish databases are designed to provide access to all rulings, the Slovak database might be incomplete as it provides access to a large number of 'selected' judgments.

¹⁰² The PCT has been adjudicating since 1986 (several years before the democratic transition).

the right to education.¹⁰³ Nonetheless, under Article 81 of the Constitution selected social rights ‘may be asserted subject to limitations specified by statute’. The realisation of social rights may also be reviewed based on constitutional principles, such as the principle of a democratic state ruled by law (Article 2 of the Constitution) and the principle of dignity (Article 30 of the Constitution).¹⁰⁴ The former provision also serves as a basis for other specific provisions, including the principles of trust in the state and protection of acquired rights.¹⁰⁵ These constitutional standards have been repeatedly applied by the Tribunal in austerity cases.

In the first decade after the fall of communism, the PCT endeavoured to navigate in its statements between protecting social rights and not interfering with the competences of other state branches, reiterating that determining the expenditures falls within Parliament’s authority, and that, respectively, the Tribunal cannot excessively constrain this freedom, but is still competent to review whether legal solutions infringe citizens’ constitutional rights.¹⁰⁶ The main structures of argumentation of the 1990s continued into the 2000s and the 2010s. Over the years, the Tribunal also reserved that the obligation imposed on the legislator to implement social guarantees should not be interpreted as the obligation to maximise the expansion of the benefits system. While respective legislative solutions must be compatible with budgetary balance, the ‘essence’ of social rights can never

¹⁰³ The Constitution of the Republic of Poland (*Konstytucja Rzeczypospolitej Polskiej*), *Dziennik Ustaw (Journal of Laws)* 1997, no. 78, item 483, as amended.

¹⁰⁴ eg Adam Płoszka, ‘The Right to Subsistence Minimum and Its Role in the Protection of People Living in Extreme Poverty – the Polish Experience’ (2019) 24 *Comparative Law Review* 225.

¹⁰⁵ eg Piotr Tuleja, ‘Commentary on Article 2’ in M. Safjan, L. Bosek (eds), *Konstytucja RP. Tom I. Komentarz. Art. 1-86* [The Polish Constitution. Vol. 1. Commentary. Art. 1-86] (C.H.Beck 2016) 223-229; Michał Jackowski, *Ochrona praw nabytych w polskim systemie konstytucyjnym* [The Protection of Acquired Rights in the Polish Constitutional System] (Wydawnictwo Sejmowe 2008).

¹⁰⁶ PCT, K 11/97, para 47.

be infringed.¹⁰⁷ It was also established that the burden of the economic difficulties (in the aftermath of the 2008 financial crisis) should be placed on all social groups rather than disproportionately affecting only some of them.¹⁰⁸ Since the fall of communism, the Tribunal has repeatedly used similar phrases to address austerity measures, making only minor changes to its arguments during the ‘constitutional crisis’.¹⁰⁹

Despite these well-established statements, the results of specific cases have not always been comprehensible.¹¹⁰ It may be quite elusive which elements of specific social rights are core and which are peripheral. The constitutional principle of protecting the citizen’s trust is not viewed as absolute, and it is not understood as a ‘guarantee of the immutability’ of social security legislation in the face of economic recession.¹¹¹ It was also repeatedly acknowledged that the state may be compelled to amend existing legal regulations, with adverse effects for beneficiaries, and to adjust the scope of social rights to the economic circumstances.¹¹² Given the flexible formulas applied, the PCT prioritised safeguarding the state’s financial stability over social rights in numerous cases.¹¹³

¹⁰⁷ eg PCT: SK 22/99, para 39; P 33/13, para 57; K 39/13, paras 131–135; P 38/12, para 81; SK 2/17, para 56; SK 31/16, paras 153–157.

¹⁰⁸ PCT: K 9/12, para 306; P 2/16, para 95.

¹⁰⁹ See also Adam Ploszka, ‘Vanishing Rights: Social Rights in the Illiberal Constitutionalism of Hungary and Poland’ (2025) 5(2) *Journal of Illiberalism Studies* 37, 53–54.

¹¹⁰ In some cases, the PCT judges adopted dissenting opinions. This might happen in cases that receive significant attention from society, such as the 2013 controversial pension system reform: PCT, K 1/14.

¹¹¹ PCT, K 9/12, para 336.

¹¹² eg PCT: K 40/12, para 124; K 27/13, para 91; SK 29/12, para 62; K 5/99, para 49; SK 16/01, para 25; P 9/05, para 33.

¹¹³ eg PCT: SK 32/17, para 111; K 32/02; K 12/02; K 23/03; K 1/12, para 239.

The justiciability of social rights cases has rarely been questioned by judges.¹¹⁴ Nonetheless, after applying the argumentation structures to specific cases, the Tribunal is far more likely to conclude that the broad scope of the legislator's discretion must be acknowledged. Declaring austerity measures unconstitutional is relatively rare.¹¹⁵ One such example can be found, before the adoption of the 1997 Constitution, when the PCT declared some regulations amending the pension benefits system, adopted in response to the economic crisis after the fall of communism, unconstitutional.¹¹⁶ It was underlined that these benefits are strongly protected by law because they guarantee the minimum level of social security (the constitutional protection of pension rights), and that the legislature should make every effort to ensure that less favourable regulations are adopted within democratic procedures, particularly through negotiations with interested parties or their representatives.¹¹⁷ The Tribunal also expressed the view that citizens should not be surprised by new regulations, and, hence, the adjustment period to new legal regulations should be sufficiently long, which can be achieved either by gradually reducing benefits spread over time or by an appropriately long *vacatio legis*.¹¹⁸ Another noteworthy case on pension rights and austerity occurred in 1996, when the Tribunal reiterated that maintaining budgetary balance is a constitutional value.¹¹⁹ However, it still argued that the exclusion from the pension benefit indexing mechanism exceeds the limits of parliamentary freedom in choosing the most appropriate legal solutions and places the burden of the increase in the

¹¹⁴ Doubt might arise only if the applicant relies on provisions that express one of the so-called constitutional programmatic norms (general objectives that the state authorities should attain), rather than subjective social rights.

¹¹⁵ See also PCT, K 15/91.

¹¹⁶ PCT, K 14/91.

¹¹⁷ PCT, K 14/91, paras 119–122.

¹¹⁸ PCT, K 14/91, para 123.

¹¹⁹ PCT, K 8/96, para 67.

cost of living on the pensioners.¹²⁰ These rulings are clear examples of declaring austerity measures incompatible with constitutional standards long before rigorous international standards were developed.

Some significant rulings were also made in subsequent decades, such as the 2013 judgment on care benefits, in which the PCT declared that guarantees of the state's aid for people with disabilities cannot be limited 'in the first place' and 'without any unambiguous and unquestionable confirmation that it is really necessary'.¹²¹ Nevertheless, after the adoption of the 1997 Polish Constitution, the PCT has been visibly less inclined to declare unconstitutionality of austerity measures.¹²² This trend can be explained by the previously discussed argumentation structures and the limitation clause of Article 81 of the Polish Constitution. The PCT still occasionally issues judgments favourable for right-holders.¹²³ However, the Tribunal's approach to austerity measures is much more reserved than in the 1990s. This cautious position of the PCT was especially noticeable in the 'financial crisis case-law'.¹²⁴

Despite several instances of declaring cut-based measures unconstitutional, there is hardly any reference to the evolving international standards on austerity in the justifications of the judgments even though the Tribunal has at times generally referred to social rights in international law¹²⁵ and even invoked non-binding documents.¹²⁶ This selective engagement with international discourse is even discernible in cases in which the austerity measures were deemed unconstitutional.¹²⁷

¹²⁰ PCT, K 8/96, para 68.

¹²¹ PCT, K 27/13, para 91.

¹²² See also Krajewski (n 3) 172–173.

¹²³ eg PCT, SK 140/20.

¹²⁴ Krajewski (n 3) 172–174.

¹²⁵ PCT, K 3/94; PCT, K 9/00; SK 45/04; PCT, K 43/12; SK 31/16.

¹²⁶ PCT, SK 17/09, para 151.

¹²⁷ Eg PCT, SK 31/16; SK 140/20.

2. *Czechia*

Social rights have not been framed within the 1992 Constitution of Czechia,¹²⁸ but a separate constitutional act – the 1991 Czech Charter of Fundamental Rights and Freedoms, which enumerates specific rights in Chapter 4 (Economic, Social, and Cultural Rights), including the right to fair remuneration for work and to satisfactory work conditions, the right to adequate material security, and the right to health care.¹²⁹ Similarly to Poland, the judicial review of austerity measures is complicated by Article 41(1) of the 1991 Charter, which stipulates that selected constitutional rights, especially social rights, ‘may be claimed only within the confines of the laws implementing these provisions’.¹³⁰ The case law of the Czech Constitutional Court (CCC) provides an example of treating this last provision as a legal obstacle to the enforcement of social rights, possibly leading to the dismissal of constitutional complaints as manifestly unfounded.¹³¹

The Czech Court repeatedly underscored that it cannot decide on the most appropriate ways to implement social rights in place of the legislature.¹³² Nevertheless, the adjudicating panels began applying a specific method to determine whether laws implementing constitutionally guaranteed social rights are constitutional. This approach, named as the rationality test, consists of the following four steps: (1) defining the meaning and essence of a social right (a certain essential content), (2) assessing whether the law does not affect the very existence of a social right or its implementation, (3) assessing

¹²⁸ The Constitution of the Czech Republic (*Ústava České Republiky*), 16 December 1992, Constitutional Law (*Ústavní zákon*) č. 1/1993 Sb.

¹²⁹ The Charter of Fundamental Rights and Freedoms (*Listina základních práv a svobod*), 9 January 1991, Constitutional Law (*Ústavní zákon*) č. 23/1991 Sb.

¹³⁰ On this issue see eg Maxim Tomoszek, ‘Commentary on Article 41’ in F. Husseini, M. Bartoň, M. Kokeš, M. Kopa (eds), *Listina základních práv a svobod. Komentář* [The Charter of Fundamental Rights and Freedoms: A Commentary] (C.H. Beck 2021) 1276.

¹³¹ eg CCC, IV.ÚS 197/95.

¹³² eg CCC, Pl.ÚS 2/08, para 79.

whether the legal regulation pursues a legitimate aim (whether the reduction is not arbitrary), and (4) considering whether the legal means used to achieve it are reasonable (rational), although not necessarily the best, most appropriate, most effective or wisest.¹³³ This approach is intended to balance the need to respect the legislator's discretion with the need to safeguard social rights.¹³⁴

The question arises whether the above test provides an effective tool for reviewing austerity measures. It still contains some general clauses (the essence, the legitimate aim, the reasonableness) and does not explicitly predetermine how the CCC views the relationship between conflicting values, which is understandable given that the decision to adopt specific solutions is entrusted to other state branches. Still, it is unclear which austerity measures are unconstitutional, because safeguarding financial stability by reducing public expenditures, even if it affects some right-holders, pursues a legitimate aim and is reasonable, although not necessarily the most appropriate. The four-step test may therefore yield very different outcomes in specific cases.¹³⁵

Despite developing the rationality test, the CCC has consistently held a reserved approach in cases concerning social rights. Very similar argumentation structures can be boiled down to several stances. It is repeatedly underlined that the legal regulation of social rights is limited by the state budget. Respectively, questions regarding social rights are regarded as inherently political, which implies the statement that the assessment of the effectiveness and appropriateness of legal solutions should be left to the

¹³³ eg CCC, Pl.ÚS 1/08, para 103; I.ÚS 3134/22, para 12; Pl.ÚS 54/10, para 48; Pl.ÚS 1/20, para 40; Pl.ÚS 43/13, para 46.

¹³⁴ CCC, Pl.ÚS 54/10, para 47.

¹³⁵ See also Marek Antoš, 'The Czech Constitutional Court and Social Rights. Analysis of the Case Law' in Pavel Šturma, Narciso Leandro Xavier Baez (eds), *International and Internal Mechanisms of Fundamental Rights Effectiveness* (Právnická fakulta UK 2015) 187–196.

legislature. Social rights are therefore considered not unconditional in nature and the CCC takes the view that they can only be claimed within the limits of applicable laws.¹³⁶

However, it is not entirely true that other state branches can always exercise their extensive power to address the economic crisis. For example, in 2012, CCC rejected the argument that ‘extraordinary circumstances’ resulting from the crisis can justify the obligation of job seekers to accept an offer to perform public service, and argued that the reference to the crisis is vague, making it unclear how the public service would contribute to overcoming its consequences.¹³⁷ This measure was, therefore, declared incompatible with the prohibition of arbitrariness, the principle of dignity, and the prohibition of forced labour.¹³⁸ This judgment illustrates how, in extreme cases, the Court has addressed the problem of unjustified crisis-related measures.

Even though the CCC has the potential to counter the austerity measures that manifest ‘unreasonableness’, the scope for reviewing contested austerity measures is generally limited. Despite this reserved approach, the Court has repeatedly invoked international human rights acts, including the ESC¹³⁹ and the ICESCR.¹⁴⁰ In this context, it is worth mentioning the 2018 judgment, which quashed the Czech Supreme Administrative Court ruling in a case concerning the failure of regional authorities to take steps to ensure the availability of appropriate social services for a person with disabilities.¹⁴¹ In this case, the ICESCR, the Convention on the Rights of Persons with Disabilities, alongside the EU Charter, and some general comments adopted by UN bodies were referred. These standards do not directly refer to

¹³⁶ eg CCC: III.ÚS 117/24, para 16; I.ÚS 3134/22, para 11; Pl.ÚS 1/20, para 38; Pl.ÚS 40/17, para 50; Pl.ÚS 55/13, para 45; Pl. ÚS 31/09, paras 39–40.

¹³⁷ CCC, Pl.ÚS 1/12, paras 259–260.

¹³⁸ CCC, Pl.ÚS 1/12, para 261.

¹³⁹ eg CCC, Pl.ÚS 49/18; Pl.ÚS 20/09; IV.ÚS 572/06.

¹⁴⁰ eg CCC, II.ÚS 2533/20; Pl.ÚS 49/18; I.ÚS 2637/17; IV.ÚS 572/06.

¹⁴¹ CCC, I.ÚS 2637/17.

austerity measures, yet this judgment confirms that referring to international discourse can be a practice entirely consistent with the case law of the CCC.¹⁴²

On the debit side, the recent international standards on limitations to austerity measures have not been integrated into the Czech practice. In 2011, the CCC referred to decisions of the ESCR, but only to argue that there is no contradiction between the contested regulation and the European Social Charter.¹⁴³ Similarly, in 2015, the Court elaborated on the protection of ‘legitimate expectations’ regarding social benefits to demonstrate that the CCC’s approach is in line with the ECtHR’s reserved case law.¹⁴⁴ Besides this, there is no further evident sign of robust deliberations by the Court regarding international standards on austerity measures.

3. Slovakia

In contrast to Czechia, social rights were directly integrated into Chapter Four of the 1992 Slovak Constitution (Part Five, entitled ‘Economic, social, and cultural rights’ – Articles 35–43).¹⁴⁵ The overall approach to social rights enforcement is shaped by the constitutional limitation clause (similar to the Czech and the Polish ones), which stipulates that certain constitutional rights ‘may be claimed only within the restrictions of the laws implementing these provisions’ – Article 51(1) of the Slovak Constitution. These provisions correspond to the Charter of Fundamental Rights and Freedoms, which is part of the Czechoslovak constitutional heritage. The Slovak constitutional regulation deviates to some extent from the Charter, which does not, however, lead to substantially different approaches to austerity measures.

¹⁴² CCC, I.ÚS 2637/17.

¹⁴³ CCC, Pl.ÚS 20/09, para 32.

¹⁴⁴ CCC, Pl.ÚS 55/13, paras 49, 74.

¹⁴⁵ The Constitution of the Slovak Republic (Ústava Slovenskej republiky), 1 September 1992, 460/1992 Zb.

In the case law of the Slovak Constitutional Court (SCC), social rights are repeatedly referred to as second-generation rights, and the SCC acknowledges a greater scope for the legislator's discretion in implementing these rights.¹⁴⁶ The Slovak rulings are, in many respects, based on extensive references to the CCC's case law, reflecting mutual influence between the two courts and their shared heritage.¹⁴⁷ The SCC also refers to the reasonableness test.¹⁴⁸ This leads to many similarities in argumentation structures between the Czech and Slovak systems.

Still, the SCC has demonstrated its potential to review austerity measures. For example, in 2013 (in the aftermath of the 2008 financial crisis), the SCC also declared unconstitutional the legislation that made judges' salaries dependent on the budget deficit, citing its incompatibility with the principles of judicial independence and the rule of law.¹⁴⁹ In 2018, some other austerity measures were found unconstitutional, namely legislation that extraordinarily 'froze' the salaries of public officials to consolidate public finances.¹⁵⁰ The SCC observed that the adopted measure had a 'symbolic rather than a real significance' as the amount of savings was not substantial, and had an almost 'immeasurable impact', which made the burden placed on the persons concerned disproportionate.¹⁵¹ Nevertheless, the unconstitutionality was declared only with respect to some addressees of the contested legislation, not including the MPs, the Government, and the President, as they could not have a legitimate expectation that their salaries would not be reduced, given their participation in the legislative process.¹⁵²

¹⁴⁶ eg SCC, PL. ÚS 9/2018, para 78; PL. ÚS 16/2018, para 106; PL. ÚS 14/2018, para 42; PL. ÚS 8/2014, para 15; PL. ÚS 98/2011.

¹⁴⁷ eg SCC, PL. ÚS 98/2011.

¹⁴⁸ eg SCC, PL. ÚS 14/2014, paras 76–77; PL. ÚS 14/2018, para 43.

¹⁴⁹ However, in this judgment, the protection of subjective rights was not central to the analysis, see SCC, PL. ÚS 99/11.

¹⁵⁰ SCC, PL. ÚS 8/2017, para 73.

¹⁵¹ SCC, PL. ÚS 8/2017, paras 74–80.

¹⁵² SCC, PL. ÚS 8/2017, paras 60–64.

In this case, the SCC did not apply the reasonableness test, but instead the general proportionality test, because it was established that the salaries were protected under the right to property, which is classified as a first-generation right.¹⁵³ This approach corresponds to the ECtHR's strategy of safeguarding social rights through rights set out in the Convention.

These two examples show that the judges might be inclined to assess austerity measures more rigorously if the contested legislation infringes a constitutional principle or even a right that does not seem 'social' in nature. This assumption is also reflected to a minor extent in the 2010 judgment of the SCC in which one of the provisions of the social security legislation was declared incompatible with the principle of a democratic state governed by the rule of law in conjunction with the right to adequate material security, as well as, *inter alia*, the right to property.¹⁵⁴ Despite its reserved character, this kind of enforcement might implicitly strengthen social guarantees.

Although finding some linkage with other constitutional rights and principles can create more opportunities to declare austerity measures unconstitutional, the enforcement is undoubtedly complicated by the acceptance of a wide margin of the legislator's discretion, greater flexibility in times of crisis, and the reasonableness test, which creates ambiguities in the judicial enforcement of social rights, similar to those in Czechia. As a rule, the SCC resolves such cases with great restraint – treating austerity as a legitimate way of safeguarding the state's financial stability and declaring unconstitutionality only exceptionally.

Notably, the case law of the SCC also contains some references to the ICESCR¹⁵⁵ and the ESC.¹⁵⁶ Deliberations on the ECtHR's case law are also

¹⁵³ SCC, PL. ÚS 8/2017, para 65.

¹⁵⁴ SCC, PL. ÚS 11/08.

¹⁵⁵ *eg* SCC, PL. ÚS 16/2018; II. ÚS 269/2019; II. ÚS 737/2015; II. ÚS 242/2015; PL. ÚS 13/2012; PL. ÚS 3/04; II. ÚS 104/92.

¹⁵⁶ *eg* SCC, II. ÚS 242/2015; PL. ÚS 13/2012; PL. ÚS 13/09.

closely embedded in the practice of the SCC.¹⁵⁷ The case on ‘freezing’ salaries of public officials serves here as an exceptional example, because the SCC relied on the ECtHR’s reserved stance to austerity measures and the concept of ‘legitimate expectations’ (based on Article 1 of the Additional Protocol No. 1 to the European Convention on Human Rights). However, in general, the SCC has not incorporated the recent auxiliary standards on austerity measures into the constitutional review. The failure of the SCC to further deliberate on these developments might point to the practice of ‘selective’ engagement with international discourses.

4. The Ambiguous Relation Between the Constitutional Courts and International Standards

In each of the studied countries, certain argumentative structures have been consistently expressed over the years. The judges mostly follow ‘precedent’ notions formulated by other judges of the same constitutional court, not changing these views considerably. However, the well-established practices seem to go beyond a single jurisdiction. The circulation of constitutional ideas is most significant between the CCC and the SCC since both courts usually refer to the ‘reasonableness test’. In Poland, a slightly different focus has been adopted, underlying that the ‘essence’ of social rights must be safeguarded and that potential changes to relevant legislation cannot infringe on relevant constitutional principles, with acceptable exceptions to safeguard financial stability. This Polish perspective still fits constitutional arguments formulated in both Czechia and Slovakia. Unsurprisingly, references to the PCT can also be found in the case law of the CCC and the SCC.¹⁵⁸ Studying the practices of the three courts reveals some significant regional patterns in the review of austerity measures.

The above observations can be reduced to the following: the courts reuse nearly the same general formulaic expressions (referring primarily to the

¹⁵⁷ eg SCC, II. ÚS 242/2015; PL. ÚS 3/09; PL. ÚS 8/2017; PL. ÚS 12/2014.

¹⁵⁸ eg CCC, Pl.ÚS 54/10, para 50; SCC, PL. ÚS 38/2015, para 19.2.

extensive scope for the legislator's discretion in implementing social rights) to justify their positions and generally do not integrate recent international developments into constitutional discourse, thereby not developing particularly rigorous methods of reviewing austerity measures, despite extensive catalogues of social rights contained in the constitutional acts. While this is overall an accurate depiction of what has happened in these CEE countries amid the proliferation of the international standards, there is a subtle, deeper meaning of these judicial 'strategies', which touches upon at least three crucial areas.

Firstly, all three constitutional courts have indicated a broad scope for the legislator's discretion, which requires a 'different approach' to the judicial enforcement of social rights. In practical terms, this translates into general acceptance of austerity measures as a legitimate way to safeguard financial stability, leaving other state branches free to make nearly unconstrained budgetary decisions. I do not argue that these courts have adopted a European variant of the 'political question doctrine', as it is beyond doubt that these cases are certainly justiciable.¹⁵⁹ The probability of countering austerity measures at the constitutional level is, however, relatively low because, as a rule, they are considered acceptable, except for some extreme ones. On the comparative landscape, this situates these courts far from those judicial bodies that were particularly 'progressive' in reviewing austerity measures (eg, the Portuguese example).¹⁶⁰ However, they are still at a considerable distance from courts that are notorious for failing to resolve such questions altogether (eg, in the United States).¹⁶¹ This perspective can

¹⁵⁹ eg Fritz W. Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75(4) *Yale Law Journal* 517; Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85(5) *Yale Law Journal* 597.

¹⁶⁰ eg Canotilho et al. (n 2).

¹⁶¹ eg Cass R. Sunstein, 'Why Does the American Constitution Lack Social and Economic Guarantees' (2005) 56(1) *Syracuse Law Review* 1.

be regarded as a form of CEE's 'judicial restraint', which, however, remains less reserved than the approaches of the ECtHR and the CJEU.

Secondly, although over long timeframes, the adjudicating panels have changed considerably, none of the studied courts has shown a willingness to incorporate new international standards on austerity measures. One could argue that this says very little about these courts, given that they already rely on national standards and do not have to integrate international developments into their constitutional review. The focal issue is that, within an already well-established practice in these countries, the constitutional practice is enriched by referring to international discourse. Even in cases concerning austerity measures, the judges occasionally refer not only to provisions of treaties but also to international case law and non-binding documents. Nonetheless, in juxtaposition with the evolution of international standards, it is clear that constitutional courts are selective in their engagement with international standards on austerity measures. The recent ones, especially those that acknowledge less discretion for national authorities, are almost absent in constitutional deliberations. One could argue that this approach is justified because these recent sources fall mostly into the category of 'auxiliary standards'. However, the non-binding character is not the only reason these developments have not infiltrated the domestic case law. The courts are still likely to pick international practices that could substantiate their restraint approaches, but do not refer to standards that might require the courts to evaluate the austerity measure more rigorously. I would argue that this inconsistency in referring to international standards may reflect a tendency toward the so-called cherry-picking strategy.

Thirdly, the similarity among the three courts is primarily reflected in their general reluctance to declare austerity measures unconstitutional. It does not, however, imply that the courts are expected to conclude with the same outcomes in comparable cases. Although their argumentation structures are largely repetitive (despite considerable shifts in the economic environment

since the transition to a market-oriented economy in the early 1990s and later amid the 2008 financial crisis), it is hardly possible to confirm the existence of solid correlations between the economic situation and the approaches of the constitutional courts. Specific legislative measures can occasionally be deemed unconstitutional even if they are intended to address severe economic hardship, and certain limitations on public expenditures introduced in less turbulent times are recognised as acceptable because the constitutional courts refuse to intervene in the sphere of political decisions. In general, the courts are inclined to acknowledge an even broader scope of the legislator's discretion in periods of economic difficulties. Nevertheless, the rulings issued by the constitutional courts have been, presumably, adopted after lengthy deliberations of adjudicating panels. Consequently, the conclusions in specific cases reflect not only how the majority of judges viewed the uneasy relation between financial stability and the realisation of social rights, but also how the courts tried to handle existing and possible tensions with other state branches and explain the role of constitutional review to the post-communist societies, in which the constitutional protection of social rights has been a subject of public disputes since the transition to a free market economy.¹⁶² There is therefore a risk that declaring multiple austerity measures unconstitutional could provoke backlash from certain political actors. This specificity of the CEE states explains why the courts have so sparingly used the international standards and instead adopted a strategy of reiterating the long-established formulaic expressions, securing greater flexibility in deciding specific cases.

V. CONCLUSION

The 2008 financial crisis and the changes it triggered in social policies in Western and Southern European countries led to the development of international standards for austerity measures. The approaches that gained momentum in international discourse because of the crisis assume a

¹⁶² eg Krajewski (n 3) 172–173; Antoš (n 135).

significantly reduced scope of domestic authorities' discretion in implementing such measures. The present study, however, did not confirm that the proliferation of these standards has contributed to a shift in the approaches of the three CEE constitutional courts towards austerity measures. Nonetheless, what can be observed is that, although the courts do not necessarily reach the same outcomes in analogous cases, the approaches to austerity measures reflected in the constitutional courts' case law in Czechia, Poland, and Slovakia are comparable. Still, this trend is caused by similar constitutional frameworks, specific positions of these courts in post-communist states, and the circulation of constitutional ideas among the three CEE countries rather than by influences of international law.

All three courts presented in the study exhibit traits of a 'common model' of reviewing austerity measures – acknowledging justiciability of such cases, but rarely using their competencies to invoke unconstitutionality. They have attached significant importance to the legislator's broad discretion in deciding on changes in public expenditures. This discretion might even be wider in times of financial difficulties. Still, in some exceptional circumstances, the courts have declared the incompatibility of adopted measures with relevant standards.

The study has thereby shown the constitutional courts to be firm in their well-established approaches, as they do not significantly depart from the argumentation structures developed in earlier case law. This, in itself, is unsurprising because constitutional courts generally resolve cases by building on arguments presented in earlier judgments. However, what appears striking is how the constitutional courts largely omitted the dynamics in formulating new standards on austerity measures at the international level (the Council of Europe, the United Nations, the European Union), given that enriching constitutional review through reference to international discourse is entrenched in these courts' practice. The deliberations on the relationship between financial stability and the realisation of social rights in the case law also at times contain references to

international human rights law. Still, they do not incorporate developments regarding austerity measures, suggesting selective treatment of these discourses.

In the future, the CEE constitutional courts may develop more rigorous and transparent methods for reviewing austerity measures by incorporating international developments into their constitutional review. There are already many arguments in international discourse that can be integrated into resolving specific cases, which can, *inter alia*, enable the courts to consider the interests of the most vulnerable and the long-term effects of austerity on society. Moreover, constitutional courts can evaluate the proportionality of particular measures and the extent of social dialogue – examining the arguments presented during the adoption of specific legislation and identifying concerns raised by civil society organisations. Ideally, by considering international standards, courts could establish a test based on the premise that austerity should be seen as a ‘last resort’ rather than a typical public policy measure. Significantly, leveraging the full potential of international developments does not only depend on whether the parties to proceedings invoke such arguments, as these courts can always substantiate their interpretation of constitutional law by building upon the international standards. There is still another underlying systemic problem. Any shift in this regard seems possible only if the constitutional courts themselves transform their role by adopting a less restrained approach in matters viewed as ‘politically contentious’. In the context of the CEE states (especially the Polish ‘constitutional crisis’), this process might pose significant challenges, given how little time these courts have had to build their authority in post-communist landscapes. Building the legitimacy of specific decisions through reliance on international discourse, however, is a promising strategy that could move these courts from judicial restraint to transformative constitutionalism.

FILLING THE LEGAL VACUUM: THE EUROPEAN UNION'S NORMATIVE RESPONSE TO THE CYBERSECURITY OF SPACE INFRASTRUCTURE?

Croizet Fontane Romane* 

In view of the growing interdependence between terrestrial and orbital systems, the cybersecurity of space infrastructure has become a critical regulatory field, yet it remains underregulated. The existing binding international instruments, having emerged in state-centric Cold War circumstances, offer little guidance on cyber-related questions. Against this background, the paper proposes to examine how the European Union, a prominent actor in space, might respond to this legal vacuum by developing a layered regulatory framework that connects space and cybersecurity regulation. It argues that through internal legal instruments, starting with general cybersecurity law and moving towards sector-specific space regulation, and by creatively using alternative normative strategies, the Union is constructing both an internal framework and a mechanism of normative projection. Drawing on the concepts of the Brussels Effect and normative power, the analysis examines how internal regulation can acquire external influence and how a regional actor can shape global regulation in the absence of binding multilateral norms. Concluding that the Union's approach can be understood as a form of regional-to-global normative leadership, this paper remains cautious regarding the effective limits of such an ambition within a fragmented international legal order.

Keywords: EU space law; space cybersecurity; space governance; Brussels Effects; critical infrastructure

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INTRODUCTION

Outer space, once a domain reserved for major powers, has become a saturated and contested environment where technical, security, and geopolitical challenges converge.¹ In May of 2025, more than 12,000 active satellites were in various Earth orbits, a figure approximately three times the cumulative number of satellites launched over the entire space age as of a decade ago, according to UNOOSA.² As of today, modern societies

¹ Serge Plattard and Alan Smith, 'Reducing Vulnerabilities of Space Activities: A Call for Coordinated Leadership at the Global Level' (2021) 8 *Journal of Space Safety Engineering* 323.

² For up-to-date numbers, the satellite tracking website 'Orbiting Now' provides publicly available orbital elements and predictions concerning active satellites and re-entry. 'Active

increasingly depend on critical space infrastructure, whether for telecommunications, satellite navigation, or Earth observation, both for civilian and military purposes.³ The acceleration of the New Space dynamic furthered the transformation of the space sector, driven by the rise of private actors and the multiplication of satellite constellations in low Earth orbit (LEO).⁴ This proliferation, combined with the strong dependence of terrestrial critical infrastructures on space-based services, including commercial services, has made the space segment a prime target for hybrid and cyber threats.⁵

Due to their transversal nature, space infrastructures have become both essential to the functioning of states and particularly vulnerable, potentially exposed to a growing range of risks, whether physical (collisions, debris, jamming) or non-physical (cyberattacks, interference, hacking, disinformation).⁶ Space systems, which rely on highly interconnected digital

Satellite TLE Data and Information' (*Orbiting Now*) <<http://orbit.ing-now.com>> accessed 18 February 2026; 'Online Index of Objects Launched into Outer Space' (*UNOOSA*) <https://www.unoosa.org/oosa/osoindex/search-ng.jsp?lf_id=> accessed 14 January 2026.

- ³ Antonio Carlo and Paola Breda, 'Impact of Space Systems Capabilities and Their Role as Critical Infrastructure' (2024) 45 *International Journal of Critical Infrastructure Protection* 100680; Alexandru Georgescu, Olga Bucovetchi and Unal Tatar, 'Space Systems as Critical Infrastructures' (2018) 6 *FAIMA Business & Management Journal* 24.
- ⁴ On the impact of private actors on the space sector see William Ferguson, Scott Shackelford and Eytan Tepper, 'Cyber Threats to Space Systems and Business Opportunities for Addressing Them' (Sirius Space Talks 2025, Toulouse, 2025); see on the issue of LEO François Baccelli and others, 'Large Satellites Constellations : Issues and Impacts' (*Report from the Academy of Sciences*, 30 March 2024); see also European Union Agency for Cybersecurity and Satconsult, 'LEO Satcom Cyber Security Assessment' (*Publications Office of the EU*, 2024); and Devanshu Jha and others, 'Safeguarding the Final Frontier: Analyzing the Legal and Technical Challenges to Mega-Constellations' (2022) 9 *Journal of Space Safety Engineering* 636.
- ⁵ Vijay Varadharajan and Neeraj Suri, 'Security Challenges When Space Merges with Cyberspace' (2024) 67 *Space Policy* 101600; James Pavur, 'Securing New Space: On Satellite Cyber-Security' (DPhil thesis, University of Oxford 2021).
- ⁶ The transversal nature of space infrastructures refers to their cross-sectoral role in supporting various essential services and infrastructures across the world, rather than

and ground-based networks, are particularly exposed to attempts to compromise command-and-control functions, intercept or exfiltrate data, or disrupt services through denial-of-service operations.⁷ Concomitantly, electronic attacks such as spoofing, jamming, or eavesdropping specifically target the link segment, seeking to corrupt, imitate, or unlawfully capture communications between space and ground components.⁸ The rise in targeting of space systems by cyber operations, ever since the shift shown during the ViaSat attack of February 2022, marks a new tendency to see space asset threatened as a general trend both during and outside of armed conflict.⁹

A set of structural vulnerabilities inherent to a complex contemporary space ecosystem compounds these threats. The New Space industrial model, characterised by shortened development cycles, extensive reliance on commercial off-the-shelf (COTS) hardware and software components, and the proliferation of multi-tenant models for satellite operations, has significantly expanded the attack surface of space systems.¹⁰ Moreover, the

operating within a single sector or geographical zone. On the vulnerability of space infrastructure see Stefano Zatti, 'Space and Cyber Threats' in Kai-Uwe Schrogl (ed), *Handbook of Space Security* (Springer International Publishing 2020); for a comprehensive review of the literature on cybersecurity in space, including of the threats, risks and vulnerabilities of satellites, see Georgios Kavallieratos and Sokratis Katsikas, 'An Exploratory Analysis of the Last Frontier: A Systematic Literature Review of Cybersecurity in Space' (2023) 43 *International Journal of Critical Infrastructure Protection* 100640.

⁷ For instance, the Israelian Space Agency was targeted by a DDoS attack on December 2023. See Clémence Poirier and Stefan Soesanto, 'Breaking the Final Frontier: Cyber Operations against the Space Sector' (ETH Zurich Centre for Security Studies 2025).

⁸ Poirier and Soesanto (n 7).

⁹ For an analysis of the cyber operations against space systems after the Via-Sat attack, see Clémence Poirier, 'Hacking the Cosmos: Cyber Operations against the Space Sector. A Case Study from the War in Ukraine' (*Center for Security Studies*, 2024); for a further exploration of the evolution of cyber operation in the space domain since then, see Poirier and Soesanto (n 7).

¹⁰ On the New space model, see Mikko Punjala and others, 'Navigating the Space Frontier: Insights into the Current State and Future Potential of the Space Economy' (2025) 74

increasing interconnection between space and terrestrial digital infrastructures, combined with the long operational lifecycles of satellites and the difficulty of performing in-orbit patching or system upgrades, further aggravates these vulnerabilities.¹¹ Finally, the very nature of space systems, designed on Earth, launched into orbit, and expected to operate for long periods with limited possibilities for physical intervention, means that many satellites rely on legacy hardware and software, sometimes with outdated firmware and insufficient cybersecurity mechanisms.¹² The difficulty of performing in-orbit maintenance, patching, or system upgrades over increasingly complex architectures further aggravates this situation and contributes to the persistence of known vulnerabilities over extended operational lifetimes.¹³

The increased reliance on vulnerable satellites for communication, navigation, and strategic capabilities has brought the cybersecurity of space

Space Policy 101710; the use of Commercial Off-The-Shelf (COTS) components, ie, non-specialised hardware and software not originally designed for high-security environments, reduces costs but also increases cyber exposure, as such components are widely accessible, often insufficiently hardened, and dependent on complex supply chains that may themselves become vectors of vulnerability. Berg Nussbaum and George Berg, 'Cybersecurity Implications of Commercial Off The Shelf (COTS) Equipment in Space Infrastructure' in Unal Tatar and others (eds), *NATO Science for Peace and Security Series - D: Information and Communication Security* (IOS Press 2020); unlike traditional satellites operating on a single mission or operated by a single user, today's satellites are often in a shared usage for several usages and/or several users, which facilitate access to a satellite's capabilities for various entities. Nikita Yadav and others, 'Orbital Shield: Rethinking Satellite Security in the Commercial Off-the-Shelf Era' (2024 Security for Space Systems (3S), Netherlands, 2024); Brianna Bace, Yasir Gökce and Unal Tatar, 'Law in Orbit: International Legal Perspectives on Cyberattacks Targeting Space Systems' (2024) 48/4 Telecommunications Policy 102739.

¹¹ Pavur (n 5).

¹² James Pavur and Ivan Martinovic, 'Building a Launchpad for Satellite Cyber-Security Research: Lessons from 60 Years of Spaceflight' (2022) 8 Journal of Cybersecurity.

¹³ David Livingstone and Patricia Lewis, 'Space, the Final Frontier for Cybersecurity' [2016] Chatham House, the Royal Institute of International Affairs <<https://www.chathamhouse.org/2016/09/space-final-frontier-cybersecurity>> accessed 6 January 2025.

infrastructure to the forefront of legal and political concern.¹⁴ The risks affecting space systems have become both more dynamic and more complex, reflecting technological advances, the multiplication of disruptive instruments, and the growing interdependence between digital and physical infrastructures.¹⁵ However, as those systems are exposed to specific threats and are subject to particular vulnerabilities, cybersecurity solutions for space systems cannot be conceived as ‘one-size-fits-all’. Any solution must instead account for the specific operational constraints, architectural heterogeneity, and supply chain dependencies of space infrastructures¹⁶. This calls for a distinct regulatory approach.¹⁷

Yet, this dynamic is far from being addressed by international regulatory frameworks. Its foundational instruments were elaborated in a context where space activities were almost exclusively conducted by states, primarily for strategic purposes, and where the technological architecture of space systems remained largely isolated, quantitatively limited, and mostly physical. The central regulatory concerns at the time were sovereignty, non-appropriation, liability for physical damage, and the prevention of the weaponisation of outer space.¹⁸ Under these conditions, cybersecurity could not reasonably emerge as a regulatory priority, as space infrastructures were neither digitally networked nor exposed to systemic cyber risks. Issues of

¹⁴ Leticia Cesari, ‘Cybersecurity’ in PJ Blount and Mahulena Hofmann (eds) *Elgar Concise Encyclopedia of Space Law* (Elgar 2025) 54

¹⁵ André Adelsbach, Thomas Schaefer and George Tountas, ‘New Space Architectures – Connectivity and Cyber Security’ in PJ Blount and Mahulena Hofmann (eds) *Space Law in a Networked World* (Brill | Nijhoff 2023).

¹⁶ Ariana Vettorel, ‘Cybersecurity in New Space and the Problem of International Regulation’ (2024) 49 *Air and Space Law* 311 <<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\AILA\AILA2024025.pdf>> accessed 20 March 2025.

¹⁷ Vettorel (n16); James Pavur and Ivan Martinovic, ‘The Cyber-ASAT: On the Impact of Cyber Weapons in Outer Space’ (2019 11th International Conference on Cyber Conflict (CyCon), Estonia 2019).

¹⁸ Philippe Achilleas and Stephan Hobe, *Fifty Years of Space Law* (Centre for Studies in International Law and International Relations 2020).

digital interconnection, software dependence, or systemic cyber vulnerabilities were not only technically marginal but also conceptually absent from the regulatory imagination.¹⁹ Even as space activities progressively diversified and commercial actors entered the sector, regulatory efforts continued to focus predominantly on physical safety, spectrum management, and debris mitigation.²⁰ The progressive digitisation of space systems and their integration into global information infrastructures therefore created a widening gap between the existing framework of space law and the evolving risk environment in which space infrastructures now operate.²¹

Thus, the growing complexity and interdependence of space activities highlight an urgent need for legal frameworks capable of addressing cyber threats, a need clearly identified for more than a decade now.²² Yet, the international legal framework governing outer space offers little guidance on contemporary cybersecurity challenges, such as resilience, risk mitigation, attribution of responsibility, and the role of private operators. More broadly, neither existing space law nor current multilateral processes provides a coherent normative framework for protecting space infrastructure against cyber threats.²³ The main generally accepted frameworks on the matter are found in industry-level initiatives stemming from standard-

¹⁹ Manfred Lachs, 'The International Law of Outer Space' (1964) 113 *Rd C* 5.

²⁰ Almudena Azcárate Ortega and Hellmut Lagos Koller, 'The Open-Ended Working Group on Reducing Space Threats Through Norms, Rules and Principles of Responsible Behaviours: The Journey so Far, and the Road Ahead' (2023) 48 *Air and Space Law* <<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\AILA\AILA2023029.pdf>> accessed 20 March 2025.

²¹ Gregory Falco, 'The Vacuum of Space Cyber Security' (2018 AIAA SPACE and Astronautics Forum and Exposition, American Institute of Aeronautics and Astronautics, United-States 2018).

²² For reference, Livingstone and Lewis identified the pressing matter of an under-studied and under-regulated cybersecurity issue in space systems as early as 2016, Livingstone and Lewis (n 13).

²³ On multilateral processes failing to sufficiently address the cybersecurity gap in space, see Ortega and Koller (n 20).

setting bodies that lack binding power.²⁴ While major space powers have developed national approaches reflecting divergent strategic priorities, multilateral initiatives have so far largely avoided the issue, resulting in a fragmented regulatory landscape and a persistent governance vacuum.²⁵ In this context, the European Union occupies a distinctive position. Endowed with competences in both the space and the cybersecurity domains, and equipped with an established regulatory capacity in the governance of digital and critical infrastructures, the Union appears structurally well placed to articulate a legal response to the cybersecurity of space infrastructures and, potentially, to project this regulatory model beyond its borders.²⁶ As a regional actor, counting amongst its members some of the main space powers, its unique position might allow for an in-between level of regulatory action, neither purely national nor multilateral, and yet somewhat global.²⁷

This paper thus proposes to examine the role of the European Union in the emerging field of cybersecurity for space infrastructure, at the intersection of EU law and international space law, and how its regulatory actions reflect its normative power and expose the limitations of existing international space law. It starts from the observation that, in the absence of specific binding international norms addressing cyber threats to space systems, regulatory initiatives are increasingly driven at other levels.²⁸

²⁴ See for example the recommendations to Commercial space actors emitted by the National Institute of Standards and Technology; Matthew Scholl and Theresa Suloway, 'Introduction to Cybersecurity for Commercial Satellite Operations' (National Institute of Standards and Technology (US) 2023).

²⁵ Leticia Cesari, 'Multilateral Approaches to Space Security: The Uneven Integration of 'Cyber Threats'' (2025) 50 *Air and Space Law* 351.

²⁶ Francesco Cappelletti and Vagelis Papakonstantinou, 'A Question of Strategic Legislation: Can the EU Deal with Cybersecurity Issues in Space?' (2025) 49 *Telecommunications Policy* 102954.

²⁷ On European space powers and the Union's position as a space power in its own right, see Mireille Couston and others, *L'Europe puissance spatiale* (E Bruylant 1991).

²⁸ Vettorel (n 16).

Against this background, the article addresses the following research questions. Firstly, to what extent does the existing international space law framework leave a legal gap concerning the cybersecurity of space infrastructures, and why is the European Union in a position to intervene in this field? Then, how is the Union constructing an internal regulatory framework for the cybersecurity of space infrastructures, notably through instruments such as the NIS2 Directive,²⁹ the Cyber Resilience Act,³⁰ the Space Strategy for Security and Defence,³¹ and the proposed EU Space Act?³² Building on those questions, the issue of whether this regulatory activity can be understood as a form of normative projection beyond the Union's borders is raised, and whether it might be understood as a 'Brussels Effect' in the space sector. Finally, the paper explores whether this engagement, more broadly, contributes to the emergence of a new governance layer in outer space. The article argues that, taken together, these developments show that the Union is progressively filling a legal vacuum at the intersection of cybersecurity and space governance, and that its regulatory activity in this field constitutes both a normative and strategic intervention, able to position the EU as a regional norm leader in the absence of global consensus.

²⁹ Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) [2022] OJ L333/80

³⁰ Regulation (EU) 2024/2847 of the European Parliament and of the Council of 23 October 2024 on horizontal cybersecurity requirements for products with digital elements and amending Regulations (EU) No 168/2013 and (EU) 2019/1020 and Directive (EU) 2020/1828 (Cyber Resilience Act) [2024] OJ L 2024/2847.

³¹ European Commission, 'Joint Communication to the European Parliament and the Council, European Union Space Strategy for Security and Defence' (2023) JOIN (2023) 9 final.

³² European Commission, 'Proposal for a Regulation on the Safety, Resilience and Sustainability of Space Activities in the Union', (EU Space Act) (2025) COM (2025) 335 final.

While addressing the question of the EU's potential normative projection beyond its borders, the article does not claim to provide an empirical measurement of regulatory diffusion. Instead, it adopts a structural and analytical approach inspired by the literature on the Brussels Effect, examining whether the normative configuration of the European space sector, as reflected in the design of EU regulatory instruments, could generate external effects. This assessment is therefore based on legal mechanisms such as market access conditions, participation in EU programmes, and standard-setting processes, as well as on the position of European actors within the space ecosystem. Similarly, this article does not aim to provide a comparative assessment of space cybersecurity regulation across major space powers, nor to evaluate the effectiveness or industry uptake of competing regulatory models. Rather, it adopts a deliberately EU-centered perspective, focusing on the Union's regulatory activity as an intervention in an emerging field characterised by legal uncertainty and fragmented governance. The analysis, therefore, does not assess whether a Brussels Effect has materialised in practice, but interrogates whether the European legal architecture is evolving in a way that could generate external normative influence in the field of space cybersecurity. Similarly, while the law applicable to cyber operations in armed conflict raises distinct questions, this article focuses on the preventive regulatory framework applicable in peacetime, that is, the obligations and governance structures that should govern space infrastructure security regardless of whether an armed conflict is underway.

To do so, this article relies primarily on doctrinal legal research. It is based on an analysis of relevant EU primary and secondary legislation, regulatory proposals, and policy documents pertaining to cybersecurity and space governance. Such an approach appears appropriate given the paper's descriptive and analytical objectives, which aim to map the emerging EU regulatory framework applicable to space infrastructures and to assess its normative and strategic significance. 'Space infrastructure' refers here to the technical systems enabling space activities, encompassing the space segment,

the ground segment, and the link segment. 'Cyberspace' refers to the digital environment constituted by interconnected information systems, networks, and data flows. The two domains intersect in that modern space systems are increasingly dependent on digital architectures and networked communications, making them vulnerable to cyber threats. This article focuses on that intersection treating cyberspace as the threat environment and space systems as the object of the regulatory analysis.

To explore the extent to which the European Union is shaping this new framework for the cybersecurity of space infrastructure, this article proceeds in two main parts, each corresponding to a distinct but complementary element of the argument. The first part argues that the Union is progressively filling a regulatory vacuum at the intersection of space governance and cybersecurity. It first identifies the existence and nature of this gap and explores how the EU is institutionally and legally positioned to fill it. It then analyses the content and logic of the Union's regulatory activity, showing how the EU is constructing a coherent framework through the articulation of horizontal cybersecurity instruments and emerging space-specific regulatory initiatives and observing the interplay of soft law, hybrid regulation, and standard-setting being used. The second part then advances the claim that this regulatory activity should not be understood merely as internal regulation but as a broader normative and strategic intervention. It examines, first, whether and to what extent the EU framework might produce effects beyond the Union's borders, notably through mechanisms akin to a 'Brussels Effect' in the space sector. It then analyses how this combination of regulatory constraints, standard-setting practices and participation conditions in European space programmes contributes to the emergence of a new governance layer, positioning the Union as a regional norm leader in an increasingly fragmented yet under-regulated domain.

I. FILLING A REGULATORY VACUUM: THE CONVERGENCE OF CYBERSECURITY AND SPACE REGULATION IN EU LAW

1. The fragmented international regulation of space cybersecurity: an opportunity for the Union's intervention?

The progressive digitalisation and interconnection of space infrastructures have profoundly transformed both their strategic value and the breadth of their vulnerabilities.³³ Contemporary space systems, and in particular large satellite constellations, have shifted from hardware-defined architectures toward complex software-defined architectures, permanent data links with terrestrial networks, and increasingly fragmented industrial supply chains.³⁴ This technological evolution, however, has not been matched by a corresponding evolution in the international legal framework governing space activities. As a result, malicious cyber operations targeting space systems currently operate in a legal grey zone, where neither their precise legal qualification nor the applicable preventive obligations are clearly established. The increasing ease and stealth of cyber operations against space infrastructure, combined with the absence of explicit legal prohibitions or dedicated regulatory regimes, makes it particularly difficult to develop both credible deterrence and effective preventive governance mechanisms.³⁵ This combination of exposure and legal uncertainty constitute the core of the legal gap.

This gap is first and foremost a structural one. Existing space law instruments, developed in a technological context far removed from today's realities, offer little clarity on these challenges, particularly regarding responsibility attribution, obligations of resilience and mitigation, or the role of non-state actors. The legal framework governing outer space remains

³³ On the vulnerability of space infrastructure see Zatti (n 6) and for a comprehensive review of the literature on cybersecurity in space, see Kavallieratos and Katsikas (n 6).

³⁴ Bace and others. (n 10) 3.

³⁵ Cesari (n 25) 352.

largely based on the Outer Space Treaty of 1967, and its subsequent instruments were conceived in a Cold War context and designed primarily to regulate inter-state relations in space.³⁶ The space legal regime addresses security, with notably the obligation of States Parties to conduct space activities in accordance with international law, including the Charter of the United Nations, state's responsibility and liability regarding activities in space, as well as the due regard principle, that is, the duty to conduct space activities with regard to the corresponding interests of all other States Parties to the Treaty, and initiate consultations with each other when a planned activity might interfere with the peaceful exploration and use of outer space by other states.³⁷ However, it does not address cybersecurity issues, having been drafted long before the digitisation of space systems and the emergence of hybrid threats targeting critical infrastructures. The foundational instruments of space law therefore offer little purchase on the cybersecurity challenges that now pervade the operational environment of space systems.

Although the international space law framework retains all its due applicability, and its general principles can be read in ways that inform cybersecurity issue's handling, its general nature leaves numerous lacunae on

³⁶ Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies (Outer Space Treaty) (opened for signature 27 January 1967, entered into force 10 October 1967) 610 UNTS 205 (OST); Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (opened for signature 22 April 1968, entered into force 3 December 1968) 672 UNTS 119 (Rescue Agreement); Convention on International Liability for Damage Caused by Space Objects (opened for signature 29 March 1972, entered into force 1 September 1972) 961 UNTS 187 (Liability Convention); Convention on Registration of Objects Launched into Outer Space (opened for signature 14 January 1975, entered into force 15 September 1976) 1023 UNTS 15 (Registration Convention); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (opened for signature 18 December 1979, entered into force 11 July 1984) 1363 UNTS 3 (Moon Agreement).

³⁷ In order: OST, art. III; OST, art. VI and art. VII, see Bin Cheng, *Studies in International Law*, vols 604–612 (Clarendon Press Oxford 1997); OST, art. IX; see Almuneda Azcárate Ortega and Victoria Samson (eds), 'A Lexicon for Outer Space Security' (UNIDIR 2023).

specific new issues.³⁸ Binding instruments do not address the protection of data flows between ground stations and satellites, nor do they address obligations related to the security of software and hardware components, including supply chain vulnerabilities. No widely accepted instruments provide definitions of resilience or mitigation obligations, patch management, or cybersecurity requirements applicable throughout the operational lifecycle of space systems. Instruments are largely silent on procedures for detecting, reporting, or responding to cyber incidents affecting space infrastructure, leaving operators without clear obligations in the event of attacks. Agreements have yet to be reached on even the definitions of ‘cyber operation’ or on the threshold for the use of force in the context of a cyberattack.³⁹ The absence of specific norms further complicates issues of attribution and liability in cases of malicious cyber interference with satellite services.⁴⁰ This regulatory gap leaves space actors without clear guidance on cybersecurity requirements, complicating both preventive measures and coordinated responses in the event of an attack.

Indeed, as noted in the literature, there is currently no global, comprehensive and binding legal regime governing cyber operations as

³⁸ For instance, the principle of due regard contained in Article IX OST may be interpreted as applying to cyber activities affecting space systems. However, its general nature and reliance on consultation rather than specific cybersecurity obligations leave significant gaps regarding the prevention, attribution, and management of cyber incidents. Lauren Napier, ‘Due Regard’ in PJ Blount and Mahulena Hofmann (eds) *Elgar Concise Encyclopedia of Space Law* (Edward Elgar Publishing 2025) 77.

³⁹ On an attempt to define ‘cyber operation’ see the wording of the Tallinn Manual 2.0, Michael Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press 2017); on the policy gaps are regarding the application of cybersecurity to space-based assets, such as the lack of global consensus on a precise definition of a use of force and on a clear threshold for what constitutes a use of force in cyberspace, see Leticia Cesari, Lisa Lacroix and Antonio Carlo, ‘The Challenge of Protecting Space-Based Assets against Cyber Threats’ (IAC 2020 – International Astronautical Congress, International Astronautical Federation, online 2020).

⁴⁰ Du Li, ‘Legal Dilemma for Combatting Malicious Cyber Activities against Space Activities’ (2023) 207 *Acta Astronautica* 47.

such.⁴¹ International-universal binding rules are lacking both about cybersecurity in general and regarding the cybersecurity of space systems in particular, and even instruments such as the Tallinn Manual 2.0 merely restate existing *lex lata* without providing operational regulatory guidance for space infrastructures.⁴² State practice remains limited, *opinio juris* is scarce, and the absence of clear physical boundaries in cyberspace further complicates both legal qualification and enforcement.⁴³ Within the United Nations, and in particular under the PAROS agenda item, cyber threats to space systems are rarely addressed substantively and systematically, in part due to attribution difficulties and in part because cyber issues are often addressed in parallel diplomatic fora.⁴⁴ Existing international and regional initiatives largely focus on *ex post* responsibility and liability rather than on preventive security obligations. This situation reflects both the structural reluctance of states to bind themselves through hard law in the cyber domain and the absence of a shared understanding of cybersecurity itself.⁴⁵ As a

⁴¹ See Vettorel (n 16); Edward Verco E, 'Satellites Are Cyber Insecure: We Need Regulation to Avoid a Disaster' (2021) 2 ANU Journal of Law and Technology 57; Federico Bergamasco, Roberto Cassar and Popova Rada, *Cybersecurity: Key Legal Considerations for the Aviation and Space Sectors* (Kluwer Law International BV 2020); Syed Shahzad and others, 'Cyber Resilience in Critical Space Infrastructure: A Protection Framework to Better Fuse Their Legal and Technical Governance' [2026] Space Policy 101767.

⁴² Unlike the Tallinn Manual 1.0 (2013), which focused on cyber warfare and the law of armed conflicts, the 2.0 version (2017) extends its analysis to cyber operations in peacetime, over a varied range of domains. However, the text remains a non-binding manual, functioning on the basis of rules for specific case, that apply to the cyber question existing principles of the applicable international law. Schmitt (n 39).

⁴³ Bace and others. (n 10) 2.

⁴⁴ UNGA Res 75(47) (13 October 2020) UN Doc A/C.1/75/L.47 'Open-ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security Established Pursuant to General Assembly Resolution 73/27 of 5 December 2018'; UNGA Res 75(240) (4 January 2021) UN Doc A/RES/75/240 'Developments in the Field of Information and Telecommunications in the Context of International Security'.

⁴⁵ Andrew Liaropoulos, 'Exploring the Complexity of Cyberspace Governance: State Sovereignty, Multistakeholderism, and Power Politics' (2016) 15/4 Journal of Information Warfare 14.

result, regulatory responses have developed in a fragmented manner, often through non-binding instruments, soft law, or transnational private standards, at the risk of proliferating uncoordinated regimes ill-suited to address a global challenge.

Despite the growing urgency of the issue, multilateral responses to cybersecurity in space remain limited.⁴⁶ Existing binding instruments fail to establish specific norms or coordination mechanisms, and efforts at the UN level have so far avoided addressing space cybersecurity issues directly.⁴⁷ Major space powers, focusing on the strategic aspect of the issue, have instead adopted divergent national approaches. For instance, the United States tends to favour security and defence-focused frameworks, while China favours autonomy and control over information sovereignty.⁴⁸ Taken together, these elements explain why space cybersecurity governance today is often described as a ‘regulatory vacuum’ or, at best, as a patchwork of partial, ex post and largely reactive instruments.⁴⁹ Yet, the cyber protection of space systems necessarily requires a combination of technical measures and legal instruments, and in particular a shift towards genuinely preventive

⁴⁶ Cesari (n 25).

⁴⁷ For example, the guidelines issued in 2016 by the Working Group on the Long-term Sustainability of Outer Space Activities under the Scientific and Technical Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) included some that were relevant to the issue (such as Guidelines 9, 18 and 19), yet those were not solidified into the Guidelines for the Long-term Sustainability of Outer Space Activities; Committee on the Peaceful Uses of Outer Space, ‘Report on its Fifty-Ninth Session, Held in New York’ (8–17 June 2016), UN Doc A/71/20; Committee on the Peaceful Uses of Outer Space, ‘Report on its Sixty-Second Session, Held in New York from’ (12–21 June 2019) UN Doc A/74/20.

⁴⁸ On the different approaches to cyber threats regulation at the international level, see Cesari (n 25).

⁴⁹ Falco (n 21).

regulatory approaches embedded in authorisation, supervision and operational requirements.⁵⁰

According to Article VI of the Outer Space Treaty, space activities ‘shall require authorisation and continuous supervision by the appropriate State Party to the Treaty’, in view of which states might establish specific procedures for licensing or authorisation of various types of space activities.⁵¹ Before granting authorisation for a space activity, States increasingly require operators to comply with conditions intended to ensure the security and resilience of space systems.⁵² These conditions, defined in national space frameworks, typically combine administrative, financial, and technical requirements.⁵³ Within the latter, cybersecurity considerations are gradually gaining prominence, as operators may be required not only to implement protective cyber measures but also to demonstrate that these measures are appropriate and proportionate to the mission’s objectives and risk profile.⁵⁴ Compliance by satellite providers with domestic requirements is not novel, as such an approach appears consistent with existing practices in the telecommunications sector, whereby satellite service providers are required to comply with domestic regulation requirements even when they do not operate physically on one’s territory, as affirmed in Article 1 of the

⁵⁰ Preventive (ex-ante) law designates regulatory approaches that aim to reduce risks before harm occurs by imposing obligations of anticipation, risk management and security-by-design, rather than relying primarily on sanctions or liability after damage has materialised. By contrast, reactive (ex post) law intervenes mainly through responsibility and sanction once a violation or harm has occurred. Cesari (n 25).

⁵¹ UNGA Res 68(74) (11 December 2013) UN Doc A/RES/68/74 ‘Recommendations on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space’.

⁵² Cesari (n 25).

⁵³ See most notably, United States, Commercial Space Launch Competitiveness Act 2015; France, Loi n° 2008-518 relative aux opérations spatiales 2008; Luxembourg, Loi portant sur les activités spatiales 2020; Australia, Australia Space (Launches and Returns) Act 2018; India, Norms, Guidelines and Procedures for Implementation of Indian Space Policy-2023 in respect of Authorization of Space Activities (NGP) 2024; United Kingdom, Space Industry Act 2018.

⁵⁴ Cesari (n 25) 364.

International Telecommunication Union (ITU) Constitution.⁵⁵ Yet, implementing cybersecurity measures through these procedures remains a challenge.⁵⁶ Therefore, regarding cybersecurity requirements for space systems, while authorisation and supervision procedures constitute the main vector through which space law is operationalised at the national level, existing scholarship shows that, where they exist, cybersecurity requirements in the space context remain uneven, loosely defined, and largely dependent on non-binding standards or operator self-regulation.⁵⁷ In other words, the preventive aspect of cybersecurity for space systems, that is, licensing, is where the gap becomes most visible.

In this context, the European Union (EU) occupies a key position to address these issues, both as a regulator and as a normative actor, as the ‘EU’s unique characteristics of shared competencies in a shared domain (ie, space) offer unique perspectives on the Union’s potential to lead in establishing international standards for space cybersecurity’.⁵⁸ This opportunity appears significant given the nature of the gap identified: existing international instruments largely address responsibility for space activities *ex post* and fail to establish preventive cybersecurity obligations, leaving the resilience of space infrastructure without adequate normative grounding at the international level.⁵⁹ Relying on legal foundations in both the space and cyber domains, the EU retains a unique opportunity to shape the normative response to the cybersecurity of space infrastructure. Indeed, the EU Treaties confer competences to the Union in both specific and wide-ranging areas,

⁵⁵ Constitution and Convention of the International Telecommunication Union (adopted and entered into force 22 December 1992) UNTS 1825, 1826.

⁵⁶ Berna Akcali Gur and Joanna Kulesza, ‘The EU’s Dual Policy Dilemma: Orbital Sustainability and Digital Autonomy Policies Intertwined’ (2025) *Space Policy* 101731, 7 <<https://www.sciencedirect.com/science/article/pii/S0265964625000554>> accessed 19 January 2026.

⁵⁷ Cesari (n 25) 364.

⁵⁸ Cappelletti and Papakonstantinou (n 26).

⁵⁹ Shahzad (n 41).

enabling it to act regarding Global Spaces and pursue external action objectives.⁶⁰

Regarding space matters, the EU has two distinct legal foundations. Internally, under the title related to research and technological development and space, the EU possesses the ability to take measures in space matters. Article 189 of the Treaty on the Functioning of the European Union (TFEU) grants the Union a supporting competence in space matters, enabling it to develop its own space policy and adopt common regulations.⁶¹ This competence remains shared between the Union and its Member States. That is, 'space' is a domain listed in the powers shared between them set out in Article 4(3) of the TFEU. This competence is therefore to be exercised by the Union while respecting the competences of its Member States. In this understanding, the space competence is rather unique as it is more of a 'parallel' competence than a classic shared one. Yet, thanks to the Union's creativity in using its competences, as well as some principles governing their exercise, such as 'consistency', intended to mitigate fragmentation across different competence domains, the EU appears overall able to formulate an internal space policy. The internal competence thus provides the Union with a basis to develop a space regulatory framework.

Beyond its internal competence, the EU's engagement with international space law finds support in the text of the OST itself. Although the EU is not formally a party to the 1967 Outer Space Treaty, as its non-state nature limits its ability to engage in international agreements, the text allows for the recognition of international organisations' activities in space, making it one

⁶⁰ Joris Larik, 'EU Law and the Governance of Global Spaces: Ambitions, Constraints and Legal Creativity' (2023) 45 *Journal of European Integration* 1125, 1132.

⁶¹ Article 189 of the TFEU grants the Union a supporting competence, allowing it to define a space policy without preventing Member States from exercising their own, distinguishing this parallel competence from shared competence, which is subject to the principle of preemption. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/1 ('TFEU').

of the first treaties to address international organisations explicitly.⁶² Article VI of the Treaty recognises the international responsibility of intergovernmental organisations for space activities conducted under their authority, stating that States are internationally responsible for national activities in outer space and extending that responsibility to activities conducted through international organisations.⁶³ This responsibility is shared between the international organisation and its Member States. In addition, Article XIII clarifies the Treaty's application to international organisations, emphasising that they may act, yet that Member States cannot escape their responsibility by acting through such organisations, confirming that a shared responsibility exists between the international organisation and the States. It can therefore be argued that these provisions effectively legitimise the EU as an actor of international space law, capable of contributing to the development of norms beyond its internal market.⁶⁴

Moreover, although the coexistence of both the Union and its Member States on the international scene can lead to complications regarding the expression of a single voice, and even without the use of the pre-emption principle, the issue of parallel representation seems to remain limited, maybe as their duty of sincere cooperation (Article 4(3) TEU) incites Members to avoid harming the common objectives.⁶⁵ Therefore, this double legal

⁶² Stephan Hobe, Bernhard Schmidt-Tedd and Kai-Uwe Schrogl, *Cologne Commentary on Space Law: Outer Space Treaty* (BWV Verlag 2017).

⁶³ The Union enjoys a unique status in the sense that, although it is not a party to the 1967 Outer Space Treaty, it can be considered a space actor in its own right due to its ability to act in a coordinated and integrated manner on behalf of its Member States. Article VI of the Treaty, which places all space actors, including international organizations, on an equal footing in terms of responsibility, reinforces this position.

⁶⁴ This evolution is considered to have been the result of a divergence of opinion between partisans of sole State's activities in space, notably the ex-USSR, and those of a possible private venture, most prominently the United States., Michael Gerhard, 'Article VI', in Hobe and others (n 62).

⁶⁵ Contrary to comparable domains of shared competence such as the internal market, the Union retains a parallel competence rather than a shared one, and thus cannot see effects

foundation allows the EU not only to develop its own regulatory framework but also to participate in shaping broader, regional and multilateral governance structures.

Regarding cyber issues, most of the EU's competences stem from its internal market competence, as set out in Article 114 of the TFEU. Since its very first legal act in the area, the EU has developed its regulatory capacity and expanded its competences, shifting from coordination to legislative acts.⁶⁶ If harmonisation is possible in the field of cybersecurity, it is mostly due to the power to facilitate the digital market (Article 114 TFEU). In cyber-related issues, the Union's competence also overlaps with other areas, including product safety law, digital services, data governance, and the more recent AI question, offering a broader range of legal bases for action. Finally, cybersecurity issues have evolved beyond secondary legislation. They are slowly gaining ground in the EU's constitutional framework, most notably in the protection of fundamental rights related to the security of personal data.⁶⁷ Yet, similarly to space matters, cybersecurity issues fall within the limits of the Union's competence, as national security remains the sole responsibility of its Member States (Article 4(2) TEU). Therefore, the boundary between cybersecurity issues, which relate to the Union's competence, and national security issues, which are retained by the Member

of the principal of pre-emption limiting Member State's ability to act internationally in shaping a common single voice in the international scene. Therefore, while the Member States themselves are Parties to the Treaties and are represented in the UN processes, whereas the Union is not in the way a State can be, there is usually an understanding that both Member States and the Union's interests align on the matter.

⁶⁶ Council Decision 92/242/EEC of 31 March 1992 in the Field of Security of Information Systems, [1992] OJ L123/19; Lee Bygrave, 'The Emergence of EU Cybersecurity Law: A Tale of Lemons, Angst, Turf, Surf and Grey Boxes' (2025) 56 Computer Law & Security Review 106071.

⁶⁷ See the jurisprudence of the Court of Justice of the EU with Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* EU:C:2014:238, as well as the jurisprudence of the European Court of Human Rights with *I v. Finland* (Merits) (Judgment) ECtHR App No 20511/03 (17 July 2008) [47].

States' competence, is blurred. Cybersecurity matters thus appear to have a legal basis for discussion at the Union's level, if only through the overlap between cybersecurity and other fields of competence, yet its action integrates into a complex and fragmented landscape.⁶⁸

As recent comparative scholarship has shown, space cybersecurity governance in Europe and allied jurisdictions remains fragmented and non-binding, thereby creating regulatory asymmetries across the value chain, and most existing instruments apply to programme-specific systems or the ground segment.⁶⁹ Additionally, the specificity of both the space and cybersecurity domains, where international norms remain limited or fragmented, presents the EU with a window of opportunity to innovate in normative action. EU regulation in both space and cyber domains shows some proximity in methods, as both make use of internal market mechanisms and, to some extent, of the Common Security and Defence Policy. At the same time, both areas retain clear sectoral specificities, with the common limit of Member States' sole competence on national security issues. Experienced in the field of data protection, where the EU's General Data Protection Regulation (GDPR) has become a global reference, the Union now appears to be applying a similar strategy in space and cybersecurity.⁷⁰ In both fields, regulatory frameworks are still under construction, allowing

⁶⁸ Bygrave (n 66).

⁶⁹ Francesco Casaril and Letterio Galletta, 'Space Cybersecurity Governance: Assessing Policies and Frameworks in View of the Future European Space Legislation' (2025) 11/1 *Journal of Cybersecurity*.

⁷⁰ On the topic of the data protection global effect, see Lee Bygrave, 'The 'Strasbourg Effect' on Data Protection in Light of the 'Brussels Effect': Logic, Mechanics and Prospects' (2021) 40 *Computer Law & Security Review* 105460; Council Decision of 31 March 1992 in the Field of Security of Information Systems 92/242/EEC [1992] OJ L123/19; on the acknowledgement by the Union of its own normative ambition in the space domain, see for instance European Commission, 'Joint Communication to the European Parliament and the Council European Union Space Strategy for Security and Defence' (2023) JOIN(2023) 9 final.

the EU to experiment with hybrid regulatory models and position itself as a normative leader.⁷¹

2. Integrating space and cybersecurity: the EU's progressive regulation of space cybersecurity

The EU has progressively developed a plural normative approach, incorporating space infrastructures into its main cybersecurity regulations while initiating reflection towards a dedicated framework for space cybersecurity. Although no specific legal framework is in place at the time of writing, space systems are now formally covered by several cross-sectoral instruments, marking a significant shift in how the previously exposed vulnerabilities are addressed.⁷² The intersection of cybersecurity law and space law has led to the gradual inclusion of space systems within broader cybersecurity frameworks, reflecting the EU's method of layering regulations onto existing structures while progressing toward specialisation.⁷³ Space infrastructure, long overlooked in cybersecurity strategies, is now increasingly recognised as critical within general cybersecurity frameworks.⁷⁴ The current European approach, therefore, relies on a set of general regulations, derived from the fields of digital regulations and cybersecurity policies, within which space is increasingly treated as a critical sector.⁷⁵ Nevertheless, a fully specialised framework for space cybersecurity has yet to be formalised, despite growing political

⁷¹ Bygrave (n 66).

⁷² Francesco Casaril and Giovanni Tricco, 'Space Infrastructure as Critical Infrastructure: Rights Beyond Earth in the Digital Age' (2026) 2026 Technology and Regulation 116.

⁷³ This layering consist in the succession of regulatory levels, from the general horizontal to the sector-specific. See Jean-Pierre Thil and Marie-Eve Samson (eds), *Le droit spatial saisi par le droit de l'Union européenne* (Bruylant 2025).

⁷⁴ In particular, with the inclusion of space amidst the domains covered by the NIS 2 Directive (2022) (n 29), see also Casaril and Tricco (n 72).

⁷⁵ See Thil and Samson (n 73).

consensus within the EU on the need to ensure the long-term security of orbital infrastructures.⁷⁶

The progressive integration of space cybersecurity into EU regulation is not an isolated development, but rather part of a broader regulatory trajectory in which cybersecurity has gradually become a strategic priority for the Union. Recent scholarship has highlighted that the EU's growing regulatory involvement in space cybersecurity is grounded in the reclassification of space systems as critical infrastructure, whose disruption would have cascading economic, societal, and security effects.⁷⁷ This framing provides a functional justification for extending EU cybersecurity and resilience requirements to space activities. This evolution follows a typical pattern in EU policy-making: initial political recognition of the risks, followed by the definition of strategic objectives, and finally the adoption of binding regulations. The case of space infrastructure follows this pattern, in which cybersecurity concerns, initially treated as general security matters, have progressively translated into targeted regulatory initiatives.

This trajectory is reflected in a sequence of instruments that progressively embedded cybersecurity obligations in the Union's regulation. Cyber risks have increasingly been identified in EU texts, marked by the EU Cybersecurity Strategy (2020)⁷⁸ and subsequent texts such as the NIS2 Directive (2022), the Cyber Resilience Act (CRA) (2024),⁷⁹ and the Cyber

⁷⁶ See the EU Space Act (n 32) and European Commission, 'Joint Communication to the European Parliament and the Council: The EU's Cybersecurity Strategy for the Digital Decade' (2020) JOIN (2020) 18 final.

⁷⁷ Alexandru Georgescu, Clara Cotroneo and Andreaa Dinu, 'The European Union and the Protection Of Critical Space Infrastructure from Cyber-Threats: A Strategic Approach?' (2025) 24 European Conference on Cyber Warfare and Security 127.

⁷⁸ Joint Communication to the European Parliament and the Council: The EU's Cybersecurity Strategy for the Digital Decade (2020) JOIN/2020/18 final.

⁷⁹ Regulation (EU) 2024/2847 of the European Parliament and of the Council of 23 October 2024 on Horizontal Cybersecurity Requirements for Products with Digital Elements (Cyber Resilience Act) [2024] OJ L2024/2847.

Solidarity Act (CSoA) (2025).⁸⁰ These instruments reflect a political will to impose a cybersecurity-by-design approach, integrating digital security from the systems' conception stage. These documents build on a dynamic that emerged in the 2010s, as the Union progressively incorporated cybersecurity into its security and defence policy through key instruments such as Directive 2013/40/EU⁸¹ and the 2014 cyber defence framework.⁸² This evolution then continued with the adoption of the NIS Directive (2016) and the Cybersecurity Act (2019).⁸³ At the same time, space-specific initiatives, including the IRIS² programme and the EU Space Security and Defence Strategy (2023), emphasised the need to secure the entire space infrastructure, from satellites to ground control centres.⁸⁴ Taken together, these instruments trace a trajectory from political recognition to integration into horizontal regulation, allowing for the establishment of a sector-specific framework to be developed.

Recent EU instruments reflect the gradual convergence of cyber regulations with space regulations. At the time of writing, the biggest step towards incorporating space concerns into a cybersecurity framework was taken

⁸⁰ Regulation (EU) 2025/38 of the European Parliament and of the Council of 19 December 2024 laying down measures to strengthen solidarity and capacities in the Union to detect, prepare for and respond to cyber threats and incidents (Cyber Solidarity Act) [2024] OJ L2025/38.

⁸¹ Directive (EU) 2013/40 of the European Parliament and of the Council of 12 August 2013 on attacks against information systems [2013] OJ L218/8.

⁸² Joint Communication to the European Parliament and the Council: an EU Cyber Defence Policy Framework (2022) JOIN (2022) 49 final.

⁸³ Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on Information and Communications Technology Cybersecurity Certification (Cybersecurity Act) [2019] OJ L151/15.

⁸⁴ One of the key objectives of the Secure Connectivity Programme is to 'contribute to cyber resilience by proactive and reactive defence against cyber and electromagnetic threats and operational cybersecurity'. Alexandros Kolovos, 'Strengthening Links Between European Union Space and Defence: Adopting a Combined Approach' (2023) 63 Space Policy 101534; European Commission, 'A EU Space Strategy for Security and Defence for a Stronger and More Resilient EU' (2023) JOIN (2023) 9 final.

with the NIS2 Directive, which includes satellite operators within its scope.⁸⁵ The general framework established by the NIS2 Directive addresses cybersecurity in the space sector at the Union level, at least in part. The inclusion of the space sector among the ‘critical’ and ‘essential’ sectors in the NIS 2 Directive frameworks extends binding cybersecurity and resilience obligations to both public and private operators whose activities are deemed essential, regardless of their formal classification or size.⁸⁶ Through this move, the Union does not regulate ‘space’ as such, but rather space as a functional component of interconnected critical infrastructures, thereby, in practice, circumventing the limitations of Article 189 TFEU.⁸⁷ NIS 2 thus represents a first meaningful convergence between cybersecurity and space in EU regulation.

However, this framework does not provide comprehensive coverage of all actors and services involved in the space sector. Although the NIS2 Directive covers certain ground-segment operators, large parts of the space sector remain outside its scope, including spacecraft, key satellite systems, micro-operators, third-country launch services and Union-owned constellations, a gap mirrored by the Critical Entities Resilience Directive’s (CER) exclusion of EU Space Programme assets from its scope. Another example is that NIS2 acknowledges the vulnerability of ICT supply chains, with a mechanism for Union-level coordinated security risk assessments of critical ICT supply chains (Article 22, Recital 91), reflecting the understanding that the increasing fragmentation and globalisation of production chains multiply points of entry for malicious interference and expose structural asymmetries in security standards and technical capabilities among suppliers.⁸⁸ These gaps

⁸⁵ Directive NIS 2 (2022) (n 29).

⁸⁶ Directive NIS 2 (2022) (n 29).

⁸⁷ Kadri Bussov, ‘The European Union in International Law’ (Cambridge University Press 2021) 9, 32–33.

⁸⁸ Omera Khan and Daniel Sepúlveda Estay, ‘Supply Chain Cyber-Resilience: Creating an Agenda for Future Research’ (2015) 5 *Technology Innovation Management Review* 6.

confirm that NIS 2, while a significant step, remains an incomplete response to the specific needs of the cybersecurity question in the space sector.

The CER Directive (2022) also identifies the space sector as an essential sector, justifying the imposition of reinforced obligations for risk prevention. Complementarily, the European Electronic Communications Code (EECC) requires national authorities to supervise the security of services provided by satellite operators offering paid services.⁸⁹ Added to these texts is the CRA, which introduces the principles of cybersecurity by design and by default, requiring manufacturers of digital equipment, including space equipment, to integrate security requirements from the design stage throughout the product lifecycle.⁹⁰ While the application of this regulation to space products remains auxiliary, it marks a milestone in the European commitment to preventing vulnerabilities from the early technological stages. These texts are part of a movement toward the progressive codification of European cybersecurity law applied to space, creating a layered regulatory framework that extends the coverage provided by NIS 2 into new dimensions. The EU Space Act project, as a *lex specialis*, would reinforce this progression, as the proposed legislation aims to fill gaps left by the NIS2 and CER Directives and to cover the assets of the Union's space programme.⁹¹

The proposal for an EU Space Act therefore represents a significant step in the shift from general cybersecurity regulation to sector-specific rules tailored to the needs of space infrastructure. Framed as *lex specialis* in relation to the NIS2 Directive, this new instrument signals the EU's move toward specialisation in a domain previously addressed only through broad,

⁸⁹ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L321/36.

⁹⁰ Car Polona and Stefano De Luca, 'EU Cyber-Resilience Act' (2024) EPRS Briefing EU Legislation in Progress <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739259/EPRS_BRI\(2022\)739259_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739259/EPRS_BRI(2022)739259_EN.pdf)> accessed 5 January 2025.

⁹¹ EU Space Act (n 32).

horizontal frameworks. By positioning the proposed Space Act as a sector-specific complement to the NIS2 Directive, the EU acknowledges that the specific vulnerabilities and operational realities of space infrastructure, highlighted by the challenges outlined above, are not adequately covered by the existing legal framework and therefore would benefit from a distinct, targeted regulatory approach.⁹² This development is particularly significant, as it confirms that cybersecurity regulation would no longer be transversal and that space systems would benefit from a dedicated, stricter framework – marking a shift toward specialisation in the Union’s approach to space cybersecurity.

The proposed Space Act further introduces a comprehensive approach by covering all segments of space infrastructure, from ground to space, digital and physical, which reflects the recognition of space systems as integrated cyber-physical networks (Article 5). Moreover, the regulation, which would apply not only to Union-owned assets but also to national governmental and private operators, expands its scope to cover the full range of actors involved in space operations (Articles 2 and 5). This shift is further reinforced by the proposition of a bespoke resilience baseline, setting minimum cybersecurity and resilience standards specifically adapted to space infrastructure, as discussed below. In doing so, it seems the EU is seeking to address the existing regulatory vacuum to advance the progressive development of a coherent and comprehensive internal framework for the cybersecurity of space systems. Highlighting a preference for by-design and by-default logics, the EU Space Act proposal reflects a shift toward a broader approach to cybersecurity for space issues. Its references to cybersecurity throughout the lifecycle of space systems reinforce the Union’s emphasis on proactively embedding security measures rather than relying solely on reactive responses. This preventive approach aligns with the broader EU strategy, as seen in cyber-related instruments such as the NIS2 Directive and the CRA,

⁹² See on this positioning the exploratory memorandum of the EU Space Act proposal, especially the section ‘Consistency with other Union policies’, EU Space Act (n 32).

as well as related initiatives, all of which stress the importance of integrating security considerations from the earliest design phases. Such a choice seems to illustrate an oncoming evolution towards a proactive approach, specialised to the space sector yet coordinated across strategic domains.

If initially presented in a quite uncoordinated manner, the cybersecurity requirements were a significant step in the shift from general cybersecurity regulation to sector-specific rules tailored to the needs of space infrastructure. Substantively, the proposed EU Space Act goes beyond general cybersecurity duties by imposing detailed risk management and governance requirements throughout the life cycle of space systems, including obligations relating to supply chain security, business continuity (Article 87), staff training (Article 89), and crisis communication and disclosure policies (Article 90). Particularly emblematic of this preventive law turn is the introduction of a mandatory threat-led penetration testing regime (Article 88), to be carried out before launch and periodically thereafter, inspired by other sectoral resilience frameworks such as the Digital Operational Resilience Act.⁹³ This progression can be viewed as signalling a maturation of the Union's regulatory approach to space cybersecurity.

Furthering the process, the Danish Presidency of the Council of the European Union presented a revised version of the Act.⁹⁴ While earlier EU interventions in this field relied primarily on the indirect application of horizontal instruments such as the NIS2 Directive, this draft of the Space Act would establish a fully sector-specific and autonomous regulatory framework for space activities. This evolution is most visible in the dedicated "resilience" chapter of the draft (Chapter II), which introduces a

⁹³ Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector [2022] OJ L333/1 (DORA).

⁹⁴ Council of the European Union, 'Compromise Version of the EU Space Act: Regulation on the Safety, Resilience and Sustainability of Space Activities in the Union (EU Space Act) - Danish Presidency Compromise Text' (2025) 2025/0335 (COD).

comprehensive set of binding obligations tailored to the specific risk profile of space systems. These provisions still explicitly position the Space Act as *lex specialis* with respect to the NIS2 Directive (Article 75), but also impose cybersecurity obligations on all space operators not covered by the NIS2 Directive (Article 75-a).⁹⁵ The result would therefore be a regulatory coverage of the issue that is both specific and complementary, closing the gaps left by *lex generalis* instruments without displacing them.

Beyond substantive obligations, the revised Act constructs an integrated supervisory and incident response architecture that integrates the specialised actors into the broader EU framework. The latest draft establishes an incident reporting architecture (Article 93), involving both EU-level and national authorities. It embeds space operators within an integrated supervisory and coordination framework centred on EUSPA. The Act would also complement the CER Directive by imposing additional resilience duties, requiring operators to conduct comprehensive risk assessments, implement security measures proportionate to the criticality of their missions, and maintain continuity protocols across all operational phases (Articles 78–88). Additionally, a new Union Space Resilience Network (EUSRN) would facilitate coordinated responses to major cyber incidents and again support harmonisation across member states (Article 94), building upon the established network of the NIS 2 Directive, that is, the computer security incident response teams network (‘CSIRTs network’), ENISA and the European Cyber Crisis Liaison Organisation Network (EU-CyCLONe). Taken together, these developments appear to signal a willingness to position the notion of resilience as a structural transformation of EU space governance: space infrastructures are no longer treated merely

⁹⁵ Article 75 (a) of the Danish presidency revised version, dedicated to cybersecurity, would subject all entity that are not already concerned by the qualification of essential, important or critical and therefore subject to Directives NIS2 and CER, to a space specific set of cybersecurity obligations. The text would subject broadly space operators to risk-based cybersecurity measures following an all-hazards approach, with clarified incident reporting obligations.

as objects of technical regulation or international responsibility, but as critical cyber-physical systems subject to a fully-fledged, *ex ante*, compliance-oriented regime of risk management and regulatory oversight.

This dynamic appears further confirmed by the Commission's January 2026 proposal for a revised Cybersecurity Act, which explicitly identifies space services and satellite systems as part of critical ICT supply chains.⁹⁶ The proposal introduces a Union-level framework to address non-technical and structural cybersecurity risks affecting supply chains, including the phase-out of high-risk ICT components from key satellite network assets (Article 110) and the prohibition of certain suppliers in critical satellite systems (Article 111). It also seeks to strengthen institutional coordination between ENISA and EUSPA for the protection of strategic space infrastructures (Recitals 29 and 73). This evolution would continue, from a model focused on incident response and organisational risk management to one of structural risk prevention, targeting technological dependencies, design choices, and upstream vulnerabilities. In this respect, the NIS 2 Directive can be seen as the starting point of a broader process to secure critical digital and space supply chains, a process now being pursued and refined through subsequent initiatives.⁹⁷

The preventive logic would also appear further supported by the proposal advanced on 21 January 2026 by the Commission, aimed at strengthening the regulatory framework for digital connectivity, a domain increasingly intertwined with space infrastructure.⁹⁸ The proposal for a Digital Networks

⁹⁶ European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2022/2555 as regards simplification measures and alignment with the (Proposal for the Cybersecurity Act 2)' COM (2026) 11 final.

⁹⁷ Akcali Gur and Kulesza (n 56) 7.

⁹⁸ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Digital Networks, Amending Regulation (EU) 2015/2120, Directive 2002/58/EC and Decision No 676/2002/EC and Repealing Regulation (EU) 2018/1971, Directive (EU) 2018/1972 and Decision No 243/2012/EU (Digital Networks Act - DNA)' COM (2026) 13 final.

Act (DNA) would aim to modernise and harmonise the Union's connectivity and electronic communications framework, replacing the existing EECC. Among its key elements, the DNA seeks to create an integrated EU market for connectivity services and introduce an EU-level spectrum authorisation framework, including for pan-European satellite communication services (Article 45). These developments reflect the Union's broader strategic agenda to embed security, resilience, and harmonised regulatory oversight into critical infrastructure for terrestrial and space-dependent digital ecosystems, thereby complementing space-specific initiatives.

Overall, although Article 189 TFEU formally excludes the harmonisation of national space policies, the Union is working toward a regulatory framework for the cybersecurity of space infrastructures by integrating space systems into its critical infrastructure and cybersecurity acquis. Within the EU Space Programme itself, security requirements already apply to Galileo, EGNOS, Copernicus, SST and GOVSATCOM

under the authority of the Security Accreditation Board (SAB), albeit only for Union flagship systems.⁹⁹ Within these parameters, the Union appears to be on the way to constructing a meaningful regulatory framework for space cybersecurity, especially in the preventive layer of said framework.

However, if the preventive layer in construction appears to be positive, the establishment of a harmonised Union-level authorisation regime for space activities by the proposed Space Act appears to be much more limited (Articles 6–13). In particular, the proposed constellation licensing

⁹⁹ Galileo (the EU global navigation satellite system), EGNOS (the European Geostationary Navigation Overlay Service), Copernicus (the EU Earth observation programme), EU Space Surveillance and Tracking (EU SST), and GOVSATCOM (the EU Governmental Satellite Communications programme) are components of the EU Space Programme; see Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme and repealing Regulations (EU) No 912/2010, (EU) No 1285/2013, (EU) No 377/2014 and Decision No 541/2014/EU [2021] OJ L170/69; Bussov (n 88) 25.

mechanism, which would allow a single authorisation for an entire constellation, is in practice subject to highly restrictive conditions, as it applies only where all satellites are identical, perform the same tasks, and are launched from the same site using the same launch vehicle (Article 9 of the Space Act), a situation which in practice rarely applies. This significantly limits the operational relevance of the simplified procedure and risks discouraging flexible deployment strategies, including the use of European launch services that are still scaling up in capacity and competitiveness. More fundamentally, the introduction of a specific derogation for large third-country constellations in Article 19, justified either by the absence of viable Union-based alternatives or by overriding strategic interests, amounts to an implicit acknowledgement of Europe's current launch and deployment dependency, notably vis-à-vis non-European providers. Finally, although the Act formally extends to third-country operators (Articles 14 to 21) and introduces an equivalence mechanism to facilitate market access (Article 16), the combination of derogations, differentiated treatment and strategic conditionality suggests that the harmonised authorisation regime may, in practice, become a new site of regulatory friction rather than a purely integrative instrument.

Complementing the use of binding legal instruments, existing or prospective, the Union relies on soft law to further its activity. Indeed, complementary to the content of the norms enacted, the form that is chosen to enact them can be said to contribute to the structuration of the European Union's normative activity. The combination of forms and strategies through which the EU designs its regulatory influence, namely soft law tools, hybrid regulatory mechanisms, and standard-setting practices, appears to be blending formal legislation with softer, industry-driven methods to address the unique challenges of space infrastructure. Soft law instruments are prominent elements of the Union's activity.¹⁰⁰ Such instruments, including guidelines, recommendations, and non-binding standards, offer

¹⁰⁰ Thil and Samson (n 73).

flexibility and adaptability, allowing the EU to engage stakeholders without the constraints of binding regulation.¹⁰¹

With this combination of soft and hard law, the EU adopts a hybrid regulatory model that combines top-down regulatory mandates with bottom-up contributions from industry actors, fostering an iterative process where practical needs inform normative development. Standardisation, in particular, serves as the primary mechanism for practical enforcement: the ECSS plays a central role in developing technical standards for space systems, covering areas such as project management, manufacturing processes, testing protocols, and launch operations.¹⁰² While a dedicated ECSS standard does not yet cover cybersecurity, it is indirectly addressed in several documents on data and communications security.¹⁰³ In parallel, the European Telecommunications Standards Institute (ETSI) contributes by creating ‘European standards’ for satellite communications security, notably through its Satellite Earth Station committee.¹⁰⁴ Standards such as the GEO

¹⁰¹ Fabien Terpan, ‘Soft Law in the European Union’ (2015) 21(1) *European Law Journal* 68.

¹⁰² The list of standards can be consulted at: ‘Active Standards’ (*European Cooperation for Space Standardization*) <<https://ecss.nl/standards/active-standards/>> accessed 14 January 2026; see also on the relevance of regional standardisation process Katarzyna Malinowska, ‘Universal Safety Standards as a Foundation of National and European Space Laws’ (2025) 12 *Journal of Space Safety Engineering* 464.

¹⁰³ For example, the ECSS-E-AS-50-25 standard adopts the TC Space Data Link protocol from the Consultative Committee for Space Data Systems (CCSDS), while integrating the Space Data Link Security (SDLS) module, which addresses the confidentiality, integrity, and authentication of space transmissions. See ECSS, ‘ECSS-E-ST-10C Rev.1 – System engineering general requirements’ (ECSS, 15 February 2017). ECSS, ‘ECSS-E-ST-40C – Software’ (ECSS, 6 March 2009), ECSS, ‘ECSS-E-ST-50C Rev.1 – Communications’ (ECSS, 1 March 2021), ECSS, ‘ECSS-E-AS-50-25C Rev.1 – Adoption Notice of CCSDS 232.0-B-4, TC Space Data Link Protocol’ (ECSS, 13 January 2023).

¹⁰⁴ Regulation (EU) No 1025/2012 of the European Parliament and of the Council (25 October 2012) on European standardisation [2012] OJ L316/12; Regulation (EU) 2022/2480 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 1025/2012 as regards decisions of European standardisation organisations concerning European standards and European standardisation deliverables [2022] OJ L323/1.

Mobile Radio (GMR), used by certain geostationary satellite operators, incorporate encryption mechanisms to protect user-to-satellite links.¹⁰⁵ Although these standards are global in scope, they exert significant influence on the security of critical space infrastructure. In particular, the Union's proactive approach to the cybersecurity of low Earth orbit (LEO) constellations today relies primarily on these standards.¹⁰⁶

Indeed, the Union's approach to space cybersecurity includes the use of alternative forms of regulation to complement hard law. In particular, standard-setting and compliance obligations are positioned as key tools within this hybrid regulatory framework. For instance, the EU Space Act proposal emphasises extending resilience obligations to subcontractors and supply chains, as implied by the regulation's coverage of all space infrastructure (Article 2 and Recital 71). While these obligations are anchored in binding legislation, their practical implementation relies heavily on technical standards and certification practices rather than on detailed prescriptive rules. This logic is visible in the Union's industrial and technological policy instruments. In its 2024 programme on 'Space Technologies for European Non-Dependence and Competitiveness', the Commission explicitly recommends the use of the standards developed by the European Space Components Coordination (ESCC) for the qualification of electrical, electronic, and electromechanical components. It refers to ECSS as the relevant framework at the equipment and system levels.¹⁰⁷ The same documents systematically rely on ISO standards, notably ISO 16290 on Technology Readiness Levels (TRLs), as references for assessing

¹⁰⁵ However, these standards leave providers a certain degree of flexibility in choosing encryption algorithms and authentication schemes, which raises issues regarding uniformity and the overall level of protection.

¹⁰⁶ European Union Agency for Cybersecurity and Satconsult (n 4).

¹⁰⁷ European Commission, 'Space Technologies for European Non-Dependence and Competitiveness' (2024) HORIZON-CL4-2024-SPACE-01-73, 6.

technological maturity.¹⁰⁸ The result is a regulatory model that complement binding regulation with technical standardisation.

The reliance on harmonised standards extends beyond general recommendations to structure the development of critical and sensitive technologies, such as microelectronics and high-speed data links for space systems. The Commission explicitly links the development of radiation-hardened, high-data-rate, low-consumption components for secure space communications to formal space qualification under ECSS standards and to ISO-based TRL assessment.¹⁰⁹ This illustrates a certain convergence between European standards and international standardisation frameworks, and confirms that standard-setting is being used as a concrete instrument to govern the security, reliability and trustworthiness of strategic space technologies.¹¹⁰ Such a reliance on harmonised industry standards by the EU is not specific to space, but rather a commonly found aspect of its digital and cyber-related frameworks, particularly apparent in the NIS 2 Directive, the Digital Service Act (DSA)¹¹¹ and the Cybersecurity Act,¹¹² but also of its approach to space security more broadly. Standard-setting is thus being used across diverse domain, including space, to govern the security, reliability and and trustworthiness of technologies.

Indeed, in practice, the EU has, for example, materialised this standardisation strategy through a normative ‘toolbox’ that regulates satellite operators’ licensing regarding STM practices. While relying on non-binding guidelines, the STM toolbox integrates strong compliance incentives, including certification mechanisms comparable to those used for 5G

¹⁰⁸ European Commission HORIZON-CL4-2024-SPACE-01-73.

¹⁰⁹ European Commission HORIZON-CL4-2024-SPACE-01-73, 8.

¹¹⁰ Hans-W Micklitz, *The Role of Standards in Future EU Digital Policy Legislation* (Report Commissioned by ANEC and BEUC, 2023).

¹¹¹ 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 [2022] OJ L277/1 (Digital Services Act).

¹¹² Cappelletti and Papakonstantinou (n 26) 1.

infrastructure deployment.¹¹³ This approach blends technical adaptation into a non-binding regulatory framework with the use of existing international principles, with the said ‘toolbox’ drawing, for example, on state responsibility under international law and the role of national legislations pursuant to Article 189(2) of the TFEU, which ensures that the EU’s strategy remains coherent with broader legal frameworks. In this way, the EU might use standardisation both as a tool of governance and as a channel for embedding its cybersecurity norms within the operational practices of the space sector. If not yet finalised for the specific issue of space cybersecurity, this approach would enable standard-setting and compliance obligations to support the Union’s normative action in this field.

Compliance also seems to serve as a central regulatory tool and strategic mechanism in the Union’s approach to space governance, particularly given the absence of specific binding international frameworks and the inherent challenges of regulating private actors through traditional public law. Rather than replacing formal regulation, compliance transforms its dynamics, introducing a form of privatised norm enforcement in which private entities share responsibility for the effectiveness of norms.¹¹⁴ This evolution reflects a logic of meta-regulation, characterised by structured cooperation between

¹¹³ It notably includes a ‘Safe Space’ label, a mechanism granting privileged access to European funding, as well as the inclusion of responsible operators on a ‘whitelist’; See ‘The EU Toolbox for 5G Security’ (*Shaping Europe’s digital future*, 29 January 2020) <<https://digital-strategy.ec.europa.eu/en/library/eu-toolbox-5g-security>> accessed 18 February 2026.

¹¹⁴ Unlike regulation, understood as an external function of public authority aimed at balancing competing objectives within a market, compliance is based on a voluntary or semi-voluntary approach, integrated into the company’s own practices. It is not necessarily selfless as it serves both to protect the company and to foster its accountability, particularly in areas such as anti-corruption, environmental protection, or cybersecurity. Gaëlle Hardy, ‘La compliance, une privatisation de la régulation?’ (2022) *Revue de Droit International d’Assas*, 32 <<https://univ-antilles.hal.science/hal-04072058v1>> accessed 6 June 2025; Marie-Anne Frison-Roche, ‘Le droit de la compliance, voie royale pour réguler l’espace numérique’, in Pierre Bonis et Laurent Castex (eds), *Compliance et nouvelles régulations* (Annales des Mines, coll. “Enjeux numériques”, 2025), 69–77 <<https://mafr.fr/fr/article/le-droit-de-la-compliance-voie-royale-pour-reguler/>> accessed 18 December 2025.

public authorities and industry stakeholders, where the latter become co-producers and vectors for implementing norms serving the public interest.¹¹⁵ Compliance mechanisms typically take the form of codes of conduct, risk assessments, reporting obligations, and certification schemes; tools commonly used to regulate the a-territorial sectors of digital technologies or space. Within the prospective EU space sector, the Space Act would embody this logic by conditioning market access on compliance with standards on data security, orbital debris mitigation, and infrastructure resilience through a ‘certification’ mechanism.¹¹⁶ While these requirements are firstly technical, they are also normative, as they shape private behaviour and embed public interest considerations into private operational practices. This creates a dual dynamic. A vertical, top-down structure, where EU laws and regulatory frameworks define the standards to be met, and a horizontal process whereby private actors integrate compliance measures both to meet legal obligations and to anticipate market expectations.

The governance of space cybersecurity is particularly challenging as effective protection of space systems depends on both public regulatory authority and private technical capabilities; two sets of actors with different incentive structures, accountability frameworks, and operational constraints. Effective protection of space systems cannot rely exclusively on either top-down approaches or purely voluntary industry self-regulation but requires hybrid governance arrangements combining public oversight with private implementation.¹¹⁷ In this perspective, the EU’s use of compliance in its regulatory frameworks might offer a particularly relevant model. By imposing legally binding risk-management obligations, security-by-design requirements, and incident-reporting duties on private operators, while

¹¹⁵ Frison-Roche (n 117), 38.

¹¹⁶ Such mechanism is to be found in the proposed Union Space Label, EU Space Act proposal, Article 111 and 112.

¹¹⁷ Gokhan Ikitemur, Bilge Karabacak and Andy Igonor, ‘A Mixed Public-Private Partnership Approach for Cyber Resilience of Space Technologies’ (2020) 57 NATO Science for Peace and Security Series - D: Information and Communication Security 120.

leaving them discretion over the concrete technical means of implementation, such frameworks structure a form of public–private cooperation. Furthermore, the use of certification schemes, notification requirements, standard adoption (via ECSS or ISO), and conditions attached to public contracts illustrates how the EU delegates norm enforcement to private actors while retaining structural control over the standards they must meet to regulate space activities. These instruments appear to function as *de facto* normative tools, allowing the EU to project its standards in a sector marked by multi-level governance and transformed state-based regulation. That said, notwithstanding its coherence or usefulness, the EU's reliance on soft law in space cybersecurity regulation relies on voluntary industry compliance and market-driven adoption, as these instruments lack formal enforceability.¹¹⁸ This non-binding nature limits the EU's ability to ensure uniform application.

To sum up, the Union's approach to space cybersecurity regulation illustrates a gradual but deliberate trajectory of recognition and specialisation. In a complex context, the EU seems to have chosen to govern space cybersecurity through a layered architecture that combines horizontal instruments, sector-specific legislation and standardisation-based compliance mechanisms. This method reflects both the Union's traditional reliance on norm diffusion and a functional response to the structural fragmentation of global space governance. Initially addressed through political and strategic initiatives, the issue was later incorporated into broad, cross-sectoral instruments. Following the recognition of space systems as a critical infrastructure, the protection is on the way to being formalised through a dedicated framework, as the proposal for the EU Space Act would mark a significant step in the formal recognition of space systems' unique vulnerabilities and operational realities. Yet, this specialisation does not occur in isolation; it integrates into a regulatory architecture in which

¹¹⁸ Leticia Cesari, 'Éthique et responsabilité dans l'exploration spatiale : l'essor de la soft law pour encadrer les nouvelles pratiques' (Notes de l'Ifri, 2023).

horizontal frameworks and sector-specific rules operate simultaneously and is operationalised through soft law and standards. Above all, this architecture is structured around a preventive logic: embedding cybersecurity and resilience requirements upstream, at the design, qualification and operational planning stages, as Union seeks to move from a model centred on incident response to one based on systemic risk management. In doing so, the EU is not only strengthening the internal resilience of its space sector but also consolidating a regulatory model capable of projecting its normative preferences beyond its borders.

II. BEYOND INTERNAL REGULATION: THE EU'S REGULATORY ACTIVITY AS A STRATEGIC APPROACH TO SPACE CYBERSECURITY

1. Global reach and normative projection: towards a Brussels Effect for the cybersecurity of space infrastructure?

Beyond the internal consolidation of its regulatory framework, the European Union's approach to space cybersecurity raises questions about its potential external effects. More specifically, it invites an assessment of whether the Union is in the process of creating the conditions for a form of the 'Brussels Effect' in the space domain, namely the capacity to shape global practices through the unilateral projection of its internal regulatory standards.

The notion of the Brussels Effect, as conceptualised by Bradford, refers to the European Union's capacity to project its regulatory influence beyond its borders through market mechanisms.¹¹⁹ It describes how non-EU companies adopt EU rules to maintain access to the European market, thereby extending the EU's legal influence globally without formal extraterritorial enforcement. This mechanism has been particularly visible in the digital domain, most notably with the GDPR, whose standards have become de facto global benchmarks. More broadly, this dynamic is closely connected

¹¹⁹ Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

to the idea of the EU as a ‘normative power’, that is, an actor that seeks to shape international behaviour less through coercion than through the diffusion of legal standards, regulatory models and conceptions of appropriate conduct.¹²⁰ This phenomenon could be tied to the EU’s global legal reach, manifesting through a wide array of external-facing actions: from asserting EU values in international organisations and treaties to shaping foreign legal regimes, enforcing compliance beyond EU borders, and even conducting regulatory investigations in third countries.¹²¹ This influence operates through different degrees of extraterritoriality, including direct application and more nuanced forms such as ‘extraterritorial extension,’ in which the EU governs conduct beyond its territory.¹²²

Applied to space cybersecurity, the notion raises a preliminary caveat: unlike data protection, the emergence of a Brussels Effect in this domain cannot yet be empirically demonstrated. The regulation of the sector appears to be an ongoing process, and the EU Space Act has not entered into force. At this stage, the claim is therefore not that such an effect already exists, but rather that the Union appears to be assembling the legal and institutional conditions that could make it possible. As shown by Bradford, even though a country’s market size is a good indicator of its ability to extend its regulatory reach, such influence does not stem from market size alone, but rather from its combination with said country’s regulatory capacity and political will to do so.¹²³ Therefore, it appears worthy to examine whether the normative and political conditions could be met for such an effect to emerge.

As for the material conditions, out of the five cumulative conditions necessary for the Brussels Effect to materialise, that is, a large and attractive

¹²⁰ Ian Manners, ‘Normative Power Europe: A Contradiction in Terms?’ (2002) 40 *Journal of Common Market Studies* 235.

¹²¹ Marise Cremona and Joan Scott, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019).

¹²² Christopher Kuner, ‘The Internet and the Global Reach of EU Law’ in Cremona and Scott (n 124).

¹²³ Bradford (n 122).

internal market, sufficient regulatory capacity, political will to deploy stringent regulation, inelastic targets, and non-divisibility of production, the Union satisfies three without significant difficulty.¹²⁴ Its internal market represents a major destination for space services and products; its regulatory capacity in both cybersecurity and space governance is well established and expanding; and its political will to deploy stringent regulation in this domain is explicitly articulated in its own strategic documents (see Section II/ 2)). The two remaining conditions warrant more careful examination in the space context. Space operators are not wholly inelastic, unlike individual consumers, they can, in principle, configure separate systems for different regulatory environments. However, several features of the space sector limit this mobility such as the high costs of developing parallel system architectures, the technical interdependence of space and ground segments, and the economies of scale inherent in satellite manufacturing, making true divisibility economically untenable for most operators.¹²⁵ Moreover, access to EU-funded programmes, frequencies, and procurement markets constitutes an inelastic dependency that cannot easily be replicated elsewhere, as will be discussed later. Non-divisibility operates in that case through economic and institutional structure as operators integrated into European supply chains, programme ecosystems, and market access frameworks face compliance costs that make maintaining separate regulatory postures impractical.

First, several structural features of the space sector make it particularly receptive to this type of regulatory projection. Such an effect seems most

¹²⁴ Bradford (n 122).

¹²⁵ On the capital intensity and scale economies of satellite manufacturing, see Giacomo Gatto and others, 'Space industry trends: How Europe could outcompete' (*McKinsey*, 2025) <<https://www.mckinsey.com/industries/aerospace-and-defense/our-insights/is-europe-still-on-the-launchpad-reshaping-its-space-ecosystem-to-lead#/>> accessed 19 December 2025 ; on the technical interdependence of space and ground segments as a structural feature of space systems, see Bace and others (n 10) 3; on the economics of the New Space industrial model more broadly, see Punjala and others (n 10).

visible through three channels: market access, programme participation, and the industry-standardisation ecosystem for industry actors. Indeed, space infrastructure is deeply embedded in global supply chains; satellite systems rely on complex assemblages of components, software, launch services, and ground infrastructure sourced across multiple jurisdictions. At the same time, access to key markets, frequencies, or public procurement programmes is highly concentrated and politically structured. Thus, for the Union's markets, the relevance of these channels does not merely lie in the formal existence of EU requirements, but in the structural dependence of space industry actors on continued access to legally and institutionally central ecosystems. In a sector characterised by high entry costs, long development cycles, and strong reliance on public procurement and interoperability, exclusion from EU markets or programmes would entail more than the loss of isolated commercial opportunities; it would entail durable marginalisation from key segments of the global space economy.¹²⁶ It is this structural dependency, rather than empirical market dominance alone, that underpins the Union's capacity to induce regulatory alignment among foreign actors.

For instance, recent developments in the European launch sector further illustrate this dynamic of growing structural centrality. The successful commercial deployment, in February 2026, of 32 satellites from Amazon's LEO constellation by Ariane-6 under the largest launch contract in Arianespace's history reflects the Union's capacity to position its infrastructure as an indispensable node within global space value chains, including for non-European mega-constellations traditionally associated with US-based systems such as Starlink.¹²⁷ It appears that the Union is in the

¹²⁶ Sara Dalledonne, Justine Dousset and Marco Aliberti, 'New Challenges for European Space Industrial Policy' (2025) *Global Policy*.

¹²⁷ Pierre Manière, 'Ariane-6 réussit son premier lancement commercial pour la constellation de satellites d'Amazon' (*Le Monde*, 12 February 2026) <https://www.lemonde.fr/economie/article/2026/02/12/ariane-6-reussit-son-premier-lancement-commercial-pour-la-constellation-de-satellites-d-amazon_6666549_3234.html> accessed 12 February 2026.

process of re-establishing itself as a competitive provider of access to orbit through Arianespace and the Ariane-6 programme. The significance of this example extends beyond the commercial as the reestablished orbit access reinforced the credibility of regulatory conditionality attached to market access, programme participation and industrial cooperation. This growing infrastructural relevance for non-EU actors dependent on access to European launch services and programmes strengthens the Union's ability to induce compliance with its normative frameworks, including in the field of space cybersecurity.

In such a context, regulatory requirements imposed at critical nodes of the value chain, such as certification, licensing, market access, or public funding, can exert a powerful structuring effect well beyond the regulator's territory.¹²⁸ Thus, this domain offers fertile ground for observing the EU's attempt to diffuse its regulatory model beyond its borders. The EU's space cybersecurity initiatives, though territorially grounded, allow for a global reach; making space an instructive case study for examining the external dimension of EU norm-setting. Thus, this regulatory activity might reflect more than just a legal strategy; rather, it embodies the Union's broader identity as a normative power, as the EU uses internal regulatory sophistication to generate external influence.

It connects to a larger question about the EU's mode of international influence, and specifically about the relationship between its normative power identity and its market-based influence. Manners' theory of normative power describes the EU as an actor that shapes international behaviour through the diffusion of norms, values, and conceptions of appropriate conduct.¹²⁹ The Brussels Effect, as described above, differs from normative power which operates through persuasion and legitimacy, while

¹²⁸ On the value chain of the space economy see Danielle Binci, Andrea Appolloni and Wenjuan Cheng, 'Space Economy, Innovation and Sustainability' [2022] *Symphonya. Emerging Issues in Management* 110.

¹²⁹ Manners (n 123).

the Brussels Effect operates through structural dependency and compliance incentives. In the space cybersecurity context, both mechanisms appear to be at work, through different channels and with different implications. The Brussels Effect, through market access conditions, programme participation, and supply chain integration, as previously discussed, and the Union's normative power, emerging from its deliberate framing of its regulatory project as a contribution to international governance, as reflected in its institutional discourse and strategic documents.

The relationship between the two is thus complementary as the Brussels Effect provides the market mechanism through which EU norms spread, while normative power provides the political legitimacy and identity-driven framing that shapes how that diffusion is justified and received. Thus, this article treats them as analytically distinct but mutually reinforcing dimensions of the EU's external normative influence in the space cybersecurity domain. The diffusion of European standards beyond its borders, often through market access conditions or international alignment efforts, as discussed below, might lead to a form of Brussels Effect that would further the EU's capacity to set global norms unilaterally. In doing so, those normative strategies would reflect the EU's deeper identity as a normative power, shaping international influence by defining appropriate standards of behaviour and seeking to establish an ethical baseline for conduct in space activities.¹³⁰

This external resonance of the EU's cybersecurity regulations seems particularly evident in the space sector, where both proposed and existing frameworks extend their influence beyond EU borders. The proposal for an EU Space Act illustrates this trend, as its resilience and cybersecurity requirements are intended to apply across entire supply chains, ensuring risk management throughout the full operational lifecycle of space systems, rather than being limited to specific phases or actors (see section I/2). In practice, European norms would function as *de facto* market access

¹³⁰ Manners (n 123).

conditions: manufacturers and operators outside the EU must comply with these uniform requirements if they wish to engage with the European market or participate in EU-funded programmes.

As noted in the literature, the ambition to extend the applicability of EU space regulation to non-EU operators was articulated well before the publication of any legislative proposal, through policy documents, stakeholder consultations, and institutional discourse that explicitly framed the EU Space Act as a tool for international norm-setting and market conditioning.¹³¹ Indeed, as Commissioner Kubitius has noted, the Act lays ‘the foundations for an EU space single market for space’ and for ‘trade with like-minded partners based on reciprocity’, thereby linking regulatory alignment to market access and participation in the European space ecosystem.¹³²

This regulatory export is not new, however. Even before the proposed Space Act, existing instruments such as the NIS2 Directive and the CRA had already begun to generate extraterritorial effects by imposing cybersecurity-by-design principles on digital products and critical infrastructure.¹³³ Collectively, these frameworks reflect a broader EU strategy that mirrors its approach in the digital domain, where regulations, most notably the GDPR, have successfully projected European norms globally. In the emerging field of space cybersecurity, the Union appears to be replicating this approach, using its internal regulatory authority to shape practices well beyond its borders. Such a parallel with the GDPR is not merely a figure of speech.

¹³¹ Ingo Baumann and Katharina Prall, ‘The EU Space Act’ s Global Reach: Legal Considerations on the Envisaged Application to Non - EU Operators’ (2025) Global Policy.

¹³² Commissioner Kubitius, ‘Opening Address by Commissioner Kubitius at the 18th European Space Conference’ (*European Commission*, 27 January 2026) <https://ec.europa.eu/commission/presscorner/detail/en/speech_26_228> accessed 28 January 2026.

¹³³ Benjamin Farrand, Helena Carrapico and Aleksei Turobov, ‘The New Geopolitics of EU Cybersecurity: Security, Economy and Sovereignty’ (2024) 100 *International Affairs* 2379.

European institutional actors explicitly claim it themselves. In April 2024, the Director of EUSPA, Rodrigo da Costa, drew a direct analogy between the GDPR and the future Space Act, expressing the ambition that a similar global effect should occur in the fields of space infrastructure sustainability and cybersecurity.¹³⁴

Industry actors have also voiced converging expectations. Notably, ASD Eurospace has called for the Space Act to apply to non-European operators to ensure that access to the EU market is conditioned on compliance with European standards, stating that ‘EU Space Law shall apply to non-European stakeholders willing to address the EU market, in order not to create any competitiveness distortion with the European space industry’.¹³⁵ Taken together, these institutional and industry positions suggest that the extraterritorial reach of the Space Act is not an incidental feature but a deliberate regulatory strategy, in which the Union intends to use its internal market authority to shape practices and standards beyond its borders.

While a Brussels Effect does not necessarily result from extraterritorial regulations, nor does every instance of extraterritorial EU law generate a Brussels Effect, both dynamics remain closely intertwined as they contribute to the current global reach of the EU’s space cybersecurity norms.¹³⁶ As expressed in the proposed EU Space Act, the EU’s extraterritorial reach is less about regulating foreign conduct per se than about preserving the integrity

¹³⁴ Théophane Hartmann, ‘Space Agency Director Thinks EU Space Law Would Have GDPR-Style Outsized Impact’ (*Euractiv*, 25 April 2024) <<https://www.euractiv.com/news/space-agency-director-thinks-eu-space-law-would-have-gdpr-style-outsized-impact/>> accessed 16 August 2025.

¹³⁵ ASD Eurospace, ‘Position Paper on the Proposal for a Regulation on the Safety, Resilience and Sustainability of Space Activities in the Union (EU Space Act)’ (Eurospace, November 2025) <<https://eurospace.org/eurospace-position-paper-eu-space-act/>> accessed 5 December 2025.

¹³⁶ Austen Parrish, Cédric Ryngaert and Régis Bismuth, ‘The European Union Experience of Extraterritoriality: When a (Willing) Victim Has Become a (Soft) Perpetrator’, *Research Handbook on Extraterritoriality in International Law* (Edward Elgar Publishing 2023).

and competitiveness of its internal market.¹³⁷ By broadening the scope of application of its laws, under Article 114 TFEU, the EU aims to ensure a level playing field between EU and non-EU companies, thus protecting its internal economic balance. Therefore, the inclusion of entire supply chains within the scope of the proposed EU Space Act, for example, appears to be a defensive regulatory move aimed at preventing vulnerabilities and distortions of competition. Regarding this extraterritorial reach of EU regulation, the effects might in fact rarely be aimed at projecting influence per se, as they typically result from the internal objective of protecting EU interests through regulations that, incidentally or deliberately, extend their scope beyond borders.¹³⁸ Yet they appear to reinforce the EU's global reach. Both dynamics converge in their practical effect, that it, extending the reach of EU space cybersecurity norms beyond its territory.

That said, the EU seems to be conscientiously applying its internal norms to exert global influence, and there appears to be a growing tendency to justify extraterritorial application of those norms by framing the issue as falling within its territory.¹³⁹ This dynamic appears to go beyond a mere byproduct of internal objectives, as the use of certification schemes and standard-setting in space cybersecurity suggests a more deliberate deployment of EU normative influence. For example, the mechanism envisaged in the EU Space Act, under which non-EU operators may be presumed to meet EU cybersecurity requirements if the Commission issues an equivalence decision (Articles 16 and 105), mirrors the EU's established 'carrot and stick' approach in fields such as data protection and trade. As with adequacy decisions under

¹³⁷ Parrish, Ryngaert and Bismuth (n 139).

¹³⁸ Léna Hornkohl, 'The Extraterritorial Application of Statutes and Regulations in EU Law' (2022) SSRN Electronic Journal <<https://www.ssrn.com/abstract=4036688>> accessed 23 July 2025.

¹³⁹ The EU's use of extraterritoriality is typically grounded in the protection of specific and subjective Union interests, such as safeguarding the internal market or the fundamental rights of its citizens. This is usually justified by a rational connection between the triggering factor (eg, effects doctrine or targeting criterion) and the EU's interest at stake, as seen in areas like competition or data protection law.

the GDPR, this method offers preferential access (the carrot) to third-country actors aligning with EU standards, while implicitly withholding market benefits from those that do not (the stick), thereby incentivising regulatory convergence.¹⁴⁰

Those external effects created by binding regulatory requirements appear to be reinforced through non-binding mechanisms, contributing to what the article would describe as a ‘compliance-as-norm projection’ dynamic. In practice, access to the EU space market is becoming conditioned on adherence to European standards, encouraging non-EU firms to align with these norms to secure market entry. This fosters an additional form of soft extraterritorial reach, where regulatory influence extends beyond the Union’s borders through voluntary alignment driven by commercial incentives rather than direct legal imposition. However, the scope of this soft normative projection remains constrained, as its effectiveness depends on private actors’ willingness to comply, potentially leading to fragmentation if compliance varies across supply chains.

Taken together, these elements might be examined through the lens of the Brussels Effect, which holds that the European Union’s internal regulatory choices exert influence beyond its borders. The development of the IRIS² constellation provides an illustration of how participation in EU programmes operates as a vector of normative projection in the space sector. Although data protection is not a space-specific constraint, the architecture of IRIS² has been significantly shaped by the need to ensure GDPR compliance by design, to the point of delaying deployment.¹⁴¹ Such an example is instructive as the data protection obligations are an established case of the Brussels Effect.¹⁴² Its weight is felt here within a space programme

¹⁴⁰ Kuner (n 125).

¹⁴¹ ‘EU Accepts ‘Best-and-Final Offer’ Bid for Satellite Mega-Constellation Project’ (*EuroNews*, 1 November 2024), <<https://www.euronews.com/next/2024/11/01/eu-accepts-best-and-final-offer-bid-for-satellite-mega-constellation-project>> accessed 16 January 2026.

¹⁴² Bygrave (n 70).

itself, demonstrating that access to EU flagship programmes is effectively conditioned on the internalisation of EU legal and value-based requirements into the technical design of space systems.¹⁴³ EU requirements, therefore, function as de facto filters regarding the access to the European Space ecosystem, a logic that the future Space Act could extend and systematise in the field of space cybersecurity and resilience. By analogy, by embedding cybersecurity requirements into supply chains, certification processes, and market access conditions, the EU could be constructing the conditions for such an export of its space cybersecurity norms to non-EU actors.

Although the credibility of the Union's capacity to project its regulatory and cybersecurity norms beyond its borders depends on the structural position it occupies within the space sector, it appears that its position as one of the main space powers could assure its space industry and market enough relevance to see some global diffusion of the norms that condition its access.¹⁴⁴ Indeed, the EU is not a marginal actor, as '[d]espite its modest workforce and output, the European satellite industry exerts a strong leverage effect on EU trade'.¹⁴⁵ In Europe, public spending remains the primary market driver.¹⁴⁶ At the same time, private investment remains comparatively limited and concentrated in early-stage projects, reinforcing the centrality of institutional programmes for industrial survival and scaling.¹⁴⁷ Thus, through flagship programmes such as Galileo, Copernicus and IRIS², the Union has become one of the world's major institutional

¹⁴³ Marco Franzoso, 'The 'Third Way' to Space Power: Europe's Digital Sovereignty Advantage' (*Stanford Law School*, 2026) <<https://law.stanford.edu/2026/01/23/the-third-way-to-space-power-europes-digital-sovereignty-advantage/>> accessed 18 February 2026.

¹⁴⁴ Isabelle Sourbes Verger, 'La place de l'Europe au sein des puissances spatiales', in *L'espace extra-atmosphérique et le droit international* (2021) <<https://hal.science/hal-03513360>> accessed 16 May 2024.

¹⁴⁵ Dalledonne, Dousset and Aliberti (n 129).

¹⁴⁶ ESA, 'Report on the Space economy 2024' (ESA, December 2024) <<https://space-economy.esa.int/documents-area>> accessed 5 January 2026.

¹⁴⁷ McKinsey (n 128).

customers, infrastructure operators and organisers of demand for space services. In space economy, a sector that remains overwhelmingly driven by public procurement and long-term programmes rather than by consumer markets, such a centrality gives the Union significant leverage.¹⁴⁸

In such a technical, capital-intensive and highly integrated sector, exclusion from EU frameworks does not merely imply the loss of a commercial opportunity. Still, it risks durable marginalisation from core industrial ecosystems, supply chains and space applications.¹⁴⁹ Access to European programmes can thus be seen as a gatekeeping mechanism, that is, compliance with EU technical and security requirements becomes a precondition for participation in the space ecosystem. As a result, even non-EU manufacturers, operators and service providers face strong structural incentives to align with EU technical, security and compliance requirements to remain eligible for participation in these programmes and the industrial ecosystems they structure.¹⁵⁰

This structural dynamic extends to the regulatory plane. Satellite operators and manufacturers based outside the Union may be compelled to comply with EU cybersecurity norms, whether through adoption of technical standards, conformity assessments, or product certifications, to access the internal market of the Union or participate in European space programmes. In this sense, the Space Act's extraterritorial ambition would rest on the expression of a structural reality, as the EU's position as a major organiser of demand in the space economy gives its regulatory requirements a pull that extends beyond its formal jurisdictional boundaries.

Overall, the external reach of EU space cybersecurity regulations reflects its broader capacity to convert market size into legal influence. This regulatory

¹⁴⁸ ASD Eurospace, 'The European space industry in 2021' (*ASD Eurospace*, 2022) <<https://www.asd-europe.org/news-media/publications/asd-reports-publications/facts-figures-2021/>> accessed 17 June 2024.

¹⁴⁹ McKinsey (n 128).

¹⁵⁰ Baumann and Prall (n 134).

power depends not only on the Union's market attractiveness but also on its regulatory capacity, specifically its ability to identify and formulate relevant rules, provide clear and coherent normative frameworks, and ensure effective enforcement.¹⁵¹ Much as with the GDPR, the EU positions itself as a regulatory model for cybersecurity of space infrastructure, using its internal norms to shape external market expectations, some already in place such as with NIS 2 Directive or the CRA and some under negotiation, notably the proposed Space Act.¹⁵² In this context, compliance with EU requirements functions as a form of normative soft power. While a *de facto* Brussels Effect cannot yet be empirically demonstrated in this domain; given that the central instrument, the Space Act, has not entered into force; identifying the legal and structural conditions under which such an effect could emerge is itself analytically valuable, particularly in a field where regulatory choices made now will shape the governance architecture for decades.¹⁵³ Indeed, rather than imposing direct regulatory dominance, as seen with instruments such as the US ITAR, the EU promotes the diffusion of its norms through supply chains and market dependencies. For many non-EU actors, especially emerging space operators, aligning with established EU norms might then often appear more practical than developing their own, enabling the Union's rules to spread beyond its immediate jurisdiction through a logic of regulatory adoption.¹⁵⁴

¹⁵¹ EU's ability to transform its market size into legal influence depends on its regulatory capacity, which in turn relies on its expertise (identification and formulation of rules), its coherence (clear and predictable normative frameworks), and its enforcement power (ability to ensure compliance with the standards). See David Bach and Abraham Newman, 'The European Regulatory State and Global Public Policy: Micro-Institutions, Macro-Influence' (2007) 14 *Journal of European Public Policy* 827.

¹⁵² Abraham Newman, *Protectors of Privacy* (Cornell University Press 2008); Bradford (n 122).

¹⁵³ Manners (n 123) ; The *de facto* Brussels Effect refers to non-EU companies aligning with EU standards to access the EU market and subsequently applying them globally, while the *de jure* version involves third countries voluntarily incorporating EU rules into their domestic law. Both describe regulatory influence beyond borders., Hornkohl (n 141).

¹⁵⁴ Kuner (n 125).

In sum, the progressive construction of its internal framework contributes to shaping the EU's emerging role as a normative power in the domain of space cybersecurity. Instruments such as the NIS2 Directive, the CRA, and the upcoming EU Space Act not only regulate the European market but also reflect a broader strategic ambition to influence global practices. By exporting its regulatory logic, the Union is positioning itself as a standard-setter in an increasingly contested technological domain, in the absence of binding international law. This strategy seeks to position the Union not only as a standard-setter, but as one of the architects of international regulation through normative projection. While its influence may depend on voluntary alignment, the interplay of binding and non-binding tools appears to reinforce its capacity to structure behaviours beyond its borders, as analysed in Section I/ 2) and above.

That said, important limits must be acknowledged. The effectiveness of this strategy will depend on several contingent factors: the actual stringency and coherence of the final Space Act, the credibility of its enforcement, the relative attractiveness of the EU market and programmes such as IRIS², and the reactions of competing regulatory powers, notably the United States.¹⁵⁵ Unlike data protection, where the EU regulates a near-unavoidable global market, space activities remain more geopolitically fragmented and strategically contested.¹⁵⁶ Whether this strategy will ultimately lead to a genuine Brussels Effect remains to be seen. Still, the legal and institutional conditions for such an outcome appear to be in place.

¹⁵⁵ For instance, the U.S. Government voiced its concerns over the intended scope of the EU Space Act, estimating that it would impose 'unacceptable regulatory burdens on U.S. providers of space services to European customers' and therefore requesting the text to be amended so as to ensure the EU 'proceed cautiously' under threat of ceasing the cooperation between the two space powers; Office of Space Commerce, 'U.S. Government Provides Feedback on Draft E.U. Space Act' (*Office of Space Commerce*, 20 November 2025) <<https://space.commerce.gov/u-s-government-provides-feedback-on-draft-e-u-space-act/>> accessed 4 December 2025.

¹⁵⁶ Florence Gaillard-Sborowsky, *À la recherche d'une sécurité spatiale*. (Le Cavalier Bleu, 2023).

2. From strategic regulation to regional norm leadership: the consolidation of a European governance layer

Rather than simply producing new rules for space cybersecurity, it can be argued that the EU is actively constructing a new governance layer at the regional level, one that fills the international legal vacuum described earlier. This regional framework does not purport to bind non-EU states directly, but rather to establish a credible normative reference point that may, over time, exert influence beyond EU borders through the dynamics analysed in the preceding section. In doing so, it positions the EU as a regional normative leader in a blocked multilateral context, framing the cybersecurity of space as both a normative and strategic priority. Even more so as it could be seen as ‘strategic legislation’, that is, law-making that is explicitly aligned with broader political, economic and technological objectives.¹⁵⁷ Such a consolidated governance layer would then help make the Union a ‘strategic actor in its own right’ in space.¹⁵⁸

Applied to space cybersecurity, this approach would go beyond the adoption of isolated security requirements, with its emerging layered and increasingly coherent governance architecture, combining horizontal instruments such as NIS2 and CER Directive, sector-specific regulation, notably the proposed EU Space Act, standardisation strategies, certification schemes, supervisory structures and programme-based conditionalities. Taken together, these elements hint at a new regulatory layer that does not merely regulate behaviour *ex post*, but organises the space sector around risk management, compliance, auditability and resilience-by-design. This development seems to mark a transformation in the way space activities are framed, as the emerging European approach ‘cyberises’ space governance. That is, it

¹⁵⁷ ‘In the context of the European Union, strategic legislation can be defined as “A set of laws and regulations aligned with the EU’s overall strategy and aimed at achieving planned goals. Strategic legislation benefits stakeholders and promotes cooperation within the internal market’, Cappelletti and Papakonstantinou (n 26) 5.

¹⁵⁸ Philip De Man and Jan Wouters, ‘EU Space Governance at the Threshold of A New Era’ (2025) Global Policy.

replaces *ex post* responsibility with *ex ante* risk management, legal attribution with continuous compliance, and abstract obligations with operational requirements such as incident reporting, penetration testing, supply chain security, and governance by audit. This development marks a transformation in the framing of cybersecurity obligation in the space sector at the European level – as a preventive layer is being constructed.

While the lack of binding international legal instruments in space cybersecurity has been acknowledged earlier, what sets the EU's approach apart is the way it is constructing a progressively layered legal framework to fill the perceived gap.¹⁵⁹ Identifying a regulatory gap, the EU is responding not by waiting for multilateral consensus but by developing its own internal framework, with layered, hybrid, and increasingly sector-specific initiatives.¹⁶⁰ The proposed EU Space Act illustrates this shift by building on broader instruments such as the NIS2 Directive and the CER Directive, yet is explicitly framed as *lex specialis*, marking a key moment in the Union's move from general cybersecurity regulation to tailored legal frameworks for space systems. This nested regulatory architecture, where sectoral laws are embedded within horizontal ones, allows the EU to progressively specialise and raise baseline standards for resilience across all segments of space infrastructure, including national and private operators. In the absence of

¹⁵⁹ Indeed, EU's own communication point out an issue as existing international instruments, particularly the Outer Space Treaty, remain fundamentally state-centric and technologically outdated, leaving gaps on some issues. As exposed by the proposal for an EU Space Act, those fundamental texts do not provide detailed responses to today's critical challenges, including cyberattacks on space infrastructure, the environmental impact of space activities, or the congestion of orbital zones and multilateral instruments, such as the UN's Long-Term Sustainability Guidelines, offer only non-binding recommendations, leaving a growing set of risks legally unaddressed. See EU Space Act (n 32) 15.

¹⁶⁰ Indeed, in the explanatory memorandum for the proposed EU Space Act, the "lack of specific binding technical rules to implement the general OST obligations" is proposed as a reason for a 'fragmented regulatory landscape' that must be remedied by the adoption of said Act.

international law, the EU seems to be constructing its own norms by adding a layer of specialised sectoral regulation.

For instance, the soft law approach to space cybersecurity appears not only strategic but also intentionally pragmatic, functioning as a complement to the existing international legal framework – that is, the general instruments of space law that do not contain preventive and specific cybersecurity obligations (see Section I/ 1). Centred on the formulation of technical standards, particularly aimed at enhancing the security of LEO and GEO constellations, this soft-law-based approach positions the EU as a normative frontrunner in protecting and enhancing the resilience of space infrastructure.¹⁶¹ Framed as a pragmatic response to multilateral inertia, it relies on the diffusion of guidelines and best practices rather than binding commitments. Presented as a provisional mechanism ‘in anticipation’ of future hard law, the use of non-binding standards reflects a broader strategy of normative soft power.¹⁶² However, such instruments face limitations in achieving international alignment, particularly amid divergent regulatory models and geopolitical competition among major space powers.¹⁶³ As such,

¹⁶¹ See, for example, the progress envisioned in the ‘European Connectivity Programme’, Clément Evroux, ‘EU Secure Connectivity Programme 2023–2027’ (European Parliamentary Research Service, February 2023) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2022\)72944_2](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)72944_2)> accessed 20 January 2025; see also, the exposition of the Union's classification of space systems as critical infrastructure being still under discussion by other major space powers, Casaril and Tricco (n 72).

¹⁶² Manners (n 123).

¹⁶³ Katrina Moon, Mark Glissman and Allison Dempsey, ‘Space Traffic Management’ (2025) 12 *Journal of Space Safety Engineering* 327; see also Michael Gleason, ‘Establishing Space Traffic Management Standards, Guidelines and Best Practices’ (2020) 7 *Journal of Space Safety Engineering* 426. <<https://www.sciencedirect.com/science/article/pii/S2468896725000242>> accessed 5 May 2025; and Kuan Yang, ‘Chinese Perspective on an International Regime of Space Traffic Management’ (2019) 6 *Journal of Space Safety Engineering* 156 <<https://www.sciencedirect.com/science/article/pii/S2468896719300631>> accessed 5 May 2025; Jie Long and Tao Zhang, ‘Pillars of Space Traffic Management in the Era of

the EU's normative ambitions, while often cited as a reference point, remain inherently fragile and open to global contestation.

Despite this fragility, the EU strategy appears to be showing some results, largely due to stakeholder involvement and the structured diffusion of standards. The example of ECSS's central role in harmonising technical practices across the European space sector illustrates such effectiveness. In practice, ECSS standards increasingly serve as technical reference points within research.¹⁶⁴

Additionally, while ECSS standards are not imposed at the global level, they increasingly participate in international standardisation processes, notably through formalised cooperation and harmonisation efforts with global bodies such as ISO.¹⁶⁵ By striving for technical compatibility and complementarity, particularly within the ISO Technical Committee for Space Systems, ECSS contributes to the convergence of European and international space standards. The Commission's guidance also explicitly couples European space standards with international norms; for instance, while component qualification is framed by ECSS standards, core evaluation metrics, such as TRLs, are defined by direct reference to ISO Standard 16290.¹⁶⁶ Finally, ECSS standards are frequently mandated by the ESA, which is basing its list of Approved Standards (LEAS) applicable to ESA space

LEO Mega-Constellations: A Global Perspective' (2024) 74 *Advances in Space Research* 800 <<https://www.sciencedirect.com/science/article/pii/S0273117724003430>> accessed 27 March 2025.

¹⁶⁴ See for example Ricardo Eito-Brun, Juan Miguel Gómez-Berbís and Antonio de Amescua Seco, 'Knowledge Tools to Organise Software Engineering Data: Development and Validation of an Ontology Based on ECSS Standard' (2022) 70 *Advances in Space Research* 485.

¹⁶⁵ Point of contact is for instance maintained with ISO in its Technical Committee (TC) 20, Subcommittee (SC) 14 Space Systems, for the purpose of harmonisation and complementary actions; for further details on the cooperation, see 'ISO - ECSS - European Cooperation for Space Standardization'.

¹⁶⁶ European Commission (n 98) 6.

projects on published ECSS standards.¹⁶⁷ Such coupling illustrates the idea that the EU is, if not yet globally diffusing, at least clearly diffusing its standards in the regional layer.¹⁶⁸ Moreover, this mechanism would echo the dynamics observed in digital regulation, where the Brussels Effect enables European standards to spread beyond the EU's borders, as companies comply with them to access the European market, as both the structural parallels drew earlier and the Union's stated ambition converge.¹⁶⁹

Indeed, while this regulatory strategy is not novel for the EU, it is being applied in the space sector in a targeted and increasingly structured manner.¹⁷⁰ Confronted with the growing influence of China within international standard-setting bodies, where technical standards are directly linked to geopolitical and economic interests, the EU has made it a priority to assert its presence in pre-normalisation and standardisation processes.¹⁷¹

¹⁶⁷ The reference to a objectives of implementing ECSS standards can be found on ESA's page, ESA, 'Requirements and Standards' <https://www.esa.int/Enabling_Support/Space_Engineering_Technology/Requirements_and_standards> accessed 14 January 2026; see also Werner Kriedte and Youssef El Gammal, 'A New Approach to European Space Standards' [1995] ESA Bulletin.

¹⁶⁸ The regional layer here is understood as the fact that the EU is at least achieving consistent uptake across the European space sector, encompassing EU Member States, ESA member states, and the European industrial ecosystem more broadly. This regional consolidation establishes a critical mass of adoption that would be the precondition for any kind of outward diffusion, as standards that are uniformly applied within a large and technically sophisticated regional market tend to become reference points for actors seeking access to it.

¹⁶⁹ Newman (n 133); and Bradford (n 122).

¹⁷⁰ This regulatory strategy of using standardization as a tool of normative projection is fitting within previous broader and well-established EU approach, as evidenced by previous initiatives such as the GDPR. See Kuner (n 125).

¹⁷¹ See for example China's "standards 2035" in the "National Standardization Development Outline", '中共中央 国务院印发《国家标准化发展纲要》_新华网' ['The Central Committee of the Communist Party of China and the State Council Issue the National Standardization Development Outline'] (新华网, 10 October 2021) <http://www.news.cn/politics/zywj/2021-10/10/c_1127943309.htm> accessed 7 November 2025.

This general strategic posture of competing for normative influence in standard-setting as a matter of geopolitical priority provides the context within which the EU's more specific ambitions in space cybersecurity standardisation should be understood. The space sector is one instance of a wider competition, and the EU's early positioning in space cybersecurity standard-setting reflects the same logic applied to a domain where the race is still open. This ambition is clearly articulated in the renewed European Standardisation Strategy, which identifies space as a critical sector and aims to develop technical specifications specific to the European space economy, first to recognise them as European standards, then as international standards.¹⁷² By coordinating Member States, national standardisation bodies, and specialised agencies, the EU is embedding space standardisation within a coherent strategic framework that explicitly treats technical standards as instruments of influence. This approach not only enhances the Union's capacity to shape global norms in line with its interests and values but also strengthens the international competitiveness of its space industry.¹⁷³ A position that the proposed EU Space Act aims to consolidate by establishing standardisation as both a tool of governance and an instrument of strategic autonomy, one that space matters increasingly seems to enable.¹⁷⁴

¹⁷² European Commission, 'Communication for the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions: An EU Strategy on Standardisation Setting global standards in support of a resilient, green and digital EU single market' (2022) COM (2022) 31 final.

¹⁷³ European Commission, 'Communication for the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions: A vision for the European Space Economy', (2025) COM (2025) 336 final.

¹⁷⁴ The concept of 'strategic autonomy' appears to be increasingly exploited both by commentators and by the Union's own discourses, and is mostly used as both a descriptor of a state of non-reliance on outside provider of strategic means (those ranging from materials, such as microchips, to intangible alliances, exemplified for example by the idea of a 'Defense Europe') and as an objective to achieve to further the EU's position as a global actor. See on this concept: Niklas Helwig and Ville Sinkkonen, 'Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term' (2022)

Moreover, amid persistent deadlocks in multilateral negotiations, the European Union appears to embrace a pragmatic regionalist strategy for space governance. Rather than waiting for a global consensus to emerge, the EU seeks first to consolidate credible and effective standards at the European level, then to promote their international uptake.¹⁷⁵ This two-step logic is not new. It underpinned the success of the GDPR in digital governance and is now resurfacing in the space domain, particularly in areas such as STM, where EU standards already exert extraterritorial effects.¹⁷⁶ This approach relies on a spillover effect as once a set of standards is broadly applied within the internal market, it often becomes a *de facto* global benchmark, particularly for international operators seeking access to the European market. By creating legal obligations that extend across supply chains and market access requirements, the Union effectively projects its standards outward. This governance model aims not only to fill a void but to shape what comes next, filling the legal vacuum with regional rules that may later act as global precedents.

While vulnerable to fragmentation and competing visions, it creates a concrete, strategic response to legal inertia at the multilateral level, and it signals the EU's intention to lead, at least regionally, on questions of security, resilience, and sustainability in space. By presenting a regional model of

27 European Foreign Affairs Review 1; Chiara Cellerino, 'EU Space Policy and Strategic Autonomy: Tackling Legal Complexities in the Enhancement of the 'Security and Defence Dimension of the Union in Space' 2023 8 European Papers - A Journal on Law and Integration 487 <<https://www.europeanpapers.eu/en/europeanforum/eu-space-policy-and-strategic-autonomy>> accessed 29 November 2024; see on the subject of space as an enabler of the Union's strategic autonomy: Letizia Caito, 'European Technological Non-Dependence in Space' (2015) 51 ESPI Report; Daniel Fiott, 'The European Space Sector as an Enabler of EU Strategic Autonomy' (Policy Department for External Relations - Directorate General for External Policies of the Union, 2020).

¹⁷⁵ Mario Barbano, 'Space Traffic Management and Space Situational Awareness: The EU Perspective' (2022) 47 Air and Space Law 451.

¹⁷⁶ European Commission, 'Joint communication to the European Parliament and the Council: An EU Approach for Space Traffic Management An EU Contribution Addressing a Global Challenge' (2022) JOIN (2022) 4 final, 13.

normative leadership in the absence of global consensus, the EU appears to follow a strategy of proposing norms at its level, in the hope that they spread. Regionalism thus seems to be a reasonable response to the blockage of multilateralism, in which the EU's governance model could encourage upward convergence towards the multilateral adoption of international norms.

This approach reveals a pragmatic dual objective: regional consolidation is the immediate goal, while international norm projection is a secondary, implicit ambition. A similar dynamic was observed in the 2010s, when the launch of the Union's Space Situational Awareness programme coincided with its efforts to advance a Code of Conduct for Outer Space Activities, reflecting its first attempts to secure critical space infrastructure.¹⁷⁷ Faced with the absence of binding multilateral instruments and the increasing fragmentation of space governance, the EU acts first out of necessity to protect its infrastructure, secure its internal market, and address legal uncertainties left by outdated treaties. This explains the progressive layering of sector-specific instruments, notably the proposed EU Space Act, over broader cybersecurity frameworks, for example, the NIS2 Directive. In space cybersecurity, the EU may not formally articulate norm export as a primary goal, but it nonetheless seems to recognise the geopolitical potential of regulatory leadership.¹⁷⁸ Through its control of standards, certification procedures, and compliance mechanisms, often diffused through market access and partnerships, the Union shapes global practices. This dual movement reflects not only the dynamics of the Brussels Effect but also a

¹⁷⁷ Phillip Slann, 'Anticipating Uncertainty: The Security of European Critical Outer Space Infrastructures' (2016) 35 *Space Policy* 6.

¹⁷⁸ For instance, in its Space Strategy for Security and Defence, the Union frames space governance as a strategic normative project, stating that 'The main challenge for the EU [...] is to convince the vast majority of UN member countries of the relevance of a normative approach', and that it will 'work towards broadening international support for their position on outer space'. European Commission, 'Joint Communication to the European Parliament and the Council European Union Space Strategy for Security and Defence' (2023) JOIN (2023) 9 final.

secondary strategy to assert normative power in a domain where global consensus remains elusive.¹⁷⁹

Despite this ambition to take a leading role in regulating space cybersecurity, several challenges raise questions about the strategy's actual reach and effectiveness. The success of the governance layer that the EU is attempting to construct ultimately hinges on industry actors' uptake, particularly in the case of its non-binding initiatives.¹⁸⁰ Yet, industry adoption cannot be taken for granted. Private operators may resist regulatory frameworks perceived as overly complex or burdensome, especially if compliance entails high operational or financial costs.¹⁸¹ As several commentators, including those from within the space industry and legal circles, have noted, regulation alone will not suffice: without adequate incentives, funding mechanisms, or support structures, the EU's leadership may remain more declaratory than transformative.¹⁸² Critiques have also emerged around the perceived proactivity of the EU in areas where it is not formally a party to international treaties, raising questions about potential interference with Member states' work in international fora, especially the UNCOPUOS.¹⁸³ These tensions reflect deeper structural limits to the EU's governance model: while it can project norms through internal regulation, its success depends on whether those norms are accepted, implemented, and supported by European industry and international partners. This dependency on private actors is particularly significant at the international level as the governance of space cybersecurity notably relies on technical standards developed by private

¹⁷⁹ Deliberate identification with a normative power as concept can for example be found when the High Representative of the Union for Foreign Affairs and Security Policy described the Union as a 'key normative power in setting world-wide rules and standards'. Josep Borrell, 'A Stronger Europe in the World' (Hearing of Josep Borell High Representative of the Union for Foreign Affairs and Security Policy), Committee on Foreign Affairs of the European Parliament, Brussels, (2019) 6.

¹⁸⁰ Frison-Roche (n 117).

¹⁸¹ ASD Eurospace (n 138).

¹⁸² Pavur (n 5); Livingstone (n 13).

¹⁸³ Baumann and Prall (n 134).

standardisation bodies and implemented by private operators; meaning that industry uptake is a condition for the international credibility and diffusion of the EU's regulatory model.¹⁸⁴ Finally, even if said norms are far-reaching and adopted, their adoption by third countries may appear voluntary. Yet, the line between emulation and subtle coercion is often hard to draw. In some instances, alignment with EU norms may be driven less by independent policy choices than by implicit political pressure.¹⁸⁵

Moreover, in pursuit of regional-level normative leadership, the EU remains constrained by its nature as an international organisation, bound by the letter of its foundational treaties and by the extent to which its Member States agree to delegate power to its institutions. Those deeper structural constraints, some inherent to the EU's nature as an international organisation and some reflecting genuine political tensions with Member States over the scope of delegated competence, are evident as, while the EU Space Act proposal is presented as a harmonising instrument, the very possibility of harmonisation in space matters is formally excluded by Article 189(2) TFEU. This provision clearly states that Union measures in the field of space policy must not lead to the harmonisation of Member States' laws and regulations. Although the Commission has grounded the proposed Space Act in Article 114 TFEU, which relates to the internal market, to sidestep this constraint, such a move is not immune to criticism.¹⁸⁶ Legal scholars and Member States

¹⁸⁴ Ikitemur, Karabacak and Igonor (n 120).

¹⁸⁵ Kuner (n 125).

¹⁸⁶ Malin Wållgren, 'Exploring the Outer Limits of Article 114 TFEU — Towards a General Power? An Analysis of Non-Market Objectives and "Measures Having as Their Object the Establishment and Functioning of the Internal Market"' (Uppsala University, 2016); Bas Jacobs, 'Understanding the EU's Competence to Harmonise Space Law Amid Publication Delays' (2024) 49 *Air and Space Law* <<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\AILA\AILA2024030.pdf>> accessed 17 January 2026; Dimitra Stefoudi, 'EU Space Law — Three Reasons Against, Three Reasons in Favour' (EJIL: Talk!, 29 April 2024) <<https://www.ejiltalk.org/eu-space-law-three-reasons-against-three-reasons-in-favour/>> accessed 14 November 2024.

alike might voice concerns that this legal basis would exceed the EU's competence, especially when the regulation touches on matters closely tied to national sovereignty and security, such as the issuance of launch authorisations or the operation of sensitive infrastructure. Therefore, the stated objective of 'harmonisation' embedded in the proposed EU Space Act is not without controversy. Some fear that it may override or marginalise national positions or create legal frictions within multilateral settings, particularly in areas such as space resource exploitation, where legal authority remains contested. The resulting ambiguity raises the question of whether the EU is overreaching or attempting a strategic reinterpretation of its role by innovating norms in an area traditionally governed by intergovernmental logic. In this sense, the Union's push for 'harmonisation' may paradoxically weaken its normative project, if it alienates Member States or creates legal uncertainty around the enforceability of its regulatory instruments.

Finally, while the Union often frames its regulatory approach as an expression of normative power, grounded in values of rule-based governance, market openness, and multilateral cooperation, its increasing reliance on regional regulation in the space sector raises some interesting questions.¹⁸⁷ In the absence of binding international legal frameworks adapted to emerging challenges, for instance, cybersecurity, the EU's use of internal legislation to fill the normative vacuum may also signal a shift away from traditional multilateralism. Rather than strengthening global legal consensus, it would thus risk fostering legal fragmentation, particularly if other space powers continue to adopt similar unilateral or regional approaches.¹⁸⁸ The Union's initiative, while covering a genuine gap, therefore risks contributing to the fragmentation it nominally seeks to address.

¹⁸⁷ Manners (n 123).

¹⁸⁸ On the increasing tendency to supplant, or at least supplement, international multilateral space law through national or regional normative structures, See Achilleas and Hobe (n 18) 21.

Moreover, the EU itself justifies its regulatory initiatives in explicitly strategic terms, emphasising the need to protect its autonomy, assert its place on the international scene, and ensure the competitiveness of its space sector.¹⁸⁹ This narrative, while understandable, paradoxically echoes the very logic of power competition that space law historically sought to temper. The construction of regional governance frameworks as substitutes for, or at least complements of, multilateral instruments reflects a broader transformation in the architecture of space law today. This reveals a growing reliance on inventive, sometimes asymmetric legal tools to regulate newer issues in domains such as cybersecurity or commercial exploitation, where international law remains vague or silent. While these innovations respond to urgent regulatory gaps, they also underscore the limits of consensus-based norm-making. They may, in the long term, reinforce a fragmented legal order shaped by the interests and capacities of dominant space actors.

In sum, the Union's normative initiatives in space cybersecurity aim to position it as a regulatory leader, offering a governance model in the absence of effective multilateral consensus. By developing layered, sector-specific regulations and projecting them beyond its borders, the EU appears to strive for both strategic autonomy and normative influence. In this approach, norm projection serves both as a consequence of market dynamics and as a strategic tool. However, this trajectory is not without friction as regional normative leadership ambitions may provoke resistance from other space powers, especially where interests diverge, and relies heavily on the engagement of private actors to ensure operational uptake. While the EU model offers structure in an otherwise fragmented landscape and may serve

¹⁸⁹ See notably Council of the European Union, 'Council conclusions on 'Strengthening Europe's competitiveness through space'' (23 May 2024) ST 10142/24; General Secretariat, 'Strategic Autonomy, Strategic Choices' (Council of the European Union Issues paper, 5 February 2021). See also Fiott (n 177).

as a stepping stone toward broader international convergence, whether it can scale globally or truly catalyse multilateral revival remains to be seen.

CONCLUSION

The increasing complexity and vulnerability of space systems in the digital age, especially in LEO, have exposed major shortcomings in the current international legal framework. Against this backdrop, this paper has examined whether and how the European Union might be developing a distinct normative response to the cybersecurity of space infrastructure, and whether this response can be understood as more than a purely internal regulatory exercise. As this paper observed, the EU responded by positioning itself both as a regulator addressing internal-market and security concerns and as a strategic and normative actor, developing a creative governance approach to space cybersecurity. This approach, progressively layering soft and hard law with standardisation and compliance mechanisms, seems to position the EU as not only responding to internal security needs but as an actor capable of influencing the global direction of space governance, simultaneously serving its strategic interests and reflecting its broader identity as a normative power.

With the proposed EU Space Act, the shift from the ad hoc inclusion of space infrastructure in general cybersecurity frameworks to the development of a dedicated, sector-specific legal framework seems confirmed. This progression aligns with the Union's long-term commitment to consolidating the security of its space infrastructure while projecting its regulatory standards outward. Far from a purely technical exercise, the EU's normative strategy relies on a combination of hard law, soft law instruments, compliance mechanisms, and standard-setting, all of which create the conditions to extend the EU's influence beyond its borders, particularly by conditioning market access on compliance with EU-defined norms. This approach might reflect a pragmatic dual strategy. On the one hand, regional consolidation, motivated by the absence of binding international law,

remains the primary objective – and most effective level of action, where the Union seeks to coordinate internal practices, secure space assets, and close legal gaps. On the other hand, norm projection emerges as a secondary but strategic ambition, in which the EU leverages internal norms to shape global practices. Taken together, these elements suggest that a degree of international diffusion of EU norms may occur, supporting the hypothesis of a potential Brussels Effect in the field of space cybersecurity.

However, the effectiveness and sustainability of this strategy remain uncertain. The absence of international consensus leaves room for competing frameworks led by other global actors, who may seek to promote their own distinct models of governance and regulation. In such a competitive environment, the Union's ambition as a normative leader may ultimately be perceived as merely one regional approach among others, increasing the risk of regulatory fragmentation and norm rivalry across regulatory spaces. The broader implications of this analysis extend beyond the case of space cybersecurity. The Union's approach illustrates a shift in how international regulation is evolving in technically complex and politically charged domains where multilateral consensus remains elusive. The rise of regional regulatory areas might complement existing international law, but it might as well produce a fragmented legal order in which the applicable norms depend less on international consensus than on which regulatory power an operator is economically dependent on. Whether this constitutes a productive form of regulatory experimentation or a structural threat to the original ambitions of space law is a question that goes beyond this article's scope, but one that the EU's normative activity in space cybersecurity makes increasingly necessary to address.

Ultimately, the EU's normative response to space cybersecurity governance can be seen as part of a broader transformation of international law in the space domain, where regulatory inventiveness increasingly compensates for multilateral paralysis. Its ability to sustain this ambition of leadership and to transform a regional solution into a global reference framework will depend

not only on political cohesion and industrial alignment, but also on the international community's receptiveness. In this sense, the EU's normative approach to space cybersecurity should be understood less as an established model of global governance than as a laboratory of regulatory experimentation. Whether this regional model might globalise and lead to a fully effective Brussels Effect thus remains to be seen, but the more consequential question may be what it would mean for the architecture of international space law if it does.

AFTER THE STANDARD OF CIVILISATION: A GENEALOGY OF CONDITIONAL INCLUSION IN EU ACCESSION

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*This article examines how the relation between assessment and procedural movement in EU accession was historically formed and changed, and in what sense it can be understood as a reconfiguration of earlier forms of conditional inclusion. It develops a Foucauldian genealogy that traces this relation from nineteenth-century practices associated with the standard of civilisation, through their postwar rupture, to the later construction of accession governance around the *acquis communautaire*. Whereas evidence of nineteenth-century legal and administrative reform did not necessarily settle whether those reforms were sufficient to justify a change in legal treatment, European Union accession allows a candidate to be found to have met particular accession requirements without that assessment itself determining procedural movement. By focusing on the separation between the assessment of fulfilment and the authority to determine its procedural consequence, the article identifies a distinct contemporary form of conditional inclusion.*

Keywords: conditional inclusion; the standard of civilisation; sovereignty; *acquis communautaire*; European Union enlargement; genealogy; the Ottoman Empire; extraterritoriality

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I. INTRODUCTION

Accession to the European Union (EU, the Union) requires a candidate to align its national law with the accumulated body of Union law and to

demonstrate that the administrative and judicial institutions responsible for applying those rules can make them effective in practice.¹ The European Commission (the Commission) examines that position chapter by chapter through screening and recurrent country reporting, comparing national legislation and implementation capacity with the requirements attached to membership.² Over time, this examination became increasingly specified. In 2015, the Commission introduced, initially in selected pilot areas, two published scales that distinguished a candidate's current level of preparation from its progress during the reporting period.³ Screening and annual reporting can produce express findings of sufficiency, including findings that a candidate sufficiently fulfils particular criteria or has reached a sufficient level of alignment in a chapter.⁴ Such a finding does not open a chapter or provisionally close one. Those decisions rest with the Council of the European Union (the Council) and the Member States acting within the accession framework.⁵ The framework merely requires the Council to take the Commission's assessment into account.⁶

The separation between assessment and procedural movement frames the inquiry pursued in this article. This paper asks how the authority to judge

¹ Council of the European Union, 'Negotiating Framework' (12 October 2005) Doc 12823/1/05 REV 1, annex II, para 17.

² Council, 'Negotiating Framework' (n 1) annex II, paras 19, 21–23; European Council, 'Presidency Conclusions' SN 400/97 (Luxembourg, 12–13 December 1997) paras 13, 23, 29–30.

³ European Commission, 'EU Enlargement Strategy' COM (2015) 611 final, 4, 31–32.

⁴ European Commission, 'Screening Report: Turkey, Chapter 18 – Statistics' (4 December 2006) 8–9; European Commission, 'Screening Report: Turkey, Chapter 22 – Regional Policy and Coordination of Structural Instruments' MD 154/07 (14 May 2007) 14; European Commission, 'Turkey 2005 Progress Report' SEC (2005) 1426, 41; European Commission, 'Turkey 2009 Progress Report' SEC (2009) 1334, 66.

⁵ Council, 'Negotiating Framework' (n 1) annex II, paras 19, 21–23.

⁶ Council, 'Negotiating Framework' (n 1) annex II, para 23.

whether a candidate is sufficiently prepared came to be separated from the authority to determine what follows from that judgment, and how that relation changed historically. I use ‘conditional inclusion’ to describe a relation in which movement towards a different legal position is conditioned on domestic legal and administrative transformation and an authorised judgment of its sufficiency. The comparison therefore follows the legal position at stake, the transformation required, the standards used to judge it, the documentary practices through which it becomes assessable, the authority to judge its sufficiency, and the authority to determine its legal or procedural consequence.

The historical inquiry begins with nineteenth-century practices associated with the standard of civilisation, through which civilisational classifications helped determine a polity’s treatment under international law. Judgments about domestic legal and administrative organisation could bear on whether a polity received equal legal treatment, while evidence of reform did not necessarily settle whether such treatment should follow.⁷ However, sovereign equality and self-determination broke the connection between domestic preparedness and entitlement to sovereign independence.⁸ The later EU accession framework therefore concerns a different legal position and a different institutional setting. Membership in the Union, rather than international legal personality, became conditioned on domestic transformation assessed against standards developed within the European

⁷ Treaty between the United Kingdom and China Respecting Commercial Relations, &c (signed 5 September 1902, entered into force 28 July 1903) [1903] UKTS 17 (‘Mackay Commercial Treaty’), art XII; Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020) 45–46, 54–55, 78–79.

⁸ Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (‘UN Charter’), arts 1(2) and 2(1); UNGA Res 1514 (XV) (14 December 1960) UN Doc A/RES/1514(XV), paras 2–3.

legal order.⁹ The question is accordingly how domestic transformation, judgments of sufficiency and changes in legal position were brought into a new relationship within EU accession.

The *acquis communautaire*, the accumulated body of common rights and obligations binding on EU Member States, provides the principal historical thread through which the formation of EU accession governance can be reconstructed. It first accumulated within the European Communities for internal legal purposes and only later became a condition of accession, before the Copenhagen criteria placed political, economic and membership requirements within a more explicit framework.¹⁰ Existing scholarship addresses both the earlier practices of civilisational classification and the later role of the *acquis* in European integration. Work on the standard of civilisation explains how civilisational classification conditioned legal standing and authorised scrutiny of domestic arrangements, while Ntina Tzouvala identifies the unresolved place of reform within civilisational judgment.¹¹ Stephen J Silvia and Aaron Sampson provide the closest genealogy connecting the standard of civilisation to European integration,

⁹ Consolidated Version of the Treaty on European Union [2016] OJ C202/13 ('TEU') art 49. Council of the European Union, 'Negotiating Framework' (n 1) annex II, paras 6, 10 and 17. European Council, 'Conclusions of the Presidency', SN 180/1/93 REV 1 (Copenhagen, 21–22 June 1993) pt 7.A.iii.

¹⁰ Antoine Vauchez, 'Methodological Europeanism at the Cradle: Eur-Lex, the *Acquis* and the Making of Europe's Cognitive Equipment' (2015) 37(2) *Journal of European Integration* 193, 197–201. Commission of the European Communities, 'Opinion on the Applications for Membership Received from the United Kingdom, Ireland, Denmark and Norway for Submission to the Council under Articles 237 of the EEC Treaty, 205 of the Euratom Treaty, and 98 of the ECSC Treaty' COM (67) 750 final, paras 9–10. Knud Erik Jørgensen, 'The Social Construction of the *Acquis Communautaire*: A Cornerstone of the European Edifice' (1999) 3(5) *European Integration Online Papers* 1, 9–10. European Council, 'Conclusions of the Presidency' (n 9) pt 7.A.iii.

¹¹ Gerrit W Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press 1984) 14–15. Tzouvala (n 7) 45–46, 54–55, 62, 78–79.

arguing that the *acquis* retrieves functions of the earlier standard and turns them into a codified measure of Europeanness.¹² Enlargement scholarship, by contrast, explains candidate compliance, the credibility of conditionality, Member State bargaining, bilateral disputes and inconsistencies in the application of accession conditions.¹³ This article shifts the inquiry from what the *acquis* measures, and from what explains particular accession outcomes, to the historical formation of the relation between assessment and the authority to determine its procedural effect.

The article approaches that problem through Foucauldian genealogy. Genealogy does not require the continuous survival of an institution or doctrine from one period to another.¹⁴ It instead permits examination of how elements of a legal relation were connected in one setting, broken apart, and

¹² Stephen J Silvia and Aaron Beers Sampson, 'Acquis Communautaire and European Exceptionalism: A Genealogy' (2003) American Consortium on European Union Studies Working Paper 2003.1, 3, 17–21

¹³ Frank Schimmelfennig and Ulrich Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe' (2004) 11(4) *Journal of European Public Policy* 661, 664–67; Heather Grabbe, *The EU's Transformative Power: Europeanization Through Conditionality in Central and Eastern Europe* (Palgrave Macmillan 2006) 34–35, 86–88; Christophe Hillion, *The Creeping Nationalisation of the EU Enlargement Policy* (Swedish Institute for European Policy Studies 2010) 6–7; Elena Basheska, 'EU Enlargement in Disregard of the Rule of Law: A Way Forward Following the Unsuccessful Dispute Settlement Between Croatia and Slovenia and the Name Change of Macedonia' (2022) 14 *Hague Journal on the Rule of Law* 221, 225–27; Dimitry Kochenov, 'Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 8(10) *European Integration Online Papers* 1, 2–17.

¹⁴ Michel Foucault, 'Nietzsche, Genealogy, History' in Donald F Bouchard (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Donald F Bouchard and Sherry Simon trs, Cornell University Press 1977) 139, 146–54; Ben Golder, 'Foucault and the Genealogy of Pastoral Power' (2007) 10(2) *Radical Philosophy Review* 157, 165, 172–73.

later reorganised under different legal and institutional conditions. Rupture is therefore part of the inquiry rather than evidence against the comparison. The analysis also attends to documented alternatives, since they show that the eventual arrangement was one possible configuration rather than an inevitable outcome.¹⁵ The genealogical claim is consequently neither one of direct institutional continuity nor one of resemblance alone. It concerns how a relation among domestic transformation, assessment and change in legal position was historically assembled, displaced and reconfigured.

The operation of accession assessment must nevertheless be examined through candidate-specific records, since screening reports, country reports and chapter documents are produced for individual candidacies.¹⁶ The article examines this relation through Türkiye's accession process. Its accession record allows assessment and procedural position to be observed together over an extended period, including periods in which assessment continued while chapter movement did not.¹⁷ The coexistence of continued assessment and stalled negotiations makes this record useful for examining the distinction between evaluating preparedness and deciding whether negotiations should advance. That distinction also concerns candidacies in which negotiations progress, since advancement involves both assessments and decisions on their procedural consequences. Scholarship on Türkiye's candidacy has examined its compliance with political accession conditions, the influence of Member State preferences on the course of negotiations, and

¹⁵ Foucault (n 14) 148–52; Peter Triantafillou, 'The Dependency and Contingency of Politics: Historical Institutionalism and Genealogy' (2016) 9(1) *Journal of Political Power* 123, 126–27.

¹⁶ Council of the European Union, 'Negotiating Framework' (n 1) annex II, paras 19 and 23. European Commission, 'Screening Report: Turkey, Chapter 18 – Statistics' (n 4) 1, 8–9; European Commission, 'Türkiye 2025 Report' SWD (2025) 756 final, 2–3.

¹⁷ Council of the European Union, 'Council Conclusions on Enlargement and Stabilisation and Association Process', Doc 10555/18 (26 June 2018) para 35; European Commission, 'Türkiye 2025 Report' (n 16) 2–18.

European opposition to membership associated with contested understandings of European belonging.¹⁸ The article distinguishes these possible explanations of different aspects of Türkiye's candidacy from the institutional relation through which candidate preparedness is assessed and the separately determined procedural movement. The general structure examined here derives from the accession framework, within which candidate participation remains voluntary, and is not treated as peculiar to Türkiye.¹⁹ The analysis is limited to the accession period and does not seek to explain why Türkiye has not acceded, why one candidacy advances while another stalls, or whether specific assessments and procedural decisions were substantively correct.

Accordingly, Section II reconstructs the nineteenth-century practices of civilisational assessment and the post-war rupture that ended preparedness as a general condition of sovereign independence. Section III traces how the *acquis* became a condition of accession and how assessment and chapter movement operate in Türkiye's candidacy. Section IV compares the two configurations, identifies the reconfiguration at issue, and sets out the limits of what that genealogy can explain.

¹⁸ Beken Saatçioğlu, 'Revisiting the Role of Credible EU Membership Conditionality for EU Compliance: The Turkish Case' (2011) 8(31) *Uluslararası İlişkiler* 23, 24–25; Ebru Turhan, 'Turkey's EU Accession Process: Do Member States Matter?' (2016) 24(4) *Journal of Contemporary European Studies* 463, 463–66; Elizabeth Shakman Hurd, 'Negotiating Europe: The Politics of Religion and the Prospects for Turkish Accession' (2006) 32(3) *Review of International Studies* 401, 401–402; Münevver Cebeci, 'Deconstructing the EU's "Standards of Civilisation": The Case of Turkey' (2019) 16(64) *Uluslararası İlişkiler* 77, 79, 85–90.

¹⁹ TEU, art 49; Council of the European Union, 'Council Conclusions on Enlargement and Stabilisation and Association Process', Doc 16991/14 (16 December 2014) para 36.

II. JUDGING ADEQUACY: THE STANDARD OF CIVILISATION AND ITS POSTWAR RUPTURE

The international lawyer Lassa Oppenheim considered the Ottoman Empire a member of the ‘Family of Nations’, the privileged community of states whose members were entitled to the rights and protections accorded to sovereign states, yet described its position as ‘anomalous’.²⁰ In this sense, the position of the Empire was one that stood ‘for some parts’ within that legal order and ‘for other parts’ outside it.²¹ Ottoman sovereignty was recognised, but important exercises of its jurisdiction remained restricted.²² The question was therefore how changes within the Empire came to bear on whether those restrictions would continue or be removed.

1. Assessing Adequacy and Distributing Authority under the Standard of Civilisation

The nineteenth-century standard of civilisation emerged as a legal doctrine that defined the conditions for judging whether political communities were entitled to the rights and protections associated with participation in an international legal order centred on Europe.²³ It did not take the form of a single treaty provision or formal admission procedure that was operated by

²⁰ Lassa Oppenheim, *International Law: A Treatise* (Ronald Roxburgh ed, 3rd edn, Longmans, Green and Co 1920) 34; Mostafa Minawi, ‘International Law and the Precarity of Ottoman Sovereignty in Africa at the End of the Nineteenth Century’ (2021) 43(5) *The International History Review* 1098, 1098.

²¹ Davide Rodogno, ‘European Legal Doctrines on Intervention and the Status of the Ottoman Empire within the “Family of Nations” Throughout the Nineteenth Century’ (2016) 18(1) *Journal of the History of International Law* 5, 34; Martina Zago, ‘Civilization as an Aesthetic Concept: The “Standard of Civilization” Reconsidered’ (2025) 5(2) *Global Studies Quarterly* ksaf045, 4.

²² Umut Özsu, ‘The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory’ in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 127–129.

²³ Gong (n 11) 14–15.

a single body.²⁴ In the nineteenth and early twentieth centuries, international lawyers used civilisational classifications to divide polities into ‘civilised’, ‘semi-civilised’, and ‘uncivilised’ categories.²⁵ This boundary-making role structured the degree of international legal personality accorded to political communities and the distribution of rights, duties and privileges under international law.²⁶ Carlos Calvo, the Argentinian lawyer, for example, connected civilisational rank to the extent of jurisdictional sovereignty, with civilised states having full jurisdiction, semi-civilised states exercising it according to unequal treaties with Western powers, and uncivilised ones falling outside of the scope of international law.²⁷

Although international lawyers repeatedly identified certain attributes of ‘civilised’ statehood, ‘civilisation’ did not operate as a unitary legal concept lending itself to conclusive definition, nor was there a common procedure or threshold for determining when those attributes were sufficient.²⁸ Civilisational classification gained authority within a broader shift from an

²⁴ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2002) 134–135.

²⁵ Tzouvala (n 7) 44–45, 50–52; Özsu (n 22) 123–27; Rodogno (n 21) 5–8, 32. This classification also produced differentiations within Europe. Westlake’s treatment of the ‘Balkan question’ illustrates this. He applied ethnological categories to distinguish ‘Bulgars, Serbs, Vlachs, Greeks, and Albanians, each with their characteristics and tendencies,’ treating the region as subject to civilisational classification rather than the framework of sovereign equality applied among Western European states, see John Westlake, ‘The Balkan Question and International Law’ (1906) 60 *The Nineteenth Century and After: A Monthly Review* 889, 891.

²⁶ Tzouvala (n 7) 44–45, 50–52; Özsu (n 22) 125–26, 137.

²⁷ Tzouvala (n 7) 52.

²⁸ Tzouvala (n 7) 1–2, 53; Cemil Aydin, ‘Ottoman Empire and Eurocentric Law of Nations’ (draft chapter for *The Cambridge History of International Law*, vol VIII, 2022) 20–21 < <https://pil.law.harvard.edu/wp-content/uploads/2022/10/Aydin-Cambridge-International-Law-Chapter-Ottoman-Europe-October20.pdf?>> accessed 9 April 2026; Rodogno (n 21) 7–8.

earlier natural-law tradition that claimed applicability to all societies towards positivism, while coexisting with established practices of treaty and diplomatic intercourse and confronting alternative forms of international normativity.²⁹ The declining authority of Christianity, the consolidation of Western nation-states, the spread of the state form beyond Europe and the revival of state-led imperialism created the conditions in which positivism became the comparatively most successful conception of international law, whose authority rested on presenting law as derived from state practice and historical and social facts that could be observed, compared and classified by a professional community of international lawyers, or, in the words of Gustave Rolin-Jaequemyns, as a ‘science of facts’.³⁰ Internal legal and administrative organisation thus became evidence through which external actors judged a polity’s capacity for ‘civilised’ statehood and its corresponding legal position within international society.³¹

Jurists and officials gave particular attention to the operation of domestic courts and legal codes, the protection of life and property, and the ability of state authorities to maintain order and enforce the law.³² Perceived

²⁹ Tzouvala (n 7) 46–47; Mustafa Serdar Palabıyık, ‘The Emergence of the Idea of “International Law” in the Ottoman Empire Before the Treaty of Paris (1856)’ (2014) 50(2) *Middle Eastern Studies* 233, 234–235, 242.

³⁰ Tzouvala (n 7) 46, 48–53; Gustavo Gozzi, ‘History of International Law and Western Civilization’ (2007) 9(4) *International Community Law Review* 353, 353–357; Gustave Rolin-Jaequemyns, ‘Les principes philosophiques du droit international’ (1885) 17 *Revue de Droit International et de Législation Comparée* 517, 521.

³¹ Tzouvala (n 7) 44–45, 76–80; Özsu (n 22) 132–33; Richard S Horowitz, ‘International Law and State Transformation in China, Siam, and the Ottoman Empire During the Nineteenth Century’ (2004) 15(4) *Journal of World History* 445, 462–65, 467; Rodogno (n 21) 18.

³² Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge University Press 2010) 47; Horowitz (n 31) 462–63, 467; Liliana Obregón, ‘The Civilized and the Uncivilized’ in Bardo

deficiencies in domestic legal systems were invoked to justify unequal treaties and extraterritorial jurisdiction, particularly where local courts were considered inadequate to protect foreign nationals and their commercial interests.³³ The British Foreign Office, in its confidential note of 19 June 1889 supported the continuation of extraterritoriality in Japan on the basis of uncertainty over the conformity of Japanese laws with Western standards, police reorganisation and the functioning of the courts.³⁴

The assessment of being ‘civilised’, as Tzouvala argues, oscillated between a ‘logic of improvement’, under which institutional change could lead to equal treatment, and a ‘logic of biology’, which attributed differences between polities to immutable characteristics, such as race and culture.³⁵ The coexistence of these two argumentative patterns meant that the evidence of reform did not have a fixed legal meaning, since the same institutional change could be read either as proof of advancement or as insufficient to overcome presumed difference.³⁶ Tzouvala’s distinction is relevant here to the instability of sufficiency within the nineteenth-century standard, rather than as a template for the later accession analysis. Non-European lawyers and officials did not accept these classifications, as they invoked their own reforms to argue that unequal legal treatment could no longer be justified.³⁷

Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 935.

³³ Horowitz (n 31) 455, 462–63; Özsü (n 22) 123–25, 132–33, 137.

³⁴ Tzouvala (n 7) 78; Jacques E C Hymans, ‘Why Recognize? Explaining Victorian Britain’s Decision to Recognize the Sovereignty of Imperial Japan’ (2014) 12 *The Korean Journal of International Studies* 49, 58–59.

³⁵ Tzouvala (n 7) 44–45.

³⁶ Tzouvala (n 7) 54–55; Hymans (n 34) 58–60.

³⁷ Arnulf Becker Lorca, ‘Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation’ (2010) 51(2) *Harvard International Law Journal* 475, 496–498, 547; Aimee M Genell, ‘Autonomous Provinces and the Problem of “Semi-Sovereignty” in European International Law’ (2016) 18(6) *Journal of Balkan and Near Eastern Studies* 533, 537–538.

Their challenge was directed less at the relevance of reform than at the Western claim to decide whether reform was enough to change a polity's civilised status.³⁸

Competing assessments of reform were worked out through dispersed juristic, diplomatic and interstate practices, in which different actors possessed different forms of authority to give those assessments practical or legal effect.³⁹ International lawyers presented themselves as authoritative interpreters to classify polities and judge whether they had attained civilised status, but their assessments did not themselves change treaty relations or terminate extraterritoriality.⁴⁰ The Institut de Droit international was one forum in which international lawyers exercised this professional role, including through debates over the application of European international law to non-European states.⁴¹ Diplomatic officials, treaty conferences and commissions translated juristic standards into case-specific assessments by examining domestic legal institutions.⁴² In inquiries such as the 1926 Commission on Extraterritoriality, they converted that examination into findings and recommendations for governments that retained authority over their treaty privileges.⁴³ Article XII of the 1902 Mackay Treaty linked Chinese judicial reform to the possible relinquishment of British extraterritorial rights, while leaving Britain to determine whether Chinese laws, their administration and other relevant considerations were sufficient

³⁸ Becker Lorca (n 37) 496–498, 547; Aydin (n 28) 4–6, 17–21.

³⁹ Horowitz (n 31) 448–50; Rodogno (n 21) 6–7; Tzouvala (n 7) 77–80.

⁴⁰ Rodogno (n 21) 6–7; Tzouvala (n 7) 52–53.

⁴¹ Tzouvala (n 7) 53; Özsu (n 22) 133–134.

⁴² Turan Kayaoğlu, 'The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality' (2007) 51(3) *International Studies Quarterly* 649, 658–61, 665–69; Horowitz (n 31) 455–457, 465.

⁴³ Commission on Extraterritoriality in China, *Report of the Commission on Extraterritoriality in China, Peking, September 16, 1926* (Government Printing Office 1926) 89–104, 107–09; Tzouvala (n 7) 77–78.

to warrant that change.⁴⁴ These practices distinguished between carrying out reform, judging its adequacy, and deciding whether that judgment warranted a change in the legal relationship, even where the same treaty power performed the latter two functions.

2. Ottoman Reform between Claims to Equal Treatment and External Assessment

Long before the nineteenth century the Ottoman Empire had already maintained treaty and diplomatic relations with European powers.⁴⁵ During the nineteenth century, however, those relations became increasingly asymmetrical due to the expansion of European intervention and extraterritorial jurisdiction.⁴⁶ Ottoman officials used these legal and diplomatic practices for different purposes, including resisting intervention and protecting territorial security to asserting reciprocity and legal standing.⁴⁷ Within this broader repertoire, reform became increasingly important as Ottoman officials linked internal change to European support, territorial security and claims to legal equality.⁴⁸

In response to the French invasion of Egypt in 1798, the Empire relied on the law of nations to present the occupation as an unlawful violation of Ottoman territorial rights.⁴⁹ This legal argument was also used in the 1805 alliance with Russia, where the existing law of nations was linked to maintaining the European balance of power.⁵⁰ Ottoman officials returned to these legal claims in 1807 by grounding war against Russia in breaches of existing treaties, and in 1827 by protesting the Navarino intervention as

⁴⁴ Treaty between the United Kingdom and China Respecting Commercial Relations (n 7) art XII.

⁴⁵ Palabıyık (n 29) 235–236.

⁴⁶ Rodogno (n 21) 5–6, 22–23; Horowitz (n 31) 455–462.

⁴⁷ Palabıyık (n 29) 239–242.

⁴⁸ Aydın (n 28) 7, 21–22.

⁴⁹ Minawi (n 20) 1104; Palabıyık (n 29) 240.

⁵⁰ Aydın (n 28) 5; Palabıyık (n 29) 241.

contrary to the law of nations.⁵¹ In 1840, the Empire participated in the London negotiations over Egypt and the Straits and concluded the resulting treaty as an equal party alongside the European powers.⁵²

Behind the 1840 settlement was the Egyptian crisis of the late 1830s, which threatened Ottoman territorial integrity and increased the Empire's need for European diplomatic and military support.⁵³ However, Ottoman officials differed over how territorial integrity should be protected under these conditions. Hüsrev Paşa framed the protection of Ottoman territorial integrity through Vattel's language of sovereign equality to reject the civilised/barbarian hierarchy and resist intervention, while prioritising military reform rather than political and legal reform.⁵⁴ Mustafa Reşid Paşa, conversely, pursued a 'self-civilising' strategy that placed greater emphasis on how reforms could support the Empire's inclusion in the European order.⁵⁵ Drafted by Reşid Paşa, the Gülhane Imperial Edict of 1839 placed domestic reform within an official programme by promising Ottoman subjects security of life, honour and property that also sought to justify claims to European military and financial assistance during territorial crises.⁵⁶

The Crimean War was one such crisis, during which Britain, France and Sardinia fought alongside the Ottoman Empire against Russia.⁵⁷ At the end of the war, Article VII of the Treaty of Paris admitted the Porte to the 'advantages of the Public Law and System (Concert) of Europe', while the

⁵¹ Palabıyık (n 29) 241. See also Aydın (n 28) 5.

⁵² Palabıyık (n 29) 239.

⁵³ Aydın (n 28) 6–7.

⁵⁴ Aydın (n 28) 7; Palabıyık (n 29) 242–44.

⁵⁵ Aydın (n 28) 7; Palabıyık (n 29) 241.

⁵⁶ Palabıyık (n 29) 241; Ayşe Zarakol, *After Defeat: How the East Learned to Live with the West* (CUP 2011) 117; Aydın (n 28) 13.

⁵⁷ Roderic H Davison, 'Ottoman Diplomacy at the Congress of Paris (1856) and the Question of Reforms' in *VII. Türk Tarih Kongresi: Ankara 25–29 Eylül 1970 Kongreye Sunulan Bildiriler* (Türk Tarih Kurumu 1973) vol II, 582.

Powers undertook to respect and collectively guarantee the Empire's independence and territorial integrity.⁵⁸ The Treaty also addressed the Reform Edict issued by the Sultan only weeks earlier, which extended promises of legal equality amongst his subjects.⁵⁹ Ottoman ministers regarded the Edict as an exercise of sovereign authority that should remain outside the Treaty, but the allied Powers insisted that Article IX record both its communication and their recognition of its 'high value'.⁶⁰ Article IX therefore made Ottoman reform an object of international evaluation.⁶¹ In Protocol XIV, Âli Paşa argued that capitulatory privileges restricted the local administration creating overlapping foreign jurisdictions that obstructed reform, within a broader regime that also enabled foreign offenders to evade Ottoman justice and extended foreign protection to Ottoman subjects.⁶²

⁵⁸ General Treaty for the Re-establishment of Peace (signed 30 March 1856, entered into force 27 April 1856) 114 CTS 409 ('Treaty of Paris') art VII.

⁵⁹ Sultan Abdülmecid, 'Firman and Hatti-Sherif by the Sultan, Relative to Privileges and Reforms in Turkey' (18 February 1856) 47 British and Foreign State Papers 1363, 1363–68; Treaty of Paris, art IX; Davison (n 57) 582–584.

⁶⁰ Treaty of Paris, art IX; Davison (n 57) 582–85.

⁶¹ On examination as a combination of observation and normalising judgment through which subjects become objects of evaluation see Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, Vintage Books 1995) 184–94. On the absence of a fixed standard that automatically determined legal status and on the role of negotiation and agreement in determining legal consequences see Koskeniemi (n 24) 134–35.

⁶² HC Deb 10 July 1868, vol 193, cols 1029–30; Berna Kamay, 'The Ottoman Empire, the United States, and the Legal Battle over Extradition: The "Kelly Affair"' (2021) 65 *New Perspectives on Turkey* 78, 94; Horowitz (n 31) 461; Daniel-Joseph MacArthur-Seal, 'Resurrecting Legal Extraterritoriality in Occupied Istanbul, 1918–1923' (2018) 54(5) *Middle Eastern Studies* 769, 771. The extension of foreign protection to local subjects operated in part through *berats*, patents of protection whose holders (*beratlı*) could come within foreign consular protection and jurisdiction, see Zülâl Muslu, 'Ottoman Mixed Commercial Courts' in Anne Peters and Hélène Ruiz Fabri (eds), *Max Planck*

While the delegates agreed that these privileges restricted the Empire's authority, they deferred the issue.⁶³ Formal admission and the guarantee of Ottoman independence thus coexisted with the continued operation of the capitulations and the restrictions they placed on Ottoman jurisdiction.⁶⁴

Judicial reform served Ottoman officials both as a means of improving the administration of justice and as part of their claim for the removal of capitulatory privilege.⁶⁵ Ottoman judicial reform included the adaptation of commercial and criminal codes and the introduction of procedural laws for the Nizamiye courts.⁶⁶ The mixed commercial courts placed disputes between Ottoman subjects and foreigners within the Ottoman legal order.⁶⁷ When the Empire sought to subject judgments of the first chamber of the Istanbul Commercial Court to the Ottoman Court of Cassation, the foreign missions opposed the proposal because that court did not include foreign assessors.⁶⁸ The mixed courts enlarged the reach of Ottoman territorial jurisdiction without bringing mixed litigation to the ordinary judicial hierarchy, since foreign assessors remained part of the court and the missions resisted appellate review by a body in which they had no representation.⁶⁹

Encyclopedia of International Procedural Law (Oxford University Press 2022) paras 5–6.

⁶³ HC Deb 10 July 1868, vol 193, cols 1029–30.

⁶⁴ Treaty of Paris, art VII; HC Deb 10 July 1868, vol 193, cols 1029–30; Genell (n 37) 535–36; Kamay (n 62) 94.

⁶⁵ MacArthur-Seal (n 62) 772. Under the capitulatory regime, disputes involving foreign defendants could fall within consular rather than Ottoman jurisdiction, since the applicable forum generally followed the defendant, see Muslu (n 62) para 7.

⁶⁶ MacArthur-Seal (n 62) 772; Avi Rubin, 'Modernity as a Code: The Ottoman Empire and the Global Movement of Codification' (2016) 59(5) *Journal of the Economic and Social History of the Orient* 828, 829.

⁶⁷ Muslu (n 62) paras 2, 14–18, 25.

⁶⁸ Muslu (n 62) para 38.

⁶⁹ Muslu (n 62) paras 20–22, 38.

The turn toward codification and centralised administration was therefore not an inevitable conception of sovereign reform, but became increasingly attractive because, amid territorial insecurity and external judgments of legal inadequacy, it offered a means both to contest constraints on equal standing and to consolidate the central state's authority over competing jurisdictions.⁷⁰

The Eastern crisis of 1875–78 strengthened claims among European jurists and policymakers that the Ottoman government was unable or unwilling to protect its Christian subjects and implement promised reforms.⁷¹ European jurists read these alleged failures of 'good government' as evidence of deficient civilisation and used that diagnosis to defend exceptions to the principle of non-intervention, making the Empire, in Umut Özsu's terms, a 'laboratory' for 'exceptional' modes of interference.⁷² Following the crisis, Article 61 of the Treaty of Berlin required the Empire to carry out reforms in the Armenian-inhabited provinces and communicate periodically to the Powers the measures adopted.⁷³ In 1880, when the six Powers requested such information, Earl Granville, the British Foreign Secretary, passed the Ottoman response to British consuls in Anatolia for observations, adding consular reports and local information to the documentary assessment of implementation.⁷⁴ While the Empire questioned the consular accounts, British officials challenged the Ottoman population figures, and the two sides disagreed over whether reform should apply generally or be only for the Armenian-inhabited provinces.⁷⁵ The representatives of the Powers considered the Ottoman proposals as insufficient, and British statements in

⁷⁰ Genell (n 37) 533–34; Aydin (n 28) 19–20; Tzouvala (n 7) 78–79.

⁷¹ Rodogno (n 21) 20–21; Aydin (n 28) 16–17.

⁷² Rodogno (n 21) 6, 20–21; Özsu (n 22) 128.

⁷³ Treaty for the Settlement of Affairs in the East (signed 13 July 1878, entered into force 3 August 1878) 153 CTS 171 ('Treaty of Berlin') art 61.

⁷⁴ Great Britain, Foreign Office, *Further Correspondence Respecting Administrative Reforms in the Asiatic Provinces of Turkey, Part III, July to December 1880* (March 1881) FO 424/107, no 4, 7, no 78, 118–19.

⁷⁵ HC Deb 23 July 1880, vol 254, col 1313; FO 424/107 (n 74) no 118, 190–94.

1881 and 1882 reported that the promised reforms had either not been carried out or had produced no benefit.⁷⁶ Article 61 made minority protection the subject of a recurring treaty-based documentary relationship and gave this involvement of the Powers in monitoring and assessing reform implementation an operative structure.⁷⁷ Although the Empire supplied the official account of reform, the Powers judged its sufficiency on a record that their own consuls had helped to produce.⁷⁸ Yet this documentary relation remained diplomatic without consolidating into a standing supervisory institution.⁷⁹

Having failed to secure the abolition of the capitulations by agreement required under later nineteenth-century treaties, the Empire abolished them unilaterally in September 1914, invoking its long programme of legal reform to claim the judicial sovereignty that European diplomacy had not conceded.⁸⁰ The unratified 1920 Treaty of Sèvres would have reversed that assertion of judicial sovereignty. It would have restored the capitulatory regime and left the shape of its eventual replacement to an Allied commission, whose approved scheme the Ottoman government had agreed

⁷⁶ FO 424/107 (n 74) no 118, 190–94; HC Deb 14 February 1881, vol 258, cols 767–68; HC Deb 2 March 1882, vol 266, cols 1929–30.

⁷⁷ Treaty of Berlin art 61; FO 424/107 (n 74) no 4, 7, no 78, 118–119, no 118, 190–94.

⁷⁸ FO 424/107 (n 74) no 4, 7, no 78, 118–119, no 118, 190–94.

⁷⁹ Great Britain, Foreign Office, *Further Correspondence Respecting Administrative Reforms in the Asiatic Provinces of Turkey*, Part IV, January to June 1881 (December 1881) FO 424/122, nos 22–24, 30; Mustafa Turan and Emel Demir Görür, ‘İngiltere’nin Anadolu Genel Konsolosu Charles William Wilson ile Erzurum Konsolosu Henry Trotter’ın Ermenilerle Meskûn Bölgelerin Islahına Yönelik Hazırladıkları Islahat Projeleri’ (2018) 44 OTAM Ankara Üniversitesi Osmanlı Tarihi Araştırma ve Uygulama Merkezi Dergisi 311, 313–15.

⁸⁰ Foreign Office, *Correspondence Respecting Events Leading to the Rupture of Relations with Turkey* (Cd 7628, 1914) 8–9, 22–24; MacArthur-Seal (n 62) 772–73.

in advance to accept.⁸¹ However, by 1922, nationalist forces controlled Anatolia, and their victories brought the Allies into a new peace negotiation at Lausanne.⁸² Britain's Foreign Secretary and chief negotiator, George Nathaniel Curzon, pointed to the Muslim religious foundations of Turkish civil law as a source of its alleged inadequacy, while the initial Allied judicial scheme would have placed international jurists in the majority in trials of foreigners in Istanbul, Izmir and Bursa.⁸³ Rather than removing foreign expertise altogether, the Turkish counterproposal narrowed the place of foreign legal involvement.⁸⁴ Article 28 of the Treaty of Lausanne then abolished the capitulations 'in every respect'.⁸⁵ The separate Declaration Relating to the Administration of Justice still referred to reforms made advisable by the development of 'manners and civilisation', but placed the counsellors under the Turkish Minister of Justice for at least five years.⁸⁶ They would work for the Turkish government, advise on legal reform, observe the courts, submit reports and receive complaints, but could not interfere with the judges in the exercise of their functions.⁸⁷ Although Lausanne changed the legal form of European involvement by separating scrutiny from jurisdiction, knowledge about how Turkish courts operated continued to be produced through European observers authorised to record problems and identify possible reforms.

⁸¹ Treaty of Peace with Turkey (signed 10 August 1920, never entered into force) [1920] UKTS 11 ('Treaty of Sèvres') arts 136, 261; MacArthur-Seal (n 62) 776.

⁸² MacArthur-Seal (n 62) 777, 780.

⁸³ Foreign Office, *Lausanne Conference on Near Eastern Affairs, 1922–1923: Records of Proceedings and Draft Terms of Peace* (Cmd 1814, 1923) 496–97, 507–08.

⁸⁴ Foreign Office, *Lausanne Conference* (n 83) 852–54; MacArthur-Seal (n 62) 781–82.

⁸⁵ Treaty of Peace with Turkey (signed 24 July 1923, entered into force 6 August 1924) 28 LNTS 11 ('Treaty of Lausanne') art 28.

⁸⁶ Declaration by Turkey Relating to the Administration of Justice (signed 24 July 1923) 36 LNTS 161 ('Justice Declaration') preamble, para 1.

⁸⁷ Justice Declaration, para 2.

3. From Supervised Preparation to Sovereign Equality, and the Opening of a Different Route

In the aftermath of the First World War, annexation, claims to self-determination and new forms of international supervision competed over the political future of former territories of Germany and the Ottoman Empire.⁸⁸ The Mandate System emerged from these competing possibilities by placing certain territories formerly governed by the defeated empires within a new international regime of tutelage under Article 22 of the Covenant of the League Nations (the League).⁸⁹ Its adoption was therefore a contingent settlement among competing post-war projects rather than the inevitable form of the post-war territorial order. The extent of international tutelage varied according to the alleged stage of development of the mandated communities, with the A Mandates considered sufficiently advanced for their existence as independent nations to be provisionally recognised.⁹⁰ In the Iraqi case, for example, this provisional recognition did not itself end tutelage, as it left open the question of what characteristics and reforms were sufficient to gain full independence and sovereign statehood.⁹¹ More broadly, full sovereign independence was treated not simply as a status to be recognised according to a polity's perceived fitness, but an end to be produced, as international institutions were, in Anghie's words, 'actively engaged in the process of creating sovereignty'.⁹²

⁸⁸ Tzouvala (n 7) 88–93; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 115–20.

⁸⁹ Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) 108 LNTS 188 ('League Covenant') art 22(1)–(2); Anghie (n 88) 116, 120–121.

⁹⁰ League Covenant, art 22(3)–(4); Tzouvala (n 7) 97–99; Anghie (n 88) 121–22.

⁹¹ Tzouvala (n 7) 89, 124–25; Quincy Wright, 'The Proposed Termination of the Iraq Mandate' (1931) 25(3) *American Journal of International Law* 436, 439–442.

⁹² Anghie (n 88) 148.

Assessments of mandated communities' development extended beyond legal and administrative arrangements to the broader political, administrative, economic and social conditions considered necessary by League institutions for self-government.⁹³ Mandatory powers were required to submit annual reports to the League, while the Permanent Mandates Commission (PMC) examined those reports and advised the League Council, which defined the terms of each mandate and retained the power to end supervision.⁹⁴ Annual reports were supplemented by questionnaires, petitions and additional information requested by the Commission.⁹⁵ For example, landholding, education, health, labour and related public expenditure became part of the factual basis on which the PMC assessed the administration and development of mandated territories.⁹⁶ Judgment was thus anchored in recurring practices of reporting, standard-setting and evaluation, giving supervision a regular institutional form through which information could be collected and assessed over time.

⁹³ Anghie (n 88) 117, 150–52; Tzouvala (n 7) 106–107.

⁹⁴ League Covenant, art 22(7)–(9); 'Note by M. van Rees: General Conditions that must be fulfilled before the mandate regime can be brought to an end in respect of a country placed under that regime' (1931) 20 Permanent Mandates Commission Minutes, annex 3, 197; 'Note by Lord Lugard' (1931) 20 Permanent Mandates Commission Minutes, annex 3, 201; Tzouvala (n 7) 103–106.

⁹⁵ League of Nations, Permanent Mandates Commission, "B" Mandates: Questionnaire Intended to Facilitate the Preparation of the Annual Reports of the Mandatory Powers' League of Nations Doc C.396.1921.VI (C.P.M.7); League of Nations, Permanent Mandates Commission, "C" Mandates: Questionnaire Intended to Facilitate the Preparation of the Annual Reports of the Mandatory Powers' League of Nations Doc C.397.M.299.1921.VI; League of Nations, Permanent Mandates Commission, 'Mandate for Palestine: Questionnaire Intended to Assist the Preparation of the Annual Reports of the Mandatory Powers' League of Nations Doc C.553.M.335.1922.VI (23 August 1922); Tzouvala (n 7) 105–107.

⁹⁶ Anghie (n 88) 150–52; Tzouvala (n 7) 106–107.

After the Second World War, the demise of the League and the creation of the United Nations (UN) did not bring internationally supervised administration to an end.⁹⁷ While the UN Charter established sovereign equality among its members, several former mandate territories were placed within the new Trusteeship System and remained subject to international supervision of their preparation for self-government.⁹⁸ The UN Charter continued to refer to the ‘progressive development’ of political institutions according to territories’ ‘varying stages of advancement’ and provided for movement towards either self-government or independence.⁹⁹ However, this organisation of political advancement through international supervision was increasingly contested as colonial powers sought to preserve empire while anti-colonial and socialist actors pressed for independence.¹⁰⁰ As decolonisation advanced, self-determination became increasingly associated with a right to sovereign independence rather than continued supervised preparation for it.¹⁰¹ This change was reflected in Resolution 1514, which rejected political, economic, social or educational unpreparedness as a basis for postponing independence, thereby removing insufficient domestic

⁹⁷ UN Charter arts 75–76.

⁹⁸ UN Charter arts 2 (1), 76 (b), 77 (1) (a); UNGA Res 63(I) (13 December 1946) UN Doc A/RES/63(I).

⁹⁹ UN Charter arts 73 (b), 76 (b).

¹⁰⁰ Jessica Lynne Pearson, ‘Defending Empire at the United Nations: The Politics of International Colonial Oversight in the Era of Decolonisation’ (2017) 45(3) *The Journal of Imperial and Commonwealth History* 525, 525–530; Cindy Ewing, ‘“With a Minimum of Bitterness”: Decolonization, the Right to Self-Determination, and the Arab-Asian Group’ (2022) 17(2) *Journal of Global History* 254, 257–260.

¹⁰¹ Elisabeth Leake, ‘States, Nations, and Self-Determination: Afghanistan and Decolonization at the United Nations’ (2022) 17(2) *Journal of Global History* 272, 278–279.

preparedness as a general basis for withholding sovereign independence even though standards and forms of external assessment remained.¹⁰²

As newly independent Asian and African states entered international society as juridical equals, the distinction between ‘civilised’ European states entitled to sovereignty and non-European political communities whose sovereign standing had been qualified or denied ceased to organise sovereign status, and Europe lost the privileged legal position from which it had claimed authority to define and judge civilisation.¹⁰³ European integration developed alongside decolonisation as one response to Europe’s post-war position, allowing Western European states to rebuild their economies, reorder their interstate relations and recover a measure of autonomy within an international order dominated by the United States and the Soviet Union.¹⁰⁴ The language of civilisation did not disappear from European legal and political texts after the war. Its evaluative work, however, increasingly appeared in the language of standards and assessment, while explicit invocations of civilisation came to describe a role claimed for an organised Europe rather than to rank other polities’ fitness for sovereign standing.¹⁰⁵

The Schuman Declaration of 1950, which proposed the creation of the European Coal and Steel Community (ECSC), described the contribution of an ‘organised and living Europe’ to civilisation as indispensable to peaceful relations and identified the development of the African continent as one of Europe’s ‘essential tasks’.¹⁰⁶ The preamble to the 1951 Treaty, which

¹⁰² UNGA Res 1514(XV) (14 December 1960) UN Doc A/RES/1514(XV) para 3; UNGA Res 1654(XVI) (27 November 1961) UN Doc A/RES/1654(XVI).

¹⁰³ Signe Rehling Larsen, ‘European Public Law after Empires’ (2022) 1 *European Law Open* 6, 10–11, 15–17; Silvia and Sampson (n 12) 7, 10, 17.

¹⁰⁴ Larsen (n 103) 15–20.

¹⁰⁵ Tzouvala (n 7) 109; Larsen (n 103) 20–21.

¹⁰⁶ Robert Schuman, ‘Schuman Declaration May 1950’ (European Union, 9 May 1950) <https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en> accessed 21 August 2026.

established the ECSC, repeated the connection between an organised Europe, civilisation and peaceful relations.¹⁰⁷ At the first session of the Common Assembly in 1952, Jean Monnet described the new supranational institutions as part of a European revolution that would arrest the decline of European civilisation.¹⁰⁸ The Organisation for European Economic Co-operation promoted common investment in overseas territories and the Council of Europe developed Eurafrican plans for the collective exploitation of African resources, while Part IV of the Treaty of Rome placed the development and economic relations of the Member States' overseas countries and territories within a collective Community framework.¹⁰⁹ Nora Fisher Onar and Kalypso Nicolaïdis interpret this combination of post-war reconstruction and collective colonial reorganisation as containing a 'desire for continuity' with empire.¹¹⁰

Nicolaïdis and others describe the emerging rules governing relations among the participating European states as 'standards of cooperation', part

¹⁰⁷ Treaty Establishing the European Coal and Steel Community (signed 18 April 1951, entered into force 23 July 1952) 261 UNTS 140 ('ECSC Treaty') preamble.

¹⁰⁸ Jean Monnet, 'Opening Address to the Common Assembly concerning the High Authority's Programmes' (Strasbourg, 11 September 1952), reproduced in European Parliament, *From the Schuman Declaration to the Birth of the ECSC: The Role of Jean Monnet* (CARDOC Journals No 6, May 2010) 55, 61.

¹⁰⁹ Treaty Establishing the European Economic Community (signed 25 March 1957, entered into force 1 January 1958) 298 UNTS 11 ('EEC Treaty') pt IV, arts 131–36; Peo Hansen and Stefan Jonsson, 'Building Eurafrica: Reviving Colonialism through European Integration, 1920–1960' (EUSA Twelfth Biennial International Conference, Boston, 3–5 March 2011) 14–17; Nora Fisher Onar and Kalypso Nicolaïdis, 'The Decentring Agenda: Europe as a Post-Colonial Power' (2013) 48(2) *Cooperation and Conflict* 283, 293; Larsen (n 103) 20–23.

¹¹⁰ Fisher Onar and Nicolaïdis (n 109) 293.

of what they characterise as an effort ‘to civilise Europe itself’.¹¹¹ These standards were initially concerned with trade liberalisation, competition rules and the movement of workers and were shaped in common and adopted voluntarily by the participating states.¹¹² As cooperation within the Community deepened, these standards increasingly required changes within national legal orders, including adjustments to domestic rules governing banks and social rights for the completion of the internal market.¹¹³ Article 100 of the Treaty of Rome authorised directives approximating national laws affecting the functioning of the common market, while Article 189 made such directives binding on Member States as to the result to be achieved.¹¹⁴ Unlike in the nineteenth-century arrangements examined above, domestic legal change within this internal arrangement did not serve to demonstrate an outsider’s fitness for sovereign standing but enabled already sovereign Member States to give effect within their own legal orders to rules they had shaped in common.¹¹⁵ Article 237 of the Treaty of Rome nevertheless provided a procedure through which European states could apply for membership, but it did not connect admission to an applicant’s prior adoption or implementation of Community law.¹¹⁶

III. THE CONSTRUCTION OF ACCESSION CONDITIONALITY AND THE SEPARATION OF ASSESSMENT FROM CHAPTER MOVEMENT

At the first meeting of the EEC Council in January 1958, Commission President Walter Hallstein described the Treaty as ‘not a static treaty’ but as

¹¹¹ Kalypso Nicolaïdis and others, ‘From Metropolis to Microcosmos: The EU’s New Standards of Civilisation’ (2014) 42(3) *Millennium: Journal of International Studies* 718, 729.

¹¹² Nicolaïdis and others (n 111) 729.

¹¹³ Nicolaïdis and others (n 111) 731.

¹¹⁴ EEC Treaty, arts 100 and 189.

¹¹⁵ EEC Treaty, arts 100 and 189; Nicolaïdis and others (n 111) 729, 731.

¹¹⁶ EEC Treaty, art 237.

one that envisaged ‘a continual progression’.¹¹⁷ The Treaty itself organised the establishment of the common market around a twelve-year transitional period divided into three stages.¹¹⁸ Movement from the first to the second stage depended on a finding that the objectives assigned to the first stage had been attained in substance and that the relevant obligations had been fulfilled.¹¹⁹ One year after the Treaty entered into force, Member States were required to make the first reduction in customs duties between them.¹²⁰ By the time enlargement became a practical question, the progression Hallstein described was already underway.¹²¹ The question was whether an applicant could reopen the commitments produced in the course of that development, or whether those commitments would set the terms of entry.

1. From Acceptance of Community Commitments to Assessed Preparedness

In 1958, the European Economic Community (EEC) and European Atomic Energy Community (Euratom) started operating with the existing ECSC.¹²² Although they shared a Court and Parliamentary Assembly, each Community was governed by its own treaty, executive and procedures.¹²³ Despite the separate treaties and executives, a single Legal Service started working across all three Communities in 1958, which advised on proposed

¹¹⁷ Walter Hallstein, ‘Address at the First Meeting of the EEC Council of Ministers’ (Speech at the First Meeting of the EEC Council of Ministers, Brussels, 25 January 1958) 2<https://www.cvce.eu/content/publication/2002/11/13/23fdb3ca-36f5-45e5-9c1e-f663f11101c3/publishable_en.pdf> accessed 30 August 2026.

¹¹⁸ EEC Treaty, art 8(1).

¹¹⁹ EEC Treaty, art 8(3).

¹²⁰ EEC Treaty, arts 14(2)(a), (3).

¹²¹ HC Deb 31 July 1961, vol 645, cols 928–31; EEC Treaty, arts 8, 14.

¹²² Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015) 15–16, 19, 23.

¹²³ Vauchez, *Brokering Europe* (n 122) 16, 23.

acts and sought to build ‘one body of law’ for the six Member States.¹²⁴ In its 1963 judgment in *Van Gend en Loos*, the Court of Justice held that Treaty provisions could create rights that national courts must protect, and in *Costa* the following year, it held that domestic legislation could not override Community law.¹²⁵ Throughout the 1960s, regulations, directives and decisions were issued by the Council and Commission.¹²⁶ A decade later, the volume of the Official Journal expanded from 2,784 pages to more than 45,000 pages, so much so that it became difficult to manage.¹²⁷ In 1967, the Commission responded to this accumulation by classifying acts and resolutions according to their legal effects, while the Legal Service also started building CELEX to collect and search acts and judgments.¹²⁸ These developments made Community law identifiable as a body of law enforceable within Member States.

When the United Kingdom applied in 1961, it approached Article 237 of the EEC Treaty on the basis that the conditions of entry remained open to negotiation, including arrangements protecting its own interests and those of the Commonwealth and the European Free Trade Association (EFTA).¹²⁹ In a separate Opinion issued in 1967, the Commission stated that the new members would have to accept the objectives of the Treaties and the decisions taken since their adoption, with transitional measures being taken in case of a problem rather than changing existing rules.¹³⁰ In 1969, the

¹²⁴ Vauchez, *Brokering Europe* (n 122) 30–33.

¹²⁵ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, [1963] ECR 1; Case 6/64 *Flaminio Costa v ENEL* EU:C:1964:66, [1964] ECR 585.

¹²⁶ EEC Treaty, art 189; Vauchez, ‘Methodological Europeanism at the Cradle’ (n 10) 197.

¹²⁷ Vauchez, ‘Methodological Europeanism at the Cradle’ (n 10) 197.

¹²⁸ Vauchez, ‘Methodological Europeanism at the Cradle’ (n 10) 198–201.

¹²⁹ HC Deb 31 July 1961, vol 645, col 930.

¹³⁰ Commission of the European Communities, ‘Opinion on the Applications for Membership’ (n 10) paras 9–10.

Commission's position became a shared political premise as the Heads of State or Government agreed at The Hague that negotiations would open only on that basis.¹³¹ This agreed position still allowed applicants to negotiate transitional periods and technical adaptations, but they could not reopen every existing Community rule.¹³² By 1972, that acceptance extended to the Treaties and to the acts adopted by the institutions before accession, which the Act of Accession made binding on the new Member States.¹³³ The character of those rules as a Community legal order defined by direct applicability, primacy and uniform interpretation had been established by the Court rather than by the Act, so an applicant entered a legal order whose doctrines of direct effect and primacy had already been developed before its accession.¹³⁴ Existing members therefore negotiated from within an order they had helped create, while applicants negotiated as states seeking admission to it.

¹³¹ Commission of the European Communities, 'Opinion concerning the applications for membership from the United Kingdom, Ireland, Denmark and Norway submitted under articles 237 of the EEC Treaty, 205 of the Euratom Treaty and 98 of the ECSC Treaty' COM (69) 1000, paras 9–10; Conference of Heads of State or Government, 'Final communiqué of the Conference' (2 December 1969) Bulletin of the European Communities No 1-1970, 11, 16 (point 13).

¹³² Commission of the European Communities, 'Opinion concerning the Applications for Membership' (n 131) paras 9–10; Act concerning the Conditions of Accession and the Adjustments to the Treaties [1972] OJ L 73/14 ('1972 Act of Accession'), arts 2 and 8–9.

¹³³ 1972 Act of Accession, arts 2–4.

¹³⁴ Van Gend en Loos (n 125) 12; Costa v ENEL (n 125) 593–94; Commission Opinion of 19 January 1972 on the Applications for Accession to the European Communities by the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland [1972] OJ L 73/3.

Over the same period, Community actors also began to ask whether an applicant's political system was compatible with membership.¹³⁵ In its 1962 Birkelbach Report, the European Parliamentary Assembly connected the applicant's domestic political order to the decision on admission, identifying democratic government as a condition of membership and the rule of law, human rights and fundamental freedoms as considerations in that decision.¹³⁶ These political requirements soon had practical consequences for the Community's relations with authoritarian European states, as Francoist Spain did not obtain an association with a view to membership and the Community suspended the future development of Greece's existing association after the 1967 coup.¹³⁷ In 1973, the Communities' nine Member States placed their Treaties, institutions and common policies within 'a common European civilization' and described the United Europe they were constructing as open to other European nations sharing their ideals and objectives, while two years later the Tindemans Report presented 'a progressive Europe' whose values were to be demonstrated 'to those within and without'.¹³⁸ In 1978, the European Council made this connection

¹³⁵ Emma De Angelis and Eirini Karamouzi, 'Enlargement and the Historical Origins of the European Community's Democratic Identity, 1961–1978' (2016) 25 *Contemporary European History* 439, 444–445.

¹³⁶ European Parliamentary Assembly, 'Report on Behalf of the Political Committee on the Political and Institutional Aspects of Accession or Association to the Community' (Willi Birkelbach rapporteur) Working Documents 1961–1962, Doc 122 (15 January 1962) 4–5; De Angelis and Karamouzi (n 135) 444–445.

¹³⁷ Agreement between the European Economic Community and Spain [1970] OJ Spec Ed 270; Council of the European Communities, reply by Mr Schiller, President-in-Office, to an oral question concerning the EEC–Greece Association (28 November 1967) [1967] OJ 307/9; Ronald Janse, 'The Evolution of the Political Criteria for Accession to the European Community, 1957–1973' (2018) 24 *European Law Journal* 57, 64–71.

¹³⁸ 'Document on the European Identity Published by the Nine Foreign Ministers on 14 December 1973 in Copenhagen' Bulletin of the European Communities

explicit by declaring that respect for and maintenance of representative democracy and human rights in each Member State were essential elements of membership of the European Communities.¹³⁹ The object of assessment therefore extended from acceptance of Community law to the applicant's domestic political system.

As the prospect of enlargement to Central and Eastern Europe took shape after the Cold War, a further question concerned whether applicants could make the obligations of membership operate within their own legal orders.¹⁴⁰ In its 1992 report on enlargement, the Commission distinguished between accepting the Community system and having the capacity to implement it, noting that the obligations of membership had become more difficult to fulfil as the Community's legal, economic and political framework developed.¹⁴¹ A year later, the Copenhagen European Council made this capacity a condition of membership by requiring prospective members to have the ability to assume the obligations of membership.¹⁴² It also stated that the European Council would continue to follow each associated country's progress towards fulfilling the conditions of accession.¹⁴³ Copenhagen did not, however, specify how this ability was to be demonstrated.¹⁴⁴ The pre-

12/1973, 118, paras 2–4. Leo Tindemans, 'European Union: Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council' *Bulletin of the European Communities*, Supplement 1/76, 12.

¹³⁹ European Council, 'Declaration on Democracy' (Copenhagen, 7–8 April 1978) *Bulletin of the European Communities* 3/1978, 5–6.

¹⁴⁰ Commission, 'Europe and the Challenge of Enlargement' (24 June 1992) *Bulletin of the European Communities*, Supplement 3/92, paras 5, 9, 37–38.

¹⁴¹ Commission, 'Europe and the Challenge of Enlargement' (n 140) paras 9, 38.

¹⁴² European Council, 'Conclusions of the Presidency' (n 9) pt 7.A.iii.

¹⁴³ European Council, 'Conclusions of the Presidency' (n 9) pt 7.A.iii.

¹⁴⁴ European Council, 'Conclusions of the Presidency' (n 9) pt 7.A.iii; Ronald Janse, 'Is the European Commission a Credible Guardian of the Values? A Revisionist Account of the Copenhagen Political Criteria during the Big Bang Enlargement' (2019) 17(1) *International Journal of Constitutional Law* 43, 47.

accession strategy adopted at Essen in 1994 gave the requirement a more concrete form by making phased adoption of the internal-market *acquis* the central element of a route plan for preparing the associated countries for accession.¹⁴⁵ The *acquis* therefore began to operate before accession not only as the body of obligations that a new member would accept, but also as a reference point around which preparation for membership could be organised.¹⁴⁶

Using legal alignment in this way raised a further question about what adoption of the *acquis* could establish about preparedness in practice.¹⁴⁷ The Commission's 1995 White Paper distinguished legislative approximation from the structures needed to implement and enforce the resulting rules, treating 'merely formal transposition' as insufficient for the effective operation of the internal market.¹⁴⁸ Its assessment of the Central and Eastern European countries also found that establishing, staffing and making the necessary administrative structures operational was lagging behind the legislative process.¹⁴⁹ At Madrid later that year, the European Council incorporated the adjustment of candidate states' administrative structures into the pre-accession strategy for their gradual integration.¹⁵⁰ Once

¹⁴⁵ European Council, 'Presidency Conclusions' (Essen, 9–10 December 1994) annex IV, pts I, III.

¹⁴⁶ Commission, 'Europe and the Challenge of Enlargement' (n 140) paras 11 and 38; European Council, 'Presidency Conclusions' (n 145) annex IV, pt I.

¹⁴⁷ Commission of the European Communities, 'White Paper: Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union' COM(95) 163 final (3 May 1995) paras 1.12, 3.25; Antoaneta Dimitrova, 'Enlargement, Institution-Building and the EU's Administrative Capacity Requirement' (2002) 25(4) *West European Politics* 171, 177–179.

¹⁴⁸ Commission, 'White Paper' (n 147) Executive Summary, paras 1.12, 3.25–3.26.

¹⁴⁹ Commission, 'White Paper' (n 147) para 4.28.

¹⁵⁰ European Council, 'Presidency Conclusions' (Madrid, 15–16 December 1995) pt III.A; Dimitrova, 'Enlargement, Institution-Building' (n 147) 177.

administrative structures entered the pre-accession strategy, the *acquis* also provided the point of reference for asking whether domestic institutions could make aligned rules operate in practice.¹⁵¹ This extended accession assessment into areas of public administration in which the level of administrative capacity required for membership was not exhaustively specified by a uniform body of Community rules.¹⁵² Assessment therefore could not be reduced to checking compliance with existing rules, but required a further judgment as to whether the candidate's own institutions were sufficiently capable of implementing the obligations attached to membership.¹⁵³ Since that judgment remained with the existing Community, the relationship was becoming asymmetrical in a further respect, as Central and Eastern European applicants had to demonstrate the adequacy of their institutions while Community institutions judged whether that demonstration was sufficient.¹⁵⁴

¹⁵¹ Commission, 'White Paper' (n 147) paras 3.25–3.26; Dimitrova, 'Enlargement, Institution-Building' (n 147) 178–79.

¹⁵² Dimitrova, 'Enlargement, Institution-Building' (n 147) 179–180; Matteo Bonomi, 'The Emergence and Consolidation of the Administrative Capacity Criteria within the EU Enlargement Policy' (2015) 48(1–2) *Economic Analysis* 1, 1–2, 5–6.

¹⁵³ For the emergence of horizontal administrative capacity as an accession criterion extending beyond sector-specific compliance with the *acquis*, and the resulting difficulty of determining what level of administrative capacity was sufficient, see Dimitrova, 'Enlargement, Institution-Building' (n 147) 178–80; Bonomi, 'The Emergence and Consolidation' (n 152) 5–6. Dimitrova notes that administrative capacity remained an 'elusive concept' and that the Commission had not developed a settled mechanism for judging the quality of an administration.

¹⁵⁴ On the asymmetrical character of enlargement governance, in which governance flowed from the EU to applicants through the Commission and Council, see Dimitrova, 'Enlargement, Institution-Building' (n 147) 174. On the allocation of evaluative authority within the accession process, see Heather Grabbe, 'A Partnership for Accession? The Implications of EU Conditionality for the Central

By 1997, the question had become how this broader assessment of preparedness could be organised across the Central and Eastern European applicants.¹⁵⁵ Agenda 2000 described the Commission's task as 'unprecedented', pointing both to the breadth of the Copenhagen criteria and to the expansion of the *acquis* since previous enlargements.¹⁵⁶ The resulting pre-accession framework organised this assessment through a series of connected practices.¹⁵⁷ In 1998, Accession Partnerships identified short- and medium-term priorities for each applicant, while national programmes set out timetables, the staff and financial resources needed to meet them.¹⁵⁸ At this stage, the *acquis* supplied the framework through which legal alignment, implementation and institutional capacity could be documented and assessed as evidence of preparedness.¹⁵⁹ A broader documentation also developed around screening, a chapter-by-chapter examination against the *acquis*, which systematically recorded where each eastern enlargement

and East European Applicants' (1999) EUI Robert Schuman Centre Working Paper RSC No 99/12, 20, 22–23, explaining that the Commission interpreted the conditions, elaborated their detailed requirements and recommended whether they had been met, while the Council retained the final decision on the application of accession conditionality.

¹⁵⁵ Commission of the European Communities, 'Agenda 2000: For a Stronger and Wider Union' COM (97) 2000 final, 48; European Council, 'Presidency Conclusions' (n 2) paras 10–13 and 29–30.

¹⁵⁶ Commission, 'Agenda 2000' (n 155) 48.

¹⁵⁷ European Council, 'Presidency Conclusions' (n 2) paras 13–16 and 29; Grabbe, 'A Partnership for Accession?' (n 154) 13–14.

¹⁵⁸ Council Regulation (EC) No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships [1998] OJ L85/1, arts 1–2; Commission of the European Communities, 'The Phare Programme: Annual Report 1998' COM(2000) 183 final, 5.

¹⁵⁹ European Council, 'Presidency Conclusions' (n 2) paras 23 and 29; Commission of the European Communities, 'Enlargement Strategy Paper: Report on Progress towards Accession by Each of the Candidate Countries' COM (2000) 700 final, 15.

candidate stood and what remained to be changed.¹⁶⁰ As screening could only establish the candidate's position at a particular stage, Regular Reports allowed changes in legal and institutional capacity to be assessed over time.¹⁶¹ By translating broad questions of institutional fitness into recorded legal and administrative findings, these practices changed the mode through which fitness was judged by making an open-ended judgment easier to administer and more technical in form.¹⁶² Yet the production of such findings did not itself explain how they came to count as evidence of sufficient progress, or how that judgment acquired consequences within the accession process.

2. Assessing Preparedness in Türkiye's Candidacy: Screening and Annual Reporting

In order to see how findings came to count as evidence of sufficient progress, the analysis now follows the framework through its application to a candidate. Türkiye first sought integration with the Community through its 1959 application to the EEC and acquired a treaty basis through the 1963 Ankara Association Agreement.¹⁶³ Article 22(2) of the Ankara Agreement

¹⁶⁰ European Council, 'Presidency Conclusions' (n 2) paras 13 and 27; Commission, 'Enlargement Strategy Paper' (n 159) 14–15.

¹⁶¹ European Council, 'Luxembourg Presidency Conclusions' (n 2) paras 29–30; Commission, 'Enlargement Strategy Paper' (n 159) 15.

¹⁶² On the indeterminacy and difficulties of operationalising the administrative-capacity criterion, see Dimitrova, 'Enlargement, Institution-Building' (n 147) 178–80. On the Commission's response to the increasing complexity of accession conditionality by linking the setting of conditions, monitoring of preparations and allocation of assistance, and on the resulting technocratic character of accession policy, see Grabbe, 'A Partnership for Accession?' (n 154) 24–25, 29–30. For the connection between the recorded assessment of progress and subsequent decisions within the accession process, see European Council, 'Presidency Conclusions' (n 2) para 29.

¹⁶³ European Commission, 'Key Findings of the 2014 Progress Report on Turkey' (European Commission, 8 October 2014) 3 <<https://ec.europa.eu/commission/p>

required the Association Council to review periodically the functioning of the association that was established between Türkiye and the EEC.¹⁶⁴ The Association Council subsequently issued its first annual activity report, covering the period from 1 December 1964 to 31 December 1965.¹⁶⁵ In 1995, the Customs Union brought trade in industrial goods between Türkiye and the EU within a common customs framework and deepened the institutional relationship established by the Ankara Agreement.¹⁶⁶ In this context, the Commission undertook to report annually on EU-Türkiye relations, issuing reports in 1996 and 1998.¹⁶⁷ In 1998, the Commission's first Regular Report shifted the focus of assessment towards Türkiye's preparedness for membership, and examined the political and economic criteria for accession

resscorner/api/files/document/print/en/memo_14_559/MEMO_14_559_EN.pdf
> accessed 27 August 2026; Agreement establishing an Association between the European Economic Community and Turkey [1977] OJ L361/29 (Ankara Agreement).

¹⁶⁴ Ankara Agreement, art 22(2).

¹⁶⁵ EEC-Turkey Association Council, 'Association entre la Communauté économique européenne et la Turquie: Premier rapport annuel d'activité du Conseil d'association à la Commission parlementaire d'association (1er décembre 1964–31 décembre 1965)' ['Association between the European Economic Community and Turkey: First Annual Report on the Activity of the Association Council to the Parliamentary Committee of the Association (1 December 1964–31 December 1965)'] (1966) 4–5 <<https://aei.pitt.edu/42352/1/A5875.pdf>> accessed 27 August 2026.

¹⁶⁶ Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union [1996] OJ L35/1, preamble and arts 2–7, 12 and 52–60.

¹⁶⁷ European Commission, 'Report on Developments in Relations with Turkey since the Entry into Force of the Customs Union' COM (96) 491 final, 1; European Commission, 'Report from the Commission on Developments in Relations with Turkey since the Entry into Force of the Customs Union' COM (1998) 147 final, 1.

and its ability to assume the obligations of membership.¹⁶⁸ The Helsinki European Council recognised Türkiye as a candidate state in 1999, bringing the Commission's regular assessment of its preparedness within the formal pre-accession framework.¹⁶⁹ From 2000, the *acquis* component of the Regular Reports was organised around the twenty-nine chapters then covering the *acquis*.¹⁷⁰ In October 2004, the Regular Report recorded significant progress in political reforms 'on the ground', while finding that implementation remained uneven.¹⁷¹ In the accompanying Recommendation, the Commission concluded that, provided Türkiye brought the outstanding legislation into force, it 'sufficiently' fulfilled the Copenhagen political criteria and recommended the opening of accession negotiations.¹⁷² In December 2004, the European Council adopted the same conditional sufficiency judgment and requested the Council to agree on a negotiating framework with a view to opening negotiations on 3 October 2005.¹⁷³ Although the European Council had the authority to open negotiations, the Commission's sufficiency judgment informed a recommendation for procedural movement. After the opening of negotiations, the Commission undertook the formal chapter-by-chapter screening of the *acquis* under paragraphs 19 and 20 of the Negotiating Framework, with Türkiye participating in the process from its

¹⁶⁸ European Commission, 'Regular Report from the Commission on Turkey's Progress Towards Accession' COM (98) 711 final, 5.

¹⁶⁹ European Council, 'Presidency Conclusions' (Helsinki, 10–11 December 1999) para 12.

¹⁷⁰ European Commission, '2000 Regular Report from the Commission on Turkey's Progress Towards Accession' COM (2000) 713 final (8 November 2000) 5.

¹⁷¹ European Commission, '2004 Regular Report on Turkey's Progress Towards Accession' SEC(2004) 1201 (6 October 2004) 53.

¹⁷² European Commission, 'Recommendation of the European Commission on Turkey's Progress Towards Accession' COM (2004) 656 final, 4.

¹⁷³ European Council, 'Presidency Conclusions' (Brussels, 16–17 December 2004) Doc 16238/1/04 REV 1, para 22.

commencement on 20 October 2005 to its completion on 13 October 2006.¹⁷⁴

In this context, the findings of screening concerned both the extent of legislative alignment and whether the administrative and judicial structures required for implementation could operate effectively in practice.¹⁷⁵ In Chapter 24, for example, the Commission found Türkiye only ‘partially in line with the *acquis*’ and concluded that its administrative and judicial capacity needed to be enhanced ‘at all levels’.¹⁷⁶ In judicial cooperation in civil matters, it stated that it remained to be verified whether Türkiye’s administrative capacity was ‘sufficient’ to handle requests for legal assistance ‘in practice’.¹⁷⁷ The Chapter 27 report recorded progress through the transposition of EU rules, but also found that Türkiye still needed to implement the aligned legislation and establish mechanisms for testing all

¹⁷⁴ Council of the European Union, ‘Negotiating Framework’ (n 1) annex II, paras 19–20; Republic of Türkiye Ministry of Foreign Affairs, Directorate for EU Affairs, ‘Accession Negotiations’ (Directorate for EU Affairs, updated 5 December 2022) <https://www.ab.gov.tr/37_en.html> accessed 20 July 2026.

¹⁷⁵ Council of the European Union, ‘Negotiating Framework’ (n 1) annex II, paras 17, 19 and 21–23; European Commission, ‘Screening Report: Turkey, Chapter 24 Justice, Freedom and Security’ (6 June 2006) 2, 9, 17 <https://www.ab.gov.tr/files/ardb/evt/2_turkiye_ab_iliskileri/2_2_adaylik_sureci/2_2_6_muzakere_sureci/2_2_6_2_tarama_raporlari/Screening_Report-Chapter_24_-_Justice_Freedom_and_Security-TR.pdf> accessed 22 December 2025; European Commission, ‘Screening Report Turkey: Chapter 27–Environment’ (22 June 2007) 23. <https://enlargement.ec.europa.eu/document/download/bb_242e72-0c0d-4a2f-be48-153e2e1ade08_en?filename=screning_report_27_tr_internet_en.pdf> accessed 22 December 2025.

¹⁷⁶ European Commission, ‘Screening Report: Turkey, Chapter 24 Justice, Freedom and Security’ (n 175) 17.

¹⁷⁷ European Commission, ‘Screening Report: Turkey, Chapter 24 Justice, Freedom and Security’ (n 175) 9.

the parameters required by the Drinking Water Directive.¹⁷⁸ Across eight screening reports, the Commission used ‘satisfactory’ to describe the level of alignment or preparedness, while the Chapter 4 and Chapter 22 reports found Türkiye not yet ‘sufficiently prepared for negotiations’.¹⁷⁹ The variation between these conclusions, which followed from the different requirements of each chapter, is not the point of analysis. What matters here is the evaluative step common to them. In each report, the Commission used specific findings on legislative alignment and implementation capacity to make a chapter-level judgment about Türkiye’s level of alignment or preparedness.

Annual reporting extended this evaluative practice over time by repeatedly reassessing Türkiye’s preparedness and alignment as new findings entered the record. In its 2005 Progress Report, issued after accession negotiations had opened, the Commission stated that Türkiye ‘continues to sufficiently fulfil the Copenhagen political criteria’.¹⁸⁰ Chapter-level assessments also repeatedly expressed sufficiency, such as in Chapter 20, where successive reports from 2009 to 2013 described Türkiye as having achieved, maintained or possessed a ‘sufficient level of alignment’.¹⁸¹ The direction of the

¹⁷⁸ European Commission, ‘Screening Report: Turkey, Chapter 27 – Environment’ (n 175) 23.

¹⁷⁹ See Council of the European Union, ‘Negotiating Framework’ (n 1) annex II, paras 19 and 21–23; European Commission, ‘Screening Report: Turkey, Chapter 24 – Justice, Freedom and Security’ (n 175) 9, 17; European Commission, ‘Screening Report: Turkey, Chapter 27 – Environment’ (n 175) 23; European Commission, ‘Screening Report: Turkey, Chapter 18 – Statistics’ (n 4) 8; European Commission, ‘Screening Report: Turkey, Chapter 22 – Regional Policy and Coordination of Structural Instruments’ (n 4) 14.

¹⁸⁰ European Commission, ‘Turkey 2005 Progress Report’ (n 4) 41.

¹⁸¹ European Commission, ‘Turkey 2009 Progress Report’ (n 4) 66; European Commission, ‘Turkey 2010 Progress Report’ SEC (2010) 1327, 72; European Commission, ‘Turkey 2011 Progress Report’ SEC (2011) 1201, 81; European Commission, ‘Turkey 2012 Progress Report’ SWD (2012) 336 final, 68;

Commission's assessment could also change over time, shifting from positive to negative. In the judiciary, for example, the Commission recorded 'some progress' in 2007 and further progress in 2011, before finding in 2014 that new judicial legislation raised 'serious concerns'.¹⁸² In 2015, the Commission further systematised this evaluative practice in a set of pilot areas through harmonised assessment scales that distinguished a candidate's current level of preparedness from progress during the reporting period.¹⁸³ While the state-of-play scale classified current preparedness from 'early stage' to 'well advanced', the progress scale classified the changes over the preceding twelve months from 'backsliding' to 'very good progress'.¹⁸⁴ In the 2015 assessment of freedom of expression, for example, the Commission found that Türkiye had 'some level of preparation' while also recording 'serious backsliding'.¹⁸⁵ The harmonised scales therefore made assessments of both preparedness and change more systematic and comparable, but they did not specify the point at which a recorded level became sufficient, and no category within them determined what procedural consequence would follow in the negotiations.¹⁸⁶

3. Benchmarks, Blockages and the Authority over Chapter Movement

The separation between the assessment of preparedness and decisions on procedural movement within the negotiations was institutionalised in the

European Commission, 'Turkey 2013 Progress Report' SWD (2013) 417 final, 42.

¹⁸² European Commission, 'Turkey 2007 Progress Report' SEC (2007) 1436, 58; European Commission, 'Turkey 2011 Progress Report' (n 181) 83; European Commission, 'Turkey 2014 Progress Report' SWD (2014) 307 final, 62.

¹⁸³ European Commission, 'EU Enlargement Strategy' (n 3) 4, 32.

¹⁸⁴ European Commission, 'EU Enlargement Strategy' (n 3) 4, 31–32.

¹⁸⁵ European Commission, 'Turkey 2015 Report' SWD (2015) 216 final, 21.

¹⁸⁶ European Commission, 'EU Enlargement Strategy' (n 3) 32; Council of the European Union, 'Negotiating Framework' (n 1) annex II, paras 18–19 and 21–23.

Negotiating Framework.¹⁸⁷ Under the Framework, the Commission provided the assessment of preparedness, while authority over the opening and provisional closure of chapters remained with the Council and the Member States acting through the Intergovernmental Conference, and the Council was to take that assessment into account when deciding on further steps relating to the negotiations on the chapter concerned.¹⁸⁸ Assessment and procedural movement were connected through benchmarks, which turned identified shortcomings in legislative alignment, implementation, or administrative and judicial capacity into conditions that had to be met before a chapter could move forward.¹⁸⁹ In this context, while opening benchmarks were framed as preparatory steps for future alignment, closing benchmarks required a demonstrable record of implementation in practice.¹⁹⁰ Although benchmarks already appeared in Türkiye's 2005 Negotiating Framework, the Commission described them in 2006 as a 'new tool' drawn from the fifth enlargement, whose lessons it associated in particular with tackling judicial reform and corruption earlier and sustaining public-administration

¹⁸⁷ Council of the European Union, 'Negotiating Framework' (n 1) annex II, paras 18–23. This allocation of functions was not specific to Türkiye but also appeared in the negotiating frameworks adopted for other candidates. See eg Council of the European Union, 'Negotiating Framework for Croatia' (Luxembourg, 3 October 2005) ST 20004/05, paras 14, 16 and 18; Conference on Accession to the European Union – Montenegro, 'General EU Position' (Brussels, 27 June 2012) AD 23/12 CONF-ME 2/12, paras 38–42 and 46; Conference on Accession to the European Union – Serbia, 'General EU Position' (Brussels, 9 January 2014) AD 1/14 CONF-RS 1/14, paras 39–43 and 49.

¹⁸⁸ Council of the European Union, 'Negotiating Framework' (n 1) annex II, paras 5 and 18–23.

¹⁸⁹ Council of the European Union, 'Negotiating Framework' (n 1) annex II, paras 19, 21–22.

¹⁹⁰ European Commission, 'Enlargement Strategy and Main Challenges 2006–2007' COM (2006) 649 final (8 November 2006) 6.

reform.¹⁹¹ Benchmarks were proposed by the Commission, but they became operative only once they had been laid down by the Council acting by unanimity.¹⁹² Chapters moved through these procedures, with sixteen opened between 2006 and 2016 and one provisionally closed.¹⁹³

These chapter-specific benchmarks were not the only conditions governing chapter movement.¹⁹⁴ In December 2006, the Council imposed a separate condition on chapter movement outside the chapter-specific benchmark structure.¹⁹⁵ Under this condition, no chapter could be provisionally closed until the Commission verified Türkiye's compliance with the Additional Protocol.¹⁹⁶ The Additional Protocol adjusted the Ankara Agreement, including the customs union arrangements established under it, to the EU's 2004 enlargement by making them applicable to the ten new Member States, including the Republic of Cyprus.¹⁹⁷ However, fulfilment of a chapter's own technical closing requirements did not affect the separate Additional

¹⁹¹ Council of the European Union, 'Negotiating Framework' (n 1) annex II, para 21; European Commission, 'Enlargement Strategy and Main Challenges 2006–2007' (n 190) 6.

¹⁹² Council of the European Union, 'Negotiating Framework' (n 1) annex II, para 21.

¹⁹³ Republic of Türkiye Ministry of Foreign Affairs, Directorate for EU Affairs, 'Current Situation' (Directorate for EU Affairs) <https://www.ab.gov.tr/current-situation_65_en.html> accessed 4 September 2026.

¹⁹⁴ Republic of Türkiye Ministry of Foreign Affairs, Directorate for EU Affairs, 'Current Situation' (n 193); Council of the European Union, '2770th Council Meeting, General Affairs and External Relations' Press Release 16289/06 (Presse 352) (11 December 2006) 8–9.

¹⁹⁵ Council of the European Union, '2770th Council Meeting' (n 194) 7–8.

¹⁹⁶ Council of the European Union, '2770th Council Meeting' (n 194) 8.

¹⁹⁷ Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey following the enlargement of the European Union [2005] OJ L254/58, recital (3) and art 1(1); Council of the European Union, '2770th Council Meeting' (n 194) 2.

Protocol condition.¹⁹⁸ For example, the Chapter 20 record makes the division of authority explicit, as Türkiye's Directorate for EU Affairs records that the Commission informed Türkiye on 14 April 2011 that it assessed the chapter's single technical closing benchmark as fulfilled, while stating that this did not prejudice the assessment to be made by the Council under the established procedure.¹⁹⁹ Chapters 20 and 21 were both recorded as technically ready for closure, but neither could be provisionally closed while the Additional Protocol condition remained outstanding.

At the stage of chapter opening, the division of authority operated before any benchmark had been formally laid down. Eight screening reports were pending before the Council, and any potential opening benchmarks arising from those reports had therefore not been formally laid down by the Council or communicated to Türkiye.²⁰⁰ The Commission recorded eight reports as pending in 2013, and eight remained pending in 2024.²⁰¹ What was missing was therefore not an assessment of Türkiye's preparedness in relation to the relevant *acquis*, which the screening exercise had already supplied, but an

¹⁹⁸ Council of the European Union, '2770th Council Meeting' (n 194) 8; Republic of Türkiye Ministry of Foreign Affairs, Directorate for EU Affairs, 'Current Situation' (n 193).

¹⁹⁹ Republic of Türkiye Ministry of Foreign Affairs, Directorate for EU Affairs, 'Chapter 20: Enterprise and Industrial Policy' (Directorate for EU Affairs, updated 12 September 2023) <https://www.ab.gov.tr/chapter-20-enterprise-and-industrial-policy_85_en.html> accessed 4 September 2026.

²⁰⁰ Council of the European Union, 'Negotiating Framework' (n 1) annex II, para 21; Republic of Türkiye Ministry of Foreign Affairs, Directorate for EU Affairs, 'Current Situation' (n 193).

²⁰¹ European Commission, 'Turkey 2013 Progress Report' (n 181) 4; Republic of Türkiye Ministry of Foreign Affairs, Directorate for EU Affairs, 'Current Situation' (n 193).

operative opening benchmark that Türkiye could address and that could then inform a separate decision on opening those chapters.²⁰²

The division of authority also operated in the opposite direction, as an adverse assessment did not itself reverse Türkiye's procedural position in the negotiations. The Negotiating Framework instead provided separate procedures for reopening a provisionally closed chapter where Türkiye had failed to meet important benchmarks or implement its commitments, and for suspending negotiations in the event of a serious and persistent breach of the Union's foundational principles.²⁰³ In each case the Commission's role was to recommend and the Council's to decide, whether on suspension by qualified majority under paragraph 5 or on further steps relating to a chapter whose re-opening had been recommended under paragraph 23.²⁰⁴ When the Council addressed what it described in 2018 as continuing backsliding in the rule of law and fundamental rights, it neither reopened Chapter 25 on Science and Research, the only chapter that had been provisionally closed, nor formally suspended the accession negotiations.²⁰⁵ It concluded instead that Türkiye had been 'moving further away from the European Union', that its accession negotiations had therefore 'effectively come to a standstill',

²⁰² Council of the European Union, 'Negotiating Framework' (n 1) annex II, paras 19 and 21-23; European Commission, 'Turkey 2013 Progress Report' (n 181) 4.

²⁰³ Council of the European Union, 'Negotiating Framework' (n 1) annex II, paras 5 and 23.

²⁰⁴ Council of the European Union, 'Negotiating Framework' (n 1) annex II, paras 5 and 23.

²⁰⁵ Council of the European Union, 'Council Conclusions on Enlargement and Stabilisation and Association Process' (n 17) paras 32 and 35; European Commission, 'Turkey 2018 Report' SWD (2018) 153 final (17 April 2018) 3; Council of the European Union, 'Negotiating Framework' (n 1) annex II, paras 5 and 23; Council of the European Union, 'General Affairs and External Relations' 9946/06 (Presse 161) (12 June 2006) 8.

and that ‘no further chapters can be considered for opening or closing’.²⁰⁶ The standstill was therefore prospective in effect, preventing further advancement through the opening or provisional closure of chapters rather than changing Türkiye’s existing procedural position through either of the formal procedures provided by the Framework.²⁰⁷

Table 1. Continuous assessment and procedural outcomes in Türkiye’s accession process, 2005–2025

Period	Commission assessment record	Benchmarks and procedural outcome
2005–06	Screening covered all 33 chapters. Results differed by chapter, including a ‘satisfactory level of alignment’ in Chapter 18 (Statistics) and ‘not sufficiently prepared for negotiations’ in Chapter 22 (Regional Policy and Coordination of Structural Instruments). (Chapter 18 Screening Report 8; Chapter 22 Screening Report 14; Turkey 2013 Progress Report 4)	Chapter 25 (Science and Research) opened and was provisionally closed. Cumulative position: 1 opened / 1 provisionally closed. (Council, Türkiye, ‘Accession conference meetings’)
11 Dec 2006	No separate Commission assessment event.	Opening was withheld for 8 chapters, and no chapter could be provisionally closed pending verified implementation of the Additional Protocol. This was a separate cross-cutting condition, not a formal suspension. (Council Press Release 16289/06, 2 and 9; Negotiating Framework para 5)
2007–14	Annual reports recorded changing and chapter-specific judgments. Chapter 20 (Enterprise and Industrial Policy): ‘sufficient level of alignment’ in 2009–13. Judiciary: ‘some progress’ in 2007, then ‘serious concerns’ in 2014. (Turkey Progress Reports 2007, 58; 2009, 66; 2010, 72; 2011, 81–83; 2012, 68; 2013, 42; 2014, 62)	By end-2014: 14 opened / 1 provisionally closed. Chapter 27 (Environment and Climate Change): 2 opening + 6 closing benchmarks, comprising 5 technical benchmarks and 1 Additional Protocol condition. In 2013, 8/33 screening reports remained pending before the Council and 1 had not yet been delivered. (Turkey 2013 Progress Report 4; Directorate, ‘Chapter 27’ and ‘Current Situation’)
2015–16	The Commission introduced separate preparedness and annual-progress scales. In 2016, the judiciary was at an early stage/some level of preparation and showed backsliding. Following the attempted coup, 3,508 judges and prosecutors were suspended and 3,390 dismissed. (EU Enlargement Strategy 2015, 4 and 31–32; Turkey 2016 Report 17–19)	2 additional chapters opened. Position by 30 June 2016: 16 opened / 1 provisionally closed. No chapter opened thereafter. (Council Press Release 403/16, 1; Council, Türkiye, ‘Accession conference meetings’)
2017–18	No country report was issued in 2017. In 2018, the judiciary was at an early stage of preparation and showed serious backsliding. (Turkey 2018 Report 3 n 1 and 23)	The Council concluded that negotiations had ‘effectively come to a standstill’. Chapter 25 was not reopened. Reopenings: 0. Formal suspensions: 0. (Council doc 10555/18 para 35; Negotiating Framework paras 5 and 23)
2019–23	Each annual report kept the judiciary at an early stage of preparation and recorded serious backsliding. (Turkey/Türkiye Reports 2019, 22; 2020, 21; 2021, 21; 2022, 24; 2023, 24)	0 chapters opened / 0 provisionally closed. 0 reopenings / 0 formal suspensions. (Council, Türkiye, ‘Accession conference meetings’; Negotiating Framework paras 5 and 23)

²⁰⁶ Council of the European Union, ‘Council Conclusions on Enlargement’ (n 17) para 35.

²⁰⁷ Council of the European Union, ‘Council Conclusions on Enlargement’ (n 17) para 35; Council of the European Union, ‘Negotiating Framework’ (n 1) annex II, paras 5 and 23; European Commission, ‘Türkiye 2025 Report’ (n 16) 104.

Period	Commission assessment record	Benchmarks and procedural outcome
2024	Judiciary: early stage of preparation. Progress: no progress. (<i>Türkiye 2024 Report 5</i>)	0 opened / 0 provisionally closed. The same 8 screening reports remained pending. 7 closing benchmarks had been fulfilled across 5 chapters. Chapters 20 (Enterprise and Industrial Policy) and 21 (Trans-European Networks) were technically ready to close but remained blocked by the Additional Protocol condition. (<i>Directorate, 'Current Situation'; Council doc 16983/24 para 111</i>)
2025	All 33 chapters were assessed: 3 well advanced, 6 good, 12 moderately prepared, 9 with some level of preparation, and 3 at an early stage. Judiciary: early stage; backsliding. (<i>Türkiye 2025 Report 4–18</i>)	Position unchanged: 16 opened / 1 provisionally closed. Across the published 2005–25 record: 0 reopenings / 0 formal suspensions. (<i>Türkiye 2025 Report 104; Negotiating Framework paras 5 and 23</i>)

Note: The judiciary is a consistent longitudinal illustration, not the only area assessed. From 2015, the scales run from early stage to well advanced (state of play) and from backsliding to very good progress (annual progress). The 2025 distribution covers all 33 chapters. Figures are cumulative unless otherwise stated.

The Commission continued to assess Türkiye's preparedness across all 33 chapters in successive annual reports, and its gradings continued to differentiate between chapters, as the Table above sets out.²⁰⁸ After 30 June 2016, Türkiye's chapter status did not change alongside that record.²⁰⁹ No chapter was opened after that date and none was provisionally closed after 12 June 2006.²¹⁰ Despite that standstill, the assessment relationship remained in place while Türkiye maintained its candidacy, which it remained free to discontinue.²¹¹ The Council's conclusion in December 2024 that no further

²⁰⁸ European Commission, 'Türkiye 2023 Report' SWD (2023) 696 final (8 November 2023) 4–12; European Commission, 'Türkiye 2024 Report' SWD (2024) 696 final (30 October 2024) 4–18; European Commission, 'Türkiye 2025 Report' (n 16) 4–18.

²⁰⁹ European Commission, 'Accession Conference with Turkey: Talks Opened on Chapter 33–Financial and Budgetary Provisions' (30 June 2016) <https://enlargement.ec.europa.eu/news/accession-conference-turkey-talks-opened-chapter-33-financial-and-budgetary-provisions-2016-06-30_en> accessed 29 August 2026; European Commission, 'Türkiye 2025 Report' (n 16) 103.

²¹⁰ European Commission, 'Accession Conference with Turkey' (n 209); Republic of Türkiye Ministry of Foreign Affairs, Directorate for EU Affairs, 'Current Situation' (n 193); European Commission, 'Türkiye 2025 Report' (n 16) 103.

²¹¹ European Commission, 'Türkiye 2025 Report' (n 16) 3–19, 104; for an applicant state's request that it no longer be regarded as a candidate country, see European Commission, 'Iceland' <https://enlargement.ec.europa.eu/enlargement-policy/negotiations-status/iceland_en> accessed 29 August 2026.

chapters could be considered for opening or closing did not alter Türkiye's procedural position but reaffirmed the standstill identified in 2018.²¹² What remained at issue was therefore not the production of judgments about preparedness, but whether those judgments would be given procedural effect by the Council and the Member States through the opening or provisional closure of chapters.

IV. CONDITIONAL INCLUSION RECONFIGURED: THE RELATION BETWEEN ASSESSMENT AND PROCEDURAL CONSEQUENCE

Once EU accession is approached as a historical object, the difficulty is no longer only to identify similarities with earlier legal arrangements. Similarity by itself cannot establish what, if anything, was historically reconfigured across settings that differed in their institutions, legal stakes and forms of authority. The analysis must therefore begin by identifying what can legitimately constitute the object of comparison across those changes.

1. Relation, Rupture, Construction, and the Relocation of the Unresolved Question

At first sight, the institutional variation across the arrangements discussed above may appear inconsistent with a genealogical comparison. Under Article XII of the Mackay Treaty, Britain both judged whether Chinese legal and judicial reform was sufficient and decided whether that judgment warranted relinquishing its extraterritorial rights.²¹³ In 1926, by contrast, the Commission on Extraterritoriality examined reform and made recommendations to governments that retained authority over their treaty privileges, while Türkiye's Negotiating Framework allocated them among

²¹² Council of the European Union, 'Council Conclusions on Enlargement' (17 December 2024) Doc 16983/24, para 111; Council of the European Union, 'Council Conclusions on Enlargement and Stabilisation and Association Process' (n 17) para 35; European Commission, 'Türkiye 2025 Report' (n 16) 3, 103.

²¹³ Treaty between the United Kingdom and China Respecting Commercial Relations (n 7) art XII.

the Commission, the Council and the Member States acting through the Intergovernmental Conference.²¹⁴ These differences would rule out a genealogical comparison only if genealogy required the same institution or decision-making structure to persist over time.

The comparison instead concerns how the relation between domestic transformation, authorised judgment and its consequences was organised across different institutional settings.²¹⁵ The form of this relation depends not only on who judges adequacy and who controls its legal or procedural effect, but also on the legal position at stake, the standards against which transformation is judged, and the documentary practices through which it becomes assessable. Reconfiguration therefore requires evidence that these elements were historically linked and that their relation changed in form or function across the settings compared.²¹⁶ Across the Mackay Treaty, the 1926 Commission on Extraterritoriality, and Türkiye's Negotiating Framework, a judgment of adequacy was made and a determination reached as to what followed from it. Within the broader comparison, the relation between assessment and consequence is particularly important because the institutional variation lies precisely in how the two were combined or separated. The comparison therefore asks whether the judgment itself brought about the relevant change in legal or procedural position or whether a further exercise of authority was required.²¹⁷

A more fundamental discontinuity concerned the legal position to which preparedness was attached. Resolution 1514 removed insufficient preparedness as a general basis for postponing sovereign independence,

²¹⁴ Report of the Commission on Extraterritoriality in China (n 43) x; Council of the European Union, 'Negotiating Framework' (n 1) annex II, paras 5, 18–19, 21 and 23.

²¹⁵ See Foucault (n 14) 146, 148; Golder (n 14) 165, 172–173.

²¹⁶ Compare Silvia and Sampson (n 12) 3, 13–17.

²¹⁷ Tzouvala (n 7) 78, 80; Council of the European Union, 'Negotiating Framework' (n 1) annex II paras 19, 21 and 23.

while Article 237 EEC did not replace that relation by conditioning Community membership on prior adoption or implementation of Community law.²¹⁸ The later linkage between preparedness and accession was therefore neither carried across the post-war rupture nor supplied by the Treaty of Rome. The United Kingdom's 1961 approach to Article 237 and the Commission's 1967 Opinion, endorsed at The Hague in 1969, represented different understandings of the terms of entry, of which only the latter prevailed.²¹⁹ The existence of a documented alternative shows that the Commission's position was not the only possible reading of the terms of accession. Its adoption therefore made acceptance of accumulated Community commitments a condition constructed through enlargement practice rather than one already inherent in Article 237.²²⁰ Requiring applicants to accept existing Community commitments did not by itself create the later form of accession conditionality. Preparedness subsequently expanded in successive stages to include the applicant's capacity to make those commitments effective and to demonstrate that capacity through organised assessment.²²¹

²¹⁸ UNGA Res 1514 (XV) para 3; EEC Treaty, art 237.

²¹⁹ Edward Heath, 'Statement by the Rt Honourable Edward Heath MP, Lord Privy Seal, Leader of the United Kingdom Delegation' (Paris, 10 October 1961) paras 13–14, reproduced in European Economic Community, Background Documents on British, Danish and Irish Applications for Membership of the European Economic Community (1961) B11 <<https://aei.pitt.edu/35059/1/A1156.pdf>> accessed 2 September 2026; Commission, 'Opinion on the Applications for Membership' (n 10) paras 9–10; Conference of Heads of State or Government, 'Final Communiqué' (n 131) 16 para 13.

²²⁰ See Jørgensen (n 10) 9–10.

²²¹ Commission, 'Europe and the Challenge of Enlargement' (n 140) para 9; European Council, 'Conclusions of the Presidency' (n 9) pt 7.A.iii; Commission, 'White Paper' (n 147) Executive Summary and paras 1.12–1.14; European Council, 'Presidency Conclusions' (n 150) pt III.A; Dimitrova, 'Enlargement,

Establishing that the accession relation was constructed within the Community does not, however, establish the longer genealogy. A firmer basis for comparison lies in the documentary practices through which internal transformation was made available for external assessment. Article 61 of the Treaty of Berlin required periodic Ottoman communication of reform, but the resulting record was not exclusively Ottoman.²²² Consular observations were added to it, and the Powers assessed the sufficiency of reform on that combined record.²²³ Yet recurrence did not at this stage produce a standing supervisory institution.²²⁴ The Mandate System altered precisely this feature by placing annual reports, questionnaires, petitions and requested information within the continuing review of the PMC.²²⁵ EU accession placed screening and Regular Reports within a Commission-led process that repeatedly assessed legal alignment and implementation capacity in relation to membership preparedness.²²⁶ Across the three settings, the

Institution-Building' (n 147) 177–78; European Council, 'Presidency Conclusions' (n 2) paras 13, 23 and 29–30; Council Regulation (EC) No 622/98, arts 1–2.

²²² Treaty of Berlin, art 61.

²²³ FO 424/107 (n 74) no 78, 118–19, and no 118, 190–94, especially 191.

²²⁴ Treaty of Berlin, art 61; FO 424/107 (n 74) no 163, 290–91; cf League Covenant, art 22(9).

²²⁵ League Covenant, arts 22(7) and 22(9); Council of the League of Nations, 'Constitution of the Permanent Mandates Commission' (approved 1 December 1920) (1920) 1 League of Nations Official Journal 87–88, art (b); League of Nations, Permanent Mandates Commission, "B" Mandates: Questionnaire, "C" Mandates: Questionnaire' and 'Mandate for Palestine: Questionnaire' (n 95); Council of the League of Nations, 'Procedure in Respect of Petitions Regarding Inhabitants of Mandated Territories' (31 January 1923) League of Nations Doc C.44(1).M.73.1923.VI, annex 457, (1923) 4 League of Nations Official Journal 200; Tzouvala (n 7) 103–06.

²²⁶ European Council, 'Presidency Conclusions' (n 2) paras 13, 23 and 29–30; Commission of the European Communities, 'Regular Report from the Commission on Estonia's Progress towards Accession' COM (98) 705 final (17 December 1998) 4–6, 40–41.

recurring documentary relation lies in the rendering of internal transformation into a record available for external assessment, while the form of that record, the assessing institution and the legal function assigned to it change.

The EU form, however, does more than institutionalise recurrent documentation. Screening, express findings of sufficiency and the 2015 harmonised scales provided an increasingly explicit documentary record of preparedness.²²⁷ The issue in the EU case is therefore not whether preparedness can be assessed, but what follows once such an assessment has been made. Across the record, assessed screening reports could remain pending without operative opening benchmarks, Chapters 20 and 21 could remain open despite satisfaction of their technical requirements, and the Council's adverse assessment in 2018 produced neither the reopening of Chapter 25 nor formal suspension of the negotiations.²²⁸ Whether the Council was substantively correct in identifying backsliding is not the issue examined here.

These examples show that more formalised assessment made preparedness increasingly explicit without making procedural movement a consequence of the assessment itself, while the Council and Member States retained authority over whether and under what conditions that judgment would

²²⁷ European Commission, 'Screening Report: Turkey, Chapter 18 – Statistics' (n 4) 8–9; European Commission, 'Screening Report: Turkey, Chapter 22 – Regional Policy and Coordination of Structural Instruments' (n 4) 14; European Commission, 'EU Enlargement Strategy' (n 3) 4, 31–32.

²²⁸ Council of the European Union, 'Negotiating Framework' (n 1) annex II, paras 5, 21 and 23; European Commission, 'Turkey 2013 Progress Report' (n 181) 4; Republic of Türkiye Ministry of Foreign Affairs, Directorate for EU Affairs, 'Current Situation' (n 193); Council of the European Union, 'Council Conclusions on Enlargement and Stabilisation and Association Process' (n 17) paras 32 and 35.

receive procedural effect.²²⁹ Silvia and Sampson identify the first side of this development in treating the *acquis* as an increasingly precise standard of measurement.²³⁰ The EU evidence extends that account to the institutional relation between measurement and procedural authority. Tzouvala identifies a different form of contingency, in which the legal meaning of reform can remain unstable between improvement and biology.²³¹ The contrast here is between instability in the meaning attributed to reform and separate authority over the procedural effect of an increasingly explicit preparedness judgment.

Read against the three operations distinguished in section II.1, the comparison reveals that the unresolved question changes location.²³² In the nineteenth-century material, acknowledged reform could still leave open whether reform was sufficient to warrant a change in legal treatment.²³³ In accession, preparedness can instead be stated affirmatively and in increasingly explicit terms without settling what procedural consequence that finding will receive.²³⁴ Reconfiguration therefore does not lie in the survival of the earlier standard or in continuity between the actors who applied it. It lies in the movement of the unresolved question from the

²²⁹ European Commission, 'EU Enlargement Strategy' (n 3) 4, 31–32; Council of the European Union, 'Negotiating Framework' (n 1) annex I, para 5 and annex II, paras 19, 21 and 23.

²³⁰ Silvia and Sampson (n 12) 19–21.

²³¹ Tzouvala (n 7) 45, 54–55.

²³² See section II.1 above.

²³³ Tzouvala (n 7) 77–80; see also section II.1 above.

²³⁴ European Commission, 'Screening Report: Turkey, Chapter 18 – Statistics' (n 4) 8–9; European Commission, 'Screening Report: Turkey, Chapter 22 – Regional Policy and Coordination of Structural Instruments' (n 4) 14; European Commission, 'EU Enlargement Strategy' (n 3) 4, 31–32; Council of the European Union, 'Negotiating Framework' (n 1) annex I, para 5 and annex II, paras 19, 21 and 23.

meaning of sufficiency itself to the relation between an express judgment of preparedness and its procedural effect.

2. What the Genealogy Explains and What It Cannot

The prominence of Türkiye in the preceding analysis does not make the accession relation a product of Türkiye's candidacy. Madrid, Agenda 2000 and the Luxembourg framework had already made administrative capacity and recurrent assessment part of enlargement for the Central and Eastern European applicants before Türkiye's negotiations opened in 2005.²³⁵ The enlargement literature likewise treats this development as more than the addition of new procedural instruments. Antoaneta Dimitrova traces the incorporation of institution-building and administrative capacity into accession conditionality for the Central and Eastern European applicants, while Matteo Bonomi shows how these requirements extended assessment beyond formal *acquis* alignment to the capacity to implement and enforce it in practice.²³⁶ This earlier formation did not, however, produce a fixed enlargement methodology. Eli Gateva shows that enlargement methodology continued to change across successive rounds, while the Commission itself adapted the instruments and sequencing of conditionality as enlargement developed.²³⁷ What extends beyond any one candidacy is therefore the underlying relation rather than any particular procedural form.

The distinction becomes consequential once the accession relation is separated from the outcomes reached within it. The Central and Eastern

²³⁵ European Council, 'Presidency Conclusions' (n 150) pt III.A; Commission, 'Agenda 2000' (n 155) 48; European Council, 'Presidency Conclusions' (n 2) paras 13 and 29–30.

²³⁶ Dimitrova, 'Enlargement, Institution-Building' (n 147) 171, 177–79; Bonomi, 'The Emergence and Consolidation' (n 152) 1–2, 5–9.

²³⁷ European Commission, 'Enlargement Strategy and Main Challenges 2006–2007' (n 190) 6; Eli Gateva, *European Union Enlargement Conditionality* (Palgrave Macmillan 2015) 138–39.

European enlargement culminated in membership, whereas Türkiye remains a candidate whose negotiations have been at a standstill since 2018, even though both belong to the broader history of accession assessment identified above.²³⁸ The legal or procedural consequence traced by the genealogy is not the same as the eventual outcome of a candidacy. The former concerns what follows from a judgment of preparedness at a particular point in the accession process, whereas the latter concerns whether the candidacy ultimately advances to membership, remains stalled or ends without accession. A genealogy of that relation cannot therefore account, by itself, for why one candidacy advances while another stalls without turning a history of institutional formation into a theory of accession outcomes.²³⁹ Successful accession would indeed count against a stronger claim that the evaluative structure necessarily produces exclusion or indefinite delay, but not against the narrower claim that the structure through which readiness is defined and assessed was historically constituted.²⁴⁰

Those divergent outcomes have been explained in enlargement scholarship through factors operating within particular candidacies. Frank Schimmelfennig and Ulrich Sedelmeier link candidate compliance to the credibility of rewards, the determinacy of EU conditions and domestic

²³⁸ European Commission, 'Statement by President Barroso on the 10th Anniversary of the Reunification of Europe' STATEMENT/14/142 (30 April 2014); Council of the European Union, '2770th Council Meeting, General Affairs and External Relations' Press Release 16289/06 (Presse 352) (11 December 2006) 7; European Commission, 'Türkiye 2025 Report' (n 16) 2, 103.

²³⁹ For the distinction between genealogical reconstruction of historical formation and causal explanation of particular outcomes, see Triantafillou (n 15) 126–27, distinguishing genealogy's concern with how particular regimes emerged from explanatory accounts directed to why particular political outcomes occur.

²⁴⁰ For conditionality, see Schimmelfennig and Sedelmeier (n 13) 663–68; for bargaining and asymmetric leverage, see Andrew Moravcsik and Milada Anna Vachudova, 'National Interests, State Power, and EU Enlargement' (2003) 17(1) *East European Politics and Societies* 42, 48–54.

adoption costs, while Andrew Moravcsik and Milada Anna Vachudova locate variation in bargaining, national interests and asymmetric leverage.²⁴¹ Christophe Hillion and Elena Basheska identify a different source of variation in the capacity of Member States to use accession procedures, including control over chapter movement, in pursuit of national preferences or bilateral disputes.²⁴² These accounts direct attention to different actors and different parts of the accession process. Schimmelfennig and Sedelmeier's account directs attention to the candidate's conduct, while Hillion and Basheska require attention to what a Member State does with its procedural position. The two therefore cannot be treated as explanations of the same act merely because both affect the course of a candidacy. Whether an interruption reflects an adverse assessment of preparedness or a separate Member State concern has to be established from the record.

For example, Türkiye's democratic and rule-of-law deterioration provides a substantive basis for adverse Commission findings of preparedness, as documented both in the accession record and in the literature.²⁴³ By contrast, Slovenia's withholding of consent during Croatia's negotiations arose from their bilateral border dispute rather than from an adverse assessment of

²⁴¹ For conditionality, see Schimmelfennig and Sedelmeier (n 13) 663–68; for bargaining and asymmetric leverage, see Andrew Moravcsik and Milada Anna Vachudova, 'National Interests, State Power, and EU Enlargement' (2003) 17(1) *East European Politics and Societies* 42, 48–54.

²⁴² For the institutional allocation of functions in enlargement, see Dimitry Kochenov, 'EU Enlargement Law: History and Recent Developments: Treaty-Custom Concubinage?' (2005) 9(6) *European Integration Online Papers* 1, 15–23; for Member State preferences and bilateral blockages, see Hillion, *The Creeping Nationalisation of the EU Enlargement Policy* (n 13) 21–23; Basheska (n 13) 226–27, 232–33.

²⁴³ European Commission, 'Turkey 2018 Report' (n 205) 4–6, 22–23. For the deterioration of democracy and the rule of law in the literature, see Berk Esen and Sebnem Gumuscu, 'Rising Competitive Authoritarianism in Turkey' (2016) 37(9) *Third World Quarterly* 1581, 1582–83.

Croatia's preparedness in the relevant chapters.²⁴⁴ Croatia's subsequent accession further shows that this bilateral blockage affected the course of the negotiations without determining their endpoint.²⁴⁵ Türkiye's domestic performance could therefore bear on what the Commission assessed, while Slovenia's bilateral concern bore on whether Croatia's negotiations moved. A candidate may thus be assessed on the quality of its own preparedness while remaining dependent on Member State consent for the procedural effect given to that assessment. This places the candidate and the existing Member States in different institutional positions within the accession process.

The asymmetry identified above does not by itself make the accession relation coercive or render Member State authority illegitimate. Accession begins with an application by a European state under Article 49 of Treaty on European Union (TEU), and continued participation is not compulsory. Iceland's decision in 2015 to request that it no longer be regarded as a candidate illustrates that a state may discontinue the process.²⁴⁶ Nor is the requirement that an applicant accept the obligations of membership inherently anomalous.²⁴⁷ Silvia and Sampson connect acceptance of the *acquis* to the reciprocal rights and privileges that membership confers, making common obligations an ordinary condition of entry into the Union.²⁴⁸ The applicant's agency also does not disappear once the process

²⁴⁴ European Commission, 'Enlargement Strategy and Main Challenges 2009–2010' COM (2009) 533 final, 11; Gateva (n 237) 139.

²⁴⁵ European Commission, 'Croatia' <https://enlargement.ec.europa.eu/croatia_en> accessed 4 September 2026.

²⁴⁶ TEU, art 49; Council of the European Union, 'Letter from the Minister for Foreign Affairs of Iceland' (Council Doc 7226/15, 13 March 2015) 2–3.

²⁴⁷ Silvia and Sampson (n 12) 20–22.

²⁴⁸ Silvia and Sampson (n 12) 20–22.

begins.²⁴⁹ Tzouvala's account of non-European actors under the nineteenth-century standard shows that actors could appropriate and strategically use the prevailing language of reform while operating within a relation whose terms they did not fully control.²⁵⁰ Candidate agency can likewise coexist with differentiated institutional positions in accession. The significance of the asymmetry therefore lies neither in compelled participation nor in any entitlement to membership, but in the fact that, while a candidacy continues, the applicant demonstrates preparedness within a process in which existing Member States retain authority over admission and procedural movement. Although withdrawal remains available, it ends the process within which preparedness is assessed rather than giving that assessment a procedural effect.

The legitimacy of existing Member States' authority over admission and procedural movement does not itself explain the considerations on which that authority is exercised. The Croatian example above already showed that a Member State could use its procedural position in relation to a bilateral concern distinct from the candidate's preparedness in the relevant chapters. The Türkiye record contains an episode in which a different consideration was stated expressly in relation to the membership endpoint. Asked during the 2007 presidential campaign whether Türkiye would have a place in the Union if it fulfilled the conditions set by the EU, Nicolas Sarkozy replied that compliance with the criteria did not exhaust the issue because, in his view, Türkiye was not European.²⁵¹ After taking office, he maintained his

²⁴⁹ Senem Aydın-Düzgit and Alper Kaliber, 'Encounters with Europe in an Era of Domestic and International Turmoil: Is Turkey a De-Europeanising Candidate Country?' (2016) 21(1) *South European Society and Politics* 1, 4–6.

²⁵⁰ Tzouvala (n 7) 72, 79–81.

²⁵¹ Nicolas Sarkozy, 'Président de la République, dans "Politique Internationale" du printemps 2007' (1 May 2007) <<https://www.elysee.fr/nicolas-sarkozy/2007/05/01/entretien-de-m-nicolas-sarkozy-president-de-la-republique-dans-politique-internationale-du-printemps-2007-sur-sa-vision->

opposition to Turkish membership and proposed that negotiations proceed on the thirty chapters compatible with association while excluding five chapters that, in his view, were compatible only with accession.²⁵² A French Senate report subsequently recorded that France blocked five chapters because, in its view, negotiating them would lead directly to accession.²⁵³ This sequence does not establish that the view that Türkiye was not European caused French policy, still less that such a view explains Türkiye's accession trajectory as a whole. It does establish the narrower point that, in this episode, compliance and the question whether Türkiye was European were treated as distinct, and the latter was connected to the procedural position taken by a Member State within the negotiations. The wider literature situates this episode within differentiated discourses concerning Türkiye's place in Europe across EU institutions and Member States rather than a single European view.²⁵⁴ Preparedness therefore remained an assessed condition of movement towards membership without exhausting the

de-la-politique-etrangere-notamment-la-construction-europeenne-lalliance-avec-les-etats-unis-les-dossiers-du-proche-orient-l> accessed 3 September 2026.

²⁵² Nicolas Sarkozy, 'Conférence de presse conjointe de M. Nicolas Sarkozy, Président de la République, et de Mme Angela Merkel, Chancelière de la République fédérale d'Allemagne, sur les actions communes de la France et de l'Allemagne, notamment en faveur de la construction européenne, de la moralisation de la vie économique et de la paix en Afghanistan, à Meseberg (Allemagne) le 10 septembre 2007' (10 September 2007) <<https://www.elysee.fr/nicolas-sarkozy/2007/09/10/conference-de-presse-conjointe-de-m-nicolas-sarkozy-president-de-la-republique-et-de-mme-angela-merkel-chanceliere-de-la-republique-federale-dallemagne-sur-les-actions-communes-de-la-france-et-de-lallemagne-notamment-en-faveur-de-la-construction>> accessed 3 September 2026.

²⁵³ Jean Bizet, Bernadette Bourzai, Robert del Picchia and Charles Gautier, *La Turquie veut-elle toujours adhérer à l'Union européenne?* Rapport d'information No 677, Sénat, Commission des affaires européennes (28 June 2011) 12.

²⁵⁴ Senem Aydın-Düzgit, *Constructions of European Identity: Debates and Discourses on Turkey and the EU* (Palgrave Macmillan 2012) 1–29, 131–77.

considerations that could bear on the separately exercised authority over that movement.

The asymmetry traced here identifies a historically constituted institutional relation, not a conclusion about its normative character. It does not by itself establish that accession is dominating, discriminatory, civilisationally hierarchical or directed towards exclusion. It does, however, identify the institutional relation within which exclusionary judgments may acquire procedural significance. Any such conclusion would require further evidence about the considerations brought to bear on procedural movement, the relation between those considerations and the procedural positions taken by Member States, and, where relevant, the treatment of comparable candidacies, together with normative criteria for assessing that use. The genealogy therefore identifies the relation to which those questions may be addressed and the limits of what can be inferred from it, rather than answering them in advance.

V. CONCLUSION

The history reconstructed here shows how EU accession reconfigured the relation between domestic preparedness and admission after the postwar removal of preparedness as a condition of sovereign independence. In the relation that emerged, conditions and techniques for assessing candidate reform became increasingly precise, while decisions over the course of negotiations remained expressions of the Union's collective authority over enlargement. A finding that a particular benchmark had been fulfilled established what the candidate had achieved at that stage. It did not determine whether other conditions remained outstanding or whether every Member State agreed that negotiations should advance. The combination of assessment and consent meant that considerations not contained in the assessment record could affect whether and when negotiations advanced, while the candidate remained subject to continuing reform and assessment. Membership could consequently remain the formal endpoint even as the

interval between acknowledged fulfilment and further movement became open-ended.

This finding gives the long-running disagreement over Türkiye's candidacy a different significance. Accounts centred on democratic and rule-of-law regression address the assessment of Türkiye's performance, while accounts centred on Member State interests, bilateral disputes and contested understandings of European belonging address considerations that may inform the collective decision over movement. They therefore illuminate different parts of the same trajectory rather than competing to explain a single institutional judgment. Türkiye's procedural position alone cannot establish which consideration accounts for a particular interruption, and the genealogy cannot assign causal weight among them. It can, however, explain why the assessment record cannot resolve that disagreement on its own. Conditional inclusion names the relation within which each of these forces can acquire procedural significance. Within it, improvement can be required, measured and acknowledged, while membership remains held out as the objective rather than owed as the consequence.

ECO-LEGAL SYSTEMS THINKING – A CONCEPTUAL FRAMEWORK FOR RETHINKING EU DATA GOVERNANCE

Erskine Apiiyah* 

This article develops eco-legal systems thinking (ELST) as a conceptual framework for reconceptualising law, technology, and ecology as interdependent systems. The analysis demonstrates that conceptualising these domains as interdependent reveals how EU data governance continues to operate through an anthropocentric paradigm that obscures the technological and ecological conditions within which legal concepts acquire meaning. The framework situates legal norms within the broader technological and ecological contexts that make contemporary data processing possible. It thus highlights the underlying dependencies that EU data governance implicitly relies upon but does not acknowledge. ELST brings these interdependencies into conceptual view without prescribing interpretative or doctrinal outcomes.

Keywords: EU data governance; Eco-legal systems thinking; law, technology and ecology; legal epistemology; systems theory; anthropocentrism; reductionism

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I. INTRODUCTION

European data governance has expanded rapidly through instruments such as the General Data Protection Regulation (GDPR), the Artificial Intelligence Act (AIA), and the new sectoral framework, the European Health Data Space (EHDS).¹ These regulatory instruments are part of the broader European Union's (EU or the Union) regulatory architecture for the governance of data-driven technologies. However, despite their regulatory reach, they remain largely anthropocentric in design.² The GDPR, for

¹ 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 (General Data Protection Regulation) [2016] OJ L 119/1; Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L144/1; Regulation (EU) 2025/327 of the European Parliament and of the Council of 11 February 2025 on the European Health Data Space and amending Directive 2011/24/EU and Regulation (EU) 2024/2847 [2025] OJ L55/1.

² Themistoklis Tzimas, 'The Legal Anthropocentrism at Crossroads: International Legal Principles Ahead of Transhumanism and Post-Anthropocentrism' (2025) 16(1) European Journal of Law and Technology.

example, is designed to protect the fundamental rights and freedoms of natural persons in relation to personal data processing.³ Therefore, it is not designed to address the environmental externalities of digital technologies. As a result, issues such as the energy demands, resource intensity, and carbon footprint of data-driven systems fall outside the conceptual horizon of the Regulation.⁴ Other instruments that draw on the GDPR's foundations, such as the EHDS, have inherited this anthropocentric orientation.

This conceptual limitation has prompted scholars to interrogate the ecological blind spots in EU data governance by highlighting the disconnect between the Union's sustainability ambitions and the environmental implications of data-driven technologies.⁵⁶⁷ Santamaría Echeverría notes that while the EU actively promotes data-driven AI (DDAI) for sustainability goals through initiatives such as the Green Deal and the proposed Common European Data Space, it remains largely silent on the sustainability of DDAI technologies themselves.⁸ His analysis suggests that neither the European Strategy for Data, the Data Governance Act (DGA), nor the European Health Data Space (EHDS) address the ecological impact

³ General Data Protection Regulation (n 1), art (1)(2).

⁴ Tzimas (n 2); See also Guglielmo Tamburrini, 'The AI Carbon Footprint and Responsibilities of AI Scientists' (2022) 7 *Philosophies* 4.

⁵ Enrique Santamaría Echeverría, 'Integrating Environmental Sustainability into EU Data Law and Governance: The Case of Health Data' (2025) 34 *Review of European, Comparative & International Environmental Law* 512.

⁶ Paolo Balboni and Kate Elizabeth Francis, 'Data Ethics and Digital Sustainability: Bridging Legal Data Protection Compliance and ESG for a Responsible Data-Driven Future' (2025) 22 *Journal of Responsible Technology* 100099.

⁷ Philipp Hacker, 'Sustainable AI Regulation' (2023) *Social Science Research Network* <<https://www.ssrn.com/abstract=4467684>> accessed 24 January 2025.

⁸ Santamaría Echeverría (n 5); European Commission, 'The European Green Deal' (Communication) COM (2019) 640 final; European Commission, 'Common European Data Spaces' (European Commission) <<https://digital-strategy.ec.europa.eu/en/policies/data-spaces>> accessed 1 November 2025.

of data processing.⁹ Santamaría Echeverría consequently identifies a conceptual gap in EU data law and governance regarding the integration of the environmental impacts and sustainability implications of DDAI technologies.¹⁰

From a regulatory perspective, sustainability remains only indirectly recognised within EU digital regulation, illustrating the absence of binding ecological obligations in the EU digital governance framework.¹¹ Against this background, scholars have proposed various approaches to incorporate ecological considerations into EU data governance. Balboni and Francis advocate integrating data protection into Environmental Social Governance (ESG) and Corporate Social Responsibility (CSR) frameworks to promote sustainable and ethical data practices through auditable compliance models.¹² Beyond compliance-oriented approaches, subsequent scholarship has examined how existing EU data governance frameworks might be reinterpreted through an ecological lens.¹³ Hacker, for instance, has argued for a sustainability-aware interpretation of the GDPR's norms and has asserted that environmental harms should be factored into legitimate-interest

⁹ European Commission, 'A European Strategy for Data' (Communication) COM (2020) 66 final, 2-3; Regulation 2022/868/EU of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 [2022] OJ L152/1; European Health Data Space (n 1).

¹⁰ Santamaría Echeverría (n 5).

¹¹ Artificial Intelligence Act (n 1), art 95 recital 165; Ugo Pagallo, Jacopo Ciani Sciolla and Massimo Durante, 'The Environmental Challenges of AI in EU Law: Lessons Learned from the Artificial Intelligence Act (AIA) with Its Drawbacks' (2022) 16 *Transforming Government: People, Process and Policy* 359.

¹² Balboni & Francis (n 6).

¹³ Catherine Mulligan and Silvia Elaluf-Calderwood, 'AI Ethics: A Framework for Measuring Embodied Carbon in AI Systems' (2022) 2 *AI and Ethics* 363 ; Guglielmo Tamburrini, 'The AI Carbon Footprint and Responsibilities of AI Scientists' (2022) 7 *Philosophies* 4; Aimee Van Wynsberghe, 'Sustainable AI: AI for Sustainability and the Sustainability of AI' (2021) 1 *AI Ethics* 213.

assessments.¹⁴ Santamaría Echeverría supports Hacker's view and calls for traditional EU data governance frameworks to be reinterpreted to address collective and ecological harms. Drawing on relational theories of data governance, he proposes a model that incorporates the environmental costs of DDAI alongside its societal benefits.¹⁵

This emerging body of scholarship on data and digital governance signals a growing scholarly engagement with ecological responsibility in the context of EU data law. However, the discussion remains largely normative, fragmented, and without a unifying conceptual framework that situates law, technology, and ecology within a single analytical system. Drawing on Hacker and Santamaría Echeverría's ideas, this article poses a critical conceptual question: how should the relationship between law, technology, and ecology be reconceptualised within EU data governance to account for the technological and ecological conditions upon which data-driven technologies depend?

Addressing this question requires moving beyond normative appeals to sustainability towards a conceptual rethinking of how legal meaning itself is derived in the digital age. The proposed reconceptualisation challenges the dominant view of EU data law as a closed, anthropocentric system. It opens space for a more relational understanding of how EU data law conceptualises and responds to ecological and technological change. The article responds to the theoretical gap by arguing that the limited consideration of ecological interdependence in EU data governance is not merely a regulatory omission. Instead, it reflects a conceptual limitation embedded in the assumptions underlying EU data law whereby EU data governance frameworks conceptualise legal regulation as an autonomous, human-centred system detached from the ecological and technological contexts within which data processing occurs.

¹⁴ Hacker (n 7).

¹⁵ Santamaría Echeverría (n 5).

To address this conceptual limitation, the article develops eco-legal systems thinking, a framework that reconceives law, technology, and ecology as interdependent systems. ELST does not propose interpretive or doctrinal outcomes but clarifies how technological and ecological interdependencies shape the context within which EU data governance operates. The article contributes to EU data governance scholarship by introducing a conceptual model that renders technological and ecological conditions theoretically visible.

The article proceeds as follows. Section II examines the Green Gap in EU data governance and identifies limitations in existing approaches to incorporating ecological considerations into digital regulation. Section III explores the epistemic limits of EU data governance through the lenses of anthropocentrism and reductionism. Section IV develops eco-legal systems thinking as a conceptual framework through engagement with systems theory and ecological jurisprudence before examining its implications for EU data governance. Section V concludes the article.

II. EU DATA GOVERNANCE AND THE GREEN GAP

The ‘Green Gap’ in EU data governance refers to the imbalance between the Union’s constitutional and policy commitments to environmental protection enshrined in Article 11 of the Treaty on the Functioning of the European Union (TFEU) and Article 37 of the Charter of Fundamental Rights (the Charter) on the one hand and the limited integration of these values into legal frameworks governing data and Artificial Intelligence (AI) on the other hand.¹⁶ Although the European Green Deal and other high-

¹⁶ Alba Perez Victorio, Edoardo Celeste and Alberto Quintavalla, ‘Greening AI? The New Principle of Sustainable Digital Products and Services in the EU’ (2024) 61 *Common Market Law Review* 1019; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C 326/1, art 11 TFEU; Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 37.

level initiatives promote a twin transition that is both digital and sustainable, the regulatory instruments that operationalise this ambition prioritise economic growth, innovation, and the protection of individual rights.¹⁷

This ‘Green Gap’ becomes evident when examining the EU’s digital governance instruments, including the GDPR, the Data Governance Act, the Data Act (DA), the Digital Services Act (DSA), the Digital Markets Act (DMA), and sectoral frameworks such as the EHDS. Santamaría Echeverría reiterates that despite their regulatory objectives, these frameworks share a common limitation in their limited engagement with the ecological implications of data-driven AI technologies (DDAI).¹⁸ This limitation is apparent in the indirect manner in which sustainability is addressed across EU digital regulation. For instance, the AI Act references sustainability through voluntary codes of conduct, while the DSA requires very large online platforms and very large online search engines to assess and mitigate systemic risks under Articles 34 and 35.¹⁹ Griffin argues that climate-related harms could potentially qualify as systemic risks within this framework, which could allow the DSA to provide a basis for addressing systemic

¹⁷ European Commission (n 4); GDPR art 1(2) (n 4); European Commission (n 7); See European Commission, ‘2022 Strategic Foresight Report-Twinning the Green and Digital Transitions in the New Geopolitical Context’ (*Publications Office of the European Union* 2022) <https://commission.europa.eu/strategy-and-policy/strategic-foresight/2022-strategic-foresight-report_en> accessed 2 November 2025.

¹⁸ Santamaría Echeverría (n 5).

¹⁹ Artificial Intelligence Act (n 1), art 95; Regulation (EU) 2022/2065 of the European Parliament and Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1. Articles 34 and 35 require providers of very large online platforms and very large online search engines to identify, assess, and mitigate systemic risks arising from the design, functioning and use of their services. Article 34 sets out the obligation to conduct risk assessments, while Article 35 requires the adoption of reasonable, proportionate, and effective mitigation measures.

environmental risks associated with digital infrastructures.²⁰ However, since environmental harms are not expressly identified as part of the systemic risks listed in the Regulation, the extent to which these provisions can support environmental obligations remains uncertain.²¹

Similarly, in analysing the DA and DGA, Ducuing identifies a logic of data maximisation that treats the ecological transition as one among many potential objectives.²² She therefore proposes integrating ecological goals as a normative guide for EU data governance to ensure that data access and re-use rights are directed toward sustainability.²³ Hacker, on the other hand, focuses on the AI Act to advance a toolkit for sustainable AI regulation that combines co-regulation mechanisms, sustainability-by-design obligations, and energy-consumption caps linked to social utility.²⁴ However, Hacker concludes that the AI Act ultimately lacks the normative structure to operationalise its environmental ambitions.²⁵ He extends this critique to the GDPR and calls for an ‘environmentally aware’ interpretation of legitimate interests.²⁶ Although these scholarly contributions demonstrate important interpretive approaches, they remain focused on individual regulatory instruments without developing a broader conceptual account of the relationship between law, technology, and ecology within EU data governance.

²⁰ Rachel Griffin, ‘What Does Digital Policy Have to do with Climate? A Great Deal’ CIGI Online (10 July 2023) <<https://www.cigionline.org/articles/what-does-digital-policy-have-to-do-with-climate-a-great-deal/>> accessed 15 March 2025.

²¹ Digital Services Act (n 23).

²² Charlotte Ducuing, ‘Data Governance for the Ecological Transition: An Infrastructure Perspective’ (2024) 33 *Review of European Comparative International Environmental Law* 412.

²³ Ducuing (n 22) 412.

²⁴ Hacker (n 7).

²⁵ Hacker (n 7).

²⁶ Hacker (n 7).

Beyond the conceptual limitations identified in existing scholarship, the institutional organisation of EU digital governance has also been identified as a factor limiting the integration of ecological considerations. Salomia argues that this regulatory disconnect is not simply interpretive but also suggests institutional limitations that can be traced to how digitalisation is governed within the EU.²⁷ Although digitalisation drives data-intensive innovation and has significant environmental impacts,²⁸ the EU primarily governs it through secondary legislation and a wide range of soft law instruments such as communications, resolutions, and white or green papers.²⁹ By contrast, data protection and environmental law have clear grounding in Treaty provisions, with environmental protection recognised as a shared competence under Article 4(2)(e) TFEU and data protection established under Article 16 TFEU.³⁰ As noted by Conea, ‘with the exception of data protection, the digital policy of the EU does not benefit from a specific basis within primary law’.³¹ This institutional arrangement may limit the extent to which environmental sustainability obligations can be embedded directly within new frameworks such as the EHDS.

Salomia’s observation of institutional limitations highlights that the central question is not whether the EU will succeed in achieving its green and digital transitions, but whether it possesses the legal instruments and competences to do so.³² From this perspective, the EU’s pursuit of the twin

²⁷ Oana-Mihaela Salomia, ‘European legal Instruments for Green and Digital Transitions’ (2021) 14 *Challenges of Knowledge Society* 487.

²⁸ Oana Pricopoaia and others, ‘The Implications of Digital Transformation and Environmental Innovation for Sustainability’ (2025) 10 *Journal of Innovation & Knowledge* 100713.

²⁹ Salomia (n 27).

³⁰ Art 16 TFEU establishes data protection as a fundamental human right. Art 4(2)(e) TFEU outlines the shared competence between EU and its member states in the area of environmental protection.

³¹ Alina Mihaela Conea, *Politicile Uniunii Europene*, (Universul Juridic 2019) 191.

³² Salomia (n 27).

green and digital transitions risks oversimplifying the underlying legal problem: how EU data law itself is conceived and situated within the broader technological and ecological context.³³

To further grasp the dynamics, it is useful to consider theoretical perspectives on how technological change exerts pressure on legal systems. In extending the taxonomy of Lyria Benette Moses, Matthijs Maas conceptualises AI as a technological disruption because it generates legal pressures that challenge existing legal categories and regulatory capacities.³⁴ Maas identifies four distinctive pressures that may necessitate legal development. AI may generate new legal blind spots that call for entirely new rules. It may create legal uncertainty, cause existing rules to assume an incorrect scope or even render existing laws obsolete.³⁵ These pressures demonstrate the need for legal adaptation through processes such as legislative reform, regulatory adjustment, and reinterpretation of existing concepts. However, Maas's account also provides a basis for questioning whether such forms of incremental legal development are sufficient where the underlying conceptual assumptions through which law frames technological change remain unexamined.

In the context of EU data governance, the challenge therefore extends beyond adapting existing regulatory frameworks to AI and other data-driven technologies. It also requires examining whether the assumptions embedded within EU data governance make the technological and ecological conditions upon which data processing depends visible in legal analysis. While Maas's analysis explains how technological disruption creates

³³ European Commission, 'The European Green Deal' (n 4); European Commission, '2030 Digital Compass: The European way for the Digital Decade', COM (2021) 118 final.

³⁴ Matthijs M Maas, 'International Law Does Not Compute: Artificial Intelligence and the Development, Displacement or Destruction of the Global Legal Order' (2019) 20 *Melbourne Journal of International Law* 29.

³⁵ Maas (n 34), 27.

pressures for legal development, this article builds on that insight by examining the conceptual assumptions that shape how EU data governance frames the relationship between law, technology, and ecology. This conceptual perspective provides the basis for analysing the limits of existing EU data governance frameworks in accounting for the technological and ecological interdependencies that underpin contemporary data processing.

III. EPISTEMIC LIMITS IN EU DATA GOVERNANCE

Building on the previous section, this section examines how the EU's digital and environmental ambitions reveal the structural and epistemic limits in legal reasoning itself. To situate this conceptually, Liu et al highlight how AI and related technologies expose the limits of legal systems that evolve incrementally in the face of exponential technological growth. In particular, they note that because AI advances exponentially while law develops linearly, there is bound to be a point at which the exponential take-off crosses the straight line.³⁶ At that stage, technological advancement will overtake legal adaptation to the point that law itself is shocked by the rapid developments of AI, resulting in predominantly reactive regulatory responses.³⁷ Such reactive responses are significant because they seek to accommodate technological change through existing legal concepts without reconsidering whether those concepts adequately capture the technological and ecological conditions that enable data-driven technologies.

In the context of EU data governance, this regulatory mismatch captures the tension underlying frameworks such as the GDPR, AI Act, and EHDS, which are designed to provide stable, predictable regulation that evolves

³⁶ Hin-Yan Liu and others, 'Artificial Intelligence and Legal Disruption: A New Model for Analysis' (2020) 12 *Law, Innovation and Technology* 205.

³⁷ Liu and others (n 36).

slowly over time.³⁸ This emphasis on stability and regulatory order provides a context for understanding their reliance on incremental legal change. This also aligns with what Liu et al describe as a form of legal development, whereby law seeks to accommodate disruption from within its existing conceptual model rather than transform its underlying logic.³⁹ Within this framework, legal disruption may take the form of development, displacement, or destruction.⁴⁰ While development refers to the adaptation of existing legal frameworks to technological change, this article focuses primarily on the limits of legal development as a mode of adaptation.

This focus highlights that the challenge identified in EU data governance is not the absence of regulatory responses but the conceptual assumptions within which those responses occur.⁴¹ The ecological consequences of data-intensive technologies, ranging from the energy demands of data centres and AI computation to the material and environmental costs of digital infrastructures, bring to light the limits of relying solely on legal development as a mode of adaptation.⁴² Notably, legal frameworks such as the GDPR and EHDS, with their anthropocentric focus, adapt to new technologies within existing legal regimes.⁴³ As a result, they may provide limited conceptual space for addressing the collective and environmental

³⁸ Michael Veale and Frederik Zuiderveen Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act' (2021) 22 *Computer Law Review International* 97; European Commission, *White Paper on Artificial Intelligence: A European Approach to Excellence and Trust* (White Paper) COM (2020) 65 final; European Commission (n 7).

³⁹ Liu and others (note 36), 233–240.

⁴⁰ Liu and others (note 36), 233–240.

⁴¹ Liu and others (note 36), 233–240.

⁴² Tamburrini (n 3).

⁴³ General Data Protection Regulation (n 1); European Health Data Space (n 1).

dependencies of data-intensive technologies, which are not easily captured through individualised legal categories.⁴⁴

More fundamentally, EU data governance relies on established categories of actors, rights, obligations, and data-related practices, which may leave less visible the broader material and ecological conditions that enable data processing. This limitation illustrates that legal disruption is not just technical but also epistemological. The limits of law's adaptive capacity stem from its underlying assumptions about what counts as legally relevant knowledge, whose interests are prioritised, and how complex systems are conceptualised. This mirrors what Teubner describes as law's self-referential epistemology, whereby law processes external complexity through its own internal categories and reasoning.⁴⁵ These epistemic assumptions provide the basis for examining how reductionist approaches have shaped legal reasoning.

Against this background, the critique of reductionism becomes essential because the epistemic limitations identified above suggest a broader tendency within legal reasoning to analyse complex systems through discrete categories and separate domains. Reductionism, a perspective that has long shaped Western scientific and legal reasoning, holds that complex systems can be understood by breaking them into smaller, independent parts and analysing each separately.⁴⁶ Ghazavi observes that reductionist thinking in Western legal thought generates blind spots for systemic harms that arise

⁴⁴ Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity"' (2015) 26 *Law Critique* 225.

⁴⁵ Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993) 25.

⁴⁶ Fritjof Capra, *The Web of life: A New Synthesis of Mind and Matter* (Anchor Books 1996) 29; Todd Jones, 'Reductionism and Antireductionism: Rights and Wrongs' (2004) 35 *Metaphilosophy* 614.

within interconnected complex systems.⁴⁷ It reinforces segmentation, hierarchy, and control as opposed to recognising relational interdependence.⁴⁸

As established in Cartesian-Newtonian theory, this mechanistic way of thinking treats law as a rational and autonomous system that separates social, technological, and ecological domains instead of viewing them as interconnected components of a broader whole.⁴⁹ The reductionist orientation can be observed in the fragmented treatment of technology, law, and ecology within EU governance, where each domain is often addressed through separate regulatory logics. For example, the GDPR primarily structures data protection around the relationship between data subjects, controllers, and processing activities; the AI Act focuses on risk management and system governance; and the EHDS focuses on data access, reuse, and sharing mechanisms.⁵⁰ While these approaches address important dimensions of digital regulation, they largely operate within distinct legal classifications that provide limited conceptual space for recognising the ecological infrastructures and material dependencies enabling data-driven technologies.

Grear argues that this worldview finds one of its strongest legal expressions in the construction of the ‘anthropos’ – an idealised legal subject represented as rational, autonomous, and rights-bearing, and positioned as separate from

⁴⁷ Vafa Ghazavi, ‘Systems Justice, AI, and the moral Imagination’ in Noelani Arista et al (eds), *Against Reductionism: Designing a human Future with Machines* (MIT Press 2021) 118.

⁴⁸ Ghazavi (n 51).

⁴⁹ Fritjof Capra and Ugo Mattei, *The Ecology of Law: Towards a Legal System that is in Tune with Nature and Community* (Berrett-Koehler Publishers 2015) 128; Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (2nd edn, Routledge 2016).

⁵⁰ General Data Protection Regulation (n 1); Artificial Intelligence Act (n 1); European Health Data Space (n 1).

nature.⁵¹ Evolving from the Cartesian division between mind and matter, law conceives individuals as abstractly rational actors who exist independently of their bodily experience and ecological systems around them.⁵² This conceptual lineage helps explain why legal reasoning often abstracts from material and ecological conditions.

Within this Cartesian-mechanistic tradition, legal reasoning emulates a worldview in which the world is seen as passive, mechanistic, and regarded as an object.⁵³ Weber similarly observed that, since the period of Descartes, the sciences have endeavoured to grasp the world as if it were a dead, mechanical process that could be understood through statistical or cybernetic analysis as a ‘dead res extensa’.⁵⁴ In this configuration, the human and the legal merge into an abstract, universalised centre of reason from which the rest of life becomes intelligible, governable, and ultimately regarded as of secondary significance. This historical inheritance helps explain why EU data governance tends to prioritise legally recognisable actors, rights, and obligations over the wider technological and ecological relations within which data processing occurs. The outcome is a regulatory approach that protects the rights of data subjects while offering limited conceptual space for recognising the broader ecological and technological conditions underpinning data-driven processing.

IV. BEYOND CARTESIAN LAW, TOWARDS ECO-LEGAL SYSTEMS THINKING

Having highlighted the anthropocentric and reductionist tendencies within EU data governance, this section turns to systems and eco-legal perspectives to explore how law might better engage with ecological and technological

⁵¹ Gear (n 44).

⁵² Gear (n 44).

⁵³ Gear (n 44).

⁵⁴ Andreas Weber, *Enlivenment: Towards a Fundamental Shift in the Concepts of Culture and Politics* (Heinrich Böll Foundation 2012) 14.

interdependencies. The limitations identified in the previous section can be traced to wider traditions of modern Western legal thought that have conceptualised the relationship between humans, technology, and the natural world in specific ways.⁵⁵ While this article does not suggest that EU data governance simply reproduces these traditions, these intellectual legacies provide a foundation for understanding certain anthropocentric and reductionist tendencies within contemporary legal reasoning. Within this tradition, certain strands of modern law have long been characterised as a closed and anthropocentric system – operationally self-referential in its internal logic, rooted in a mechanistic and human-centred worldview, and structurally limited in its capacity to incorporate ecological interdependence.^{56,57,58} These characteristics not only shape how law conceptualises technological and ecological relations but also constrain how legal norms evolve in response to rapidly transforming technological systems.

If the epistemological foundations of modern law articulate a Cartesian separation between mind and nature, Gunther Teubner's theory of 'autopoiesis' demonstrates how this division is reproduced within law's internal operations. In Teubner's account, modern law functions as a self-referential system of communication that generates its own norms and categories and is largely autonomous of its social or ecological environment.⁵⁹ This internal autonomy ensures systemic coherence, but it also risks normative closure as it limits the law's capacity to engage directly with external realities.⁶⁰

⁵⁵ See generally Gear (n 44), Teubner (n 45), and Weber (54).

⁵⁶ Teubner (n 45) 25–27.

⁵⁷ Capra and Mattei (n 49) 3.

⁵⁸ Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (2nd edn, Routledge 2016) 4.

⁵⁹ Teubner (n 45).

⁶⁰ Teubner (n 45).

That notwithstanding, Teubner acknowledges that the legal system, although ‘self-referential’, remains ‘cognitively open’ to its environment through co-evolutionary exchanges with other social subsystems such as the economy or politics.⁶¹ Drawing on Buckley’s general systems theory, he adopts the view that systems thrive through adaptive openness to their environments.⁶² However, in the legal context, such openness remains primarily cognitive rather than normative.⁶³ This means law may respond to external developments by translating them into its own internal categories, but it does not necessarily transform those categories to accommodate the technological and ecological interdependencies underlying those developments.

Against this backdrop, an eco-legal systems perspective seeks to extend law’s self-referential model by recognising that legal regulation operates within wider technological and ecological contexts that shape the problems law seeks to govern. While Teubner’s framework captures the internal dynamics that sustain law’s coherence, it does not explore the extent to which legal meaning and normative development depend on the technological and ecological systems within which law operates. Eco-legal systems thinking, therefore, complements Teubner’s ‘autopoietic’ account by recognising that law’s cognitive openness allows it to respond to external developments through its own internal categories, but does not necessarily enable normative transformation in response to technological and ecological dependencies. Addressing these dependencies requires attention to the interdependence of legal, technological and ecological conditions.

Against this understanding of law’s cognitive openness and its limits, eco-legal systems thinking extends the systems perspective by shifting attention

⁶¹ Teubner (n 45) 35.

⁶² Teubner (n 45) 13; Walter F Buckley, ‘Society as a Complex Adaptive System’ in Walter F Buckley (ed), *Modern Systems Research for the Behavioural Scientist: A Sourcebook* (Aldine 1968) 490.

⁶³ Teubner (n 45).

from law's internal coherence towards the relationships among legal, technological, and ecological conditions within which legal systems operate.⁶⁴ It therefore views law as an adaptive system shaped by both its internal processes and its interdependencies with wider technological and ecological contexts. This relational understanding draws from general systems theory, where systems theorists observe that the important characteristics of an organism, or living system, are properties of the whole, which none of the other parts possesses.⁶⁵ They emerge from the interactions and relationships among the parts. These characteristics are destroyed when the system is divided, either physically or theoretically, into isolated elements.⁶⁶ This perspective represents a departure from the Cartesian paradigm that underpins much of Western science and, by extension, traditional legal reasoning. It also conveys a fundamental principle of systems thinking: coherence and legal meaning arise from the interactions and relationships among constituent elements, not from their separation.

Applied to AI and data governance, this systems perspective suggests that the legal significance of AI, for instance, cannot be fully understood by examining discrete elements such as data subjects, automated systems, or regulatory obligations in isolation. The operation of AI systems depends on technological and ecological conditions, including data storage, computational resources, energy systems, and material resources that enable

⁶⁴ Ronald J Allen and Paul Piazza, *The Common Law is a Complex Adaptive System* (2026) Northwestern Public Law Research Paper No 25-42; Capra (n 50); Fritjof Capra and Pier Luigi Luisi, *The Systems View of Life: A Unifying Vision* (Cambridge University Press 2014) 61; Maria Dolores Sánchez Galera, 'The Ecology of Law. Toward a Legal System in Tune with Nature and Community' 26(3) *European Energy and Environmental Law Review* 97 (book review).

⁶⁵ Capra (n 46); Capra and Mattei (n 49).

⁶⁶ Capra (n 46); Capra and Mattei (n 49); Capra and Luisi (n 64).

their functioning.⁶⁷ From a systems perspective, these relationships are better understood not as external consequences of AI regulation alone, but as conditions that shape the data-driven technologies that law seeks to govern.⁶⁸ Therefore, a legal framework focused primarily on individual rights, risks, or compliance obligations may overlook the broader technological and ecological conditions that underpin AI development and deployment.

While Teubner's account provides an analytically compelling articulation of systems theory in law, it is also vulnerable to reproducing the closure that systems approaches seek to question.⁶⁹ Earlier critiques of systems-oriented theories of law, such as Blankenburg's critique of Teubner's notion of reflexive law, drew attention to the potential vulnerability of abstract systemic models to becoming self-referential and ineffective in practice.⁷⁰ Although Blankenburg's critique was developed in the context of institutional responsiveness, it is relevant here because it suggests that increasing the reflexivity of legal systems does not necessarily enable law to recognise the wider technological and ecological interdependencies within which legal problems emerge.

The preceding discussion demonstrates that recognising the technological and ecological interdependencies within which data-driven technologies

⁶⁷ Tamburrini (n 3); International Energy Agency, 'Energy and AI' (IEA 2025), <https://iea.blob.core.windows.net/assets/de9dea13-b07d-42c5-a398-d1b3ae17d866/energyAI.pdf> accessed 11 July 2026; Kate Crawford, *Atlas of AI Power, Politics and the Planetary Costs of Artificial Intelligence* (Yale University Press, 2011).

⁶⁸ Capra (n 46); Capra and Mattei (n 49).

⁶⁹ Gunther Teubner (n 45); for a sociolegal perspective on law as socially embedded, see Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies' (2002) 29 *Journal of Law and Society* 632.

⁷⁰ Erhard Blankenburg, 'The Poverty of Evolutionism: A Critique of Teubner's Case for "Reflexive Law"' (1984) 18 *Law & Society Review* 273. See also David Nelken, *Beyond Law in Context* (1st edn, Routledge 2017) 235–254.

operate requires more than adopting the language of systems thinking. It also requires demonstrating how those insights can inform legal reasoning within EU data governance. Recent critiques of eco-legal thought similarly caution that systems-oriented approaches may remain conceptually persuasive yet exert limited influence on legal interpretation unless they are translated into doctrinal reasoning.⁷¹ In the context of EU data governance, addressing these interdependencies requires not only a different conceptual framework but also consideration of how existing legal principles may be interpreted in light of technological and ecological relationships. Bosselmann addresses this challenge by contending that ecological considerations should inform the general principles through which law is interpreted and applied. He argues that sustainability should operate as a fundamental legal principle capable of guiding legal interpretation across different areas of law.⁷² In this respect, his critique echoes a concern that also emerges in eco-legal systems thinking by suggesting that identifying these interdependencies is insufficient unless they can shape legal interpretation.

The methodological challenge for legal scholarship of translating systems thinking into legal doctrine capable of guiding interpretation and practice, highlighted by Blankenburg in his critique of reflexive law, has re-emerged in contemporary eco-legal scholarship. A prominent example is Capra and Mattei's 'The Ecology of Law', which argues that modern legal thought has been shaped by a mechanistic worldview that separates human activity from ecological interdependence. Capra and Mattei propose a shift towards an ecological conception of law based on relationality, networks, and the recognition that legal systems operate within broader social and ecological contexts. Their approach is important for this article since it illustrates the

⁷¹ Andreas Philippopoulos-Mihalopoulos, *Law and Ecology: New Environmental Foundations* (CRC Press, 2011); Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 *Journal of Environmental Law* 213.

⁷² Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (2nd edn, Routledge, 2016).

potential difficulty of applying systems-based ecological perspectives to legal reasoning. Strasser and Spencer engage with the ecological systems approaches from different angles. First, Strasser questions the feasibility of Capra and Mattei's proposals in the 'Ecology of Law', by reiterating that while its conceptual principles are inspiring, the work offers only a sketch of how these ideas might develop and lacks tangible legal mechanisms for legal implementation.⁷³ A related methodological concern also appears in Spencer's unpublished review of Capra's 'The Web of Life,' which advances a systems-based understanding of living systems as interconnected networks. While Spencer's critique is not peer-reviewed, it raises broader concerns in eco-legal scholarship about the risk that conceptual holism might remain analytically thin unless translated into methodological tools that will shape legal thought.⁷⁴

Although the theoretical traditions discussed emerge from distinct intellectual lineages, they converge in ways that justify their integration within eco-legal systems thinking. Autopoietic theory explains how law stabilises meaning through operational closure while remaining cognitively open to its environment. Ecological jurisprudence complements this by emphasising that governance systems are materially embedded and shaped by ecological dependencies that autopoiesis does not fully theorise. Systems theory adds the conceptual vocabulary of interdependence, emergence, and relational dynamics, enabling law, technology, and ecology to be understood as interdependent rather than separate domains. In the context of EU data governance, this requires a reconceptualisation of how data-driven technologies are regulated by recognising that existing legal

⁷³ Kurt A Strasser, 'Visions of Eco-Law: A Comment on Capra and Mattei, The Ecology of Law: Toward a Legal System in Tune with Nature and Community' (2017) 7 Accounting, Economics and Law Journal 13.

⁷⁴ Herb Spencer, 'LifeNet: A Critical Review/Essay of the Web of Life by Fritjof Capra (1996)' (2020) ResearchGate (unpublished manuscript) <https://www.researchgate.net/publication/342571999_LifeNet_A_Critical_ReviewEssay_of_THE_WEB_OF_LIFE> accessed 14 November 2025.

categories, including rights, risks, and compliance obligations, operate within a broader technological and ecological context. Such a perspective draws attention to the dependencies upon which these technologies rely.

The methodological critiques discussed above underscore a common challenge: systems theories of law risk remaining abstract unless they explain how legal reasoning and regulatory frameworks can account for the technological and ecological conditions upon which data-driven technologies depend. This limitation highlights the need for a conceptual approach that recognises the computational resources, material resources, and ecological conditions that underpin the operation of data-driven technologies and the legal concepts through which they are governed. The next section responds to this challenge by introducing eco-legal systems thinking as a framework that articulates the interdependencies between legal, technological, and ecological systems in EU data governance.

1. Eco-Legal Systems Thinking as a Conceptual Framework

Eco-legal systems thinking (ELST) rests on three assumptions that synthesise perspectives from autopoietic theory, ecological jurisprudence, and general systems thinking. First, legal concepts acquire coherence within the broader technological and ecological environment in which they are developed. Legal norms do not emerge in isolation, and their clarity depends on the wider social, technological, and ecological environment in which legal institutions operate. Autopoietic theory recognises that law is cognitively open to its environment, meaning the frame through which law understands the world, such as risk or harm, is stabilised through ongoing interactions with that environment.⁷⁵

ELST similarly emphasises that the properties of a system arise from interactions among its components rather than from isolated parts.⁷⁶ These propositions suggest that legal concepts and problem-frames adopted in EU

⁷⁵ Teubner (n 45).

⁷⁶ Capra (n 46); Capra and Luisi (n 64).

data governance are epistemically shaped by the technological and ecological conditions under which data-driven technologies operate. These conditions include computational infrastructures such as cloud computing and data centres, the material resources required to manufacture and maintain digital hardware, and ecological dependencies such as electricity generation and water resources that sustain large-scale data processing. These technological and ecological conditions shape the problems to which legal frameworks respond and the concepts through which they are understood.

Second, ELST rejects the view that technology and ecology are external factors to which law simply reacts or responds. Autopoietic theory notes that law relies on information from its environment to stabilise its own boundaries, while ecological jurisprudence highlights that governance systems operate within material conditions that, even if indirectly, shape the context in which legal frameworks develop and operate.⁷⁷ Drawing on these perspectives, ELST therefore views technological and ecological conditions as part of the environment within which the development and possibilities of legal reasoning emerge.

Third, ELST emphasises the importance of conceptual visibility, understood in the context of this article as bringing the technological and ecological dependencies underlying data-driven technologies into view as part of the conditions within which legal concepts acquire meaning. For example, the AI Act illustrates how these relations remain peripheral to the legal problem-frames through which AI systems are regulated. Specifically, the AI Act primarily frames AI systems through legal concepts such as risk, safety, transparency, accountability, and fundamental rights. These regulatory categories operate within a wider technological and ecological environment characterised by the computational infrastructures, material resources, energy and water dependencies that enable AI development and deployment. The conceptual framework's methodological contribution

⁷⁷ Teubner (n 45); Capra (n 46); Capra and Luisi (n 64).

therefore lies in providing a conceptual lens for analysing the technological and ecological conditions within which EU data law operates, without prescribing specific doctrinal or interpretative outcomes.

2. Implications for EU Data Governance

EU data governance frameworks such as the GDPR, the AIA, and the EHDS are often analysed as self-contained legal regimes whose principles operate independently from the technological and ecological conditions that enable data processing.⁷⁸ ELST reframes this perspective by situating regulatory frameworks within the wider technological and ecological conditions of their application. The model highlights that legal norms operate in the context of infrastructures that consume energy, rely on material extraction, and generate environmental impacts.⁷⁹ These material realities are not external but form part of the technological and ecological context within which regulatory categorisations such as risk, necessity, and proportionality are interpreted and applied.⁸⁰

⁷⁸ Hacker (n 7); Santamaría Echeverría (n 5); Eryn Rigley and others, 'Anthropocentrism and Environmental Wellbeing in AI Ethics Standards: A Scoping Review and Discussion' (2023) 4 AI 844.

⁷⁹ Eric Masanet and others, 'Recalibrating Global Data Centre Energy-Use Estimates' (2020) 367 Science 984. See also Guglielmo Tamburrini (n 3); See Organisation for Economic Co-operation and Development (OECD), 'Inclusive, Green and Digital transformation' (OECD) <<https://www.oecd.org/en/topics/inclusive-green-and-digital-transformation.html>> accessed 17 June 2025; Florian Jansen and others, 'The Climate Crisis is a Digital Rights Crisis: Exploring the Civil-Society Framing of Two Intersecting Disasters' (Paper presented at Ninth Computing within Limits 2023, online, 14–15 June 2023).

⁸⁰ The relevance of these categories can be seen in the risk-based regulatory approach of the AI Act, and the necessity and proportionality requirements of the GDPR. See Regulation (EU) 2024/1689 (Artificial Intelligence Act) (n 1) arts 6–7 on the classification of high-risk systems; General Data Protection Regulation (n 1), arts 5(1) (c).

Additionally, this conceptual model helps explain why ecological considerations remain largely absent from EU data governance frameworks.⁸¹ Where legal approaches to EU data governance treat technological and ecological conditions as external to law's domain, the material preconditions of data processing may remain outside the legal problem-frames through which data-driven technologies are assessed. ELST does not argue that these factors should inform legal obligations. However, it shows that their current limited consideration reveals the epistemic framing within which EU data law has developed.⁸² Consequently, ecological and technological interdependencies become hidden not because they lack normative significance, but because the conceptual design of EU data governance episteme does not make them visible.

The framework also highlights a pattern of institutional and analytical fragmentation. EU digital regulation and environmental law evolve in separate domains that are supported by governance structures and policy discourses that reinforce their division.⁸³ ELST does not seek to collapse these domains. However, it illustrates that the infrastructures underpinning data-driven technologies depend on ecological systems even if EU law treats these areas as legislatively distinct. Through a systems-oriented reconceptualisation of law, technology, and ecology as interdependent systems, the framework suggests that the separation between digital policy and environmental objectives is neither a natural nor an inevitable feature of EU data governance.

⁸¹ Santamaría Echeverría (n 5); Hacker (n 7); Balboni & Francis (n 6).

⁸² Santamaría Echeverría (n 5); Hacker (n 7); Teubner (n 45); Rigley and others (n 78).

⁸³ Perez Victorio, Celeste and Quintavalla (n 20); European Commission, (n 8); European Commission (n 16).

V. CONCLUSION

This article has developed eco-legal systems thinking (ELST) as a conceptual framework for reconceptualising the relationship between law, technology, and ecology as interdependent systems. The analysis argues that this perspective brings into view the technological and ecological conditions under which legal concepts acquire meaning within EU data governance. ELST makes these interdependencies conceptually visible by situating legal norms within the broader technological and ecological environment that makes contemporary data processing possible. The framework, however, does not prescribe interpretative or doctrinal outcomes. Its contribution therefore lies in providing a conceptual basis for analysing how EU data governance conceptualises the technological and ecological conditions upon which data-driven technologies depend.

KATHARINA PISTOR,
THE LAW OF CAPITALISM AND HOW TO TRANSFORM IT
(YALE UNIVERSITY PRESS, 2025)

Carolina Paulesu* 

Following the trajectory of *The Code of Capital*, Katharina Pistor's most recent work, *The Law of Capitalism and How to Transform It* (hereinafter, *The Law of Capitalism*), places her once again – and rightly so – at the centre of the debate on law and capitalism.¹ The nature of the relationship between law and capitalism is contested on a theoretical battlefield, occupied, in part, by scholars who more or less loosely associate with the label 'Law and Political Economy' (LPE). As with her previous volume, Pistor's *The Law of Capitalism* continues to make a significant contribution to LPE literature, enriching it with a most welcome normative turn centring on the social injustices of capitalism.

Theories on law and capitalism span a wide and heterogeneous spectrum. At one end of the spectrum, some Marxist historical materialists, relying on the base-superstructure dichotomy, read the law as lacking autonomy and as entirely determined in both content and form by material relations of

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¹ Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019); Katharina Pistor, *The Law of Capitalism and How to Transform It* (Yale University Press (ebook edition) 2025). The pages of *The Law of Capitalism* referred throughout are the pages indicated in the downloaded version of the ebook.

production.² At the opposite end, legal institutionalists express a firm, quite categorical belief that the law constitutes (or *makes*) capitalism.³ Recalling the arguments in Pistor's *The Code of Capital* and the significant contributions of *The Law of Capitalism*, the review discusses the position of her latest work on this spectrum. In view of the central role Pistor attributes to the discussion of material conditions, though at the cost of some necessary simplification, this brief essay compares Pistor's book with the historical materialist tenet holding that the law is determined by material relations and is thus incapable of producing social change. Having discussed Pistor's features of capitalist law and normative arguments, the review concludes by

² G. A. Cohen, *Karl Marx's Theory of History: A Defence* (Princeton University Press 2001); Jeremy Kessler, 'Law and Historical Materialism' (2025) 74 *Duke Law Journal* 1523. Cohen's and Kessler's centring of the base-superstructure relationship as explanatory of the shape of legal relations is contested in historical materialist literature, as is the corollary that the law is not *in any manner* constitutive of social reality. Problematising the base-superstructure dichotomy: E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin Books 1990); Ellen Meiksins Wood, *Democracy against Capitalism: Renewing Historical Materialism* (Cambridge University Press 1995), 49–75; for a nuanced reading of the dichotomy, which concedes that the law partly constitutes capitalism: Matthew Dimick, 'Base and Superstructure as Ontology' (*Legal Form*, 17 August 2019) <<https://legalform.blog/2019/08/17/base-and-superstructure-as-ontology-matthew-dimick/>> accessed 24 November 2025]. In general, to neatly define a Marxist interpretation of the law is impossible because accounts within the same tradition differ substantively as to the actual relations between the law and capitalism. For a recent and extended, though plausibly incomplete discussion of the literature, consider Robert Knox, Eva Nanopoulos and Andrew Woodhouse, 'Capitalism, imperialism and European Union Law: towards a Marxist approach' (2025) 4 *European Law Open* 290.

³ Simon Deakin and others, 'Legal institutionalism: Capitalism and the constitutive role of law' (2017) 45 *Journal of Comparative Economics* 188; similarly, see Jedediah Britton-Purdy and others, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' [2020] *The Yale Law Journal*.

commenting on two arguments that merit further investigation and warrant critical reflection.

I. PISTOR'S CAPITALIST LAW: MAKING CAPITALISM

Aimed at addressing the puzzle of why capitalism remains refractory to legal regulation,⁴ Pistor's latest theoretical contribution more prominently centres on material relations and their shaping role.⁵ While this shift in focus represents a novelty in Pistor's scholarship, which in *The Code of Capital* left material relations undiscussed, *The Law of Capitalism* remains firmly within the tradition of legal institutionalism, with its consistent affirmation of the law's constitutive capacity.

In her words in *The Code of Capital*, 'capitalism *exists* because modern legal systems are built on and around individual subjective rights and put the state in the service of protecting these rights'.⁶ In opposition to Marxists who rebuke the descriptions of social relations in legal terms,⁷ legal institutionalists submit that social relations cannot but be expressed using the language of law (eg, ownership, employment) because the law *constitutes* those relations and is thus the 'central mechanism of social power'.⁸ Further, Pistor observes that without 'legal coding', assets 'are just that: a piece of dirt, a building, a promise to receive payment at a future date, an idea for a new drug, or a string of digital code'.⁹ The law translates things into capital, thus allowing capitalism to exist and function.

Across seven chapters and the epilogue, *The Law of Capitalism* further develops legal institutionalist claims. Articulating an ontological argument

⁴ Pistor, *The Law of Capitalism* (n 1) 7.

⁵ Pistor, *The Law of Capitalism* (n 1) 24–25.

⁶ Pistor, *The Code of Capital* (n 1) 229 (emphasis added).

⁷ Cohen (n 3) 217–219; Kessler (n 3) 1534.

⁸ Deakin and others (n 4) 191; similarly, see Britton-Purdy and others (n 4).

⁹ Pistor, *The Law of Capitalism* (n 1) 2.

(‘Capitalism is a legal regime, not just an economic system as conventional wisdom has it’),¹⁰ Pistor submits that all of the phenomena that historical materialists associate with capitalism (ie, social relations of production, ownership of the means of production, etc.) are ‘legal to the core’.¹¹ Far from offering a simplistic view of how the law constitutes capitalism, Pistor adopts a macro perspective and gives an account of the forces that shape the relationship between law, politics, and the economy, in an attempt to unveil the role that material conditions play in capitalism’s resistance to legal governance.¹²

Capitalism is characterised by the appropriation of collective resources by private power for private benefit, and the law is one such resource that private power has progressively appropriated. Shielded from the scrutiny of power characteristic of public law and underpinned by ‘ideas of individual autonomy’ rather than the primacy of ‘collective self-governance’,¹³ private law has served as the primary mechanism for constituting capitalism. Backed by private law, indeed, private power can appropriate collective resources through three strategies, which Pistor also qualifies as features of capitalist law. The first is legal empowerment, meaning that private parties are empowered by law to pursue their interests, including at others’ expense.¹⁴ People are free to use the law as they see fit, also in a way that directly and deliberately harms other people. This is aligned with what Pistor identifies as an essential characteristic of capitalism: the prioritisation of ‘individual autonomy [...] over collective ordering’ at the cost of ‘freedom and justice

¹⁰ Pistor, *The Law of Capitalism* (n 1) 9. Cf. David Grewal, ‘The Legal Constitution of Capitalism’, in Heather Boushey, J. Bradford DeLong, and Marshall Steinbaum (eds), *After Piketty: The Agenda for Economics and Inequality* (Harvard University Press, 2017), 471–90.

¹¹ Pistor, *The Law of Capitalism* (n 1) 9.

¹² Pistor, *The Law of Capitalism* (n 1) 9.

¹³ Pistor, *The Law of Capitalism* (n 1) 7.

¹⁴ Pistor, *The Law of Capitalism* (n 1) 13.

for all'.¹⁵

The second strategy of powerful private actors is to access the 'centralized means of coercion' to enforce the rights that the law has empowered them with; this access is granted through litigation.¹⁶ Actors 'sue others defensively [and] push the limits of the law in the hope that challengers will not bother to sue them'.¹⁷ The third strategy and feature of capitalist law is legal arbitrage: powerful private actors can choose the law that applies to their transactions, thereby enjoying a high degree of freedom to pursue their own interests. By doing so, they often manipulate the law.

All three strategies are, in theory, available to anyone, but in practice, primarily those who have the means (ie, capital) use them. Taken together, legal empowerment, the access to centralised means of coercion, and legal arbitrage 'help capitalism circumvent the legal constraints that were established to [...] protect aspects of social life from being subordinated to its logic: the primacy of profit maximization over all other values'.¹⁸

In positioning her contribution within the complex landscape of LPE literature, Pistor recalls two recent, influential and contrasting accounts. On the one hand, she recalls Samuel Moyn's argument that the law, while instrumental for domination and exploitation, retains autonomous capacity for transformative change.¹⁹ On the other, Pistor discusses Jeremy Kessler's historical materialist account, grounded in the foundational Marxist work of GA Cohen's.²⁰ As seen, historical materialists, relying on the base-superstructure dichotomy, argue that material relations determine the law

¹⁵ Pistor, *The Law of Capitalism* (n 1) 10.

¹⁶ Pistor, *The Law of Capitalism* (n 1) 13.

¹⁷ Pistor, *The Law of Capitalism* (n 1) 13.

¹⁸ Pistor, *The Law of Capitalism* (n 1) 14.

¹⁹ Samuel Moyn, 'Reconstructing Critical Legal Studies' (2024) 134 *The Yale Law Journal* 77.

²⁰ Pistor, *The Law of Capitalism* (n 1) 24; Pistor is referring to Kessler (n 2); Kessler's arguments are grounded in Cohen (n 2).

and emphatically reject the law's capacity to produce social change. Pistor claims that her analysis, while sitting between these positions, comes close to the materialist one.²¹ Her aim, she posits, is to explain the conditions under which capitalism emerged and evolved, and thus to theorise on the existing 'prevailing regime – that is, of capitalist law'.²² Divorcing the legal analysis from the material conditions under which the law came to be would only offer a utopian social theory of law.

Whereas, unlike *The Code of Capital*, *The Law of Capitalism* more broadly acknowledges the shaping force of material conditions (for instance, by referring to underlying 'economic interests'),²³ the book remains, however, unquestionably distinct from materialist accounts for at least two reasons. I discuss the first reason here, and the second in the following Section. The first reason is that Pistor remains firmly of the idea that it is not possible to distinguish material relations from their legal coding. The initial surprise a historical materialist may experience at Pistor pairing her analysis with Kessler's is indeed overcome by her clarification of what considerably sets her apart from it: in her view, 'law is foundational for the production and reproduction of capital, the asset, and of capitalism, the regime. Law might even be described as a productive force in its own right, because it is the means that allows holders of assets to extract their pecuniary value'.²⁴ But where Marxists eliminate legal language (ie, that of a right to do something) for describing relations of production and refer to the *powers* to do something,²⁵ Pistor finds such distinction untenable and insists that it is 'impossible to draw a clear line between (physical) power on the one hand and a right (or legal entitlement) on the other'.²⁶

²¹ Pistor, *The Law of Capitalism* (n 1) 25.

²² Pistor, *The Law of Capitalism* (n 1) 25.

²³ Pistor, *The Law of Capitalism* (n 1) 25.

²⁴ Pistor, *The Law of Capitalism* (n 1) 25.

²⁵ Cohen (n 3) 217–219.

²⁶ Pistor, *The Law of Capitalism* (n 1) 25.

Identifying the law as part of the ‘material form’ of capitalism and submitting that the law reproduces the power relations of capitalism,²⁷ Pistor comes close to the compelling insights of those historical materialists, such as EP Thompson who, rejecting the rigid base–superstructure dichotomy, argued that the law is ‘deeply imbricated within the very basis of productive relations’.²⁸ Pistor is hence, in my view, persuasive in her inclusion of the law within the realm of the material. Notwithstanding, her insistence that material relations are ‘legal to the core’ fails to acknowledge that material conditions and the injustices produced by material power relations, while *exacerbated* by the law, precede it and are thus not *constituted* by the law.²⁹ Indeed, although the book often recalls structures that the law has struggled to destabilise, thereby acknowledging their pre-existence, the dominant and categorial emphasis remains on the law’s constitutive role.

II. UNMAKING CAPITALISM THROUGH JUST PRIVATE LAW: NORMATIVE ARGUMENTS

Constructing law as constitutive of capitalism offers the fundamental grounding for *The Law of Capitalism*’s normative argument on justice—a welcome novelty, if compared to *The Code of Capital*, and a rare finding in LPE scholarship which tends to shy away from ‘justice talk’. Pistor’s legal institutionalism provides her with the theoretical foundation for conceiving law as a crucial tool for social change: understanding the law as the deliberate product of political actors and as constitutive of capitalism, legal institutionalists are accordingly optimistic about the law’s ability to foster significant social change. Famously, Pistor in *The Code of Capital* suggests that private law is ‘highly adaptive’,³⁰ and thus can be used as ‘a powerful tool

²⁷ Pistor, *The Law of Capitalism* (n 1) 68.

²⁸ E.P. Thompson (n 2) 271.

²⁹ Pistor, *The Law of Capitalism* (n 1) 9.

³⁰ Pistor, *The Code of Capital* (n 1) 213.

for social ordering'.³¹

Elaborating on this argument, in *The Law of Capitalism*, she contends that conceptualising capitalism as a legal regime enables us to detect within it the instruments for change. The law is the product of human agency and choice, and hence it is possible to imagine that people can make *different* choices than those which lead to the injustices of capitalism and 'weigh in on the use and interpretation of existing law, imagine different uses, and even mobilize for formal legal change'.³² Turning to the second reason why her stance differs significantly from that of historical materialists, it is important to note that the latter would decisively reject this argument. For instance, Kessler is entirely dismissive of the law's causal power to constitute social reality and argues 'there is no reason to believe it is true' that the law can 'mean and do different things in different actors' hands'.³³ The belief in the law's causal power to foster social change is indeed grounded in the wrong conviction that 'more-or-less conscious human decisions to change the world [...] change the world'.³⁴ Conversely, while acknowledging that social change entails complex dynamics across several 'domains of social life',³⁵ Pistor forcefully asserts that, given the role of law in constituting society, 'transformative change is possible *only* through law'.³⁶ In a context of social, economic, and ecological polycrisis fostered by capitalism, the times are ripe

³¹ Pistor, *The Code of Capital* (n 1) xi. See also Britton-Purdy and others (n 4) 1821.

³² Pistor, *The Law of Capitalism* (n 1) 10.

³³ Kessler (n 3) 1571; see also Ntina Tzouvala, 'Global capitalism and law, and where to find them: Afterword to the Foreword by Karen Alter' (2022) 20 *International Journal of Constitutional Law* 60, 62–63.

³⁴ Kessler (n 3) 1571.

³⁵ Pistor, *The Law of Capitalism* (n 1) 59.

³⁶ Pistor, *The Law of Capitalism* (n 1) 10. See also Ugo Mattei and Alessandra Quarta, *The turning point in private law: ecology, technology and the commons* (Edward Elgar 2018), 148. Their argument is much less reformist than Pistor's, but shares with it the belief that because private law contributed to the workings of capitalism, it can be of help in going beyond capitalism.

for change, and the law must be a central harbinger of that change.³⁷

To overcome and change capitalist law's three features, Pistor suggests, it is necessary to change the normative foundation of private law:³⁸ no longer unlimited private powers, but instead their limitation by others' rights, and the pairing of rights with mutual obligations which guarantee equal opportunities for everyone and not the dominion of the most powerful.³⁹ What we need is a just private-law code (JPL).⁴⁰

Pistor finds the human capabilities approach, as developed by Martha Nussbaum, a suitable normative foundation for this *beyond*-capitalist private law.⁴¹ A capabilitarian approach to private law would result in everyone being granted the opportunity 'to live lives they have reason to value'.⁴² Adopting a capabilities approach in the formulation of principles for a JPL would clarify that 'what is at stake is not "just" a claim to be left alone that is directed against the state, but a normative commitment about the respect that humans owe one another'.⁴³ This way, it would be possible to oppose the injustices produced by the current system.⁴⁴

³⁷ Pistor, *The Law of Capitalism* (n 1) 55–57.

³⁸ She argues that a similar suggestion is made by Martijn W. Hesselink, 'Reconstituting the Code of Capital: could a progressive European code of private law help us reduce inequality and regain democratic control?' (2022) 1 *European Law Open* 316. Whether Hesselink would agree on the idea that their projects have similar nature is debatable. See Martijn W. Hesselink, 'Prefigurative EU law' (2026) 5 *European Law Open* 9. Hesselink compares his approach to Pistor's and defining the latter as reformist, argues that his approach is not.

³⁹ Pistor, *The Law of Capitalism* (n 1) Chapter 1.

⁴⁰ Pistor, *The Law of Capitalism* (n 1) 63.

⁴¹ Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (The Belknap Press of Harvard University Press 2011).

⁴² Pistor, *The Law of Capitalism* (n 1) 15.

⁴³ Pistor, *The Law of Capitalism* (n 1) 64.

⁴⁴ Pistor, *The Law of Capitalism* (n 1) 64 ff.

Pistor acknowledges that translating the theory into actionable JPL principles would not be easy.⁴⁵ However, she sketches a possible way forward: a just private law should ‘offer guidance to judges or citizen tribunals for applying the law in ways that advance human capabilities [...] in practice’.⁴⁶ By way of example, she suggests that for climate-related cases, courts should shift the burden of proof typical of tort law through the precautionary principle, thereby permitting plaintiffs to intervene to stop pollution before it is too late.⁴⁷ Similarly, she argues that the corporate law principle of limited liability should be subject to constraints, and suggests that actors ought to be responsible for the care of others and for treating them fairly.⁴⁸ This would not exclude corporations’ legal personhood, but rather require shareholders to prove that ‘they are not abusing the corporate form to deflect liability’.⁴⁹ The ‘piercing the corporate veil’ principle should thus be applied much more extensively, rather than being narrowly applied only to cases of intentional abuse. These examples point to solutions which would leverage existing law and require only ‘relatively modest changes’.⁵⁰

Here, Pistor makes an important claim regarding the degree of the transformative power of private law. She is not arguing that transformative change will be achieved through these modest doctrinal adjustments, but that it is a mistake to focus on regulatory law and not ‘also change private law, including tort and contract law’.⁵¹ Without such a change, powerful actors ‘will once again exploit the duality of public and private law to avoid their responsibilities to others’.⁵²

⁴⁵ Pistor, *The Law of Capitalism* (n 1) 65.

⁴⁶ Pistor *The Law of Capitalism* (n 2) 65.

⁴⁷ Pistor *The Law of Capitalism* (n 2) 65.

⁴⁸ Pistor *The Law of Capitalism* (n 2) 66.

⁴⁹ Pistor *The Law of Capitalism* (n 2) 66.

⁵⁰ Pistor *The Law of Capitalism* (n 2) 67.

⁵¹ Pistor *The Law of Capitalism* (n 2) 67.

⁵² Pistor *The Law of Capitalism* (n 2) 67.

III. CRITICAL REFLECTIONS AND CONCLUSION

With its normative turn and articulate theorisation of the strategies through which private power uses the law to appropriate collective resources, *The Law of Capitalism* is yet another piece in Pistor's scholarship that advances our understanding of law and capitalism. Yet, I find that one aspect merits further discussion, and another warrants caution.

First, the book eloquently explains the strategies by which private power appropriates the law as a resource. However, while it acknowledges that power also shapes law-making – operating, so to speak, at the source – it does not openly engage with *how* this happens, in the first place. The reason *why* material relations constrain law-making is clearer. Private power more readily appropriates rules already crafted to sustain its interests. Determining how, though, is more complicated. This raises a methodological issue: how power relations shape law-making may be a question whose answer depends substantially on empirical analysis grounded in truly material considerations. Put differently, the answer should resist any generalisation and instead engage in micro-investigations, all the while not abandoning theorising in favour of flat scientific positivism.⁵³

Further, a relevant consideration follows from determining how material relations constrain law-making: namely, that it is not at all evident that, under continuing conditions of capitalism, where the content and normative underpinnings of the law are shaped by private power, the JPL will be able to come to life altogether. What is more, even if the JPL were to come to life, its ability to bring about transformative social change would face a serious obstacle. Indeed, trust in legal reform overlooks the very fact that Katharina Pistor's book showcases, namely, that powerful agents manipulate the law in their own interest. Think of greenwashing and pinkwashing practices: lacking the structural change in existing material conditions that,

⁵³ I discussed this point with Niall O' Shaughnessy whose wording of the problem inspired this formulation and for whose reflections I am grateful.

situated prior to the law, enable some to be *coders* or *privileged users* of the legal rules, what prevents Pistor's powerful agents from 'washing' their practices as JPL-abiding?⁵⁴

In sum, the version of the constitutive idea (ie, the idea that the law constitutes capitalism and its injustices) underlying *The Law of Capitalism* risks significantly overstating the law's transformative potential.⁵⁵ This is particularly true if, as Pistor herself suggests, a change in the law is to be used to address and repair *structural* injustices, such as – to use one of her examples – climate change.⁵⁶ In conditions of structural injustices, wrongs indeed result from the cumulative effect of myriad socially, culturally, politically, and economically constrained practices.⁵⁷ While the law surely plays a role, it is just one determinant in the creation of unjust structures, and thus its power to rewire the system from within ought not to be overestimated.⁵⁸

⁵⁴ cf Martijn W. Hesselink, 'Beyond Capitalist Law: A Commentary on Katharina Pistor, *The Law of Capitalism and How to Transform It*' (2026) 80 *University of Miami Law Review* 569.

⁵⁵ For other critiques of this version of the constitutive idea, see: Liam McHugh-Russell, 'Getting the Constitutive Power of Law Wrong — Liam McHugh-Russell' (Legal Form, 31 March 2018) <<https://legalform.blog/2018/03/31/getting-the-constitutive-power-of-law-wrong-liam-mchugh-russell/>> accessed 20 April 2024; Marco Goldoni, 'The Constitutive Performativity of the Law of Capital' SSRN Scholarly Paper (31 October 2020) DOI: 10.2139/ssrn.3722610; Ioannis Kampourakis, 'Legal theory in search of social transformation' (2022) 1 *European Law Open* 808; Tzouvala (n 40).

⁵⁶ Persuasively qualifying climate change as a structural injustice is Maeve McKeown, *With Power Comes Responsibility: The Politics of Structural Injustice* (Bloomsbury Academic 2024).

⁵⁷ See, notably, Iris Marion Young, *Responsibility for Justice* (Oxford University Press 2011).

⁵⁸ Theorising the role of private law in structural injustices of production and consumption: Carolina Paulesu, *Structurally Unjust Production and Consumption. A*

The second and final reflection relates to the book's normative suggestion. No normative framework is exempt from criticism: by its very nature, it will have supporters and opponents. Pistor clarifies that she does not intend 'to rule out other approaches that may be equally or more promising for the democratization of private law', but she believes that 'there are, however, good reasons why this approach might be a hopeful starting point for transformative change'.⁵⁹ Conversely, I think there is at least one reason which cautions against centring the Nussbaumian notion of capabilities. Martha Nussbaum's is indeed an explicitly liberal, partial theory of social justice focused on the individual, both as regards the individual's moral duty to facilitate others' capabilities and as the beneficiary of justice. For this reason, to me, the framework seems unfit to capture the structural nature of injustices, such as patriarchal and colonial oppression, that the book brilliantly discusses. Centring these structural injustices would require reflection on social groups and the relations of oppression and domination among them. Capabilities, therefore, seem unable to uphold the book's fundamental premise and aspiration: namely, that a shift from the individual to the collective is necessary if we are to move, as Pistor powerfully advocates, beyond capitalism.⁶⁰

Youngian Theory of Private Law, European University Institute, 2026, EUI, LAW, PhD Thesis – <https://hdl.handle.net/1814/95616>.

⁵⁹ Pistor, *The Law of Capitalism* (n 1) 63.

⁶⁰ Marija Bartl makes a similar and very compelling point in relation to Hanoch Dagan's liberal theory of property, where she writes that 'If the starting point for imagining the world is 'me', how can a 'me' even start contemplating a collective that puts the same 'me' at peril?': Marija Bartl, 'On the chances of structural pluralism in the liberal theory of property' (2022) 18 *International Journal of Law in Context* 247, 248. Dagan's book is: *A Liberal Theory of Property* (Cambridge University Press 2021).