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THE EDITORIAL TEAM

FROM THE EDITORIAL DESK

The Maastricht Student Law Review (MSLR) is a biannual, student-run law journal and the official student law review of the Faculty of Law at Maastricht University. We are committed to providing a platform for students in Maastricht and beyond to publish their work, and aim to provide UM students with the opportunity to contribute to academic discourse and develop their writing and editing skills to the highest standards.

We are pleased to publish the second issue of our third volume. This issue features five submissions that fall under the umbrella of international, European, and comparative law. These submissions include theses and articles that have been written by students and UM alumni. We are very pleased to showcase many topical issues on AI regulation, data protection, immigration, and the rule of law. We are continually inspired by our authors' unique perspectives, and we hope they inspire you, our readers, in turn.

We would also like to thank the Maastricht University Faculty of Law, as well as our staff and alumni advisory boards. A special thank you goes to ELSA Maastricht for their ongoing collaboration and commitment. Through their partnership with MSLR, ELSA Maastricht plays a vital role in promoting legal education by supporting the publication of high-quality, contemporary student submissions.

With this second issue, my time as the Editor-in-Chief has come to an end. It has been a wonderful experience and a privilege to work with a team of such dedicated editors. I would like to thank the editorial team for their hard work in reviewing all the papers submitted to us and carefully editing the final selected papers. I would also like to thank everyone who submitted their work to us; it has been a pleasure to read and edit each paper. Finally, a special thank you to the authors of this issue's papers, without whose commitment this publication would not have been possible.

The editorial team hopes you enjoy reading our second issue of 2026.

Ilona Toivonen
Editor-in-Chief of the Maastricht Student Law Review
Maastricht, 14th July 2026

BOARD OF ADVISORS

"If you can't beat them, join them!" The Possibility of Adjustment of the EU Merger Control Regulation to Address AI Partnerships as Potentially Anti-Competitive M&A Behaviour of Gatekeepers in the Generative AI Sector

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TABLE OF ABBREVIATIONS

AI	Artificial Intelligence
API(s)	Application Programming Interface(s)
CJEU	Court of Justice of the European Union
CMA	United Kingdom Competition and Markets Authority
DMA	Digital Markets Act – EU Regulation
FM(s)	Foundation Model(s)
EC	European Commission
EU	European Union
EUMR	European Union Merger Regulation
GAI	Generative Artificial Intelligence
GC	General Court
GPT	Generative Pretrained Transformer
GPU	Graphics Processing Unit
LLM(s)	Large Language Model(s)
M&A	Mergers and Acquisitions
MS(s)	Member State(s)
NCA(s)	National Competition Authority(ies)
NCMS	Non-controlling minority shareholding
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

1.1. BACKGROUND

It might seem like it has existed for a long time, but ChatGPT only turned three years old in November 2025.[2] Since its release, generative artificial intelligence (GAI) has become the most prevalent topic of conversation within legal practice and academic circles.[3] Many professional workspaces have integrated some form of GAI into their environment.[4] GAI applications can process information faster and are deemed to reduce workload and increase the efficiency of basic tasks.[5] They are not only mere tools for business, but have also become an essential item of daily use for consumers.[6]

This trend has continued in the digital sector,[7] where the development and use of GAI has become pivotal. After the launch of ChatGPT, market stakeholders

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[2] OpenAI, 'Introducing ChatGPT' (*OpenAI*, Product, 30 November 2022) <https://openai.com/index/chatgpt/> accessed 31 May 2025.

[3] This statement encompasses all GAI-related discussions from AI regulation to AI use in practice and academia, to legal challenges AI brings, etc. See further: Nir Kshetri, 'The academic industry's response to generative artificial intelligence: An institutional analysis of large language models' (2024) 48/5 Telecommunication Policy <https://doi.org/10.1016/j.telpol.2024.102760> accessed 31 May 2025; European Commission, 'European approach to artificial intelligence' (Policies, *European Commission*) <https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence> accessed 31 May 2025; Anne Federle and Aurelie de Amorin, 'EU: When does the hiring of another company's stuff require merger control approval' (*Bird&Bird*, 20 November 2024) <https://competitionlawinsights.twobirds.com/post/102jp79/eu-when-does-the-hiring-of-another-companys-staff-require-merger-control-approv> accessed 31 May 2025.

[4] See further: OECD, 'Employment Outlook 2023: Artificial Intelligence and the Labour Market' (OECD, July 2023) <https://doi.org/10.1787/08785bba-en> accessed 31 May 2025, pp. 134-5, s. 4.1.2; Susanne Hupfer, 'Talent and workforce effects in the age of AI' (*Deloitte Insights,* 3 March 2020) <https://www2.deloitte.com/us/en/insights/focus/cognitive-technologies/ai-adoption-in-the-workforce.html> accessed 31 May 2025.

[5] See, for example: Kevin Z Cui and others, 'The Effects of Generative AI on High-Skilled Work: Evidence from Three Field Experiments with Software Developers' (2025) <https://dx.doi.org/10.2139/ssrn.4945566> accessed 31 May 2025, pp. 16-7; Susanne Hupfer, 'Talent and workforce effects in the age of AI' (*Deloitte Insights,* 3 March 2020) <https://www2.deloitte.com/us/en/insights/focus/cognitive-technologies/ai-adoption-in-the-workforce.html> accessed 31 May 2025; Alexander Bick, Adam Blandin, and David Deming, 'The Impact of Generative AI on Work Productivity' (*Federal Reserve Bank of St Luis*, 27 February 2025) <https://www.stlouisfed.org/on-the-economy/2025/feb/impact-generative-ai-work-productivity> accessed 31 May 2025; Edward Segal, 'AI Adds To The Workload And Stress Of Employees, Report Says' (23 July 2025) <https://www.forbes.com/sites/edwardsegal/2024/07/23/ai-adds-to-the-workload-and-stress-of-employees-report-says/> accessed 31 May 2025.

[6] ibid.

[7] There are factual, contextual, and legal differences between the terms 'sector', 'market', and 'industry'. However, for this paper, the differentiation is not crucial, and the interchangeable use of these terms does not impact the research analysis. The EU refers to the digital world as 'digital markets', but in practice, it is referred to as 'the digital sector'. The GAI world would, subsequently, be referred to as 'the GAI market' within the 'digital sector'. However, the GAI

began to focus on creating better competing GAI models and applications.[8] However, to build artificial intelligence (AI) applications such as ChatGPT, Gemini, or Copilot, foundation models (FMs) are required.[9] FMs are complex machine-learning algorithms that form the basis of all GAI applications.[10] They demand powerful computing infrastructure, extensive data, and specialised expertise to be trained and to perform generative tasks.[11] Some companies in the GAI sector only specialise in building and developing FMs, often referred to as FM developer firms.[12] The key inputs for FM development are typically held by incumbent technology firms such as Google, Amazon, and Microsoft.[13] This is due to their pre-established and long-term position of dominance within the digital market.[14] In the European Union (EU), the European Commission (hereinafter, ‘EC’ or ‘the Commission’) has designated these firms as gatekeepers under the Digital Markets Act (DMA).[15] This designation is related to their market position and their ability to provide core platform services such as social networks and operating systems.[16] Overall, the difficult access to crucial FM development

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market can be split into smaller markets, hence making it a sub-sector. To make it easier for the reader, the word ‘digital market/s’ refers to the digital sector, which includes GAI, and the word ‘GAI sector’ refers to a digital sub-sector, composed of smaller markets. Interchangeable use can be seen in this paper.

[8] Paulo R Abecasis and others, ‘Generative Artificial Intelligence: The Competitive Landscape’ (Copenhagen Economics, February 2024) <https://copenhageneconomics.com/publication/generative-artificial-intelligence-competition/> accessed 31 May 2025, pp. 3, 15, 31, para. 51, s 3.1.3; Stanford University, ‘Ecosystems Graphs for Foundational Models’ (Stanford University, 2024) <https://crfm.stanford.edu/ecosystem-graphs/index.html?mode=table> accessed 31 May 2025.

[9] Center for Research on Foundational Models, ‘Report: On the Opportunities and Risks of Foundational Models’ (Stanford University, 2021) <https://crfm.stanford.edu/assets/report.pdf> accessed 31 May 2025, p. 3.

[10] ibid.

[11] ibid.

[12] The term ‘FM developer firm’ strictly refers to companies that predominantly only produce FMs, for example, OpenAI, Mistral, Inflection, and Anthropic. See further: Jonathan M Barnett, ‘The Case Against Preemptive Antitrust in Generative Artificial Intelligence’ (2024) Artificial Intelligence and Competition Policy, Concurrences 3, USC CLASS Research Paper No 24-19 <https://ssrn.com/abstract=4829989> accessed 31 May 2025, p. 5.

[13] Autorité de la Concurrence, 'Generative artificial intelligence: the Autorité issues its opinion on the competitive functioning of the sector’ (Press Release, *Autorité de la concurrence*, 28 June 2024) <https://www.autoritedelaconcurrence.fr/en/press-release/generative-artificial-intelligence-autorite-issues-its-opinion-competitive> accessed 31 May 2025; See (n 12) and further Chapter II, s. 1.1.2.

[14] ibid.

[15] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1 (DMA).

[16] DMA, arts 1(1)(2), 2(1)(2), 3; *DMA/Alphabet* (Cases DMA.100002-04-05-06-08-09-10-11) Commission Decision C/2023/6101 [2023] OJ C C/2023/549; *DMA/Apple* (Cases DMA.100013-25-27) Commission Decision C/2023/6100 [2023] OJ C C/2023/548; *DMA/Amazon* (Cases

infrastructure has led to the birth of AI partnerships between FM developer firms and gatekeepers. These are arrangements, investments, or other forms of partnership where the FM developers typically acquire access to AI inputs and financial resources.[17]

The United Kingdom's Competition and Markets Authority (CMA), in its recent AI Report, has counted more than 90 new AI partnerships since 2019 undertaken by gatekeeper firms.[18] Given the EU's shallow capital market,[19] these partnerships present an opportunity for smaller FM developer companies to gain access to indispensable inputs, develop new models, innovate, and become competitive in the GAI sector.[20] However, while AI partnerships can be advantageous, they have equally raised concerns among lawmakers and regulators for their potential to weaken the operation of the digital market.[21] Gatekeepers can utilise these partnerships as grounds for input foreclosure and create a market feedback loop, helping them entrench their dominant market position.[22] Furthermore, competition authorities have taken into account the risk of early killer acquisitions, which involve acquiring control but also the predatory hiring

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DMA.100016-18) Commission Decision C/2023/6104 OJ C C/2023/905; *DMA/Meta* (Cases DMA.100020-24-35-44) Commission Decision C/2023/610 <https://digital-markets-act-cases.ec.europa.eu/cases/DMA.100020> accessed 31 May 2025; *DMA/Microsoft* (Cases DMA.100017-23-26) Commission Decision C/2023/6106 OJ C C/2023/551.

[17] See further Chapter II, s. 1.2.2.

[18] United Kingdom Competition and Markets Authority, 'AI Foundational Models: Technical update report' (April 2024) <https://assets.publishing.service.gov.uk/media/661e5a4c7469198185bd3d62/AI_Foundation_Models_technical_update_report.pdf> accessed 31 May 2025 (CMA FM Report), p. 30, para. 2.58; The CMA in its report refers to gatekeepers as GAMMA firms as an abbreviated form of Google, Amazon, Microsoft, Mete, and Apple.

[19] OECD AI Policy Observatory, 'VC Investments in AI by Country' (2025) <https://oecd.ai/en/data?selectedArea=investments-in-ai-and-data&selectedVisualization=vc-investments-in-ai-by-country> accessed 31 May 2025; Christophe Carugati and Nicole Kar, 'Assessing the Competitive Dynamics of AI Partnerships' (2024) <https://dx.doi.org/10.2139/ssrn.5025769> accessed 31 May 2025, p. 7.

[20] European Commission, 'Competition Policy Brief' 978-92-68-16497-6 (European Commission, September 2024) 3 (Competition Policy Brief), p. 3; Robert Ryan, James Rutt, and Mike Walker, 'How to address under-enforcement in digital markets?', in Ioannis Kookoris, and Nicholas Levy (eds), *Research Handbook on Global Merger Control* (Edward Elgar Publishing 2023), p. 151, s. 6.2.6.

[21] European Commission, 'Speech by EVP Margrethe Vestager at the webinar on generative AI organised by the French 'Autorité de la Concurrence" (European Commission, 30 September 2024) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_24_4966> accessed 31 May 2025.

[22] Competition Policy Brief (n 20), p. 7; CMA FM Report (n 18), pp. 75-6, para. 5.2. Input foreclosure refers to cases where an undertaking will make it difficult or impossible to access inputs in a market. Feedback loop refers to cases where the circumstances in the market are connects and facilitate each other. For further explanation see Chapter II, s. 1.2.2.

of talent, with the intent to limit competition.[23] Lastly, with gatekeepers’ current influence on digital policy, there is concern that AI partnerships can become a catalyst for gatekeepers to shape AI policy.[24]

Albeit these partnerships concern mostly the upstream market at the development and production level, they inherently affect consumers in the downstream market.[25] The availability of diverse GAI applications directly impacts the consumers’ choice and welfare, which form fundamental pillars of EU competition law.[26] In a world where GAI and the digital market are becoming more and more prevalent, it is of utmost importance to address competition concerns that can arise at the brink of innovation.

In light of these considerations, the EC has elected to scrutinise AI partnerships on a case-by-case basis under the EU merger control regime.[27] The investigations of the *Microsoft/OpenAI* and *Microsoft/Inflection* deals have been crucial.[28] Although these partnerships are different in contractual terms, corporate structure, and market impact, neither could qualify for scrutiny under the EU Merger Regulation (EUMR).[29]

In the case of *Microsoft/OpenAI*, the EC concluded that the partnership did not constitute a concentration within the meaning of the EUMR, as Microsoft had not acquired decisive control over OpenAI.[30] Meanwhile, the case of *Microsoft/Inflection* failed to meet the turnover threshold that establishes an EU

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[23] EVP Speech (n 21).

[24] Open Markets Institute, ‘AI in the Public Interest: Confronting the Monopoly Threat’ (Open Markets Institute, 15 November 2023) <https://www.openmarketsinstitute.org/publications/report-ai-in-the-public-interest-confronting-the-monopoly-threat#:~:text=The%20Open%20Markets%20Institute%20and,monopoly%20power%20and%20aggressively%20co%2D> accessed 31 May 2025 (Open Markets Institute), p. 25.

[25] Specifically, consumers’ choices on GAI applications. This follows from the logic that consumers are the end-point of the GAI chain and every choice throughout this chain is reflected on the final products.; see further: Aspen Hopkins, and others, ‘AI Supply Chains: An Emerging Ecosystem of AI Actors, Products, and Services’ (2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4789403> accessed 31 May 2025, p. 1.

[26] Read in conjunction with other competition law provisions; TFEU, arts 101(3), 102.

[27] EVP Speech (n 21).

[28] Microsoft, ‘Microsoft and OpenAI evolve partnerships to drive the next phase of AI’ (Microsoft Corporate Blogs, 21 January 2025) <https://blogs.microsoft.com/blog/2025/01/21/microsoft-and-openai-evolve-partnership-to-drive-the-next-phase-of-ai/> accessed 31 May 2025; Microsoft, ‘Mustafa Suleman, DeepMind and Inflection Co-founder, joins Microsoft to lead Copilot’ (Microsoft Corporate Blogs, 19 March 2024) <https://blogs.microsoft.com/blog/2024/03/19/mustafa-suleyman-deepmind-and-inflection-co-founder-joins-microsoft-to-lead-copilot/> accessed 31 May 2025; EVP Speech (n 21).

[29] EVP Speech (n 21); Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1 (EUMR).

[30] EVP Speech (n 21).

dimension under the EUMR, as Inflection is still a small firm with low turnover.[31] This left the scrutiny of the partnership solely up to national competition authorities (NCAs) and Member States' (MSs) national merger regimes, despite the Commission potentially being better positioned to investigate.[32]

While these types of partnerships are not new, the corporate structures of FM developer firms are challenging for the Commission to establish that there has been a 'concentration'.[33] Moreover, as identified by the EC itself, transactions with high value but low turnover [34] are extremely prevalent in the digital markets and pose a rising risk.[35] The EUMR's jurisdictional threshold functions on a turnover calculation basis.[36] This leads to acquisitions of small firms always failing the EU dimension test due to their limited revenue generation, leaving the EC without jurisdiction to investigate.[37] These market dynamics have exposed lacunas in the EUMR that fail to address the potential risks of AI partnerships.

Therefore, this paper aims to answer the following research question: *How can the EU Merger Regulation be adjusted to address AI partnerships as potentially anticompetitive behaviour in the generative AI market?* It will explore the structural nature of the GAI sector and the particularities related to the *Microsoft/OpenAI* and *Microsoft/Inflection* cases. Furthermore, it will research the current legal interpretation of the EUMR provisions used for the evaluations of these two cases and will identify areas of possible adjustment. Proposed EUMR application scope amendments already exist. However, considering them, this paper will more deeply assess how these proposals would fit the regulatory agenda on AI partnerships and evaluate their consequences. While the focus is on tackling the legal lacunas and challenges arising from these partnerships, the paper does not aim to argue that they are inherently anti-competitive. Instead, it seeks to

[31] ibid.
[32] EVP Speech (n 21).
[33] EUMR, art 3; see further Chapter III.
[34] Alison Jones, Brenda Sufrin, and Niamh Dunne, 'Mergers' in Breda Sufrin and others (eds), *Jones & Sufrin's EU Competition Law: Text, Cases & Materials* (8th edn, OUP 2023) (Jones), p. 1099; EVP Speech (n 21).
[35] Pierre Régibeau, 'Killer Acquisitions? Evidence and potential theories of harm' in Ioannis Kookoris, and Nicholas Levy (eds), *Research Handbook on Global Merger Control* (Edward Elgar Publishing 2023) (Régibeau), pp. 331-2, s. 2.4.
[36] EUMR, art (1)(3).
[37] EUMR, art 1(2)(3); Jones (n 34), p. 1099.

explore a better position for the Commission to improve its investigation and scrutiny of AI partnerships.

1.2. Methodology, Scope, and Structure

As the paper will explore the legal interpretation limits of the EUMR, the methodology predominantly used will be doctrinal. The doctrinal methodology is necessary to establish the EUMR's application scope, interpretation, and legislative intent. Moreover, it will help in comprehending the legal evaluation of the *Microsoft/OpenAI* and *Microsoft/Inflection* cases. The EUMR will be the main piece of legislation analysed, primarily Articles 1, 3, 5, and 22 relating to scope and the possibility of NCA merger referrals to the Commission. Other articles will also be mentioned to provide background for the EUMR legal structure. Additionally, Article 14 of the DMA will be assessed due to its significance for gatekeeper merger cases. Case law and secondary sources will help shed light on the legal framework. As the Commission has not released any official document containing its decision for these two cases, the CMA's decisions report will be utilised to establish the partnerships' history. However, the authority's legal assessment of the partnerships under English law will not be considered as it is not the jurisdiction central to the research question of the paper.

Furthermore, a doctrinal analytical approach will be employed to analyse relevant amendment proposals. Existing research will be evaluated and applied in a repurposed manner against AI partnerships and the EU's digital market agenda. Additionally, secondary sources will be used to assess the consequences of EUMR amendments against the advantages of AI partnerships. Lastly, secondary sources from computer science and AI will be examined to determine the functionality of GAI and connect it to its market, and from economics to determine the theories of harm of EUMR amendments.

Concerning the scope, while AI partnerships can be examined through Articles 101 and 102 TFEU, this paper will examine only their treatment under the EUMR. This is primarily due to three reasons. Firstly, the merger control regime was the first tool selected by competition authorities such as the EC, CMA, and the US Federal Trade Commission.[38] Secondly, merger control has been previously utilised in the pharmaceutical and digital industries to detect large-scale shifts in market structures.[39] Mergers and acquisitions (M&A) have always been incumbent firms' strategy to entrench their market position.[40] Thirdly, considering the concentration tendencies of the GAI market, it is the broadest tool to deal with the competition risks of AI partnerships firsthand.[41] Moreover, the paper is limited to analysing the EUMR from the perspective of the EC's enforcement powers. The legal framework's assessment will focus solely on the application scope and how the EC can enforce its investigative authority, but not on whether AI partnerships can be considered anti-competitive under the EUMR.

Lastly, the cases used to analyse the EUMR's ability to address AI partnerships will be *Microsoft/OpenAI* and *Microsoft/Inflection*. The Commission is currently investigating other partnerships.[42] However, these two cases are particular in nature, have already been investigated, and identify the shortcomings of the EUMR against the GAI market developments. Therefore, this paper will focus only on them, with the apprehension that other AI partnerships are similar and would likely yield similar investigative results against the EUMR. Since the full reasoning of the Commission's decisions is not publicly available,[43] this paper will explore why the partnerships failed to fulfil the EUMR scope. This analysis will be sufficient to pinpoint enforcement gaps, but it does not aim to substitute the EC's rationale in its decision-making.

Following the Introduction, Chapter II will dive into the GAI market. It will firstly focus on the GAI value and supply chain as the catalysts of AI

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[38] EVP Speech (n 21); UK CMA, 'Microsoft Corporation's partnership with Open AI, Inc' [2025] CMA ME/7084/23 (CMA Microsoft/OpenAI Decision), p. 14, para. 12; UK CMA, 'Microsoft Corporation's hiring of certain former employees of Inflection and its entry into associated arrangements with Inflection' [2025] CMA ME/7103/24 (CMA Microsoft/Inflection Decision), paras. 7-8; UK CMA, 'Joint statement on competition in generative AI foundational models and AI products' (UK CMA, 23 July 2024) <https://www.gov.uk/government/publications/joint-statement-on-competition-in-generative-ai-foundation-models-and-ai-products/joint-statement-on-competition-in-generative-ai-foundation-models-and-ai-products> accessed 31 May 2025.

[39] Claes Bengtsson, Josep MC Badia, and Massimilano Kadar, 'Mergers' in Jonathan Faull and others (ed), *Faull&Nikpay: The EU Law of Competition* (3rd end, OUP 2014) (Bengtsson), p. 540, para. 5.02; Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), p. 152.

[40] Régibeau (n 35), p. 319, s 5; Bengtsson (n 39), p. 152.

[41] French Competition Authority Press Release (n 13); Barnett (n 12), p. 6.

[42] EVP Speech (n 21).

[43] As will be discussed in Chapter 3, neither of the partnerships qualifies for investigation by the Commission under the EUMR. Therefore, the EC has not released a decision or any official documents on the cases; EVP Speech (n 21).

partnerships. Secondly, it will analyse the nature of these deals between gatekeepers and small FM developer firms and possible concerns for competition law. Then, Chapter III will dive into the EUMR, its legal interpretation, and its lack of application to two AI partnerships. Fourthly, the paper will continue to assess possible EUMR amendments, evaluating them against the EU’s digital markets agenda and assessing their consequences in Chapter II. Lastly, the Conclusion will enumerate the main points of this paper, summarise the findings, and explore new avenues of future research.

2. The World of Generative AI and AI Partnerships

2.1. The GAI Sector

Understanding the nature of AI partnerships and their competition risks requires a comprehension of the sector in which they exist. Currently, there is no formal legal and economic definition of the GAI sector.[44] However, the EC, unofficially, has identified that stakeholders view the sector as the GAI value chain.[45] This includes all of the chain’s stages without prejudice to the market definition assessment of these stages such as chip manufacturing, data licensing, provision of cloud infrastructure etc.[46] The stakeholders and actors partaking in the value chain form the GAI supply chain, contributing to market conditions and actively participating in AI partnerships. Therefore, the GAI sector will be examined through its technical background and value chain (2.1.1) and the supply chain’s role in market dynamics (2.1.2).

2.1.1. Features of GAI and its Value Chain

The starting point to assess the GAI value chain should not be ChatGPT, Copilot, or Gemini. These are only user-facing applications and the final step of AI deployment. Instead, the GAI value chain begins with AI infrastructure, followed

[44] Competition Policy Brief (n 20), p. 2.
[45] ibid.
[46] Competition Policy Brief (n 20), p. 2; While the aforementioned fields are part of the GAI value chain, they also encompass separate markets. The legal and economic assessment of these markets does not affect and is not affected by the fact that these fields constitute the GAI market.

by AI development, release, and deployment.[47] The figure below shows an overview of the entire GAI value chain as summarised by the CMA AI Report.[48]

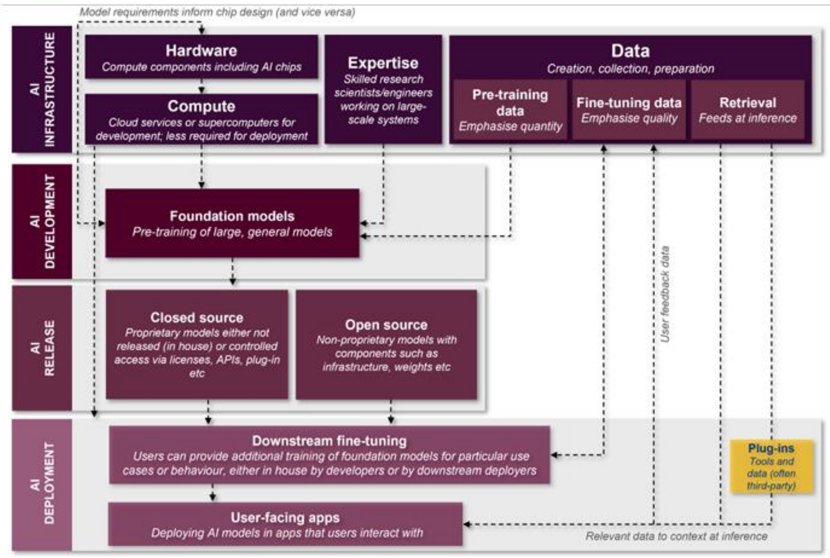

Figure 1: AI Value Chain[49]

Firstly, building a GAI or any other AI model requires three infrastructural elements: 1) specialised computing hardware with sufficient power to process large quantities of information, or computing power through cloud services or supercomputers, 2) expertise to navigate the infrastructure, and lastly, 3) data.[50] These building blocks form the FM, on which an AI application is based.[51]

FMs, referred to as general-purpose AI in the AI Act,[52] are machine-learning models trained on data to produce output.[53] From a technical perspective, these models function based on **transfer learning**, through pre-training and fine-

[47] CMA FM Report (n 18), p. 8; There can be variations of the GAI value chain, such as the one described by the French Competition Authority or the OECD in their AI report. However, at its core, the GAI value chain is comprised of these elements and for this paper, it is sufficient to create an understanding of how AI functions and where market actors fit in this chain.
[48] CMA FM Report (n 18), p. 8, fig. 8.
[49] CMA FM Report (n 18), p. 8.
[50] CMA FM Report (n 18), p. 8.
[51] Stanford University 2021 (n 9), p. 3.
[52] 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 2024/1689, art 2(63).
[53] CMA FM Report (n 18), p. 3.

tuning, and **scale**.[54] Transfer learning enables the model to learn and use the knowledge acquired from one task to perform similar tasks, and then later fine-tune that knowledge in the downstream market for specific tasks.[55] Scale speaks to the necessity of the AI infrastructure components in achieving a high-capacity, powerful FM.[56]

An important development has been the deployment of large language models (LLMs), or FMs, pretrained on language data.[57] The term ‘large’ in LLMs is derived from the extensive scale of datasets and the rapidly growing number of trainable parameters involved in the models, giving them their state-of-the-art performance.[58] LLMs perform tasks by analysing relationships and patterns in the data they are trained on, which makes them indispensable for natural language processing tasks.[59] They are often built on generative pretrained transformer (GPT) models – a type of FM – which predicts the next input in a prompt.[60]

After securing the AI infrastructure and pre-training FMs,[61] they are released either as proprietary, closed-source, or open-source models.[62] Closed-source models license their models for a fee as an application programming interface (API) or plug-in.[63] Contrastingly, open-source models allow third-party

[54] Stanford University 2021 (n 9), p. 4.
[55] ibid.
[56] Stanford University 2021 (n 9), p. 4.
[57] Christophe Carugati, ‘Competition in generative artificial intelligence foundation models’ (2023) Bruegel Working Paper No 14/2023 <https://www.bruegel.org/working-paper/competition-generative-artificial-intelligence-foundation-models> accessed 31 May 2025 (Carugati), p. 5.
[58] Yupeng Chang and others, ‘A Survey on Evaluation of Large Language Models’ (2018) 34/4 ACM Transactions on Intelligent Systems and Technology 1 < https://doi.org/10.1145/3641289> accessed 31 May 2025 (Chang), p. 111; Carugati (n 57), p. 5; see further: Jack W Rae and others, ‘Scaling Language Models: Methods, Analysis and Insights from Training Gopher’ (2021) <https://doi.org/10.48550/arXiv.2112.11446> accessed 31 May 2025; Jared Kaplan and others, ‘Scaling Laws for Neutral Language Models’ (2020) <https://doi.org/10.48550/arXiv.2001.08361> accessed 31 May 2025.
[59] Carugati (n 57), p. 2; Chang (n 58), p. 111:7; see further: Anirudh Khanna and others, ‘A Study of Today’s AI through Chatbots and Rediscovery of Machine Intelligence’ (2015) 8(7) Science and Technology 277-284 <http://dx.doi.org/10.14257/ijunesst.2015.8.7.28> accessed 31 May 2025.
[60] Carugati (n 57), p. 3.
[61] CMA FM Report (n 18), p. 8; Stanford University 2021 (n 9), pp. 6-9, 85-7; Barnett (n 12), p. 4.
[62] CMA FM Report (n 18), p. 8; Carugati (n 57), p. 2.
[63] CMA FM Report (n 18), p. 8; Carugati (n 57), p. 2; APIs function like a key to the server that contains the FM. The company owning the FM will make its model available through an API. Third parties purchase APIs and then use them to send requests to the FM. The API processes the input by using the FM and then responds. On the other hand, a plug-in is purchased by third parties, and then the FM model can be connected to that party’s specific external service, such as a web browser.

developers to access the FM freely to use it and help improve it.[64] The GAI market observes an immense number of FM releases, with 330 FMs having been publicly released globally by March 2024.[65] Some of the most well-known FMs – which are also LLMs – include GPT-4 (OpenAI), BERT (Google), and Amazon Nova (Amazon).

The release of FMs marks the virtual end of the upstream market, and the downstream market then forms through AI deployment, which consists of fine-tuning and user-facing applications.[66] Theoretically, FMs are fine-tuned to perform specific tasks.[67] However, most LLMs nowadays are only prompted.[68] Lastly, the AI models are deployed as user-facing applications such as ChatGPT, Gemini, or Copilot, where users can interact with the model and initiate the inference.[69] This process is another key element in developing GAI as it enables the model to improve and train instantaneously through output generation.[70]

2.1.2. Features of the GAI Market and Supply Chain

Another important aspect of the GAI market is the supply chain, where the production line is established. While the GAI value chain might be easily broken down into several steps, its execution through the supply chain is not linear.[71] It is often described as akin to an interconnected web for stakeholders with overlapping services and relationships.[72] From a market-level perspective, the GAI supply chain is split into two parts. At the upstream market level, the supply chain typically involves chip suppliers such as NVIDIA or Intel, and computing suppliers for cloud service providers such as Google Cloud Platform, Microsoft Azure, or supercomputer providers such as Jean Zay.[73] Furthermore, data providers are included, which typically correspond with cloud service provider

[64] CMA FM Report (n 18), p. 8.
[65] Stanford University 2024 (n 9).
[66] CMA FM Report (n 18), p. 8.
[67] Stanford University 2021 (n 9), p. 4; CMA FM Report (n 18), p. 8.
[68] Stanford University 2021 (n 9), pp. 6-9, 85-7; Barnett (n 12), p. 4.
[69] CMA FM Report (n 18), p. 8.
[70] French Competition Authority Press Release (n 7); Carugati (n 57), p. 3.
[71] OECD, 'Artificial intelligence, data and competition – Background Note' (OECD, Secretariat, 4 May 2024) <https://www.oecd.org/en/publications/artificial-intelligence-data-and-competition_e7e88884-en.html> accessed 31 May 2025 (OECD Background Note), p. 15.
[72] ibid.
[73] French Competition Authority Press Release (n 7).

companies.[74] Lastly, there are the FM developer firms, including pre-training services, such as OpenAI, Anthropic, and MistralAI.[75] At the downstream level, the supply chain narrows to operators that market user-facing applications such as OpenAI, Google, or companies that integrate the GAI applications in their services, such as Zoom.[76]

Regardless of the version of the supply chain followed, the GAI sector and supply chain display different degrees of vertical integration.[77] This integration can occur when firms are present in all parts of the supply chain, from AI infrastructure to application, or when firms outsource parts of the supply chain and maintain only one element internally.[78] Incumbent technology firms such as Google and Microsoft observe the highest level of integration due to their presence in most parts of the supply chain.[79] Medium vertical integration falls upon firms such as MistralAI and OpenAI, which have already developed their FM. Lastly, the least integration level typically falls on sole providers of GAI applications.[80]

Given the market’s structure and the incumbent firms' dominant position, bottlenecks can easily form. These are events in which the dominant firms possess the majority of infrastructure and resources needed for innovation, creating obstacles for the rest of the value chain. For example, data has been argued to be the single biggest problem for LLMs and GAI development due to the large quantity requirements to pretrain models.[81] There is little public information on the exact amounts of data used to pre-train FMs. However, a study has shown that generally 70-75% of an FM value is from data.[82] Llama 4 uses approximately 30

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[74] ibid.
[75] Barnett (n 12), p. 5.
[76] French Competition Authority Press Release (n 7).
[77] French Competition Authority Press Release (n 13); Barnett (n 12), p. 5; Vertical integration refers to the steps of the supply chain being all conducted by one undertaking.
[78] Barnett (n 12), p. 5.
[79] ibid.
[80] ibid.
[81] OECD Background Note (n 71), p. 17.
[82] OECD Background Note (n 71), p. 17; Stefan Hunt and others, ‘You Are What You Eat: Nurturing Data Markets to Sustain Healthy Generative AI Innovation’ 1 CPI Tech Reg Chronicle <https://www.keystone.ai/news-publications/you-are-what-you-eat-nurturing-data-markets> accessed 31 May 2025.

trillion tokens.[83] Tokens are sets of in the form of text, video, and images.[84] Access to sufficient training data is highly costly and unavailable.[85] This key input resource is favourable for incumbent technology companies that have access to internal and external datasets due to their digital market position.[86]

Computing resources or chips are another key input resource with restricted access. As the scale of GAI models has been, until now, correlated with capability, firms must pretrain their FMs on even larger datasets, requiring extensive computing.[87] To process this amount of data, LLMs need specialised graphics processing units (GPUs) incorporated in supercomputers.[88] GPT-3, the former FM version of ChatGPT, used to run on a thousand high-end GPUs.[89] However, the GPU market is currently dominated by Nvidia,[90] and with unprecedented demand, the cost of computing hardware has increased.[91] If a firm does not own a supercomputer or the necessary infrastructure, it can utilise another firm's computing infrastructure through cloud services.[92] The major firms dominating the cloud service sector include Microsoft and Google.[93] These GAI supply chain conditions create grounds for competition concerns, with an expected high concentration of the market to be in the upstream level.[94] While entry barriers have already formed, the expected competition impact includes network effects,

[83] Meta, 'The Llama 4 herd: The beginning of a new era of natively multimodal AI innovation' (Meta, 5 April 2025) <https://ai.meta.com/blog/llama-4-multimodal-intelligence/> accessed 31 May 2025.
[84] For a simple explanation, see: OpenAI, 'What are tokens and how to count them' (*OpenAI*) <https://help.openai.com/en/articles/4936856-what-are-tokens-and-how-to-count-them> accessed 1 June 2025.
[85] Barnett (n 12), p. 5; OECD Background Note (n 71), p. 17.
[86] Barnett (n 12), p. 5.
[87] Carugati (n 57), p. 6.
[88] OECD Background Note (n 71), p. 18, para. 51; Carugati (n 57), p. 6; see further: Deepak Narayanan and others, 'Efficient Large-Scale Language Model Training on GPU Clusters Using Megatron-LM' (2021) in *SC '21: Proceedings of the International Conference for High Performance Computing, Networking, Storage and Analysis* (Association for Computing Machinery) Article 58, <https://doi.org/10.1145/3458817.3476209> accessed 31 May 2025.
[89] OECD Background Note (n 71), p. 18, para. 53.
[90] The Economist, 'Just how rich are businesses getting in the AI gold rush?' *The Economist* (San Francisco, 17 March 2024) Business <https://www.economist.com/business/2024/03/17/just-how-rich-are-businesses-getting-in-the-ai-gold-rush> accessed 31 May 2025; CMA FM Report (n 18), p. 19, para. 2.30.
[91] OECD Background Note (n 71), p. 19, paras. 54-55.
[92] OECD Background Note (n 71), p. 19, para. 54; Carugati (n 57), p. 8.
[93] Carugati (n 57), pp. 6, 8.
[94] Barnett (n 12), p. 6.

economies of scale, and scope.[95] To combat the financial burden of developing and deploying GAI, the market has produced the case of AI partnerships.[96]

2.2. Gatekeeper and FM Developer Firm AI Partnerships

Given the market conditions outlined above, small- and medium-sized firms seek recourse in incumbent technology companies to get around entry barriers.[97] In return, these firms acquire access to FM models, expertise, or the development of FMs on their platforms.[98] While there is abundant discussion on new AI deals between companies, these partnerships are *prima facie* neutral.[99] They are not a direct threat to competition within the market, nor have they been found to have distorted competition so far.[100] However, as the digital markets are a rapid and fast-growing environment,[101] lawmakers tend to be cautious of the effects of unregulated interactions between market stakeholders.[102] Therefore, the concern and predominantly negative discourse surrounding AI partnerships is led by the fear of competition distortion and entrenchment of market positions by incumbent firms.[103] To that end, it is necessary to observe what AI partnerships are (2.2.1) and how they can become a risk for competition law and policy (2.2.2).

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[95] Carugati (n 57), p. 8; The term ‘network effects’ refers to the increase in value of a product with the increase of its use. The use and value of a product are proportional. The term ‘economies of scale and scope’ describes the proportionality between the decrease in costs and increase in production, and decrease in costs by increase in multiple product production, see further: Jacques Cremer, Yves-Alexandre de Montjoye, and Heike Schweitzer, ‘Competition policy for the digital era’ (European Commission, 2019) <https://data.europa.eu/doi/10.2763/407537> accessed 31 May 2025.

[96] CMA FM Report (n 18), p. 30, para. 2.54.

[97] Carugati (n 57), p. 8.

[98] CMA FM Report (n 18), p. 30, para. 2.55.

[99] This entails that AI partnerships both contain advantages and disadvantages for the market and market stakeholders. Without further investigation into the details of these partnerships, they cannot be declared incompatible with competition law; see further: EVP Speech (n 21).

[100] Until 1 June 2025, no AI partnerships have been declared in violation of competition law, neither in the EU nor the UK; EVP Speech (n 21).

[101] See, for example: European Commission, ‘The Digital Economy and Society Index (DESI)’ (European Commission, 2014-2025) <https://digital-strategy.ec.europa.eu/en/policies/desi> accessed 31 May 2025.

[102] EVP Speech (n 21).

[103] Related to general discussions on impact of AI partnerships, see, for example: Travers Smith, ‘Competition Law Insights – Artificial Intelligence’ (Legal Briefing, *Travers Smith*, 1 August 2024) <https://www.traverssmith.com/knowledge/knowledge-container/competition-law-insights-artificial-intelligence/> accessed 31 May 2025; Related to negative discourse: This speaks to the general tone used when discussing AI partnerships and their potential impact. There is a tendency to use hasty generalisations and slippery slope fallacies to paint the AI competition law picture; see, for example: Teodora Groza and Aleksandra Wierzbicka, ‘Mergers by Other Means? AI Partnerships and the Frontiers of (Post-)Industrial Organization’ (12 July 2024)

2.2.1. Gatekeeper/FM Developer Firm AI Partnerships

The word ‘incumbent technology firm/company’ is used to describe several well-positioned technology firms within the digital market. However, for this paper, this term will refer to all gatekeeper undertakings[104] participating in the GAI market.[105] Gatekeepers are undertakings designated by the EC under the DMA as dominant within the digital market and as providers of core platform services.[106] Currently, the designated gatekeepers partaking in the GAI market are Alphabet (Google),[107] Amazon, Meta, Apple, and Microsoft.[108]

Since 2019, these firms have concluded more than 90 partnerships with smaller FM developer firms.[109] The term partnership can be misleading in light of the legal considerations surrounding these mechanisms.[110] Here, it will be used to refer collectively to all arrangements, such as partnerships, investments, and strategic agreements, between gatekeepers and smaller FM developer firms. They can be classified into five categories: data partnerships, expertise partnerships, computing partnerships, distribution partnerships, and investment partnerships.[111] However, most AI partnerships can be included in more than one category.[112] Several AI partnerships have been and currently are on the EC’s radar, such as *Microsoft/OpenAI*, *Microsoft/Mistral, Microsoft/Inflection, Amazon/Anthropic,* and *Alphabet/Anthropic*. However, for this paper, only *Microsoft/OpenAI* and *Microsoft/Inflection* will be assessed.

Microsoft/OpenAI is a multi-tiered, multi-billion-dollar arrangement between Microsoft and OpenAI Inc.[113] In 2019, OpenAI Nonprofit created a

<https://dx.doi.org/10.2139/ssrn.4967357> accessed 31 May 2025; Related to anticompetitive effects, see Chapter II, s. 2.2.2.

[104] The term undertaking is a legal concept in competition law used to refer to companies and firms that engage in economic activities such as sale of a product. For further explanation, see Chapter II, s. 3.1.

[105] The indication that these firms are designated as gatekeeper undertakings is not derived from the fact that these firms provide GAI services. Therefore, the gatekeeper status is not inherent to the participation of these firms in the GAI market. See Chapter III for further explanation.

[106] DMA, arts 1(1)(2), 2(1)(2), 3; see (n 15).

[107] Alphabet Inc is the holding company of Google.

[108] For the involvement of gatekeepers in the GAI market, see above Chapter II, s. 2.1.

[109] CMA FM Report (n 18), p. 30, para. 2.58.

[110] This refers to the legal nature of these partnerships and whether these contracts qualify as simple economic, investment arrangements (contracts, agreements under Art 101 TFEU) between undertakings or as concentrations (EUMR). See Chapter III for further elaboration.

[111] CMA FM Report (n 18), pp. 32-3, para. 2.59; Carugati and Kar (n 19), p. 3.

[112] Carugati and Kar (n 19) p. 3.

[113] CMA Microsoft/OpenAI Decision (n 38), p. 1.

capped-profit subsidiary called OpenAI OpCo LLC.[114] Investors would generate profit at a limited rate, and any outstanding sums would be redirected to OpenAI Nonprofit.[115] Later that year, Microsoft invested $1,000,000,000 into OpenAI Inc – including both OpenAI nonprofit and OpenAI OpCo LLC.[116] They did not acquire board appointment rights, but rather financial investor protections and governance rights.[117] These rights typically involve anti-dilution protection, pre-emptive rights, exit rights, and others.[118] The 2019 agreement iterated that Microsoft would be the exclusive supplier of computer infrastructure to OpenAI for research, products, and API services.[119] In the years leading up to 2025, Microsoft continuously invested in OpenAI Inc, totalling $13,000,000,000.[120] In January 2025, the terms of the agreement were renegotiated to allow OpenAI more training and computing capacity.[121] Both parties have committed to collaboration arrangements, including regular contact between senior decision-makers at OpenAI and Microsoft.[122]

Competition authorities were particularly concerned about this partnership following the events of November 2023.[123] On 17 November, Sam Altman and another director were removed from OpenAI's board without prior notice to Microsoft.[124] On 19 November, Microsoft hired Sam Altman as the new lead for its subsidiary, the AI Research Lab.[125] On 20 November, a public petition was addressed to OpenAI's board, largely by its staff, threatening to resign and work for Microsoft instead.[126] On 21 November, Microsoft confirmed that it would hire

[114] CMA Microsoft/OpenAI Decision (n 38), pp. 6-7, paras. 19, 21a.
[115] CMA Microsoft/OpenAI Decision (n 38), p. 7, para. 21a.
[116] OpenAI, 'Microsoft invests in and partners with OpenAI to support us building beneficial AGI' (*OpenAI*, 22 July 2019) <https://openai.com/index/microsoft-invests-in-and-partners-with-openai/> accessed 10 June 2026.
[117] CMA Microsoft/OpenAI Decision (n 38), pp. 2, 7, paras. 5a, 21a.
[118] The CMA's Decision on Microsoft/OpenAI does not include a list of the rights Microsoft has regarding financial investor protections. These are just examples of what these rights usually look like in business practice.
[119] CMA Microsoft/OpenAI Decision (n 38), p. 2, para. 5c.
[120] CMA Microsoft/OpenAI Decision (n 38), pp. 7-8, para. 21a, c.
[121] CMA Microsoft/OpenAI Decision (n 38), p. 2, para. 5c.
[122] CMA Microsoft/OpenAI Decision (n 38), p. 9, para. 21d.
[123] CMA Microsoft/OpenAI Decision (n 38), p. 9, para. 22.
[124] CMA Microsoft/OpenAI Decision (n 38), p. 9, para. 24a; OpenAI, 'OpenAI announces leadership transition' (*OpenAI,* 17 November 2023) <https://openai.com/index/openai-announces-leadership-transition/> accessed 31 May 2025.
[125] CMA Microsoft/OpenAI Decision (n 38), p. 10, para. 24b.
[126] CMA Microsoft/OpenAI Decision (n 38), p. 10, para. 24c; The New York Times, 'The Employee Letter to OpenAI's Board' *The New York Times* (New York, 20 November 2023) < https://www.nytimes.com/interactive/2023/11/20/technology/letter-to-the-open-ai-board.html>

anyone who resigned from OpenAI.[127] Later that evening, Sam Altman was reinstated as CEO, and the board of directors was largely replaced.[128] In December 2023, Microsoft acquired the right to appoint an observer to OpenAI Nonprofit's board, which was later relinquished in July 2024.[129] In March 2024, Sam Altman was reappointed to the board, together with three new independent board members.[130]

Regarding *Microsoft/Inflection,* Microsoft entered into agreements with Inflection AI Inc. itself and its employees in March 2024 at $650M.[131] Inflection was a relatively small FM developer firm at the beginning of 2023, with only 70 employees and primarily centred in the US market.[132] Prior to the partnership, Inflection's business model included the development of FMs and its flagship AI-powered chatbot Pi, as well as the AI studio business for enterprise customers.[133] In March 2024, Microsoft acquired Inflection's former CEO, former Chief Scientist, and other staff members, amounting to almost Inflection's entire team.[134] After the acquisition of the majority of Inflection's employees, effectively the expertise in FM development, Inflection shifted its focus to only its AI studio business.[135] Furthermore, Microsoft also obtained a non-exclusive IP license to Inflection's IP, and Inflection waived any claims against Microsoft concerning soliciting and hiring its former employees.[136] The partnership was of interest to competition authorities as a possible example of early killer acquisitions. These would be cases in which an incumbent firm acquires a smaller firm with more

accessed 31 May 2025; Kevin Scott, 'To my partners at OpenAI' (X, 21 November 2023) < https://x.com/kevin_scott/status/1726971608706031670> accessed 31 May 2025.

[127] CMA Microsoft/OpenAI Decision (n 38), p. 9, para. 24c.

[128] CMA Microsoft/OpenAI Decision (n 38), p. 10, para. 24d.

[129] CMA Microsoft/OpenAI Decision (n 38), p. 12, para. 33.

[130] OpenAI, 'OpenAI announces new members to board of directors' (*OpenAI,* 8 March 2024) <https://openai.com/index/openai-announces-new-members-to-board-of-directors/> accessed 31 May 2025.

[131] CMA Microsoft/Inflection Decision (n 38), p. 8, para. 30; Krystal Hu and Mary Varghese, 'Microsoft pays Inflection $650M in licensing deal while poaching top talent source says' *Reuters* (21 March 2024) <https://www.reuters.com/technology/microsoft-agreed-pay-inflection-650-mln-while-hiring-its-staff-information-2024-03-21/#:~:text=March%2021%20(Reuters)%20%2D%20Microsoft,matter%20told%20Reuters%20on%20Thursday.> accessed 31 May 2025.

[132] CMA Microsoft/Inflection Decision (n 38), p. 8, para. 29.

[133] CMA Microsoft/Inflection Decision (n 38), p. 17, paras. 68-9.

[134] CMA Microsoft/Inflection Decision (n 38), pp. 8-9, para. 30.

[135] CMA Microsoft/Inflection Decision (n 38), pp. 18-9, para. 76.

[136] CMA Microsoft/Inflection Decision (n 38), p. 5, para. 13.

innovative technology before they can fully launch their product and 'kills' or internalises this product under the incumbent firm's platform instead.[137]

2.2.2. Competition Concerns and Merger Control Tool

At first glance, these partnerships stimulate innovation rather than competition risks.[138] They provide smaller FM developer firms with AI infrastructure and financial resources to develop their models long-term.[139] On the other hand, regulators are concerned with the predisposition of gatekeepers within the digital market and their ability to expand into other markets within the sector.[140]

The upstream GAI market already exhibits a strong presence of gatekeepers.[141] This would entail input foreclosure behaviour, exacerbation of market entry barriers, and the rise of the incumbent firm feedback loop.[142] The gatekeepers' entrenched market position allows them access to input, which forces small firms to seek AI partnerships.[143] This leads to the reinforcement of the dominant market position, but moreover, to the possibility of the gatekeepers selectively restricting access to key AI infrastructure.[144] Hence, a feedback loop is created as presented in Figure 2 below. Moreover, gatekeepers can start to grant preferential access to these inputs and FMs from smaller firms on their platform.[145] This behaviour would increase the market entry barriers and make it challenging for newer firms to develop their FMs or innovate their internal AI technology.[146] Furthermore, the financial (inter)dependence of small FM developer firms on gatekeepers can blunt the force of the gatekeepers and these firms as independent competitors in the GAI market.[147]

[137] CMA Microsoft/Inflection Decision (n 38), p. 4, paras. 7-8.
[138] See, for example: EVP Speech (n 21).
[139] Carugati and Kar (n 19), p. 7, s. 3.
[140] CMA FM Report (n 18), p. 75, para. 5.1.
[141] CMA FM Report (n 18), p. 75, para. 5.2.
[142] Competition Policy Brief (n 20), p. 7; CMA FM Report (n 18), p. 75, para. 5.2.
[143] See Chapter II, s. 2.1.2.
[144] Competition Policy Brief (n 20), p. 7; CMA FM Report (n 18), p. 76, para. 5.3.
[145] Competition Policy Brief (n 20), p. 7.
[146] CMA FM Report (n 18), p. 75, para. 5.2.
[147] Open Markets Institute (n 24), p. 17.

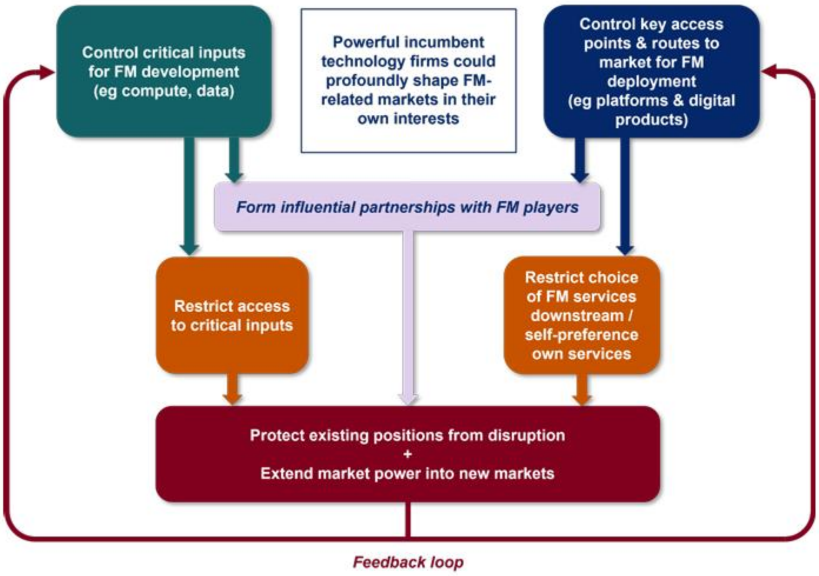

Figure 2: Feedback Loop of Incumbent Firms[148]

Additionally, AI partnerships risk being a tool for 'quashing' competitive threats.[149] Such acquisitions within the digital market do not entail the disappearance or shutdown of a company, but rather their products being integrated into large technology ecosystems.[150] For instance, in the cases of *Facebook/WhatsApp* and *Facebook/Instagram,* both acquired applications operate within Meta's platform.[151] Subsequently, a similar concern rests with gatekeepers potentially being able to assimilate competition through investment partnerships.[152] Another risk of recent AI partnerships is that the design of these deals does not fulfil the application thresholds of merger control regimes – referred to as early acquisitions.[153] The digital market is prone to exhibiting acquisitions of smaller firms too early in their lifecycle to trigger the 'notification threshold' or

148 CMA FM Report (n 18), p. 80.
149 CMA FM Report (n 18), p. 80; EVP Speech (n 21).
150 Ryan (n 20), p. 151.
151 Ryan (n 20), p. 151; Meta, 'Facebook to Acquire Instagram' (*Meta*, 9 April 2012) <https://about.fb.com/news/2012/04/facebook-to-acquire-instagram/> accessed 31 May 2025; Meta, 'Facebook to Acquire WhatsApp' (*Meta*, 19 February 2014) <https://about.fb.com/news/2014/02/facebook-to-acquire-whatsapp/> accessed 31 May 2025.
152 Régibeau (n 35), p. 304; Groza (n 103), s. II, first page; Competition Policy Brief (n 20), p. 8; CMA FM Report (n 18), pp. 80-1, paras. 5.19-20.
153 Régibeau (n 35), p. 311, s. 2.4; Competition Policy Brief (n 20), p. 8; CMA FM Report (n 18), pp. 80-1, paras. 5.19-20.

turnover thresholds.[154] This was the case of the *Microsoft/Inflection* partnership in the EU.[155]

Lastly, the importance of concern in AI partnerships lies in the status and power of gatekeepers. They not only have a pre-existing entrenched market position in some areas of the digital markets, but they also hold influence in the sector overall.[156] Firstly, due to their existing resources, network effects, economies of scale and scope, they can easily expand into new sectors within the market.[157] This widens the gap between them and their competition.[158] Secondly, gatekeepers possess the authority to shape the digital policy given their large influence through financing and lobbying.[159] Thereby, they could steer the public debate on GAI regulation.[160] A key feature of all markets within the digital industry is that competition is never *in* the market, but *for* the market.[161] This entails that the firms are competing to dominate the market as a whole rather than to take part in the market. Consequently, the core issue lies in gatekeepers possibly taking control of the GAI market, its development and its policy.

As a response, efforts to scrutinise these AI partnerships have concentrated on utilising merger control tools.[162] Merger control has historically been an overarching mechanism for concentration prevention and maintaining consumer welfare and competition.[163] In digital markets, it is particularly important as, firstly, M&A are the most common business strategy of incumbent firms and,

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154 Régibeau (n 35), p. 311.
155 EVP Speech (n 21).
156 Mariateresa Maggiolino and Laura Zoboli, 'Preserving Competition in Generative AI: Addressing the Merger Conundrum' (2024) in "AI & Competition Policy" Concurrences <https://dx.doi.org/10.2139/ssrn.4823561> accessed 31 May 2025 (Maggiolino), s. II.
157 Maggiolino (n 156), s. II; see further: Geoffrey Parker, Georgios Petropoulos, and Marshall Van Alstyne, 'Platform mergers and antitrust' (2021) Industrial and Corporate Change Association and OUP 1308, pp. 1308-9; Anne Witt, 'Who's Afraid of Conglomerate Mergers?' (2022) 67(2) Antitrust Bulletin 208-236, p. 208; Marc Bourreau and Alexandre de Streel, 'Digital Conglomerates and EU Competition Policy' (2019) Working Paper <https://dx.doi.org/10.2139/ssrn.3350512> accessed 31 May 2025.
158 See, for example: Yong Lim, 'Tech Wars: Return of the Conglomerate – throwback or Dawn of a New Series for Competition in the Digital Era?' (2020) 19 Journal of Korean Law 47.
159 Open Markets Institute (n 24), p. 25.
160 Open Markets Institute (n 24), p. 25.
161 Elena Argentesi and others, 'Merger Policy in Digital Markets: An Ex-Post Assessment' in Damien Geradin and Gregory Sidak (eds) (2021) 17(1) Journal of Competition Law and Economics 95 accessed from Kluwer Competition, p. 7.
162 EVP Speech (n 21).
163 Ryan (n 20), p. 152; Jason Furman, 'Unlocking digital competition – Report of the Digital Competition Expert Panel' *(UK Government*, March 2019) <https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf> accessed 31 May 2025, p. 32, paras. 1.68–1.92.

secondly, this sector has a natural tendency toward concentration that this sector observes.[164] Furthermore, the scrutiny under merger control of AI partnerships comes as a way to combat the unclear legal nature of these arrangements. The *Microsoft/OpenAI* and *Microsoft/Inflection* partnerships are long-term contracts which include investment, but also exclusivity clauses and acquisition of IP rights.[165] They are not final, as in classic cases of M&A, and can be progressively renegotiated. Therefore, technically, they can also be scrutinised as collusive agreements under Article 101 TFEU since they are partnerships (contractual agreements) or as abuse of dominant market position under Article 102 TFEU as they concern incumbent firms. However, limitations can include stock purchase agreements, defining the relevant market given GAI’s supply chain, and determining whether these constitute horizontal or vertical agreements.[166]

Conclusively, given the risk of high GAI market concentration and predicaments associated with gatekeepers’ involvement, merger control is the best overarching tool for addressing AI partnership competition concerns. This does not entail exclusive application of the merger regime. As the EC has communicated, it will scrutinise these arrangements through its antitrust rules, especially if they fail to qualify as concentrations under the EUMR.[167]

3. THE REGULATORY FRAMEWORK OF EU MERGER CONTROL

The EUMR was a historic development in the EU competition policy. In 1989, the Commission adopted the first Merger Control Regulation[168] to address the lack of a systemic M&A regime and the over-reliance on Articles 101 and 102 TFEU.[169] However, due to insufficient effective control of concentrations and a lack of

[164] Ryan (n 20), p. 152.
[165] See, for example, CMA Microsoft/OpenAI Decision (n 38), p. 8, para. 21c.
[166] See further Chapter IV, s. 4.1.
[167] EVP Speech (n 21); see also: Case C-449/21 *Towercast v Autorité de la Concurrence* [2023] ECLI:EU:C:2023:207, paras. 30-53.
[168] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (1989) OJ L395/1.
[169] Bengtsson (n 39), p. 540, para. 5.01; In 1973, the CJ adopted its judgment in Continental Can, confirming the Commission’s ability to apply Art 102 to acquisitions by a dominant company (Case C-6/72 *Europemballage and Continental Can v Commission* [1973] ECLI:EU:C:1973:22). Following the 1980s, the Commission started to apply Art 101 to concentrative operations. In the Philip Morris case, the CJEU upheld the Commission’s approach (Joined Cases 142 and 156/84 *BAT and Reynolds v Commission* [1987] ECLI:EU:C:1987:490).

consolidation between EU-level and national-level merger control, the 1989 Regulation was amended in 2004 to the current EUMR.[170]

Since then, the EUMR has been the main merger control legal framework, with the primary purpose of regulating changes in market structure.[171] Article 1(1) establishes the scope of the EUMR to be all concentrations[172] with a Community dimension[173] – a two-limbed jurisdictional test. Against this application scope, the EUMR is structured with two core pillars. Firstly, the regime is an *ex ante* scrutiny regime, entailing that the exertion of investigative powers is done before the implementation of the concentration.[174] The responsibility to assess whether the planned transaction fulfils the EUMR’s application scope rests with the undertakings.[175] They must notify the EC under Article 4(1) and halt its implementation under Article 7(1) until the Commission decides whether the deal is compatible with the market.[176] A similar notification obligation also exists in the DMA. Pursuant to Article 14 DMA, gatekeepers are obliged to notify every transaction that fulfils the definition of a concentration in Article 3 EUMR to the EC.

Secondly, the EUMR is built as a ‘one-stop shop’ mechanism. Article 21(3) clarifies that the Commission and NCAs cannot have concurrent jurisdiction. This establishes a clear division of competence, preventing conflicting decisions between the NCA(s) and the EC.[177] However, concentration cases can be referred prior- or post-notification between the EC and NCAs only where the referred authority is best placed to act on the case.[178]

Consequently, for the EU merger regime to apply, M&A situations must fulfil the definition of a concentration under Article 3 (**3.1**) and the EU jurisdictional threshold under Articles 1 (**3.2**). Any concentration without a

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[170] Bengtsson (n 39), p. 540, para. 5.02.
[171] Jones (n 34), pp. 1072-3, s. 2B, stating ‘In particular, Art 101 required the existence of an agreement, which was not always possible to establish in cases of acquisition of control. In turn, Art 102 could only be applied when the undertaking already held a dominant position before the concentration. Finally, the ex post nature of both instruments was not well suited to the control of structural operations.’
[172] Definition found in Art 3 EUMR.
[173] Definition found in Art 1(2) and (3) EUMR.
[174] Jones (n 34), p. 1073, s. 2A.
[175] Case T-417/05 *Endesa v Commission* [2006] ECLI:EU:T:2006:219, para. 99.
[176] EUMR, arts 4, 7; Bengtsson (n 39), pp. 543-4, para. 5.15.
[177] Commission Notice on Case Referral in respect of concentrations (2005) OJ C 56 (Notice on Referrals), para 2; Bengtsson (n 39), p. 544, para. 5.17.
[178] EUMR, arts 4(4)(5), 9(4), 22; Notice on Referrals, paras. 5, 8.

Community dimension is assessed under national competition legislation with the ‘one-stop shop’ rationale, unless the NCAs choose to refer cases to the Commission post-notification under Article 22 (**3.3**). To identify the EUMR’s enforcement gaps, the case of *Microsoft/OpenAI* will be analysed only against Article 3 for the elements that were crucial to determining that the EU had no jurisdiction. Whereas *Microsoft/Inflection* will be examined against Articles 1 and 5, acknowledging that the Commission has concluded this case is a concentration within the meaning of Article 3.

3.1. The Legal Concept of Concentrations

The first limb of the EUMR jurisdiction test is the definition of ‘concentrations’ under Article 3. This targets situations where there has been a ‘lasting change in the control of undertakings concerned’.[179] Article 3(1) predicts two instances of concentrations: (a) a merger between two or more previously independent undertakings, and (b) the acquisition of **direct or indirect control** of an **undertaking** by another **undertaking(s)** through purchase of assets, by contract or other means. The creation of joint ventures is also considered a concentration under Article 3(4). Article 3(1)(b) is significant for *Microsoft/OpenAI* as it speaks to the legal notion of acquisition of control by one or more undertakings.

The Court of Justice of the European Union (CJEU) has defined the concept of undertakings as ‘any entity engaging in an economic activity regardless of the legal state of the entity or the way the entity is financed’.[180] Under this definition, both OpenAI and Microsoft constitute undertakings. Microsoft is an undertaking since it sells products such as its cloud services, operating system, etc. While OpenAI Inc. is partially non-profit, they still engage in economic activity through, for example, the licensing of their FM APIs. Although these companies are not headquartered in the EU, the EUMR retains jurisdiction if the transaction has a Community dimension, as the EC enforcement measures are limited to safeguarding competition within the internal market.[181]

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[179] EUMR, Recital 20; Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008) OJ C 95 (Jurisdictional Notice), paras. 7, 8, 92.

[180] Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECLI:EU:C:1991:161, para. 21.

[181] Richard Whish and David Bailey, *Competition Law* (10th edn, OUP 2021), p. 508; EUMR, Recital 10; see further: *Gencor/Lonrho* (Case IV/M.619) Commission Decision 97/26/EC [1996]

On the other hand – control, whether sole or joint[182] – is defined in Article 3(2) as the ability to exercise decisive influence over another undertaking. This shall be constituted by rights, contracts or any other means leading to ownership or the right to use all or part of the assets of an undertaking or rights conferring **decisive influence** on the composition, voting, or decision of the undertaking and its organs.[183] There is no legal definition for the acquisition of sole control through decisive influence. However, the Jurisdictional Notice gives example cases of decisive influence, which are paralleled by CJEU case law.[184] In essence, exercising decisive influence entails the ability to control the strategic commercial behaviour of an undertaking or possessing corresponsive veto power.[185] In *Microsoft/OpenAI,* the EC considered whether Microsoft exerted sole control over OpenAI.[186]

Sole control can be either *de jure* or *de facto.*[187] *De jure* scenarios are typically connected to strong governance rights. It can be achieved through majority shareholding with voting rights above 50% and the ability to appoint more than half of the board of directors.[188] Alternatively, minority shareholding with specific rights attached,[189] or the right to determine the business policy based on its organisational structure, can also be control *de jure*.[190] *De facto* sole control is acquired where the minority shareholder undertaking is highly likely to achieve

OJ L11/30; *Boeing/McDonnell Douglas* (Case IV/M.877) Commission Decision 97/816/EC [1997] OJ L 336/16.

[182] Acquisition of sole control refers to the acquisition of control of a target undertaking by a single acquirer undertaking, whereas acquisition of joint control refers to the acquisition of control of a target undertaking by two or more undertakings.

[183] EUMR, art 3(2).

[184] See, for example, Jurisdictional Notice (n 179), paras. 16-23.

[185] Jurisdictional Notice (n 179), para. 16.

[186] See, more generally: EVP Speech (n 21).

[187] Jurisdictional Notice (n 179), paras. 54, 61; Jones (n 34), p. 1087; Bengtsson (n 39), p. 558, para. 5.78.

[188] Jurisdictional Notice (n 179), paras. 57-8; *APAX Partners/Telenor Satellite Services* (Case COMP/M.4709) Commission Decision 2007/C 230/01 (2007) OJ C230/1, para. 5; *Continental/Matador* (Case COMP/M.4516) Commission Decision 2007/C 217/01 (2007) OJ C217/1, para. 5; *ACS/Hochtief* (Case COMP/M.6020) Commission Decision 2011/C 23/02 (2011) OJ C23/5, para. 4; *SFPI/Dexia* (Case COMP/M.6812) Commission Decision 2013/C 28/07 (2013) OJ C28/13, paras. 7-8.

[189] *Vattenfall/Nuon Energy* (Case COMP/M.5496) Commission Decision (2009) OJ C212/5, para. 5; see further: *Electrabel/CNR* (Case COMP/M.4994) Commission Decision (2008) OJ C141/4 in conjunction with Case T-332/09 *Electrabel v Commission* [2012] ECLI:EU:T:2012:672 (Electrabel's holding of 49.94% of CNR's capital and 47.92% of its voting right amounts to sole control).

[190] *Celsa/Fundia* (Case COMP/M.4225) Commission Decision (2006) OJ C256/09, para. 6.

a stable majority at the general shareholders' meetings.[191] Additionally, a case of economic dependence may be considered *de facto* control when there are long-term supply agreements.[192] Contrastingly, a minority shareholding with no significant governance rights does not amount to decisive influence and is referred to as a situation of non-controlling minority shareholding (NCMS) or structural links.[193]

In *Microsoft/OpenAI,* Microsoft holds 49% shares of OpenAI OpCo LLC, a minority shareholding despite being OpenAI's biggest investor.[194] In December 2024, OpenAI Nonprofit announced plans to repurpose OpenAI OpCo LLC into a Delaware PBC.[195] Therefore, it is unclear how many shares Microsoft will obtain after this repurpose.[196] Furthermore, Microsoft's rights regarding voting are limited to financial investor protections.[197] They have no the right to appoint OpenAI board members.[198] Their previous observer status on the board was also relinquished in July 2024.[199] In their submissions to the CMA, Microsoft mentioned that, relating to Sam Altman's reinstatement as CEO, they neither could vote, nor had contact with the board.[200] The reappointment was largely impacted by OpenAI's employees, and Microsoft only aimed to support Sam Altman by rehiring him under its subsidiary.[201] Lastly, while Microsoft constitutes OpenAI's biggest investor and they have an exclusive cloud service agreement, OpenAI has still entered into a few other agreements independently.[202]

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[191] Bengtsson (n 39), p. 559, para. 5.80; Jurisdictional Notice (n 179), paras. 59-60; see further: *Arjomari/Wiggins Teape* (Case M.25) Commission Decision (1990) OJ C321/16 (39% shareholding conferred sole control since no other entity had more than a 4% shareholding), Case T-2/93 *Air France v Commission* [1994] ECLI:EU:T:1994:55.
[192] See, for example: *CCIE/GTE* (Case IV/ M.258) Commission Decision (1992) OJ C265.
[193] Kadir Baş, 'Reforming the Treatment of Minority Shareholdings in the EU: Making the Problem Worse Instead of Better?' (2015) 38(1) World Competition Law and Economies Review 77, p. 80; Bengtsson (n 39), p. 564, para. 5.100; see further in Chapter IV, s. 4.1: Case T-411/07 *Aer Lingus Group v. Commission* [2010] ECLI:EU:T:2010:281; *Ryanair/Aer Lingus* (Case COMP/M.4439) Commission Decision (2007) OJ C47/9.
[194] CMA Microsoft/OpenAI Decision (n 38), p. 17, para. 50.
[195] OpenAI, 'Why OpenAI's structure must evolve to advance our mission' (*OpenAI*, 27 December 2024) <https://openai.com/index/why-our-structure-must-evolve-to-advance-our-mission/> accessed 31 May 2025.
[196] CMA Microsoft/OpenAI Decision (n 38), p. 18, para. 54.
[197] CMA Microsoft/OpenAI Decision (n 38), p. 17, para. 50.
[198] CMA Microsoft/OpenAI Decision (n 38), p. 7, para. 21a.
[199] ibid p. 18, para. 53a.
[200] ibid p. 19, paras. 55a-b.
[201] ibid p. 19, para. 55c.
[202] ibid p. 20, para. 59.

The partnership structure, nevertheless, has peculiar characteristics. Microsoft is 2% off from majority shareholding and has not accepted any strong governance rights.[203] However, it has had a strong material influence on OpenAI's commercial policy as indicated by their submissions to the CMA.[204] Moreover, despite claiming not to have actively communicated with OpenAI's board about Sam Altman's reappointment as CEO, Microsoft was an active supporter of the cause and publicly backed OpenAI's employees.[205] Lastly, despite entering other smaller partnerships, OpenAI is still significantly financially dependent on Microsoft and its resources.[206] Therefore, the legal definition of 'concentrations' is too narrow to consider these important factors within the *Microsoft/OpenAI* partnership, emphasising the NCMS gap.

3.2. Community Dimension Threshold

The second limb of jurisdiction is the Community dimension.[207] It is measured in Article 1 according to the turnover threshold. The rationale is that only mergers concerning a significant structural change in the internal market should be captured under the EUMR.[208] The principal threshold is set out in Article 1(2), and the alternative in Article 1(3). These numbers have not been altered since entering into force.[209]

Article 1(2) establishes that an EU dimension is exhibited when (a) there is a combined aggregate worldwide turnover of all the undertakings of more than €5,000M and (b) there is an aggregate Community-wide turnover of each of at least two of the undertakings of more than €250M. Additionally, a negative criterion exists where, if each of the concerned undertakings achieves more than two-thirds of its EU turnover within the same MS, the jurisdiction belongs to NCAs.[210] Article 1(2) ensures the worldwide turnover is captured, and the effect on the EU scale is measured, carving out situations of national concentrations.

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203 ibid p. 7, para. 21a.
204 ibid pp. 3, 17, paras. 6, 51.
205 ibid p. 10, para. 24c.
206 ibid p. 18, para. 53b.
207 EUMR, art 1(2)(3).
208 EUMR, Recital 8; Jurisdictional Notice (n 179), para. 8.
209 Bengtsson (n 39), p. 579, para. 5.163.
210 EUMR, art 1(2); Jones (n 34), p. 1094.

To include smaller deals, Article 1(3) establishes a requirement for combined worldwide turnover at more than €2,500M, and the combined EU turnover at more than €100M in at least three MSs. Additionally, in each of at least these three MSs the aggregate turnover of each undertaking must be more than €25M, and the EU-wide turnover for each undertaking must be more than €100M.[211] Article 1(3) includes the same negative clause as under Article 1(2)[212] and was created to capture concentrations with proxy cross-border effects.[213]

To calculate the turnover, firstly, the relevant undertakings concerned must be identified,[214] and secondly, the aggregate turnovers must be calculated and allocated geographically.[215] The identification step is relatively straightforward. In situations of mergers under Article 3(1)(a), the merging entities are the relevant undertakings;[216] in situations of acquisitions of sole control under Article 3(1)(b), it would be the acquirer and the target undertaking(s).[217] Under Article 5(1), the concept of turnover is the relevant amount[218] derived from the sale of products and the provision of services falling within the undertakings’ ordinary activities,[219] after sales deductions, rebates and VAT.[220] The calculation refers to the previous fiscal year.[221] Furthermore, the turnover is geographically allocated based on the MS where the sale occurs.[222]

The calculations for the *Microsoft/Inflection* have not been made available, and an independent assessment is impossible without the undertakings’ private accounting information. Regardless, the Commission had notified that the concentration failed Article 1(2) or (3) thresholds, particularly the ones referring to EU-wide turnover and allocation of turnover in more than three MSs.[223] A similar case has been the *Illumina/GRAIL*, where the turnover value of the target

[211] EUMR, art 1(3).
[212] For a practical illustration, see *Ryanair/Aer Lingus* (Case COMP/M.4439) Commission Decision (2007) OJ C47/9, para. 14ff.
[213] Bengtsson (n 39), p. 579, para. 5.162.
[214] Jurisdictional Notice (n 179), para. 129.
[215] Bengtsson (n 39), p. 581, para. 6.168.
[216] Jurisdictional Notice (n 179), para. 132.
[217] Jurisdictional Notice (n 179), paras. 134-5, 141.
[218] Jurisdictional Notice (n 179), paras. 204 and 205.
[219] Jurisdictional Notice (n 179), paras. 161–163.
[220] Jurisdictional Notice (n 179), paras. 165-6.
[221] Lennart Ritter and W David Braun, *European Competition Law: A practitioner’s Guide* (3rd edn, Kluwer Law International 2004) (Ritter), p. 901, para. 16.108.
[222] Bengtsson (n 39), p. 587, para. 5.200.
[223] See, generally: EVP Speech (n 21).

undertaking was significantly low.[224] This displays that the turnover test is unsuitable for transactions relating to smaller undertakings in their early stage, although they have a high transaction value, limiting the EC's jurisdictional grasp.[225]

3.3. Article 22 Referral Mechanism and the *Illumina/GRAIL* Decision

Article 22 EUMR is a derogation from the competence rule that jurisdiction rests with NCA(s) where a concentration has no EU dimension. It allows MSs to refer concentration cases back to the EC to investigate, despite not fulfilling Articles 1(2)-(3). The rationale behind the article was to allow MSs without merger control rules to refer concerning concentrations back to the EC.[226] Article 22(1) establishes that one or more MSs may request the Commission to examine any concentration that does not have a Community dimension. However, not every transaction can be referred *ex post.* The NCA(s) must demonstrate not only that Article 3 EUMR is fulfilled, but that the concentration is liable to have a discernible influence on MS trade, and that it must present a real risk of having a significant adverse impact on competition.[227] Over the years, Article 22 has been used as a corrective mechanism in cases where MSs assessed that the Commission was better placed to review the cross-border effects of the transaction.[228]

Now, almost all MSs have merger control regimes.[229] Thereby, in March 2021, the Commission repurposed referrals under Article 22 to address the low-turnover high-transaction-value jurisdictional gap.[230] According to the

[224] Jones (n 34), p. 1099; Case T-227/21 *Illumina v Commission* [2022] ECLI:EU:T:2022:447, paras. 9-10.
[225] Jonas (n 34), p. 1099, s. V.
[226] Three of the first four Art 22 EUMR references were made by Member States which did not have merger control rules and all three of these concentrations were prohibited by the Commission; see *RTL/Veronica/Endemol* (Case IV/M.553) Commission Decision 96/346/EC [1996] OJ L294/14 in conjunction Case T-221/95 *Endemol Entertainment Holding BV v Commission* [1999] ECLI:EU:T:1999:85), *Kesko/Tuko* (Case IV/M.784) Commission Decision 97/277/EC [1997] OJ L174/47 (requested by the Finnish NCA).
[227] Notice on Referrals, paras. 44-5.
[228] See, for example: The conditional clearance decisions in *Promatech/Sulzer* (Case COMP/M.2698) Commission Decision 2004/251/EC (2002) OJ L79/27; *Areva/Urenco/ETC JV* (Case COMP/M.3099) Commission Decision 2006/170/EC (2004) OJ L61/11; *GE/AGFA NDT* (Case COMP/M.3136) Commission Decision (2003) OJ C125/5; *OMYA/Huber PCC* (Case COMP/M.3796) Commission Decision 2007/164/EC (2006) OJ L72/24.
[229] Only Luxembourg does not have merger control rules.
[230] Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases 2021/C 113/01 (2021) OJ C113/1 (Guidelines on Art 22 Referrals).

Commission Guidance on Article 22 referrals, the EC invited NCAs to refer concentrations, especially in the digital sector, that did not fulfil the EU dimension due to one of the undertakings being a small start-up or firm.[231] In the Guidelines, any NCA, regardless of whether the transaction satisfied national notification thresholds, could refer a concentration to the EC following Article 22 EUMR.[232] The French NCA was the first to refer the case to the EC, which then started the investigation procedure accordingly.[233] The *Illumina/GRAIL* was the first and last to be referred under these new guidelines.[234] Additionally, the Commission also invited MSs to refer the case of *Microsoft/Inflection* – the statement was later retracted in light of the CJEU's decision.[235]

The *Illumina/GRAIL* transaction was deemed a concentration under Article 3 EUMR.[236] However, it did not fulfil the turnover threshold since GRAIL was a new undertaking with no turnover in the EU.[237] Regardless, the Commission believed the concentration fulfilled the situation described in their guidelines and invited MSs to refer the case using Article 22(1).[238] Despite *Illumina/GRAIL* not qualifying for notification under French merger law, the French NCA used the Article 22 referral mechanism.[239] The EC fined Illumina for failure to comply with its standstill obligation under Article 7 EUMR.[240] The case was brought before the General Court (GC) alleging that Article 22 did not allow referrals from MSs

[231] Guidelines on Art 22 Referrals, para. 19.
[232] Guidelines on Art 22 Referrals, para. 19; see also: Jones (n 34), pp. 1111-2.
[233] European Commission, 'Mergers: Commission fines Illumina and GRAIL for implementing their acquisition without prior merger control approval' (*European Commission*, 12 July 2023) < https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3773 > accessed 1 June 2025.
[234] Jones (n 34), pp. 1111-2; EVP Speech (n 21).
[235] European Commission, 'Commission takes note of the withdrawal of referral requests by Member States concerning the acquisition of certain assets of Inflection by Microsoft' (*European Commission*, 18 September) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4727 > accessed 1 June 2025.
[236] See European Commission, 'Mergers: Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina' (*European Commission*, 22 July 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3844> 10 June 2026; The fact that the merger has fulfilled the condition of concentration under Art 3 is inherent in the reasoning of the Commission to further investigate.
[237] *Illumina v Commission* (n 224), paras. 9-10.
[238] Case C-611/22 P *Illumina Inc v European Commission* [2024] ECLI:EU:C:2024:677 (Appeal Illumina v Commission), para. 16.
[239] *Illumina v Commission* (n 224), para. 26.
[240] European Commission, 'Mergers: Commission fines Illumina and GRAIL for implementing their acquisition without prior merger control approval' (*European Commission*, 12 July 2023) < https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3773 > accessed 1 June 2025.

where the merger notification requirement had not been triggered.[241] The GC ruled in favour of the Commission, and the case was later appealed in the CJEU.[242]

The CJEU was faced with the question of whether the GC had erred in law by determining that Article 22(1) allowed MSs to refer concentrations to the Commission, despite them not satisfying national threshold notifications.[243] In its decision, the Court concluded that the meaning of Article 22(1) cannot be interpreted as allowing the Commission to have competence in such situations.[244] The Court also mentioned the principle of subsidiarity relating to the division of competences between NCAs and the EC, as well as the principle of legal certainty, to allow undertakings to predict legal restrictions on their transactions.[245] Subsequently, the Commission retracted its invitation to MSs to refer the *Microsoft/Inflection* case under Article 22.[246] The jurisdictional gap created by low-turnover high-transaction-value concentrations remains unaddressed.

4. The Future of EU merger Control in the Generative AI Sector

4.1. Potential EUMR Amendments

Although merger control underenforcement due to jurisdictional gaps is not new, the rapid development of the GAI sector has made underenforcement a pressing issue.[247] Consequently, the EC itself and different field specialists have made recommendations to amend EUMR to address competition issues. The proposals deal with gaps caused by the concentration definition (4.1.1) and the turnover test and the referral mechanisms (4.1.2).

4.1.1. Non-controlling Minority Shareholding(s)

As mentioned under Chapter III, the decisive influence concept in Article 3(2) does not include NCMS or structure links.[248] This has been flagged as a potential

[241] Appeal *Illumina v Commission* (n 224), paras. 26, 65.
[242] Appeal *Illumina v Commission* (n 224), paras. 26, 65.
[243] Appeal *Illumina v Commission* (n 224), paras. 66, 112.
[244] Appeal *Illumina v Commission* (n 224), para. 218.
[245] Appeal *Illumina v Commission* (n 224), paras. 209-10.
[246] European Commission, ‘Commission takes note of the withdrawal of referral requests by Member States concerning the acquisition of certain assets of Inflection by Microsoft’ (*European Commission*, 18 September) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4727 > accessed 1 June 2025.
[247] Ryan (n 20), pp. 147-9.
[248] Case T-411/07 *Aer Lingus Group v. Commission* [2010] ECLI:EU:T:2010:281, para. 65.

enforcement gap, peaking during the *Ryanair/Aer Lingus* case.[249] There, the Commission could not establish jurisdiction because Ryanair only obtained 25% of the shares with no formal governance rights.[250] Currently, for problematic structural links cases, the EC has relied on Articles 101-2 TFEU to fill the gap. However, in a 2013 Staff Document, the Commission acknowledged that neither article fundamentally addressed the concerns regarding NCMS.[251]

Article 101 TFEU is limited in assessing agreements of structural links only if these agreements have collusive effects.[252] Furthermore, it cannot appropriately cover cases of hostile takeovers, as it is unclear whether every purchase of stock should be understood as a separate agreement.[253] Overall, the Commission reasoned that Article 101 TFEU was not designed to apply to structural market changes.[254] Meanwhile, Article 102 TFEU only applies to cases of dominant undertakings abusing their position through their agreement.[255] Together, both articles apply *ex post*, clashing against the *ex ante* analysis predominant in the EUMR.[256] To combat the enforcement gap, the EC, throughout its efforts related to the matter from 2001 to 2016, consistently reached out for public consultations and published papers.[257] It proposed two systems: the self-assessment system and the transparency system.

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[249] Baş (n 188), p. 80; Bengtsson (n 39), p. 564, para. 5.100; see futher: Ryanair/Aer Lingus (n 188); Case T-411/07 *Aer Lingus Group v. Commission* [2010] ECLI:EU:T:2010:281.

[250] Ryanair/Aer Lingus (n 188); For a discussion of this case and the legal issues raised by the repeated attempts of Ryanair to acquire Aer Lingus, see Mark Furse, ‘Testing the Limits: Ryanair/Aer Lingus and the Boundaries of Merger Control’ (2016) 12 European Competition Journal 462 <https://doi.org/10.1080/17441056.2017.1292719> accessed 1 June 2025.

[251] European Commission, ‘Accompanying the document WHITE PAPER Towards more effective EU merger control’ (Staff Working Document) COM (2013) 239 final (Commission Staff Working Document), para. 45.

[252] See, for example: Joined Cases 142 and 156/84 *BAT and Reynolds v Commission* [1987] ECLI:EU:C:1987:490.

[253] Christopher Bellamy, ‘Mergers Outside the Scope of the New Merger Regulation- Implications of the Philip Morris Judgement’ in Barry E Hawk (ed), *Mergers & Acquisitions and Joint Ventures* (Juris Publishing 2004), pp. 102-3.

[254] Commission Staff Working Document (n 251), paras. 4-6.

[255] Ariel Ezrachi and David Gilo, ‘EC Competition Law and the Regulation of Passive Investments Among Competitors’ (2005) 26 Oxford Journal of Legal Studies 327, pp. 340-1; They argued for a narrow understanding of the judgment (i.e. only acquisitions of controlling minority shareholdings but not of active minority shareholdings, pp. 342-3.

[256] Ezrachi (n 255), p. 339.

[257] In December 2001, the Commission published a Green Paper on the Review of Council Regulation (EEC) No 4064/89, stating that minority shareholdings had drawn its attention as potential anticompetitive assertions of control. In June 2013, the Commission launched a public consultation on non-controlling minority shareholdings and published a Commission Staff Working Document, which highlighted the need for an upgrade to the merger control toolkit to intervene in problematic cases of structural links. In July 2024, another public consultation was launched together with the publication of a White Paper, Towards more effective EU merger

Under the self-assessment system, undertakings would self-assess whether the transaction, including an NCMS, amounted to a notification obligation under the EUMR, entailing that it fulfilled the definition of a concentration in Article 3(2).[258] The Commission would not investigate every case, but through market intelligence and public consultations, would intervene in cases deemed problematic, even after merger implementation.[259] While this proposal would give the EC powers to conduct *ex post* merger review in NCMS cases, such as *Microsoft/OpenAI*, it would highly affect the principle of legal certainty. Undertakings would not be able to predict whether their merger would attract legal scrutiny after its implementation. Furthermore, the Commission might struggle to maintain that the definition of a ‘concentration’ is fulfilled if agreements change terms every few years.

The transparency system is similar to the system currently in place – *ex ante* merger review. Undertakings participating in an NCMS transaction would send a notice of information to the Commission before implementation if the shareholding situation were competitively significant.[260] Competitively significant cases would be those in directly vertically-related undertakings, where the acquired undertaking must have 5%-20% shares.[261] This would allow the EC to assess the situation briefly and determine whether there is a significant concern to initiate a merger review. While this system would ensure legal certainty, it would disproportionately increase the administrative burden carried by undertakings.[262] This would require that almost every merger undergo some version of a self-

control. The EC tried to outline the right implementation of a possible extension of the merger control rules to non-controlling minority shareholdings. It only considered a few cases to be problematic. In 2016, the EC also published a support study to help aim understand the current legal practice in other jurisdictions and proposed a backdoor solution through amendment of Article 8(4). Following since 2017, the Commission has no longer pursued a jurisdictional extension of the EUMR to non-controlling shareholdings.

[258] Similar to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1; Commission Staff Working Document (n 251), paras. 4-6.

[259] Commission Staff Working Document (n 251), para. 7.

[260] European Commission, ‘Toward more effective EU merger Control’ (White Paper) COM (2014) 449 (Commission White Paper), paras. 45-54.

[261] The Commission White Paper emphasises that under the preferred system the same turnover thresholds which currently apply to concentrations under the EUMR would also apply to acquisitions of non-controlling minority shareholdings; Commission White Paper (n 255), para. 47.

[262] Commission Staff Working Document (n 251), para. 69.

review and Commission review prior to any commencement of any official investigation.[263]

After 2017, the EC no longer pursued a solution to the enforcement gap as proposals seemed suboptimal, imposing undue administrative burdens, and the likelihood of anti-competitive effects was low.[264] From the perspective of the GAI sector, the enforcement gap created in Article 3(2) should be weighed against the theories of harm arising from NCMS and whether they align with the Commission's digital market policy.

An NCMS is identified as a passive minority shareholding as it reflects financial rights for the acquirer undertaking with little to no influence over the target's decision-making.[265] The risk of passive minority shareholding, especially in vertical situations, mainly relates to customer foreclosure, i.e. foreclosing other upstream competitors.[266] The acquirer, which in the case of Microsoft is mostly at an upstream level, has an incentive to foreclose other competing suppliers at the expense of the downstream market profits.[267] The likelihood of anti-competitive effects increases if the acquirer's influence is sufficient to deter the target from buying input from others.[268] This is mostly the case for *Microsoft/OpenAI,* as OpenAI exclusively receives cloud services from Microsoft. Therefore, there are valid theories of harm relating to NCMS that can apply to AI partnerships. From a digital policy perspective, the EC has stated that it finds scrutiny of AI partnerships in light of fair play principles extremely important.[269] It has publicised its intentions to pursue ways to address the legal lacunas for AI transactions as a long-term solution.[270]

The difficulty with NCMS is that extending the scope of Article 3(2) would entail that nearly every transaction can be caught by the first leg of the

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[263] Marin Gassler, 'Non-Controlling Minority Shareholdings and EU Merger Control' (2018) 41(1) World Competition Law and Economics Review 3, p. 11.
[264] European Commission, 'Management Plan 2017 of DG Competition' Reference Ares (2016)7130280, p. 16.
[265] Gassler (n 263), p. 14; European Commission, 'Annex I to the Commission Staff Working Document Toward More Effective EU Merger Control', paras. 30–31; OECD, 'Policy Roundtables Minority shareholdings' Paper DAF/COMP(2008)30 (2009), para. 577.
[266] Gassler (n 263), p. 30.
[267] Gassler (n 263), pp. 30-33.
[268] Annex I to the Commission Staff Working Document (n 262), para. 65.
[269] EVP Speech (n 21).
[270] EVP Speech (n 21).

jurisdictional test. There being no legal definition of decisive influence,[271] identifying when a passive shareholding can be considered a concentration is challenging. A case-by-case analysis is likelier to yield results. Thus, the proposed transparency system remains the best alternative to addressing NCMS in AI partnerships. A possible amendment could include implementing this system solely in the GAI sector.

4.1.2. Turnover Test Gap and Referral Mechanisms

Like the NCMS problem, the Commission has already identified the turnover gap.[272] The low-turnover high-transaction-value issue is now even more highlighted due to the *Illumina/GRAIL* judgment. Under Article 1(4), however, despite considerations, the Commission has elected to keep the turnover threshold in its current form and continue relying on NCAs for merger review.[273]

The proposed amendment for the second leg of the jurisdiction test would be to either lower the turnover numbers or move to a transaction-based threshold.[274] The latter can already be seen in national merger control rules, such as Austria and Germany.[275] Both proposals achieve the same result of widening the EU jurisdictional net, albeit in a different way. Lowering turnover rates would require casting the net wide, considering that some target undertakings might have close to zero EU turnover.[276] The biggest concern behind both these alternatives is the disproportionate increase in administrative burden arising from the unproblematic concentrations that would be investigated.[277]

While Article 14 DMA appears to help this problem, it solely puts transactions by gatekeepers at the top of the 'potential scrutiny' list, without conferring direct EUMR application. Consequently, in line with the Commission's efforts to monitor the GAI sector, it can consider amending the jurisdictional thresholds to be sector-specific. This is supported by the fact that most low-turnover high-transaction-value deals are present in the digital and pharmaceutical

[271] See above Chapter III, s. 3.1.
[272] Jones (n 34), p. 1099.
[273] ibid.
[274] ibid.
[275] See Act against Restraints of Competition 2013 and Cartel Act 2005 respectively. This is the approach utilised in the US. Some other Member States have mechanisms for calling in mergers which fall below the jurisdictional thresholds; Jones (n 34), p. 1099.
[276] Note that GRAIl was a US-based start up, entailing its turnover is low.
[277] See also Cremer (n 95).

industries.[278] Alternatively, it could amend Article 14 DMA in conjunction with Article 1 EUMR to allow all gatekeeper deals to fulfil the jurisdictional threshold. This would ensure legal certainty but potentially increase administrative burdens.

Regarding the referral mechanisms, the most appropriate approach continues to stem from Article 22. Only insofar as the concentration triggers national merger notification requirements in the referring MS. However, the scope of such referrals can be easily expanded as MSs have started applying less stringent tests to capture mergers under their national competition law.[279]

4.2. Overarching Solutions and Considerations

Alternatively, the Commission can employ overarching amendments to address the competition concerns arising from AI partnerships in a targeted manner. Firstly, it can implement sector-specific merger notifications. This would be similar to Ireland's media merger notification requirement to the NCA.[280] In Ireland, if at least one undertaking is involved in the media business, then it is compulsory to notify the NCA for investigation.[281] For example, all transactions in the GAI sector, regardless of whether they fulfil the EUMR's application scope, would trigger the Commission's investigative powers. Alternatively, the amendment of Article 14 DMA, putting under scrutiny only concentrations by gatekeepers, would have a similar result. The latter is more in line with DMA's legislative intent and the EC's digital policy.[282] Both of these solutions would ensure a proportional administrative burden and concentrate the Commission's efforts in enforcing their competition policy goals.

Regardless of the proposal, the main concerns regarding the amendment to the EUMR's enforcement centre are legal certainty and a proportionate administrative burden. However, an even bigger consideration is the

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[278] Jones (n 34), p. 1099; Régibeau (n 35), p. 321; Ryan (n 20), p. 150, s. 6.2.3.
[279] Christophe Carugati, 'How Should Europe Revamp Merger Policy for Non-Notifiable Deals?' (Digital Policy, 24 September 2024, Issue 9) <https://www.digital-competition.com/comment/how-should-europe-revamp-merger-policy-for-non-notifiable-deals%3F> accessed 1 June 2025, p. 4.
[280] Competition and Consumer Protection Commission, 'When to Notify' <https://www.ccpc.ie/business/mergers/when-to-notify/> accessed 1 June 2025.
[281] Competition and Consumer Protection Act 2014 (Communications Regulation Amendment Act 2016), Part 3A.
[282] See, for example: EVP Speech (n 21); DMA, Recital 3, 4, 5, 10, 11, 32 etc.

overregulation sentiment, especially for the digital market.[283] While the previous Commissioner for Competition stated that AI partnerships are pro-competitive in the EC's view,[284] public opinion and practitioners tend to refer to them pessimistically.[285] There is an overarching alarmist debate that the EC should take this opportunity to scrutinise all AI partnerships as they are likely incompatible with the market.[286] It is recognisable that these deals can have anti-competitive effects. However, they are also innovation incentives.[287] Hence, AI partnership merger regulation should recognise and balance both these realities.

Small companies tend to innovate more when there is M&A activity in the industry and when they are more likely to be a target.[288] Given the current conditions of the EU venture capital market, small FM developer undertakings are less likely to yield a strong business base without external support.[289] Moreover, although the majority of acquisitions are concluded by gatekeepers, they have been benign historically.[290] This is particularly because most mergers in the digital market have a vertical or conglomerate structure, leading to increased efficiency benefits.[291] Additionally, there is a low likelihood that most of these AI partnerships will lead to input foreclosure, as gatekeepers internalise costs when acquiring a firm down the supply chain.[292] Therefore, it would be disadvantageous to them to create anti-competitive effects.[293]

Conclusively, there are multiple positive aspects of these AI partnerships which must be considered before proposing EUMR amendments that might lead

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[283] See, for example: Sean Ennis and Amelia Fletcher, 'The Goldilocks Dilemma: When is Digital Regulation 'Just Right'?' (2020) 11(10) Journal of European Competition Law & Practice 551.
[284] EVP Speech (n 21).
[285] See, comparatively: Travers Smith, 'Competition Law Insights – Artificial Intelligence' (Legal Briefing, *Travers Smith*, 1 August 2024) <https://www.traverssmith.com/knowledge/knowledge-container/competition-law-insights-artificial-intelligence/> accessed 31 May 2025; Groza (n 103), Chapter II, s. 2.2.2.
[286] Groza (n 103), Chapter II, s. 2.2.2.
[287] Régibeau (n 35), p. 318, s. 4.2.
[288] Régibeau (n 35), p. 318, s. 4.2; see, further: Gordon M Phillips, and Alexei Zhdanov (2013), 'R&D and the Incentives from Merger and Acquisition Activity' (2012) 26(1) Review of Financial Studies 34.
[289] OECD AI Policy Observatory, 'VC Investments in AI by Country' (2025) <https://oecd.ai/en/data?selectedArea=investments-in-ai-and-data&selectedVisualization=vc-investments-in-ai-by-country> accessed 31 May 2025; Carugati and Kar (n 19), p. 7.
[289] Competition Policy Brief (n 20), p. 3; Ryan (n 20), p. 151, s. 6.2.6.
[290] Ryan (n 20), p. 151, s. 6.2.6.
[291] Ryan (n 20), p. 151, s. 6.2.6.
[292] Gassler (n 263), p. 30.
[293] Gassler (n 263), p. 30.

to over-enforcement and regulation. Nevertheless, they should be balanced against long-term competition concerns and competitive innovation outcomes.[294]

5. Conclusion

This paper aimed to answer the question *“How can the EU Merger Regulation be adjusted to address AI partnerships as potentially anti-competitive behaviour in the generative AI market?”* It first approached the nature of the GAI sector through its value and supply chain. Building an AI application starts with gathering AI input, such as data, expertise, and computing power, to create and train an FM. After pretraining, FMs are released into the market as APIs to license or freely use, or fine-tuned and released as GAI user-facing applications such as ChatGPT. Some firms within the market can internalise the entire GAI value chain, whereas others must outsource parts of it due to a lack of financial and infrastructural resources. The paper observed that the GAI supply chain and market are prone to bottlenecks since big technology firms, or gatekeepers in the EU, possess most key AI inputs. To circumvent the difficulties in the market, smaller FM developer firms enter AI partnerships with gatekeepers.

While these partnerships can be advantageous for innovation, research found that they also can lead to potentially anti-competitive behaviour. They can entrench the gatekeepers’ market position and allow them to shape AI policy. Furthermore, they can be used as a form of early acquisitions that integrate the technology of the smaller firms into the gatekeeper’s ecosystem, ‘dissolving’ their competition. To address these concerns, the Commission has elected to scrutinise AI partnerships mainly under the merger control regime, as it is the most proficient tool in the antitrust toolkit.

In light of the research question, the *Microsoft/OpenAI* and *Microsoft/Inflection* agreements were analysed against the application scope of the EUMR. The EUMR applies to concentrations which have an EU dimension. To establish the notion of concentration, the acquirer undertaking must have taken control over the target undertakings. To fulfil the EU dimension, the jurisdiction threshold is measured against a stringent and high turnover test. It was evaluated that the *Microsoft/OpenAI* partnership failed to fulfil the concentration definition

[294] Ryan (n 20), p. 156, s. 6.3.3.

due to the existing issue of NCMS. Whereas the *Microsoft/Inflection* deal did not meet the turnover threshold, as Inflection is a new undertaking in the market. This restated the issue of the turnover gap in the EUMR. While the Commission had tried to solve this by invoking special referrals under Article 22 EUMR, the CJEU's *Illumina/GRAIL* decision severely limited the scope to referrals only from MSs where the transaction fulfilled national notification requirements.

Afterwards, the paper considered possible amendments, even Commission-proposed, to the EUMR's scope. The Commission had made previous efforts to include problematic NCMS scenarios in the EUMR's scope. However, none were satisfactory for either the stakeholders or the EC itself. Out of all the alternatives, the transparency system is best equipped to address the issue, where undertakings in such transactions are required to send the Commission a notice of information for the Commission to assess their situation. Proposals related to the turnover test include switching to a transaction value test or lowering the threshold altogether. However, both alternatives have been unsatisfactory for the Commission, which continues to rely on NCAs to scrutinise mergers without an EU dimension. For both types of amendments, the overarching concerns lie in the principle of legal certainty in merger control enforcement and the proportionality of administrative burdens borne by the EC and undertakings. An important and promising proposal would be the amendment of Article 14 DMA and Article 1 EUMR so the Commission can specifically scrutinise gatekeeper transactions in the GAI market, regardless of whether they fulfil the EUMR's application scope. This ensures legal certainty and appropriate administrative costs, but also that the EU's AI and digital market policy is met.

Areas of recommendation for additional research include analysing the corporate structure of the undertakings in these AI partnerships and how that can reflect on all possible scenarios of establishing decisive control. Furthermore, it would be insightful to see how amendments to the DMA's scope could affect AI partnership merger scrutiny, through Article 14, but also Article 2 by listing GAI as a core platform service. However, in concluding further research, it is also important to evaluate all legislative proposals against the advantages and theories of harm of AI partnerships. While they can lead to competition concerns, they can equally boost innovation and positively impact AI development. Further research should be careful to strike a balance between the negative and positive impact of

AI partnerships, fears of overregulation of the GAI sector, and the scale of impact of the enforcement gaps of the EUMR.

The GATT Article XXI(b)(iii) Test and Its Cross-Applicability to Semiconductor Subsidies Under the SCM Agreement

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TABLE OF ABBREVIATIONS

DSB	Dispute Settlement Body
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
MFN	Most Favoured Nation
SCM	Subsidies and Countervailing Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

1. INTRODUCTION

'If you think about national security today in 2024, it's not just tanks and missiles; it's technology. It's semiconductors. It's AI. It's drones.'[2]

The increasing interconnectedness between trade and security has led to the idea of a 'new national security'.[3] Under this concept, economic and technological capacity, rather than mere military force alone, is increasingly treated as a core object of national-security policy. Semiconductors, which are integrated circuits also known as 'chips' that process and store information in virtually all modern electronic and military systems, are a prime example of this development for several reasons. Firstly, the pandemic has revealed our reliance on an increasingly complex and vulnerable supply chain.[4] Secondly, semiconductors are at the core of the ongoing US-China trade war. Thirdly, advanced semiconductors are the foundation of modern artificial intelligence, and semiconductors are part of nearly all modern military equipment and therefore essential to a State's national security.[5] Considering the importance of semiconductors in modern society, it comes as no surprise that States, particularly the US, the EU, and China, have begun building more resilient supply chains by subsidising domestic production with hundreds of billions of dollars, raising serious concerns about compliance with World Trade Organization (WTO) law.[6] The context in which these subsidies are given raises an interesting legal question: whether subsidies that breach the Subsidies and Countervailing Measures (SCM) Agreement can be justified under General Agreement on Tariffs and Trade (GATT)'s security exception in Article XXI. This question "goes to the heart of the international trading system",[7] and its relevance is exemplified in the ongoing DS623 dispute, which concerns China's

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[2] CBS News, 'Commerce Secretary Gina Raimondo on US microchip production, blocking of sales to China and Russia' (60 Minutes, 6 October 2024) <https://www.cbsnews.com/news/commerce-secretary-gina-raimondo-on-us-microchip-production-blocking-of-sales-to-china-russia-60-minutes-transcript/> accessed 14 November 2025.

[3] J Benton Heath, 'The New National Security Challenge to the Economic Order' (2020) 129 The Yale Law Journal 1020, p. 1024.

[4] Maciel M Queiroz and others, 'Impacts of Epidemic Outbreaks on Supply Chains: Mapping a Research Agenda amid the COVID-19 Pandemic through a Structured Literature Review' (2022) 319 Annals of Operations Research 1159, p. 1160.

[5] Arjun Gargeyas, 'The Role of Semiconductors in Military and Defence Technology' (2022) 11 Defence and Diplomacy Journal 43, pp. 44–45.

[6] Yong-Shik Lee, 'Revival of Industrial Policy Implications for International Trade Law' (2025) 28 Minnesota Journal of International Law 258.

[7] ibid p. 259.

challenge to the tax credits granted under the US Inflation Reduction Act,[8] where the US relies on Article XXI to justify its alleged breach of the SCM Agreement.[9] The relevance is systemic: if the security exception could be read to justify any breach of the WTO's subsidy disciplines, States could invoke it to shield protectionist measures from review, undermining the predictability of the multilateral trading system. Concretely, this paper will aim to answer the following research question: *To what extent, and under what conditions, can the GATT Article XXI(b) justify actionable semiconductor subsidies under the SCM Agreement, and what are the broader systemic implications of recognising such a cross-applicability?*

The notion of 'cross-applicability' refers to whether a justification provided in one WTO agreement, in this case the security exception in Article XXI GATT, can be invoked to excuse a breach of a different agreement, namely the SCM Agreement. This research question was formulated to cover broader issues of international economic law, while allowing for a concrete analysis of a contemporary legal issue. Although semiconductor subsidies raise various legal issues under WTO law, this paper does not aim to address all of them; rather, it focuses on the issue from the specific angle of cross-applicability and Article XXI(b)(iii). There is another point worth mentioning with respect to the limitations of this paper. Most case law relating to Article XXI stems from the period since 2019, which means that many of the panel reports have been appealed into the void and could not be adopted.[10] This is because the first panel to interpret the provision did so in *Russia – Traffic in Transit* in 2019, while the subsequent reports could not be adopted: since the WTO Appellate Body lost its quorum in late 2019, appeals are lodged with a body that is unable to hear them. This 'appeal into the void' prevents the reports from being adopted.

In terms of methodology, this paper relies on a doctrinal method, analysing the relevant treaty text, the panel and Appellate Body reports interpreting Article

[8] *United States – Certain Tax Credits Under the Inflation Reduction Act*, Request for the Establishment of a Panel by China, WT/DS623/3 (12 June 2024).

[9] Office of the United States Trade Representative (USTR), 'United States – First Written Submission in DS623' (21 March 2025) paras. 136–193 < https://ustr.gov/sites/default/files/enforcement/DS/DS623/US.Sub1.(21Mar25).fin.pdf > accessed 14 November 2025.

[10] See for example WTO Panel Report, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/R (circulated 9 December 2022); WTO Panel Report, *United States – Origin Marking Requirement*, WT/DS597/R (circulated 21 December 2022).

XXI, and the academic commentary, in order to establish the content of the Article XXI(b)(iii) test and its possible cross-applicability to the SCM Agreement. The provisions in question are interpreted in accordance with the customary rules of treaty interpretation codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), which the WTO adjudicating bodies are themselves bound to apply. [11] A brief clarification as to the legal authority of the reports relied upon is warranted at the outset. Within the WTO system, panel and Appellate Body reports do not constitute binding precedent in the manner of common law judgments; they bind only the parties to the dispute in question, and only once adopted by the Dispute Settlement Body. Nevertheless, adopted reports create legitimate expectations among Members and are consistently relied upon by subsequent panels so that a settled line of reasoning, such as the two-step test developed in *Russia – Traffic in Transit*, carries considerable persuasive weight. This qualification matters for the present analysis, since, as noted above, several of the most relevant reports on Article XXI were appealed into the void and therefore remain unadopted, which limits but does not eliminate their interpretative value. Where appropriate, the doctrinal framework is then tested against a comparative case study of the EU Chips Act and the US CHIPS Act, which serve as concrete and contemporary examples of the security-based justification of semiconductor subsidies.

Following the structure of the research question, Section I will first analyse the existing tests under Article XXI(b)(iii) GATT. Section II will examine how subsidies are regulated within the WTO. This will be followed by Section III, where the question of cross-applicability of GATT Article XXI to the SCM Agreement will be tackled. Assuming *arguendo* that Article XXI GATT does apply to the SCM Agreement, Section IV will then apply the previously established test to the case of contemporary semiconductor subsidies. Lastly, Section V will address the shortcomings identified concerning Article XXI(b)(iii) in the context of semiconductor subsidies.

[11] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

2. The Structure and Interpretation of GATT Article XXI(b)(iii)

Among the four categories of exceptions contained in the GATT 1994, the security exception in Article XXI is the most interesting because its exact content and enforcement remain unclear.[12] More broadly, the security exception reflects the inherent tension between the notions of sovereignty and free trade.[13] This paper will focus on paragraph b, as it is the most relevant for justifying semiconductor subsidies on national security grounds. It reads:

> *Nothing in this Agreement shall be construed [...] to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests*
>
> *(iii) taken in time of war or other emergency in international relations;*

It consists of a chapeau and three subparagraphs,[14] which limit the broad discretion afforded by States in the chapeau.[15] Since semiconductors are neither 'fissionable materials' nor 'materials from which [fissionable materials] are derived', subparagraph (i) falls outside the scope of this paper. Similarly, subparagraph (ii) relates to the 'traffic' in military material, which is interpreted as referring to the transport of such material, therefore clearly excluding industrial semiconductor subsidies.[16]

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[12] Isabelle Brundieck, 'The Validity of Trade Restrictions on Artificial Intelligence Technology Under the General Agreement on Tariffs and Trade's National Security Exception' (2024) 39 American University International Law Review 119, p. 141; Ian Allen, 'The War on Trade: Applying the WTO Security Exceptions to Economic Security Measures' (2025) 45 Northwestern Journal of International Law & Business 157, p. 163.

[13] Chao Wang, 'Invocation of National Security Exceptions under GATT Article XXI: Jurisdiction to Review and Standard of Review' (2019) 18 Chinese Journal of International Law 695, p. 697.

[14] General Agreement on Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, art XXI; Gustavo Adolfo Guarin Duque, 'Interpreting WTO Rules in Times of Contestation (Part 2): A Proposed Interpretation of Article XXI(b)ii-Iii of the GATT 1994 in the Light of the Vienna Convention of the Law of the Treaties' (2019) 14 Global Trade and Customs Journal 31, p. 37.

[15] Kentaro Ikeda, 'A Proposed Interpretation of GATT Article XXI(b)(ii) in Light of Its Implications for Export Control' (2021) 54 Cornell International Law Journal 1, p. 28.

[16] ibid pp. 37–38.

In contrast, the exception contained in subparagraph (iii) is the most important and contested one, given its broad scope.[17] It is also the most prominent security exception in past and ongoing Dispute Settlement Body (DSB) proceedings.[18] Before *Russia – Traffic in Transit*,[19] which was the first case to address the scope of Article XXI(b)(iii),[20] there was uncertainty as to what approach was to be taken with respect to the security exception, particularly concerning the question of whether the provision is self-judging.[21]

The self-judging argument, as invoked by Russia in *Russia – Traffic in Transit* [22] and by the US on many occasions,[23] suggests that once a State has invoked Article XXI(b), the issue is outside the jurisdiction of the WTO DSB or,[24] as the US argues in the alternative, non-justiciable.[25] The panel rejected this self-judging argument and developed a two-step test instead.[26] Subsequent panels followed this test,[27] and it is likely to have a lasting impact on the interpretation of Article XXI(b)(iii) GATT.[28] The analysis consists of an objective and a good faith test. This two-step test provides the analytical framework applied later in this paper, where it is used to assess whether contemporary semiconductor subsidies could be justified under Article XXI(b)(iii) GATT.

The objective test follows the panel's conclusion that subparagraph (iii) contains two elements that can be 'objectively determined':[29] (1) whether a 'war or emergency in international relations' exists, and (2) whether the measures in

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[17] Allen (n 12) p. 164.

[18] Peter Van den Bossche and Sarah Akpofure, 'The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994' (World Trade Institute 2019) p. 3 <https://brill.com/view/title/60882> accessed 13 November 2025; Allen (n 12) p. 164.

[19] WTO Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R (adopted 26 April 2019).

[20] Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (5th edn, Cambridge University Press 2022) p. 675; Allen (n 12) p. 187; Van den Bossche and Akpofure (n 18) p. 5.

[21] Wang (n 13) pp. 697–698; Victoria Walker, 'Subsidizing the Microchip Race: The Expanding Use of National Security Arguments in International Trade' [2024] University of Michigan Journal of Law Reform 661, p. 676.

[22] *Russia – Traffic in Transit* paras. 7.27–7.30.

[23] *US – Steel and Aluminium Products* para. 7.105.

[24] *Russia – Traffic in Transit* para. 7.30.

[25] *US – Steel and Aluminium Products* para. 7.106; Van den Bossche and Akpofure (n 18) p. 5.

[26] Van den Bossche and Zdouc (n 20) p. 677; Allen (n 12) p. 189.

[27] Allen (n 12) p. 187.

[28] Heath (n 3) p. 1064.

[29] *Russia – Traffic in Transit* para. 7.71; Wang (n 13) p. 704.

question are taken at the time of this emergency.[30] The term 'international relations' has been intentionally kept broad and can involve relations between the invoking and the challenging State(s), as well as those with 'other participants in international relations'.[31]

Regarding the first element, while it is clearly easier to establish the existence of a 'war',[32] in the current geopolitical situation, particularly regarding semiconductors, it is unlikely that an invoking State would rely on the existence of a 'war'.[33] Instead, they would rely on the 'emergency in international relations' element.[34] In determining the threshold of what constitutes 'an emergency in international relations', past panel reports can offer guidance. In *Russia – Traffic in Transit*, the Panel did find the existence of an emergency in international relations, defining it as 'a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state'.[35] This indicates a rather high standard, under which 'political or economic differences' are not covered, 'unless they pertain to defence or military interests'.[36] In *US – Steel and Aluminium*, the Panel imposed a similarly high threshold, holding that 'an 'emergency in international relations' […] must be […] at least comparable in its gravity or severity to a 'war' in terms of its impact on international relations'.[37] In *US – Origin Marking Requirement,* the Panel defines an 'emergency in international relations' as a situation involving 'a breakdown or near-breakdown in […] relations' between the involved States.[38] In *Saudi Arabia - Intellectual Property Rights,* the panel found the breakdown of diplomatic and economic relations between Saudi Arabia and Qatar to be sufficient to find an emergency in international relations under Article 73(b)(iii) of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.[39] These

[30] Min Seong Kim, 'Chip Security: Reconciling Industrial Subsidies With WTO Rules and National Security Exception' (2025) 16 Harvard National Security Journal 74, p. 117.
[31] *US – Origin Marking Requirement* para. 7.280.
[32] Wang (n 13) pp. 704–705.
[33] Kim (n 30) p. 120.
[34] ibid.
[35] *Russia – Traffic in Transit* para. 7.76.
[36] ibid para. 7.75; Van den Bossche and Zdouc (n 20) p. 677; Wang (n 13) pp. 705–706.
[37] *US – Steel and Aluminium Products* para. 7.139; Walker (n 21) p. 678.
[38] *US – Origin Marking Requirement* para. 7.289; Walker (n 21) p. 678.
[39] WTO Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*,
WT/DS567/R (circulated 16 June 2020), para. 7.257; Allen (n 12) p. 196.

interpretations suggest a high standard for what is considered an 'emergency in international relations'. This threshold is of direct relevance to the present inquiry, since semiconductor subsidies are typically defended on economic-security grounds: measures justified under 'economic security' considerations would likely fall outside the scope of Article XXI(b) GATT, unless they relate to 'defence or military interests', a distinction to which this paper returns when applying the test to the EU and US chip legislation.[40]

The second element, which requires the measure in question to be taken *in time* of war or emergency, necessitates a temporal connection between the measure and the emergency.[41] This, at first sight, simple requirement can itself become a problem where security-related measures are becoming less and less 'time-bound',[42] as is the case for long-term semiconductor subsidies.[43]

The good faith test, also called the chapeau test because it stems from the chapeau of paragraph (b), follows the assumption that States generally enjoy discretion in determining what constitutes their essential security interests and to define the measures necessary to protect these interests.[44] This discretion is, however, limited by the general principle of good faith.[45] From *Russia – Traffic in Transit* is also clear that the term 'essential security interest' is narrower than normal 'security interests' and requires a link to 'quintessential functions of the State' such as 'the protection of its territory and its population from external threats, and the maintenance of law and public order internally'.[46] Similar to the objective test, it has two elements. Firstly, the invoking State must clearly articulate the reasons for invoking Article XXI so that a Panel can review the connection of the measure in question with the essential security interest at stake.[47] Past Panel reports do not suggest a high threshold for this requirement.[48] Furthermore, the clearer the existence of an emergency, the less specificity in the

[40] Wang (n 13) pp. 705–706.
[41] *Russia – Traffic in Transit* para. 7.70; Mona Pinchis-Paulsen, 'Let's Agree to Disagree: A Strategy for Trade-Security' (2022) 25 Journal of International Economic Law 527, p. 532; Wang (n 13) p. 704.
[42] Pinchis-Paulsen (n 41) p. 533.
[43] Kim (n 30) p. 125.
[44] *Russia – Traffic in Transit* para. 7.131; Kim (n 30) p .119.
[45] Wang (n 13) p. 709.
[46] *Russia – Traffic in Transit* para. 7.131.
[47] Allen (n 12) p. 199.
[48] ibid.

articulation is required and vice versa.[49] Secondly, the measure must not be so remote from the emergency that it would render any nexus between the measure and the essential security interests implausible.[50]

3. The National Security Exception in the Context of Semiconductor Subsidies

Being an exception, Article XXI(b)(iii) can naturally only be invoked if there is a violation of a primary obligation, meaning an obligation prescribing or prohibiting a particular conduct.[51] While there is an argument to be made that semiconductor subsidies could violate provisions of GATT, specifically the most-favoured-nation (MFN) principle and the principle of non-discrimination,[52] this paper will focus on possible violations of the SCM Agreement, as it is generally at the centre of subsidy-related issues.[53]

3.1. The Agreement on Subsidies and Countervailing Measures

To better understand the question of whether GATT exceptions can cross-apply to the SCM Agreement, one must first understand the general way in which subsidies are regulated within the WTO. While the GATT 1947 contained subsidy provisions, Articles VI and XVI were framed weakly.[54] When the question of subsidies gained more relevance, a separate code for subsidies was created during the Tokyo Round.[55] In the Marrakesh Agreement, these different agreements became, in revised form, integrated into the WTO's 'multi-treaty system', more specifically, the SCM Agreement and GATT 1994 are part of Annex 1A governing the trade in goods. [56] This shared Annex 1A architecture is exactly what gives rise to the problem at the core of this paper, since it raises the question whether a

[49] *Russia – Traffic in Transit* para. 7.132–7.135; Allen (n 12) p. 200; Wang (n 13) p. 709.
[50] Wang (n 13) pp. 709–710.
[51] Nu Ri Jung, 'Are There "Exceptions" to the SCM Agreement? Applicability of the GATT Exceptions Vis-à-Vis the International Rules on Subsidies' (2023) 57 Journal of World Trade 457, p. 460.
[52] Kim (n 30) pp. 101–108.
[53] Jung (n 51) p. 458.
[54] Andreas F Lowenfeld, *International Economic Law* (2nd edn, Oxford University Press 2009) p. 217.
[55] ibid.
[56] Allen (n 12) p. 161.

security exception drafted for the GATT can be relied upon to justify a breach of the SCM Agreement which forms part of the same treaty system.

Looking at the main provisions of the SCM Agreement, Article 1.1 defines subsidies as having three elements: (1) there must be a financial contribution, (2) by a government, (3) that confers a benefit.[57] Once it is established that a measure qualifies as a subsidy, Article 1.1(b) imposes the additional requirement of specificity.[58] The requirement of specificity requires that the legislation in question, which establishes the subsidy, must limit its access to 'an enterprise or industry or group of enterprises or industries'.[59] Past panel reports have shed some light on what this entails. In *US – Softwood Lumber*, the Panel found that subsidies which are 'limited to a single large industry' can satisfy the specificity requirement.[60] On a similar line, the Panel in *US – Upland Cotton* held that the requirement of specificity is met if a subsidy is given to a 'sufficiently discrete segment' of the economy.[61] For reasons of scope, this paper will not conduct a thorough assessment of whether the subsidies in question fulfil this requirement and instead rely on the assessment made by other scholars proving that most contemporary semiconductor subsidies in the US, China, and the EU fall within the scope of the SCM.[62] As Lee shows, the semiconductor subsidies at stake in this paper, such as the US CHIPS Act and EU Chips Act, fall within the scope of the SCM.[63] The reason this threshold is met is straightforward: the support is reserved for semiconductor production, that is, a single and clearly delimited industrial sector, rather than being made generally available across the economy, which is exactly the kind of limitation to a 'sufficiently discrete segment' that the panels in *US – Softwood Lumber* and *US – Upland Cotton* regarded as sufficient.

[57] WTO Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (adopted 25 March 2011), para. 9.29; Marc Bénitah, *The WTO Law of Subsidies: A Comprehensive Approach* (Kluwer Law International 2019) p. 10; Van den Bossche and Zdouc (n 20) p. 846.
[58] Simon Lester, *World Trade Law: Text, Materials and Commentary* (3rd edn, Bloomsbury Publishing 2018) p. 467; Bénitah (n 57) p. 8.
[59] Lester (n 58) p. 467.
[60] WTO Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R (adopted 17 February 2004), para. 7.120.
[61] WTO Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R (adopted 21 March 2005), para. 7.1151; Bénitah (n 57) p. 25.
[62] For a detailed analysis see Lee (n 6) pp. 263–267.
[63] ibid.

The fact that a subsidy falls within the scope of the SCM Agreement, however, does not automatically mean that this subsidy is unlawful.[64] Instead, the Agreement divides subsidies into two groups: prohibited subsidies under Article 3 and actionable subsidies under Article 5.[65] The former are considered so serious that they are automatically deemed sufficiently specific in line with Article 2.3,[66] which treats subsidies contingent upon export performance or the use of domestic over imported goods as specific by operation of law, and do not require the challenging party to prove an adverse effect on their economy.[67] Two types of prohibited subsidies exist: export subsidies and local-content subsidies.[68]

The second category of subsidies under the SCM Agreement is so-called 'actionable subsidies', which are not prohibited *per se* but are challengeable.[69] If the challenging State can prove that it has 'suffered an adverse effect' under Article 5, the subsidy or its effects must be removed.[70] The Article provides for three types of adverse trade effects: (1) injury to the domestic industry of another Member, (2) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, or (3) serious prejudice to the interests of another Member.[71]

As Walker notes, contemporary semiconductor subsidy schemes are likely to cause such adverse trade effects because they harm domestic production in other States and reduce their market share.[72] Lee comes to the same conclusion, finding that semiconductor subsidies of the US, the EU, and China are 'likely actionable and possibly prohibited under the SCM Agreement'.[73]

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[64] WTO Appellate Body Report, *United States – Tax Treatment for 'Foreign Sales Corporations'*, WT/DS108/AB/R (adopted 20 March 2000), para. 85.

[65] Roland Ismer and others, 'Supporting the Transition to Climate-Neutral Production: An Evaluation Under the Agreement on Subsidies and Countervailing Measures' (2023) 26 Journal of International Economic Law 216, p. 222.

[66] Bénitah (n 57) p. 64; Ismer and others (n 65) p. 222.

[67] *United States – Tax Treatment for 'Foreign Sales Corporations'* para. 147; Walker (n 21) p. 702; Lester (n 58) pp. 471–472; Bénitah (n 57) p. 63.

[68] Agreement on Subsidies and Countervailing Measures (adopted 15 April 1994, entered into force 1 January 1995), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 UNTS 14, art 3.

[69] Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (Cambridge University Press 2014) pp. 143–144.

[70] Luca Rubini, 'Ain't Wastin' Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, and Law Reform' (2012) 15 Journal of International Economic Law 525, p. 532.

[71] SCM Agreement art 5; Coppens (n 69) p. 144.

[72] Walker (n 21) p. 703.

[73] Lee (n 6) p. 277.

3.2. The Question of Cross-Applicability of Article XXI(b) GATT to the SCM Agreement

Since the SCM Agreement does not contain an exception clause, the question of whether GATT exceptions can justify breaches of the SCM Agreement has been subject to academic discussion for many years. However, before the question of whether Article XXI GATT can apply to the SCM arose, academia had focused on whether the general exception in Article XX GATT can apply to the SCM in the context of climate change.[74] Most arguments raised in this debate are transferable to the debate on whether Article XXI can cross-apply to the SCM Agreement, since they concern structural arguments on the text and relationship of the SCM Agreement and GATT 1994 within the WTO's treaty system.

There are several reasons why the question of cross-applicability is important. Firstly, it addresses a gap between State practice and the legal framework. States are increasingly justifying semiconductor subsidies on national security grounds, as the framing of the US CHIPS Act, the EU Chips Act, and China's domestic semiconductor programmes illustrates, while such an exception is absent in the SCM Agreement. Secondly, while long-standing in academia, panels have avoided this issue in the past, and it has only recently become subject to DSB proceedings.[75] Thirdly, considering the growing number of semiconductor subsidies on national security grounds, it is likely that the national security defence will be raised in future WTO disputes relating to semiconductor subsidies.[76] Lastly, the issue is reflective of a much broader question in WTO law on how the tensions between systemic coherence and the individual agreements are to be dealt with.[77]

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[74] Rubini (n 70) p. 561; Jung (n 51) p. 460; see for example Bénitah (n 57) pp. 563–565; Paolo Davide Farah and Elena Cima, 'WTO and Renewable Energy: Lessons from the Case Law' (2015) 49 Journal of World Trade 1103, p. 1113.

[75] Danielle Spiegel Feld and Stephanie Switzer, 'Whither Article XX? Regulatory Autonomy Under Non-GATT Agreements After China–Raw Materials' (2012) 38 Yale Journal of International Law Online 16, p. 21.

[76] Lee (n 6) p. 277.

[77] See for example relating to the question of how accession protocols are to be interpreted WTO Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted 22 February 2012), paras. 278–307; WTO Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (adopted 29 August 2014), paras. 5.61–5.63.

3.2.1. Arguments Against Cross-Applicability

The arguments against cross-applicability can generally be grouped into two categories. The first argument is of a textual nature. The chapeau explicitly refers to 'nothing in *this Agreement*', which some scholars interpret to mean that the exceptions are limited to the GATT Agreement. In support, they add that the negotiators during the Uruguay Round (the 1986–1994 multilateral trade negotiations that produced the WTO agreements, including the SCM Agreement) deliberately omitted to change this phrasing.[78] This point carries some weight, since the choice to preserve the GATT-specific wording when drafting a new agreement may indicate a deliberate decision not to extend the exceptions beyond the GATT. Moreover, the Appellate Body's report in *China – Raw Materials* seems to follow the logic that a direct textual link is required for the GATT exceptions to apply to non-GATT obligations.[79] While this case differed in context, referring to China's accession protocol, the Panel's Appellate Body's reasoning can be applied by analogy to the relationship between the GATT and the SCM. In addition to this textual limitation of the GATT 1994, the SCM lacks an explicit exception clause, which some scholars argue was a deliberate decision, in particular contrasting it with agreements, such as the TRIPS or General Agreement on Trade in Services (GATS), which do contain additional explicit exception clauses.[80]

The second argument relates to the systemic integrity of the SCM Agreement. Some scholars argue that importing the GATT exceptions into the SCM Agreement would upset its 'inner balance of rights and obligations'.[81] This balance refers to the negotiated trade-off between the freedom of Members to grant subsidies and the disciplines and remedies designed to protect other Members from their adverse effects; on this view, bringing into the Agreement exceptions that were not part of that bargain would allow subsidising States to escape those obligations without offering any corresponding concession. In this respect, the historical precedent of non-actionable subsidies (formerly Article 8, now lapsed)

[78] Feld and Switzer (n 75) p. 20 (emphasis added).
[79] *China – Raw Materials (AB)* para. 304.
[80] Van den Bossche and Akpofure (n 18) p. 1; Rubini (n 70) p. 562; Farah and Cima (n 74) pp. 1113–1114.
[81] Rubini (n 70) p. 562.

is cited to show that where the drafters wanted exceptions, they explicitly referred to them.[82]

3.2.2. Arguments in Favour of Cross-Applicability

Admittedly, these are good arguments to refuse the cross-applicability of GATT exceptions to the SCM Agreement. However, it is submitted that there are more compelling arguments in favour of such cross-applicability.

Firstly, considering textual issues, the link between the GATT and the SCM Agreement is strong enough to justify cross-applicability. Article 32.1 of the SCM Agreement, read together with its footnote 56, provides the clearest illustration: the former provides that no specific action against a subsidy of another Member may be taken except in accordance with the provisions of GATT 1994 as interpreted by the SCM Agreement, while the latter clarifies that this is not intended to preclude action under other relevant provisions of GATT 1994 where appropriate. Taken together with numerous further references throughout the SCM Agreement, these provisions clearly link it to the GATT and the trade in goods system contained in Annex 1A.[83] Past case law also seems to support this argument.[84] These three disputes are instructive because each addressed the analogous question of whether a GATT exception may be invoked to justify a breach of an obligation lying outside the GATT itself, namely China's accession protocol, and together they trace a movement away from a purely textual approach. In *China – Periodicals*, the Appellate Body found that GATT Article XX can apply to China's accession protocol because Article 5.1 thereof referred to 'China's right to regulate trade in a manner consistent with the WTO Agreement'.[85] While it took a step back in *China – Raw Materials* by finding that Article 11.3 of China's

[82] Farah and Cima (n 74) p. 1114.
[83] See, for example SCM Agreement arts 10 and 32.1 and fn. 56, each of which expressly ties the operation of the Agreement to GATT 1994 and its provisions on countervailing measures.
[84] WTO Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R (adopted 9 December 2002), para. 73; Rubini (n 70) p. 566.
[85] WTO Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (adopted 19 January 2010), para. 336; Protocol on the Accession of the People's Republic of China, WT/L/432 (23 November 2001), art 5.1.

accession protocol does not contain a similarly strong textual link,[86] it retracted from this purely textual interpretation in *China – Rare Earth,* adopting instead a case-by-case approach.[87] Considering the context and language of Article 32.1 in conjunction with footnote 56, and reinforced by the case-by-case approach now favoured by the Appellate Body, it is submitted that this textual link is sufficient to find Article XXI applicable to the SCM Agreement. Furthermore, the importance of the term 'nothing in this agreement' in the chapeau should not be overinterpreted, as it was drafted at a time when no other agreements besides GATT 1947 existed.[88] Lastly, the fact that the category of 'non-actionable subsidies' expired does not exclude the application of other exceptions, as nothing in the *travaux préparatoires* points in this direction.[89]

Secondly, there are strong systemic and structural arguments in favour of cross-applicability. General Interpretative Note to Annex 1A sets out important interpretation guidelines, stating that the SCM Agreement prevails over the GATT *only* in the event of a conflict and only to the extent of the conflict.[90] Accordingly, where there is no conflict, the GATT exceptions apply to the SCM Agreement.[91] This is in line with the general international law principle of *lex specialis derogat legi generali,* which prescribes that the more specific law takes precedence over the general law in the case of conflict, while the general law remains applicable to fill legal gaps in the *lex specialis*.[92] Moreover, looking at the relationship between GATT 1994 and the SCM Agreement, it is clear that the latter is meant to complement and improve the provisions of the former.[93] Denying cross-applicability would lead to odd outcomes, where export subsidies, which are prohibited by the SCM Agreement, could be justified by applying Article XXI to Article XVI GATT, while significantly less serious subsidies could be challenged under the SCM and not justified.[94] Such an interpretation would run afoul of the

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[86] *China – Raw Materials (AB)* para. 304; the clause reads: 'China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or *applied in conformity with the provisions of Article VIII of the GATT 1994*.' [emphasis added].
[87] *China – Rare Earths (AB)* paras. 5.58–5.60.
[88] Rubini (n 70) p. 563.
[89] ibid.
[90] *Marrakesh Agreement Establishing the World Trade Organization* (adopted 15 April 1994, entered into force 1 January 1995), 1867 UNTS 154, General Interpretative Note to Annex 1A.
[91] Jung (n 51) pp. 462–463.
[92] Farah and Cima (n 74) p. 1114.
[93] Jung (n 51) pp. 464–466.
[94] Farah and Cima (n 74) pp. 1114–1115; Rubini (n 70) p. 563; Jung (n 51) p. 462.

principle of good faith interpretation contained in Article 31(1) VCLT.[95] Furthermore, Rubini advances the argument that because the GATT is the 'constitutional core' of the goods regime and its security exceptions are framed in general, broad terms and have a policy value, these exceptions have a 'natural expansiveness' to cover other Annex 1A agreements.[96] Lastly, relating to systemic arguments, refusing cross-applicability would ignore the nature of the WTO as a 'single undertaking'.[97] As stated in Article II:2 of the WTO Agreement, the WTO is an 'integrated system'[98] of different agreements, which cannot be seen in isolation from each other,[99] as it was precisely the intent of the drafters.[100] Instead, they have to be 'interpreted as a whole'.[101]

3.2.3. Interim Conclusion on Cross-Applicability

Considering these textual and systemic arguments, cross-applicability of the GATT Article XXI security exception to the SCM Agreement is possible. Nevertheless, specific guidance from the WTO DSB is still to come and is urgently needed. The ongoing dispute regarding subsidies under the US IRA offers a good opportunity for the panel to provide guidance.[102]

3.2.4. Implications of Cross-Applicability

Accepting cross-applicability *arguendo*, one can now proceed to analyse to what extent GATT exceptions can apply to the SCM Agreement. General Interpretative Note to Annex 1A provides a clear answer to this question: the SCM Agreement *only* prevails over the GATT 1994 *in the event of a conflict* and only *to the extent of the conflict*.[103] This requires an understanding of the existing conflicts. Jung provides a comprehensive and convincing analysis in this regard. Concerning

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[95] Jung (n 51) p. 466; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1).
[96] Rubini (n 70) p. 562.
[97] WTO Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R (adopted 20 March 1997), 12.
[98] ibid 11.
[99] Jung (n 51) p. 461.
[100] *Brazil – Desiccated Coconut (AB)* 18; WTO Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (adopted 12 January 2000), para. 81.
[101] *Korea – Certain Dairy Products (AB)* para. 81.
[102] *US – Certain Tax Credits Under the Inflation Reduction Act.*
[103] *Marrakesh Agreement* (n 90) General Interpretative Note to Annex 1A.

prohibited subsidies, a conflict exists, as export and local content requirements are not prohibited *per se* by Article XVI of the GATT, whereas they are unequivocally prohibited by Article 3 of the SCM Agreement.[104] In this case of prohibition, the SCM Agreement prevails over the general GATT provision.[105] Consequently, the 'interpretative nexus' between the GATT Article XXI via Article XVI to the SCM Agreement is lost: since Article XXI could only reach prohibited subsidies through Article XVI of the GATT, and since the SCM Agreement displaces that provision for such subsidies, there is no longer any GATT obligation to which the security exception could attach, and therefore the GATT exception does not apply to Article 3 of the SCM Agreement.[106] Regarding actionable subsidies, no such conflict exists, since the SCM Agreement merely elaborates on the rules applicable to actionable subsidies under the GATT.[107] Accordingly, the GATT Article XXI exception does apply to actionable subsidies, but not to prohibited subsidies.[108]

4. Applying Article XXI(b)(iii) to Semiconductor Subsidies

Having shown the theoretical background to the national security exception and cross-applicability, a closer look at its practical implications is warranted. In doing so, this paper will follow the approaches taken by scholars to look at legislative acts rather than specific subsidies, since this general analysis aligns with the focus of this paper on Article XXI(b)(iii) and cross-applicability.[109] The focus here will be the EU Chips Act and the US CHIPS Act.[110] These two schemes are chosen because they are the most prominent and most directly comparable Western measures, each pursued by a major WTO Member, each expressly framed around supply-chain resilience and security, and each emanating from a jurisdiction that has previously relied on, or signalled reliance on, security-based justifications in trade disputes. China's domestic programmes pursue comparable aims but are considerably less transparent and have not been litigated in the same manner,

[104] Jung (n 51) p. 469.
[105] ibid.
[106] ibid.
[107] ibid p. 468.
[108] ibid p. 470.
[109] Kim (n 30) pp. 120–121.
[110] Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act) [2023] OJ L 229/1; CHIPS and Science Act of 2022, Pub L No 117–167, div A (CHIPS Act of 2022), 136 Stat 1372 (2022).

which makes the EU and US acts the more suitable basis for a doctrinal application of the test.

Firstly, the aid granted under these acts must qualify as a 'subsidy' within the meaning of the SCM and be either prohibited or actionable. The requirements of (1) financial contribution, (2) by a government, and (3) that confers a benefit, are fulfilled for most aid granted under the EU and US acts.[111] Each element is readily demonstrated. The direct grants for the construction and equipment of fabrication facilities and the refundable advanced-manufacturing investment credit under the US act, together with the funding provided under the Chips for Europe Initiative and the State aid authorised by Member States under the EU act, each amount to a financial contribution within the meaning of Article 1.1(a)(1). That contribution is plainly made by a government or public body, namely the competent US federal authorities and, in the EU, the Union and the Member States granting the aid. Finally, it confers a benefit, since the recipient undertakings obtain support on terms more favourable than those available to them on the market. Thus, this aid qualifies as a subsidy under Article 1 SCM. Additionally, the requirement of specificity under Article 1.1(b) is fulfilled, since the semiconductor industry is a sufficiently 'discrete segment of the economy'.[112] Having established this, the question arises whether these subsidies are actionable or prohibited under Articles 5 and 3, respectively. Since the semiconductor subsidies of the US and EU chip acts are neither import- nor export-substitution subsidies, that is, they condition support on domestic investment and production rather than on export performance or on the use of domestic over imported goods, the two categories caught by Article 3, they are unlikely to be considered prohibited under Article 3.[113] Under Article 5, a subsidy is actionable if it has 'adverse effects [on] the interests of other Members'.[114] Commentators agree that the semiconductor subsidies of the US and EU have such effects and thus are actionable.[115] Such adverse effects arise because large-scale production subsidies can distort competition by displacing imports and shifting manufacturing capacity towards the subsidising State, to the detriment of producers in other Members. On

[111] Lee (n 6) p. 265.
[112] *US – Upland Cotton* (Panel) para. 7.1151; ibid.
[113] Walker (n 21) p. 702; Lee (n 6) p. 267.
[114] SCM Agreement art 5.
[115] Walker (n 21) p. 703; Lee (n 6) p. 277.

the present author's assessment, the sheer scale of the support at issue, running into tens of billions, makes it difficult to deny that it is at least liable to cause serious prejudice of the kind contemplated by Articles 5(c) and 6.3 SCM, whether through the displacement of imports or the depression of prices in the markets of other Members. Therefore, subsidies granted by these legislative acts could be challenged before a DSB panel, which, according to commentators, is likely to happen; this is no longer a merely speculative prediction, given that precisely such a subsidy challenge, met with an Article XXI defence, is already being litigated in the ongoing DS623 dispute.[116] The US would likely follow its past strategy of invoking Article XXI(b)(iii) GATT to justify its actions, as it did in *US – Steel and Aluminium* and *US – Origin Marking Requirement*[117] and the EU could take a similar approach, given that defence and security are prevalent themes in its Chips Act.[118]

Accordingly, it is necessary to examine whether the US and EU chip legislation could be justified under the GATT security exception under the test established by past panels, in particular, *Russia – Traffic in Transit,* and outlined above.

Turning first to the objective prong, there must be 'a war or other emergency in international relations'. Neither the EU nor the US is itself a belligerent in an armed conflict to which its semiconductor measures could be connected. While both are materially affected by Russia's ongoing war against Ukraine, the 'war' limb is concerned with a war bearing on the measure in question, and, as discussed below, that conflict is unlikely to supply the requisite connection to chip subsidies whose rationale lies in long-term industrial competition with China rather than in the hostilities in Europe. Thus, an assessment of whether there is an 'emergency in international relations' is necessary. In this regard, panels have consistently upheld a high bar, requiring a situation 'at least comparable in its gravity or severity to war in terms of its impact on international relations'.[119] Considerations of economic security would not meet this threshold.[120] This is further supported by past panels on disputes between the

[116] *US – Certain Tax Credits* (n 8); Walker (n 21) p. 706.
[117] USTR (n 9) paras. 136–138; *US – Steel and Aluminium Products* para. 7.105.
[118] *EU Chips Act* recitals 1, 10, 63, Annex IV.
[119] *US – Steel and Aluminium Products* para. 7.139.
[120] Wang (n 13) pp. 705–706.

US and China, which held that the tensions between these two States do not amount to an emergency in international relations.[121] Moreover, the war between Russia and Ukraine is unlikely to be considered a 'war or emergency in international relations' that is relevant for EU or US semiconductor subsidies, since those subsidies are directed at securing long-term manufacturing capacity in the face of competition with China and East Asia rather than at the hostilities in Europe, so that the connection between that conflict and the measures is too attenuated to satisfy the requirement that the measure relate to the emergency in question.[122] However, in their arguments, the EU and the US could refer to the essential nature of semiconductors in military equipment, claiming that the crisis in economic relations relates to military and defence interests.[123] In fact, this argument has been raised by States before relating to other products, such as steel,[124] aluminium,[125] certain chemicals,[126] as well as shoes.[127] However, the Panel pointed out in *US – Steel and Aluminium*, this argument relates to the subjective assessment of the State and would need to be addressed in the chapeau, rather than the subparagraph (iii) test.[128] Thus, it is likely that a future panel seized on the question would consider Article XXI(b)(iii) inapplicable and, following past jurisprudence, would not go any further in its analysis.[129] That being said, this outcome is not inevitable. A panel could nonetheless choose to address the remaining elements in the alternative, in particular considering the novelty of the question. Thus, for the sake of completeness, this paper will continue the analysis assuming *arguendo* that there exists an emergency in international relations.

The second step of the objective prong then requires a temporal connection between the measure and the emergency.[130] This raises certain issues regarding semiconductor subsidies, since the emergencies they rely on, for example, the US-China-EU technological competition, are of a continuing character, [131] 'unbound

[121] *US – Steel and Aluminium Products* para. 7.149; *US – Origin Marking Requirement* para. 7.360.
[122] Lee (n 6) p. 283.
[123] Wang (n 13) p. 706.
[124] *US – Steel and Aluminium Products* fn. 514.
[125] ibid.
[126] Japan – Measures Related to the Exportation of Products and Technology to Korea, Request for Consultations by the Republic of Korea, WT/DS590/1 (24 July 2019).
[127] Walker (n 21) p. 696.
[128] *US – Steel and Aluminium Products* para. 7.146.
[129] *US – Origin Marking Requirement* para. 7.361; *US – Steel and Aluminium Products* para. 7.149.
[130] *Russia – Traffic in Transit* para. 7.70.
[131] Pinchis-Paulsen (n 41) p. 533.

by time'.[132] When the Panel in *Saudi Arabia – IP Rights* addressed the temporal element, it had as a starting date the sudden severance of diplomatic relations between the parties on 5 June 2017, against which it assessed the requirement.[133] In *Russia – Traffic in Transit,* the Panel relied on publicly available evidence to determine the existence of an emergency between 'at least as of March 2014' between Russia and Ukraine.[134] Such a clear starting date is absent in the case of the technological race between China, the US, and the EU.[135] In addressing the issue, a panel would likely need to engage in a deeper factual analysis of the circumstances, drawing on publicly available evidence such as official strategy documents, the legislative history of the measures, the sequence of export controls and trade restrictions, and contemporaneous policy statements, much as the Panel in *Russia – Traffic in Transit* relied on publicly available evidence, to determine a starting date against which the temporal requirement can be tested.

Assuming that a panel would be satisfied that the requirements of the objective prong are met, it would move on to consider the chapeau test, requiring (1) a clear articulation of the 'essential security interest', and (2) a plausible nexus between the measure and the security interest in the context of the emergency. As highlighted by the Panel in *Saudi Arabia – IP Rights,* the first requirement's purpose is to serve as the basis against which the nexus in the second step can be measured.[136] A 'minimally satisfactory' articulation is therefore sufficient. The EU and the US could, as pointed out by the Panel in *US – Steel and Aluminium*, refer to the importance of semiconductors for military equipment as an essential security interest.[137] A more thorough analysis would be conducted by a panel concerning the question of whether semiconductor subsidies 'meet a minimum requirement of plausibility in relation to the [articulated] essential security interest'.[138] The Panel in *Saudi Arabia – IP Rights* employed a test of whether the measures were 'so remote from, or unrelated to, the emergency […] as to make it implausible that [the State] implemented the measure for the protection of its [articulated] essential

[132] Heath (n 3) p. 1024.
[133] *Saudi Arabia – IP Rights* para. 7.268.
[134] *Russia – Traffic in Transit* para. 7.122.
[135] Pinchis-Paulsen (n 41) p. 533.
[136] *Saudi Arabia – IP Rights* para. 7.281.
[137] *US – Steel and Aluminium Products* para. 7.146.
[138] *Saudi Arabia – IP Rights* paras. 7.283–7.294, especially para. 7.288; Wang (n 13) p. 709.

security interests'.[139] Following the relatively low bar set by the Panel in this case, it is likely that a future panel would find there to be a minimum level of plausibility in the connection between semiconductor subsidies and the essential security interest of maintaining and producing military equipment.[140]

Considering the aforementioned points, it is highly likely that, under today's circumstances, a future panel confronted with the legality of the EU and the US semiconductor subsidies under Article XXI(b)(iii) would find against the existence of an 'emergency in international relations' and thus against the applicability of the GATT security exception. However, ultimately, how panels will actually deal with these questions remains a question for the future.

5. Shortcomings of the Security Exception in the Context of Semiconductor Subsidies

This paper has shown that the current approach to Article XXI(b)(iii) suffers from several significant shortcomings when put to the test in the context of contemporary semiconductor subsidies.

Firstly, the term 'emergency in international relations' as it is currently defined, imposes a threshold that is unrealistically high and ignores the nature of new threats, such as supply-chain dependencies in critical materials or products, pandemics, or climate change-related consequences, which can have significant implications for a State's legitimate essential security interests.[141] A similar issue arises with the term 'international relations', which in the current approach has a strong inter-State or at least an actor-based focus,[142] which again ignores the complex nature of contemporary security problems.[143]

Secondly, in analysing the existence of an emergency in international relations, the current approach is mostly formal, meaning, it examines whether on a surface level in the interactions between the States rather than examining whether an 'emergency in international relations' genuinely, ignoring the need for a deeper factual assessment of the situation.[144] For example, in *US – Steel and*

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[139] *Saudi Arabia – IP Rights* para. 7.285.
[140] ibid paras. 7.283–7.294.
[141] Pinchis-Paulsen (n 41) pp. 533–534.
[142] Kim (n 30) p. 124.
[143] Heath (n 3) p. 1034.
[144] Kim (n 30) p. 123.

Aluminum, the Panel ignored the importance of the domestic legal basis or debate altogether, confining its inquiry to the external situation and the bare existence of the measures rather than examining the domestic record and the reasons that had in fact motivated their adoption.[145] This formal approach hinders the DSB from developing a more nuanced approach to what constitutes an 'emergency in international relations' and gives States little *ex ante* guidance. This is problematic in the case of semiconductor subsidies, which rely on 'significant political and economic context' to show the nature of the emergency.[146]

Thirdly, assuming cross-applicability, there is a clear structural mismatch between Article XXI(b)(i) and (ii) and subsidies. The wording of subparagraphs (i) and (ii) only refers to the 'traffic' and not to other economic measures, such as subsidies. This forces all subsidies into Article XXI(b)(iii) even if they concern semiconductors used exclusively for military equipment. Arguably, this is not problematic in itself, since subparagraph (iii) operates as the residual limb of Article XXI(b) and is designed to capture measures not addressed by subparagraphs (i) and (ii). The issue is that its 'emergency' threshold established above is difficult to reconcile with the economic rationale of semiconductor subsidies.

These shortcomings show that, while legally sound and in line with the text of Article XXI(b)(iii) GATT, the *Russia – Traffic in Transit* approach is ill-equipped to deal with the changing nature of threats to States' essential security interests. Considering this, commentators have put forward several reform proposals focused on reforming the governance behind Article XXI(b)(iii).[147] While certainly interesting, a detailed analysis of these proposals, would go beyond the scope of this paper, which remains focused on doctrinal issues. An alternative to governance reform would lie in deepening the interpretation of Article XXI(b)(iii), particularly the objective test, to reflect the changing nature of security threats and emergencies in international relations. In this regard, Walker points out that the good faith standard applies to the whole of Article XXI(b)(iii),[148] and thus could also inform the assessment made concerning the

[145] ibid p. 130.
[146] ibid p. 124.
[147] Pinchis-Paulsen (n 41) pp. 541–547; Heath (n 3) pp. 1080–1096.
[148] Walker (n 21) p. 709.

existence of an emergency in international relations. Another approach would be to significantly expand the level of engagement and analysis with both the legal and factual elements of an Article XXI(b)(iii) invocation to allow for a proper 'objective' assessment. In practice, this would require a panel to interrogate the full documentary and contextual record, including national security strategies, the genesis of the measure, and the surrounding diplomatic situation, in order to test whether an emergency genuinely exists, rather than accepting the parties' surface-level characterisation of their relations.[149] It is therefore submitted that addressing this will require both an amendment to the doctrinal approach taken by panels, as well as a change in the institutional governance of the security exception, to cope with the changing trade and security environment.

6. Conclusion

This paper aimed to determine to what extent, and under what conditions, the security exception in Article XXI(b) GATT can justify actionable semiconductor subsidies that breach the SCM Agreement, and what the broader systemic implications of recognising such a cross-applicability would be. It has been argued that Article XXI(b) GATT can in principle be cross-applied to justify actionable semiconductor subsidies under the SCM Agreement, but only under conditions so demanding that most contemporary semiconductor subsidies are unlikely to satisfy them. Cross-applicability is, in other words, possible in doctrine but difficult to invoke in the context of contemporary semiconductor subsidies.

This conclusion is the logical consequence of the doctrinal analysis in this paper. The starting point of the analysis was the structure of Article XXI(b)(iii) and the two-step test developed in *Russia – Traffic in Transit*, under which a panel asks, first, and objectively, whether a war or other emergency in international relations exists and whether the measure was taken at that time, and, secondly, whether the good faith standard is met, requiring only a plausible link between the measure and the essential security interest articulated by the State. The paper then explained how subsidies are disciplined under the SCM Agreement, distinguishing prohibited from actionable subsidies, and accepted, on the strength of the existing

[149] Mona Pinchis-Paulsen, Kamal Saggi and Petros C Mavroidis, 'The National Security Exception at the WTO: Should It Just Be a Matter of *When* Members Can Avail of It? What About *How*?' (2024) 23 World Trade Review 271, p. 294.

scholarship, that the major chip subsidies are actionable. Building on this, it was submitted that, although significant textual and systemic arguments are raised against it, the more convincing view is that the GATT security exception can cross-apply to actionable, though not prohibited, subsidies, given the close textual and structural links between the two instruments within Annex 1A. Applying the test to the EU Chips Act and the US CHIPS Act, however, showed that the principal obstacle lies in the objective prong: the high threshold for an 'emergency in international relations', combined with the requirement of a temporal connection, makes it unlikely that a panel would regard long-term, economically motivated chip subsidies as falling within Article XXI(b)(iii), even though the good faith standard at the second step would probably be satisfied.

However, the lessons of this paper are not confined to the findings of these case studies. More fundamentally, it has exposed a deeper tension crucial in contemporary international economic law. The *Russia – Traffic in Transit* approach, though legally sound, is ill-suited to a 'new' conception of national security in which economic and technological capacity, rather than military force alone, is treated as a security interest. The implication is that, as security-based justifications for industrial measures proliferate, the security exception will increasingly be asked to do work for which its current interpretation is poorly equipped, with consequences for the predictability of the multilateral trading system as a whole.

The findings of this paper open several avenues for further valuable research. The first concerns the *US – IRA* dispute and other future disputes that might raise this issue. The second concerns reform, and in particular whether the shortcomings identified are best addressed through institutional governance reform, through a deeper and more genuinely objective interpretation of the existing test, or through a combination of the two. A third avenue would be to test the framework developed here against other products and other Annex 1A agreements, in order to determine whether the conclusions reached for semiconductor subsidies hold more generally. What is clear, in any event, is that the debate is not a merely theoretical one: the argument that Article XXI(b)(iii) GATT applies to the SCM Agreement has already been raised by the US in the *US – IRA* dispute, and, as the pressure exerted on the trading system by security-related measures continues to grow, the questions addressed in this paper are likely to remain at the centre of future WTO disputes and international economic law.

Cyber Espionage and Corporate Confidentiality: Evaluating the EU Legal Shield for Trade Secrets in a Digital Age

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TABLE OF ABBREVIATIONS

AI	Artificial Intelligence
BCE	Before Common Era
CSIRT	Computer Incident Response Team
CJEU	Court of Justice of the European Union
DA	Data Act
DPAs	Data Protection Authorities
EU	European Union
GDPR	General Data Protection Regulation
IoT	Internet of Things
IP	Intellectual Property
IPR/IPRs	Intellectual Property Rights
NAP	National Action Plan
NIS2	Network and Information Systems Directive
OMC	Open Method of Coordination
R&D	Research and Development
SMEs	Small and Medium-Sized Enterprises
TPMs	Technical Protection Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSA	Trade Secrets Authority
TSD	Trade Secrets Directive

1. INTRODUCTION

1.1 TRADE SECRETS IN THE DIGITAL AGE

Trade secrets are a driving force of innovation and have always held such status. In fact, Ancient laws such as Hammurabi's Code of Law from 1754 BCE mandated that if an artisan were to rear a child and teach him his craft, that child could not be demanded back by his family.[2] In the commercial world, trade secrets have consistently been leveraged as an advantage over competitors in the market.[3] A study done by Hussinger found that undertakings tend to keep innovations secret before commercialisation,[4] emphasising the strategic role of trade secrecy in early-stage innovation, for example, leading up to a patent application.[5] However, undertakings may also apply secrecy rather than other forms of Intellectual Property (IP) protection for strategic purposes,[6] which sometimes results in abuse of their dominant position.[7] Yet, the ever-growing landscape of the digital environment presents new challenges to the protection afforded to such secrets. As technology advances, the nature and volume of risks to digital trade secrets expand exponentially.[8] Common digital information includes various forms of data (such as raw, processed, or meta), codes, and algorithms. Moreover, traditional trade secrets that were once stored offline have now begun to be digitised and stored in online systems. This underscores that trade secrets do not have to be inherently technological to be at risk of cyber theft. Crucially, cyber espionage comes in different forms, such as hacking or other data breaches; moreover, the growing reliance on cloud computing and other interconnected

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[2] World Intellectual Property Organization, 'Part II: strategic roles of trade secrets in the innovation ecosystem' (*WIPO*) <https://www.wipo.int/web-publications/wipo-guide-to-trade-secrets-and-innovation/en/part-ii-strategic-roles-of-trade-secrets-in-the-innovation-ecosystem.html> accessed 17 April 2025.

[3] Mark Lemley, 'The Surprising Virtues of Treating Trade Secret as IP Rights' (2008) 61 Stanford Law Review 311, p. 313.

[4] Katrin Hussinger, 'Is Silence Golden? Patents versus Secrecy at the Firm Level' (2005) SFB/TR 15 Discussion Paper, No. 37, Sonderforschungsbereich/Transregio 15 - Governance and the Efficiency of Economic Systems (GESY), p. 11.

[5] European Commission, 'Study on Trade Secrets and Confidential Business Information in the Internal Market' (European Commission 2013), p. 94.

[6] Hussinger (n 4), p. 11.

[7] Case T-201/04, *Microsoft v. Commission* [2007] ECR II-3601.

[8] David Almeling, 'Seven Reasons Why Trade Secrets Are Increasingly Important' (2012) 27(2) Berkeley Technology Law Journal 1091, p. 1100.

infrastructures also poses increased threats.[9] Trade secrets represent a significant component of an undertaking's intangible assets; their commercial value contributes largely to stock market valuations and economic growth of that undertaking.[10] The inherent innovative aspect of trade secrets thus forms a critical part of an undertaking's competitive advantage; subsequently, this asset is a regular target of cyber theft by competitors and other malicious actors.[11] According to a European Union (EU) report, cyber theft threatened around 60 billion euros in EU economic growth and put 289,000 jobs at risk.[12] Such serious risks heighten the need for a legal framework that effectively safeguards confidential business information in the digital landscape while balancing innovation and fair competition.

This paper therefore answers the question: "to what extent does the current EU legal framework protect trade secrets against cyber espionage, and what additional measures are necessary to ensure comprehensive protection?". Protection in this paper is to be understood as clear, enforceable, and harmonised legal mechanisms that both prevent and respond to the misappropriation of trade secrets in the digital environment. A great extent of protection would therefore imply a comprehensive, coherent framework that offers clarity, legal certainty, effective enforcement, and sufficient deterrents against cyber espionage. Whereas a low extent contains fragmented regulation, lack of harmonisation across Member States, insufficient preventive mechanisms, and legal ambiguities that undermine enforcement or compliance.

1.2. Research Methodology, Value, and Structure

This paper addresses an issue which has not yet been directly regulated by the EU. In a report done by the European Commission, it was uncovered that while cyber

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[9] Thomas Eger and Marc Scheufen, 'The Law and Economics of the Data Economy: Introduction to the Special Issue' (2024) European Journal of Law and Economics 93, p. 103.

[10] Alexander Michaelides and others, 'The Value of Trade Secrets: Evidence from Economic Espionage' (2024), p. 2.

[11] Forrester Consulting, 'The Value of Corporate Secrets: How Compliance and Collaboration affect Enterprise Perceptions of Risk' (Forrester 2010), p. 11.

[12] Directorate-General for Internal Market, 'European Commission launches cyber-theft prevention toolkit to protect SMEs' trade secrets in high-risk sectors' (European Commission 15 October 2024) < https://single-market-economy.ec.europa.eu/news/european-commission-launches-cyber-theft-prevention-toolkit-protect-smes-trade-secrets-high-risk-2024-10-15_en > accessed 12 November 2024.

threats are targeted by current policy, there exists no such policy focusing on cyber theft of trade secrets specifically.[13] Cybersecurity obligations for the protection of trade secrets are extremely limited, thus requiring a greater analysis to distinguish the ways in which the current framework addresses the issue, and how it should aim to address the issue in the future.[14] The findings of this research will provide insights into how businesses, policymakers, and legal practitioners can adapt to the evolving landscape of trade secret protection in an era defined by rapid technological change and digital vulnerability.

The analysis will be undertaken using, first, a doctrinal methodology examining the Trade Secrets Directive (TSD),[15] General Data Protection Regulation (GDPR),[16] Network and Information Systems Directive (NIS2),[17] and the Data Act (DA)[18] through chapters 2 to 5. Importantly, these four instruments have been selected since they simultaneously create the current framework for protecting trade secrets in the digital environment. The TSD is the primary legislation directly regulating misappropriation. While the GDPR and the NIS2 play critical roles in mandating cybersecurity and protection of data, they do not directly address trade secret concerns. Finally, the DA is a new regulation introducing provisions regarding the sharing of confidential information and therefore has a more direct relation to trade secrets. The doctrinal approach, alongside a pure analysis of legislation, will draw on quantitative and qualitative empirical studies, which will be used to provide contextual insight into the practical application of the policies. To the extent possible, legal analysis and application of case law will also be used, however this is limited due to the novelty of the legislation analysed. Chapter 2 will define the concept of a trade secret under

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[13] European Commission, 'Study on the Scale and Impact of Industrial Espionage and Theft of Trade Secrets through Cyber' (European Commission 2018), p. 58.
[14] ibid.
[15] Council Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure [2016] OJ L 157/1, art. 1 (TSD).
[16] Council Regulation (EC) of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/EC [2016] OJ L 119/1 (GDPR).
[17] Council Directive 2022/2555 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 [2022] L 333/80 (NIS2).
[18] Council Regulation of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (DA).

EU law, Chapter 3 will provide a basis on cyber threats, Chapter 4 will analyse the legislation, and Chapter 5 will identify the gaps in the legal framework by using the analysis of Chapter 4.

Second, a normative methodology will be used to propose reforms aimed at enhancing the protection of trade secrets after identifying the gaps in the legislation. The normative section of the paper is found in Chapter 6, which uses literature and legal texts that focus on the pitfalls of current legislation in order to propose reforms to the gaps identified in Chapter 5. Official reports and studies will also prove useful in identifying effective measures to implement.

2. The Concept of Trade Secrets in EU Law

2.1 Definition of Trade Secrets Under EU Law

A trade secret is a valuable piece of information held by an undertaking that is treated as confidential and provides that undertaking with a competitive advantage because of its secrecy.[19] The EU definition, as provided in the TSD, aligns with that of Article 39 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) to ensure consistency in international protection. Trade secrets are not only a concern of IP law but also of competition law, since the possession and use of certain information may enhance the competitive advantage of an undertaking. A key point of trade secrets is their confidential nature; they are unregistered and hold all their value in their secrecy. Once that secret is compromised, the undertaking loses its competitive advantage and will likely lose its market position.[20] A trade secret thus may contribute to competitive differentiation. Such information includes formulas, manufacturing processes, strategies, or client data, which under EU law is given direct protection through the TSD.

2.2 The EU Criteria for the Protection of a Trade Secret

[19] European Commission, 'Study on The Scale and Impact of Industrial Espionage' (n 12); European Commission, 'Trade Secrets' (European Commission) < https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/trade-secrets_en > accessed 17 December 2024.

[20] TSD, art. 2(1)(a).

The TSD was adopted in 2016 with the aim of harmonising the protection provided to trade secrets within the EU Member States.[21] TSD works to create a cohesive framework in cases of unlawful acquisition, use or disclosure[22] in order to protect holders and ultimately foster competitiveness in Research and Development (R&D).[23] Thus, TSD is to be seen as a system of liability rather than a rights system;[24] a trade secret holder is not protected in cases where a secret is accessed or disclosed through fair discovery or reverse engineering.[25]

However, before a trade secret is recognised, it must qualify as such. This is important as trade secrets are unregistered rights; such a right is one which does not exist in a public register, and no administrative body pre-verifies or grants protection in advance. A holder of the information will be granted protection in occurrence of misappropriation only if they meet the requirements set out by TSD.[26] This can be particularly seen in Article 2 of the TSD where we can find three main components of the scope of protection. The first is secrecy, meaning that the information is not known or easily accessible to everyone.[27] The second component mandates that the secret carries a commercial value[28] that is enhanced by its non-availability to competitors.[29] The third component regards the fact that there must have been reasonable steps taken in order to keep the information secret. This includes appropriate implementation of, for example, non-disclosure agreements, or protection software. Thus, the inadequacy of appropriate safeguards in place will render a case against disclosed trade secrets weak or null. Due to the lack of a formal registration procedure, an undertaking will be left uncertain about protection in litigation. It is ultimately the decision of the courts whether information meets the criteria set out under Article 2 of the TSD based on evidence presented. However, these case-by-case decisions will only be made

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[21] TSD, recital 6.
[22] TSD, art. 1.
[23] ibid art. 1(3)(a).
[24] Josef Drexl, 'Designing Competitive Markets for Industrial Data - Between Propertisation and Access' (2017) 8(4) Journal of Intellectual Property, Information Technology and Electronic Commerce Law, p. 24.
[25] Sandrine Kergroach, 'SMEs Going Digital: Policy challenges and recommendations' OECD Going Digital Toolkit Notes' (OECD 2021), p. 14.
[26] Jerry Xia and Ning Dong, 'Global Trade Secrets Guides' (Lexology 2022), p. 5.
[27] TSD, art. 2(1)(a).
[28] ibid recitals 8, 14; commercial value may refer to actual or potential value.
[29] ibid art. 2(1)(b).

once misappropriation has already occurred, making the current framework an *ex-post*-based system. This also means that the courts play a crucial role in determining what types of information qualify, and what "reasonable steps" look like under the TSD.

In practice, the capacity to enforce rights over trade secrets depends heavily on the ability to preserve secrecy. The existing digital environment, however, is swamped with evolving forms of storing data, and thus increasing methods of misappropriation. This will become especially visible in the following chapter, which addresses some key threats and outlines the key technological vulnerabilities faced by undertakings.

3. The Challenges of Protecting Trade Secrets in the Digital Environment

3.1 What is Cyber Espionage?

A cybersecurity threat includes any event in which an organisational operation impacts individuals through information access.[30] However, cyber espionage is a specific crime that centres around the intention of the actor; it is the act of obtaining information without the knowledge and informed consent of the victim.[31] Espionage may be motivated by monetary, commercial, or political reasons, and is commonly employed by governments and corporations.[32] The biggest targets of cyber espionage are bodies which hold valuable IP; cyber spies consistently attempt to access and steal trade secrets, commonly through malware which steals the data on the device attacked.[33] Cyber espionage is categorised in most cases as an advanced persistent threat;[34] this is a form of cyber-attack where the intruder gains covert access to a network for an extended period with the intention of exfiltrating sensitive data.[35] Cyber attackers have a multitude of threats to choose from in order to gain access.

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[30] NIST, 'Cyber threat' (Computer Resource Security Center) <https://csrc.nist.gov/glossary/term/cyber_threat> accessed 3 January 2025.
[31] David Freet and Rajeev Agrawal, *Cyber Espionage* (Springer 2017), p. 1.
[32] Abdulla Civuli and others, 'Cyber Espionage Consequences as a Growing Threat' (2022) 7 Journal of Natural Sciences & Mathematics 13, p. 13.
[33] ibid, p. 14.
[34] Scott Shackelford and others, 'Using BITs to Protect Bytes: Promoting Cyber Peace by Safeguarding Trade Secrets Through Bilateral Investment Treaties' (2015) 52 American Business Law Journal 1, p. 8.
[35] ibid.

Cyber threats based on social engineering,[36] such as malware,[37] ransomware, phishing and spam are popularly applied by attackers.[38] Ransomware[39] continues to be a top cyber threat; in fact, in a survey done between 2021 and 2022, over half of respondents or their employees had been approached in ransomware attacks.[40] Moreover, phishing[41] poses a significant threat, as 91% of all cyber-attacks originate from this phenomenon.[42] The most vulnerable parties to such threats are Small and Medium-Sized Entreprises (SMEs) by virtue of their inability to afford the costs of efficient security. Furthermore, structural weaknesses in digital infrastructure increasingly heighten the risk to trade secrets. Prime vulnerabilities are cloud computing and the Internet of Things (IoT), both of which expose sensitive information to cyber threats.[43]

3.2. Digital Vulnerabilities: Cloud Computing and IoT

3.2.1. Cloud Computing and Trade Secret Risks

Cloud computing is the process of delivering computing services.[44] These computing services include storage, databases, networking, analytics, and

[36] Social engineering is the use of psychological manipulation to influence an individual to make a security mistake or to give away information that is sensitive.
[37] Malware is any code added, changed or removed from a software system to intentionally cause harm or subvert the indented function of the system; Anitta Namanya and others, 'The World of Malware: An Overview' (IEEE Explore, 2018) 420, p. 420.
[38] Mass, 'Know the types of cyber threats' (Mass) < https://www.mass.gov/info-details/know-the-types-of-cyber-threats > accessed 17 February 2025.
[39] Ransomware is a malicious software which hijacks the victim's device and demands ransom payment to decrypt any encrypted data; Sana Aurangzeb and others, 'Ransomware: A Survey and Trends' (2017) 12 Journal of Information Assurance and Security 1; Hesham Alshaikh, Nagy Ramadan, Hesham Hefny, 'Ransomware Prevention and Mitigation Techniques' (2020) 177 International Journal of Computer Applications 31, p. 31.
[40] European Parliament, 'Cybersecurity: main and emerging threats' (European Parliament 27 January 2022) < https://www.europarl.europa.eu/topics/en/article/20220120STO21428/cybersecurity-main-and-emerging-threats > accessed 3 January 2025.
[41] Phishing is a process where an attacker acquires information by sending emails send users to fake websites where they are asked to put in their credentials; Ike Vayansky and Sathish Kumar, 'Phishing – Challenges and solutions' (2018) 1 Computer Fraud and Security Journal 15, p. 15.
[42] Ping Wang and Peyton Lutchkus, 'Psychological Tactic of Phishing Emails' (2023) 24 Issues in Information Systems 71, p. 71.
[43] Molly Cash, 'Keep It Secret, Keep It Safe: Protecting Trade Secrets by Revisiting the Reasonable Efforts Requirement in Federal Law' (2016) 23 Journal of Intellectual Property Law 263, p. 265; Cody Scott and others, 'Predictions 2025: Cybersecurity, Risk, And Privacy' (*Forrester*, 1 October 2024) < https://reprint.forrester.com/reports/predictions-2025-cybersecurity-risk-and-privacy-fde4cede/index.html > accessed 14 March 2025.
[44] Microsoft, 'What is cloud computing?' (Microsoft) < https://azure.microsoft.com/enus/resources/cloudcomputingdictionary/whatiscloudcomputing#:~:

intelligence done over the internet, also known as "the cloud".[45] Cloud computing has become popular among undertakings due to various reasons, such as cutting costs related to buying hardware and software, and the costs of setting up data centres.[46] Other reasons include speed, scaling elastically, increased productivity and performance, and the ability to have data back-ups in case of incidents.

Nevertheless, there are considerable security concerns.[47] The majority of cloud computing services offer the ability to have "multi-tenancy" for decreased costs. Multi-tenancy is where multiple undertakings share cloud infrastructure; naturally, the lack of network isolation makes the cloud vulnerable to attacks and may undermine the "secrecy" requirement under Article 2(1)(a) of the TSD.[48] This environment leads to increased risks of cyber espionage through data leaks,[49] and taking such a risk consequently leads to a higher threshold in regard to the "reasonable steps" criterion. Furthermore, cross-border cloud storage also presents a challenge in regard to trade secrets stored in data centres located outside of the EU. Cross-Border storage causes complications in regard to the enforcement of EU law in cases of a breach since undertakings may lack control over the exact location and the security measures applied to their data; [50] it thus becomes difficult to ensure that "reasonable steps" have been taken.

3.2.2 The Internet of Things and Data Security Risks

IoT is a term used to refer to a network that connects devices that have sensors, the ability to process, that are programmed for specific uses, and are able to transmit data and communicate with not only each other, but also other devices.[51] IoT is used for automated production and data collection; the main attractions of its use include reduced costs, reduction in human error, and productivity.[52]

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text=Cloud%20computing%20defined,resources%2C%20and%20economies%20of%20scale> accessed 18 November 2024.

45 ibid.

46 ibid.

47 Cash (n 43), p. 265.

48 ibid.

49 Wayne Brown, Vince Anderson, Qing Tan, 'Multitenancy - Security Risks and Countermeasures' (2012) Conference Paper, Network-Based Information Systems (NBiS), p. 1.

50 TSD, art. 11(2)(b).

51 Ron Davies, 'Internet of Things; Opportunities and Challenges' (2015) European Parliament Research Service, p. 1.

52 Nexus, 'What are the benefits of Internet of Things?' (Nexus, 18 June 2024) < https://www.nexusgroup.com/what-are-the-benefits-of-internet-of-things-nexus-group/ > accessed 5 January 2025.

However, the considerable issue with IoT devices is the lack of strong security. Attackers have the ability to access a common class of IoT devices and execute coordinated mass attacks, as seen in the Mirai botnet attack of 2016, which targeted undertakings such as Amazon, Twitter, and Netflix.[53] Such compromised devices allow attackers to access trade secrets kept in interconnected systems easily. Thus, if an undertaking uses a network of unsecured IoT devices, it is unlikely to meet the standard of having taken "reasonable steps" to preserve secrecy. Risks of IoT breach require undertakings to conduct lengthy and costly remediation efforts, possibly replacing entire groups of devices.[54] Considering that IoT (like cloud computing) may be stored on external servers, there is an increased risk of access by third parties, putting "secrecy" and "commercial value" in danger.

3.3. Emerging Technologies and New Risks for Trade Secrets

Technologies such as Artificial Intelligence (AI), quantum computing,[55] and big data analytics introduce new challenges in the protection of trade secrets.[56] While these technologies drive innovation and competitiveness, they also create vulnerabilities that traditional legal frameworks struggle to address. One vulnerability is AI-powered systems that rely on large datasets. These complex AI systems may access information without permission once prompted, reverse engineer certain information, and may be manipulated by deceptive inputs.[57] Undertakings must implement access controls, usage monitoring, and strict internal policies; however, it is currently uncertain what exact "reasonable steps" must be taken against such AIs. Furthermore, quantum computing, while still in early developmental stages, poses a future threat to trade secret protection by breaking conventional encryption methods, which are processes where data is

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[53] Xiaolu Zhang and others, 'IoT Botnet Forensics: A Comprehensive Digital Forensic Case Study on Mirai Botnet Servers' (2020) Digital Forensics Research Conference 51, p. 52.
[54] Scott and others (n 43).
[55] Wasyihun Admass, Yirga Munaye, and Abebe Diro, 'Cyber Security: State of the art, challenges and future directions' (2024) 2 Cyber Security and Applications 6, p. 6.
[56] Janet Ngesa, 'Tackling Security and Privacy Challenges in the Realm of Big Data Analytics' (2024) 21(2) World Journal of Advanced Research and Reviews 552; p. 555.
[57] Admass, Munaye and Diro (n 55), p. 5.

made unreadable through mathematical models.[58] This technology may severely undermine the "secrecy" requirement and will diminish the "commercial value" of encrypted trade secrets.[59] The development of future quantum-resistant encryption strategies to safeguard confidential information is vital. In parallel, a risk that is currently emerging because of new regulations is the obligation of transparency and sharing of data.[60] This is a duty that is progressively implemented in EU legislation, presenting a great risk to the "secrecy" of trade secrets. The influence of sharing and subsequent safeguards applied to this duty will be explored in Chapter 4.4 with reference to the DA.

4. Assessing the Protection Afforded by the EU Legal Framework

4.1 Role of The Trade Secrets Directive 2016/943

The TSD was not designed specifically to protect trade secrets in a digital environment, but rather aims at the general goal of promoting competitiveness and innovation through the protection of trade secrets.[61] Some scholars even state that TSD was already outdated as of its implementation, as the new data economy was not fully understood at the time.[62] However, it is the only legal framework which explicitly protects trade secrets while being formulated rather broadly, allowing for a wide range of information to fall within its scope of protection.[63] One of the most vital contributions of the TSD is Article 2(1), which provides for a definition of a trade secret. As previously discussed in Chapter 2.2, the three elements of a trade secret are secrecy, commercial value, and taking reasonable steps to ensure secrecy. According to recital 14 of the TSD, its Article 2 includes technical know-

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[58] Sijjad Ali, Jia Wang, Victor Leung, 'AI-driven fusion with cybersecurity: Exploring current trends, advanced techniques, future directions, and policy implications for evolving paradigms – A comprehensive review' (2025) 118 Information Fusion 22.
[59] Peter Radanliev, 'Artificial Intelligence and Quantum Cryptography' (2024) 15 Journal of Analytical Science and Technology 9.
[60] Perry Keller and Tanya Aplin, 'Reconciling trade secrets and AI public transparency' (2024) King's College London, p. 6.
[61] Drexl (n 24), p. 23.
[62] ibid.
[63] TSD recitals 2, 14.

how and business information; this allows for a definition which may encompass data and algorithms.[64]

In that regard, a problem faced by undertakings is in relation to the scope of protection[65] when it comes to encrypted information stored in the IoT. The lack of security enables individuals to reverse engineer or decrypt that information.[66] Consequently, such information may not be regarded as secret because of the ease of access and can thus pose an obstacle to granting protection. It may also be difficult to establish whether the commercial value of such data is derived from its secrecy.[67] Additionally, isolated data is not necessarily seen as having commercial value, as that value is usually derived from the processing of that data.[68] This creates an issue in regard to protection, as the court may establish that an individual piece of information does not hold value and thus does not fall under the scope of protection of the TSD.[69] It should be noted, however, that courts have, over time, become more open to considering such information as secret.[70]

Moreover, empirical research demonstrates that certain sectors, such as health and life sciences, show a greater understanding of what qualifies as a trade secret, but overall, there exists a widespread lack of understanding.[71] Such a deficit of knowledge can be attributed to the lack of developed jurisprudence;[72] leading both undertakings holding trade secrets, and law firms to be wary. This lack of case law creates a significant gap in the legal framework, which will be examined in Chapter 5. The lack of litigation stems from several factors, including the fact that the TSD has only been fully transposed five years ago and its first two years of operation were under COVID-19. In general, trade secrets are also much less

64 ibid recital 14.
65 ibid art. 2.
66 Guido La Diega and Christiana Sappa, 'The internet of things at the intersection of data protection and trade secrets. Non-conventional paths to counter data appropriation and empower consumers' (2020) 3 Journal of European Consumer and Market Law 419, p. 436.
67 Drexl (n 24) 23.

68 La Diega and Sappa (n 66), p. 18.
69 ibid pp. 17-18.
70 *Volkswagen v Garcia* [2013] EWHC 1832 (Ch); *Ackroyds v. Islington Plastics* [1962] RPC 97, para. 104.
71 Tanya Aplin and others, 'The Role of EU Trade Secrets Law in the Data Economy: An Empirical Analysis' (2023) 54 International Review of Intellectual Property and Competition Law 826, p. 835.
72 ibid.

frequently litigated since most cases are resolved after applications for interim relief, making its judicial interpretation develop at a slow rate.[73]

Protection of trade secrets in litigation may also be limited by Article 9(4) of the TSD which requires adherence to the GDPR. Article 9 of the TSD primarily aims to preserve confidentiality during legal proceedings by restricting access to sensitive information and limiting disclosure. However, trade secrets may inherently involve personal data, such as employee information, internal correspondence, or other identifying elements embedded in trade secret-related documentation.[74] Trade secrets, including personal data, are particularly common in pharmaceutical and science industries through clinical trial data.[75] Additionally, financial sector also processes customer financial data, along with automotive industry, which collects driver behaviour data from vehicle sensors.[76] The overlap of personal data and trade secrets means that a claim could trigger obligations under the GDPR. Article 9 thus accounts for such situations and may actually limit the scope of evidence available to the claimant since certain materials may need to be redacted, withheld, or anonymised before submission.

Overall, the TSD affords a low level of protection. While it provides a broad definition of trade secrets, allowing a vast range of information to fall within the scope of protection, it was not designed clearly and faces a large problem with legal certainty, specifically regarding what qualifies as "reasonable steps". The understanding of what digital information qualifies as a trade secret also seems to be unclear among undertakings and is under debate by academics. This type of uncertainty may lead to decreased investments in trade secrets.[77] Moreover, there are issues in regard to underdeveloped jurisprudence, making the practical

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[73] Trevor Cook, 'The proposal for a Directive on the Protection of Trade Secrets in EU legislation' (2014) 19(3) Journal of Intellectual Property Rights 54, p. 57; Willis Towers Watson, 'Intellectual Property Risk Report' (2021), p. 10.
[74] Case C-434/16 *Peter Nowak v Data Protection Commissioner* [2017] ECLI:EU:C:2017:994.
[75] European Federation of Pharmaceutical Industries and Associations, 'Principles for responsible clinical trial data sharing' (European Federation of Pharmaceutical Industries and Associations 2023), p. 5.
[76] Aaron Jacoby and Andrea Gumushian, 'FTC Makes Statement on Connected Vehicle Data as Major Automaker Faces Class Action for Data Sharing Practices' (ArentFox Schiff 17 May 2024) < https://www.afslaw.com/ftc-makes-statement-connected-vehicle-data-major-automaker-faces-class-action-data-sharing > accessed 17 May 2025.
[77] Atin Basuchoudhary and Nicole Searle, 'Snatched secrets: Cybercrime and trade secrets modelling a firm's decision to report a theft of trade secrets' (2019) 87 Computers & Security 2.

application of TSD unpredictable. Finally, its implementation is fragmented across Member States, further adding to uncertainty and undermining harmonisation.

4.2. Role of The General Data Protection Regulation 2016/679

Article 32 of the GDPR[78] imposes a duty on data controllers[79] and processors[80] to ensure a level of security appropriate to the risk. The objective of this regulation is focused on ensuring that privacy rights are protected securely. However, such obligations also indirectly serve as a functional shield for trade secrets involving personal data commonly found in pharmaceutical and science, financial, and automotive industries. Article 32 of the GDPR enumerates a list of safeguards required, such as pseudonymisation and encryption of personal data and the ability to ensure the ongoing confidentiality, integrity, availability, and resilience of processing systems and services.[81] These requirements are the same contextual safeguards required to protect trade secrets in the digital environment where algorithms, codes, or documents are stored. This forces undertakings to implement safeguards, and a process for regularly testing, assessing, and evaluating the effectiveness of all security measures.[82]

When an undertaking imposes a stronger mechanism of protection that is regularly checked, it becomes better positioned to not only prevent unlawful acquisition, but to detect it early on and thus respond quicker. There is also a strong incentive to ensure compliance with security as Data Protection Authorities (DPAs) may fine undertakings up to 10-20 million euros or 2-4% of their global annual turnover.[83] A notable example is the 2019 fine of €9.55 million imposed on 1&1 Telecom GmbH by the German Federal Data Protection Commissioner.[84]

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[78] GDPR, art. 32(1).
[79] ibid art. 4(7): where a controller is defined as the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.
[80] ibid art. 4(8): where a processor is defined as a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.

[81] ibid art. 32(a)-(b).
[82] ibid art. 32(d).
[83] ibid art. 82(4)-(5).
[84] European Data Protection Board, 'BfDI imposes Fines on Telecommunications Service Providers' (European Data Protection Board, 10 December 2019) < https://www.edpb.europa.eu/news/national-news/2019/bfdi-imposes-fines-telecommunications-service-providers_en > accessed 6 April 2025.

The infringement concerned insufficient identity verification protocols, which led to unauthorised individuals accessing customer data. The commissioner fined the company through the GDPR fining model, based on the global turnover. The commissioner went as far to note that the fine imposed was "in the lower range of the possible fine framework".[85] Increasingly, undertakings are facing substantial penalties not only for their breaches, but also as a means of setting strict precedents and deterring similar conduct by others. These strict obligations therefore actually lead to undertakings that are better equipped to deal with cyber espionage.

Furthermore, Article 33 of the GDPR obliges data controllers to report any personal data breaches to the relevant supervisory authority within 72 hours of becoming aware of the breach. A breach report submitted under the GDPR may therefore act as a trigger for identifying misappropriation of any trade secrets embedded within or stored with personal data. Undertakings cannot weigh risks but must investigate every breach, and since there is a strict deadline of 72 hours, greater urgency is applied, along with mandatory documentation obligations. These mandatory obligations act as an external enforcement mechanism forcing undertakings to identify, assess, and document breaches systematically. This formalises audits and thus increases the probability of identifying trade secret theft. Moreover, this leads to an interesting way in which the GDPR supports a civil action based on the TSD. Article 33 of the GDPR triggers an official search and incident management, initiating the collection of evidence of a violation, such as breach logs, forensic analyses, and security assessments.[86] This type of evidence, which includes timestamps, IP logs, and system vulnerability assessments, may be utilised in a separate trade secret civil action.[87] Therefore, the GDPR enforces a system of evidence collection which may supply undertakings with information to use in court. The collection of such evidence can lead to a higher chance of being granted measures under Articles 10-14 of the TSD, such as injunctions, corrective measures, and damages.

[85] Simon Assion and Sven-Erik Heun, 'GDPR fine against a telecommunications provider in Germany - here are the key facts' (Bird&Bird, 13 December 2019) < https://www.twobirds.com/en/insights/2019/germany/dsgvo-bussgeld-gegen-einen-telekommunikationsanbieter > accessed 7 April 2025.

[86] GDPR, art. 33(5).

[87] Madeleine Serenhov, 'Forensic Breach Response in compliance with GDPR' (2018) Master Thesis, Lund University, p. 18.

The GDPR provides a moderate extent of protection. It focuses on protecting personal data, and it does so through clear provisions and enforcing some preventative mechanisms, such as cybersecurity systems under Article 32 of the GDPR. Indirectly, it also protects trade secrets by ensuring the collection of litigation evidence, such as breach logs, after investigation by a Data Protection Authority (DPA). Its weakness, however, is in the system of evidence collection and sharing with the court as it is not regulated and harmonised. The lack of harmonisation weakens the enforcement of trade secret protection by creating uncertainty as to how and when evidence collected can be used in trade secret proceedings. Uncertainty in regard to evidence may cause a decrease in litigation taken up by undertakings, thus reducing the protection afforded to trade secret holders.

4.3. Role of The Network and Information Systems Directive 2022/2555

The NIS2 Directive is fairly new, having been transposed into national laws in October 2024.[88] The NIS2 works to achieve a higher level of harmonisation of cybersecurity; not to protect trade secrets. It contains stronger requirements than its predecessor;[89] this can be seen through stricter security requirements as set out in Article 21, along with a broader set of mandatory cybersecurity risk-management measures, sectors, and new incident notification requirements.[90] The NIS2 makes a distinction between "important" and "essential" entities; the latter will be put under stricter supervisory obligations through *ex-ante* oversight such as inspections and audits.[91] The NIS2 also only applies to certain industries such as energy, manufacturing, and telecommunications. Further distinction is made, as only undertakings with a minimum of fifty employees and having an annual

[88] NIS2 Directive, 'NIS2 Release Date' (NIS2 Directive, 17 October 2024) < https://nis2directive.eu/nis2-release-date/#:~:text=The%20deadline%20for%20Member%20States,penalties%20and%20damage%20to%20reputation. > accessed 7 April 2025.
[89] NIS2.
[90] Deloitte, 'The NIS2 directive' (Deloitte 15 June 2023) < https://www.deloitte.com/nl/en/services/risk-advisory/perspectives/thenis2directive.html?id=nl:2ps:3gl:4obs:5:6risk:20231020::nis2&gad_source=1&gbraid=0AAAAAD-O-9tUonPKPfjVUvpwuXRznqMGt&gclid=CjwKCAjw5PK_BhBBEiwAL7GTPQA02oi4CEkNx8K_vFb7gfykZ41JvaZTOtvkxx_amgcnS7EQieFSnBoCdcIQAvD_BwE > accessed 7 April 2025.
[91] ibid.

turnover of at least 10 million have to follow the NIS2, relieving small businesses from heavier obligations.

Under Article 21 of the NIS2, both essential and important entities are obliged to take appropriate and proportionate measures to manage risks and prevent or minimise the impact of cyber-attacks on the recipients of their services and on other services.[92] The NIS2 broadens the scope of measures by accounting for the state of the art and standards set not only in Europe but internationally.[93] It is required by undertakings to consider the list of factors listed in Article 21(2)(a) through to (j) when implementing such measures. This ensures that a broad range of security is implemented by undertakings. Under Article 24 of the NIS2, a Member State may further require undertakings to implement measures certified under the European cybersecurity certification schemes adopted pursuant to Article 49 of Regulation (EU) 2019/881. Just as the GDPR imposes strict obligations to implement security, the NIS2 follows the same path by strengthening the digital environment where trade secrets are stored. Security obligations reduce the risk of misappropriation as the system in place is strengthened by leaving fewer vulnerable spots open to attackers. An attacker will thus find it more difficult to access the data, and to extract such data without being noticed by the system.

The NIS2 also enforces obligations of incident notification, which play a key role in trade secret litigation.[94] Pursuant to Article 10 of the NIS2, Member States must designate or establish a Computer Security Incident Response Team (CSIRT), which is responsible for handling incidents notified by the undertaking. The notification obligation requires undertakings to draw up a final report within a month, including a detailed description of the incident and its impact, what triggered it, and measures applied to mitigate the situation. Such a report prompts the collection of evidence which may be used in court by undertakings to demonstrate that "reasonable steps" were taken to protect the secret.[95] If an undertaking is found not to have implemented NIS2 compliant security measures, it will likely lose its case, considering that such measures are the industry standard

[92] NIS2, art. 21.
[93] ibid art. 21(1).
[94] ibid art. 23.
[95] TSD, art. 2(1)(c).

and necessary for protection. Therefore, not only does the NIS2 establish a system of evidence collection, but it also reinforces the expectation that undertakings implement compliant and strong security measures that, in turn, will reduce trade secret theft.

Accordingly, it can be said that the NIS2 provides a moderate extent of protection to trade secrets. The Directive ensures a strict cybersecurity framework, for example, under Article 21 where undertakings are forced to implement appropriate and proportionate measures to manage risks. The NIS2 thus has some preventative measures which are enforced clearly. The standardisation of implementing security measures helps to provide some clarity in regard to "reasonable steps" since undertakings obliged with the NIS2 will have taken "appropriate" measures to mitigate risks that lead to trade secret theft. Obligations of drawing up post-incident reports also ensure that undertakings reflect on the vulnerabilities of their system and thus implement changes. However, the NIS2's limitation in regard to this analysis lies in the fact that the mechanisms in it only indirectly protect trade secrets instead of directly providing tailored and active protection and measures.

4.4. Role of The Data Act Regulation 2023/2854

The DA is a new body of legislation published in 2023 that regulates IoT data.[96] The DA defines data as "any digital representation of acts, facts or information and any compilation of such acts, facts, information, including in the form of sound, visual or audiovisual recording".[97] The Regulation became applicable on 12 September 2025.[98] The DA is an important step in the regulation of data sharing and mandates that certain entities have the right to access data of an undertaking. Such data sharing obligations increase the exposure of sensitive information, which may be regarded as a trade secret to third parties. Greater exposure to information leads to additional access points, each of which becomes a potential vulnerability, increasing the overall risk of cyber espionage.[99] A study by Aplin et

[96] DA, recital 14.
[97] ibid art. 2(1).
[98] ibid art. 50.
[99] Tanya Aplin and others, 'The Role of EU Trade Secrets Law in the Data Economy: An Empirical Analysis' (2023), p. 831; Brown and others (n 48), p. 1.

al found that companies are extremely reluctant to share data, as relying on trade secret protection is not easily enforceable, considering that protection is uncertain until decided by the court.[100]

A significant conflict with protection is the fact that undertakings will have much less control over with whom the data is shared.[101] Despite this lack of control, the DA implements a system where the trade secret holder must identify the data protected as a trade secret and must come to an agreement with the other party as to which measures are necessary to preserve secrecy.[102] This measure accommodates an essential element of trade secret protection, as without identifying certain information and providing extra care for it, the definition of a trade secret cannot be fulfilled under the TSD.[103] Importantly, Article 4 of the DA allows an undertaking to refuse sharing data, including a trade secret, until all necessary precautions are taken,[104] if a user fails to implement protective measures,[105] or if the trade secret holder assesses that it is highly likely to suffer "serious economic damage" from disclosure.[106] The assessment of whether "serious economic damage" is likely to occur is done by the trade secret holder and is meant to be objective and based on elements such as enforceability of the secret, the uniqueness and novelty of the connected product, and the level of confidentiality of data requested.[107] However, the applicability of this seems very abstract and uncertain. The same exceptions apply under Article 5 in regard to a user sharing shared data with a third party. It should thus be noted that trade secret protection is not inherent in the Data Act but rather appears as an exception applied on a case-by-case basis.

The DA also implements additional technical protection measures (TPMs),[108] such as legal mechanisms which prohibit users, third parties, and data

[100] Aplin and others, 'The Role of EU Trade Secrets Law' (n 98), pp. 836-837.
[101] Ulla Mylly, 'Trade Secrets and the Data Act' (2024) 55 International Review of Intellectual Property and Competition Law 368, p. 379.
[102] DA, arts. 4(6), 5(9).
[103] Mylly (n 100), p. 384.
[104] DA, art. 4(6).
[105] ibid art. 4(7).
[106] ibid art. 4(8).
[107] ibid.
[108] DA, recital 51: these are technological tools designed to control access to and usage of digital content, thereby safeguarding intellectual property rights.

recipients from tampering with the shared data.[109] In case TPMs are circumvented, Article 11(2) of the DA sets out a list of obligations placed on a receiving party in cases of unauthorised use or disclosure, such as the duty to erase the data,[110] and the duty to have appropriate corrective measures to inform the trade secret holder about measures taken to end any unauthorised use or disclosure of the data.[111] Article 11 is thus a form of extension to remedies provided by traditional trade secret protection, which does not protect against third parties accessing shared data through legally enforced TPMs.[112] Additionally, regarding public sector, there exists an obligation that the public sector should take all the necessary and appropriate technical and organisational measures to preserve the confidentiality of the trade secrets before the data is received.[113] Since public sector has the subsequent right to share that data with another public entity, the duty of preserving confidentiality in Article 19 of the DA also applies to that secondary entity.[114]

Consequently, the DA affords a moderate to low extent of protection. The act introduces exceptions to data sharing, identification obligations, and liability for third parties and public authorities, which signals towards a greater extent of protection. Additionally, parties receiving confidential information are under an obligation to take necessary preventative steps to ensure secrecy. Unfortunately, the DA suffers from a lack of clarity regarding the thresholds in the exceptions under Articles 4 and 5, and the system of identifying trade secrets in shared data. Such a lack of clarity causes uncertainty among undertakings, leaving them to make self-assessments with ambiguous provisions. For example, an undertaking may be unsure whether certain information qualifies for an exception, thus leading to that information being shared or not having extra security provided for. This ultimately causes difficulty in enforcement, making protection of trade secrets increasingly complex.

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[109] Ella Noyette and others, 'Data Secrets: The Data Act's New Trade Secrets Framework' (2025) International Review of Intellectual Property and Competition Law 23.
[110] DA, art. 11(2)(a).
[111] ibid art. 11(2)(c).
[112] Noyette and others (n 108), p. 25.
[113] DA, art. 19(3).

[114] ibid art. 17(4).

5. Gaps in the Current EU Legal Framework

5.1. Ambiguity and Uncertainty

One of the greatest gaps identified is the legal certainty when it comes to the protection of trade secrets. This was a gap consistently identified throughout each piece of legislation regarding definitions, obligations, and thresholds. A large part of this uncertainty stems from the novelty and lack of litigation of these frameworks.[115] One such ambiguity is visible in the TSD regarding the qualifications of a trade secret. As previously discussed, there exists a major uncertainty by undertakings regarding what actually qualifies as a trade secret in the digital landscape.[116] The TSD also lacks clarity in regard to the vague requirement of "reasonable steps".[117] It is up to the court to establish whether an undertaking has taken such measures sufficiently, this puts undertakings in a high risk and low predictability environment as there is lack of certainty pre-litigation. Fostering an environment where protection remains uncertain may lead to a decrease in investments made in cybersecurity measures to protect trade secrets.[118] Less investment in trade secrets lead to reduced competition in the market.[119]

Furthermore, within the subsequent frameworks, there exist numerous obligations placed on undertakings. For instance, Article 21 of the NIS2 requires measures which are "appropriate and proportionate", nonetheless, what actually suffices as such is unclear. Under the NIS2, only specific sectors are bound by the obligations introduced in it; however, the NIS2 fails to provide sector-specific guidance. The DA is also a victim of vaguely formulated phrases, such as under Articles 4 and 5, where exceptions apply where "serious economic damage" may occur. While some guidance is given to make the assessment, it is written in vague terms, making applicability more difficult for undertakings. The lack of clear

[115] Aplin and others, 'The Role of EU Trade Secrets Law in the Data Economy' (n 98), p. 835.
[116] Ibid p. 831.
[117] TSD, art. 2(1).
[118] Atin Basuchoudhary and Nicole Searle, 'Snatched secrets' (n 76), p. 2.
[119] Katherine Linton, 'The importance of trade secrets: new direction in international trade policy making and empirical research' (2016) Journal of International Commerce and Economics, pp. 10-11.

measures increases the frequency of inaccurate self-assessments made by undertakings and thus leads to higher risks of non-compliance.[120]

5.2 Reactive Rather than Preventative: The Issue of Ex-Post Protection

A serious gap in the protection of trade secrets is the fact that legal frameworks are centred on an *ex-post* approach. Protection is mainly afforded after misappropriation takes place; this means that the EU legal framework has a reactive nature, rather than focusing on preventing such breaches from occurring. Unlike Intellectual Property Rights (IPRs), protected under Regulation 608/2013[121] and the Enforcement Directive 2004/48/EC,[122] trade secrets lack access to pre-litigation measures, such as evidence preservation,[123] injunctions,[124] and customs enforcement mechanisms. As a result, trade secret holders are often placed in a reactive rather than preventive position when misappropriation occurs.[125]

The TSD, which is the main piece of trade secret legislation, is completely *ex-post* focused; it provides multiple articles for remedies such as injunctions, damages, and confidentiality orders that may be applied once misappropriation has taken place.[126] The GDPR and NIS2 also encompass response measures, such as notification obligations, only after a breach has taken place. However, the GDPR and NIS2 do require undertakings to implement measures which prevent attacks, thus having a pre-emptive aspect. While this addresses broader data security, the lack of *ex-ante* measures fails to protect against trade secret misappropriation properly.

To some extent, however, the DA obliges trade secret holders to identify their trade secrets before sharing information.[127] Yet, this still creates a gap as the

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[120] Angelica Marotta and Stuart Madnick, ‘Convergence and divergence of regulatory compliance and cybersecurity’ (2021) 22 Issues in Information Systems 10, p. 21.
[121] Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights [2013] OJ L181/15.
[122] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157/45 (Enforcement Directive).
[123] ibid art. 7.
[124] ibid art. 9(1)(a).
[125] Holger Kastler and others, ‘Harmonization of Trade Secrets in Europe and New US Trade Secrets Law Gets the Green Light - What Do These Changes Mean for Companies in Germany, the UK and the US?’ (Lexology 2016), p. 5.
[126] TSD, arts. 10-14.
[127] DA, arts. 4(6), 5(9).

identification is done at the discretion of the trade secret holder; there are currently no standards for how to correctly identify information. This can lead to cases where an undertaking insufficiently marks information, for example, by merely watermarking the data. Thus, while the DA does have a preventative measure, it is ambiguous and consequently not very effective. Article 11 of the DA further provides that where a third party with access to data fails to adequately protect it, resulting in the disclosure of trade secrets, the data holder is entitled to seek redress against that third party.[128] While this puts a duty on third parties and public sector bodies under Article 19(1) of the DA to ensure the safety of such data, it reinforces *ex-post* remedies, rather than focusing on preventative measures.

5.3. Lack of State-Backed Enforcement and Oversight Mechanisms

When it comes to the protection of trade secrets, much of the burden is put on the trade secret holder.[129] In the TSD, the burden of identifying a secret and ensuring its protection lies wholly with the undertaking. There are no out-of-court authorities that verify whether an undertaking has taken "reasonable steps", or whether the secret has commercial value as required by Article 2 of the TSD. However, under the GDPR the DPAs supervise and enforce the GDPR and its provisions.[130] While these DPAs may indirectly support the protection of trade secrets that are embedded in personal data, there exists no supervision of trade secrets specifically. Furthermore, the NIS2 held great potential for the implementation of provisions protecting trade secrets; yet, no such action was taken. There exist no bodies that ensure undertakings have taken the appropriate cybersecurity measures in regard to the protection of trade secrets, despite the fact that a large portion of trade secret theft occurs through cybersecurity breaches.[131] The DA continues the same pattern, which is especially flawed considering the fact that protection of trade secrets is an underlying aim of the regulation.[132]

The addition of a body which assesses the application of exceptions or examines the identification of trade secrets would provide an extra layer of

[128] DA, art. 11(2).
[129] Discussed in chapter 4.3.
[130] GDPR, arts. 55, 57.
[131] Micheal Ettredge, Feng Guo and Yinjun Li, 'Trade secrets and cyber security breaches' (2018) 37(6) Journal of Accounting and Public Policy 564, p. 574.
[132] DA, recital 28.

protection, releasing the heavy burden placed on undertakings. The lack of such external bodies providing support is most heavily felt by SMEs, who will struggle to ensure compliance. Lack of state-backed mechanisms also increases the uncertainty of protection, as undertakings are left to self-assess, hoping that their measures are compliant.[133]

5.4. The Lack of Harmonisation

The final gap in the EU legal framework is the fragmentation of enforcement, which adds to the legal uncertainty and inconsistency of protection guaranteed to trade secret holders.[134] First and foremost, the TSD and the NIS2 are both directives; this automatically means that they provide less harmonisation than the GDPR and DA, both of which are regulations.[135] The enforcement of trade secret protection under the TSD is largely left to the Member States through national courts. Thus, trade secret laws are in general widely different between Member States, which creates discrepancies in the interpretation of the TSD, and also impacts the enforcement of remedies.[136] For example, France and Germany have stringent protection[137] and very few trade secret cases, whereas Italy has a higher number of them.[138]

A big problem with a lack of coordination can also be seen in regard to the DPAs and CISRTs in cases of overlapping breaches. When, for example, data which qualifies as personal and as a trade secret is leaked, this triggers investigations by the DPA.[139] However, the DPA is not specialised in matters of trade secret protection, and there exists no specific mechanism in these cases. Breaches can also trigger court actions, and while the DPA's investigation may be useful for such court actions, there exists no coordination obligations or measures in the legal frameworks that ensure authorities share their findings with the courts. This lack of procedural alignment creates a gap between regulatory enforcement

[133] Marotta and Madnick (n 120), p. 21.
[134] Andrea Andolina, 'Trade Secrets litigation trends in the EU' (*Clifford Chance*, 31 July 2023) < https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2023/07/trade-secrets-litigation-trends-in-the-eu.html > accessed 27 May 2025.
[135] Elisabetta Rotondo, 'The legal effect of EU Regulations' (2013) 29(4) Computer Law & Security Review 437, pp. 437-438.
[136] Aplin and others, 'The Role of EU Trade Secrets Law in the Data Economy' (n 99), p. 838.
[137] John Steidman, 'Trade Secrets' (1962) 23 Ohio State Law Journal 4, p. 18.
[138] Andolina (n 134).
[139] GDPR, art. 33.

and civil trade secret protection; for example, evidence collected by authorities may not reach the court when required, reducing enforcement efficiency. Additionally, these types of gaps discourage undertakings from pursuing litigation, ultimately decreasing accountability.[140] It is clear that a closer investigation into how to reform such gaps is crucial.

6. REFORMING THE EU LEGAL FRAMEWORK

This chapter proposes several reforms aimed at addressing the gaps identified in chapter 5. Some recommendations, such as interpretative guidance and coordination measures, could realistically be implemented within the current framework in the short term. Others, such as legislative amendments and specialised oversight structures are longer-term policy considerations which would require broader political agreement and institutional reform. The purpose of this chapter is therefore not to advocate for immediate transformation of the legal framework, but rather to explore possible way in which EU trade secret protection could become more coherent and effective in the digital environment.

6.1 GUIDELINES AIMED AT PREVENTING AMBIGUITY

Having identified a clear uncertainty and lack of knowledge of undertakings, it is clear that the EU must provide a greater quantity of and more specific trade secret protection guidelines.[141] Guidelines have been proven to support effective enforcement of legislation by codifying the framework, as they make clear the position of the Commission, and are often drawn up after consulting relevant stakeholders.[142] The first type of guideline which would be recommended is one which further clarifies the definition of trade secrets by explaining the established criteria. It is vital that undertakings are clear about whether their information qualifies as trade secrets in order to ensure continued investments and, therefore, a competitive market.[143] It has been previously discussed in Chapter 4.1, that IoT

[140] Giuseppe Dari-Mattiacci and Bruno Deffains ‘Uncertainty of law and the legal process’ (2007) 163 Journal of Institutional and Theoretical Economics 21.
[141] Levine David S, ‘Here come the trade secret trolls’ (2015) 71 Washington and Lee Law Review 230, p. 261.
[142] European Parliament, ‘Tools for ensuring implementation and application of EU law and evaluation of their effectiveness’ (European Parliament, 2013), pp. 46-47.
[143] Linton (n 119), pp. 10-11.

data, or isolated data, may sometimes not qualify as a trade secret due to lack of "secrecy" or "commercial value".[144] This ambiguity should be made clear, especially considering the growing opinion of scholars and of courts that such data may qualify.[145] It would be more efficient to release guidelines that speed up the interpretation process and provide education for undertakings to fill knowledge gaps.[146] Similarly, guidelines issued by the European Commission, explaining how to take "reasonable steps" depending on the type of secret, would also be extremely valuable.[147] This is especially true for SMEs, as their budget is much lower and their ability to perform extensive research is limited.[148]

Furthermore, other vague terms such as "serious economic damage" must be further explained in the DA.[149] This is significant as the DA is not yet fully implemented; thus, a flow of clear guidelines at the current stage would allow national courts and authorities to implement and interpret the regulation closer to the intended aims. This sets precedents that are progressive and sufficiently consider trade secret protection in the digital age. Regarding the NIS2, sector-specific guidelines or reports targeted at undertakings would prove useful to tailor cybersecurity standards and measures for each industry, as this is currently lacking. Tailored standards will ensure that security measures are much more attainable for each sector, thus allowing for an inclusive protection of trade secrets which considers the contextual factors of different industries.

Nonetheless, the implementation of guidelines could be critiqued in regard to narrowing the broad scopes in the legislation. For example, the TSD definition is purposefully broad in order to encompass a larger variety of information, and the issuing of guidelines may work against this advantage by narrowing the scope. Nevertheless, the guidelines can still list what types of digital information are included and then state that other interpretations are not excluded. It may also be the case that the Commission may lack the expertise to issue sector-specific

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144 Drexl (n 24), p. 23.
145 *Volkswagen v Garcia* (n 70).
146 Aplin and others, 'The Role of EU Trade Secrets Law in the Data Economy' (n 99), p. 843.
147 ibid p. 846.
148 Alladean Chidukwani, Sebastian Zander and Polychronis Koutsakis, 'A Survey on the Cyber Security of Small-to-Medium Businesses: Challenges, Research Focus and Recommendations' (2022) 10(3) IEEE Access 8.
149 DA, arts 4(6), 5(9).

guidelines as proposed for the NIS2. However, in this regard, the Commission could work together with sectoral regulators and academics in order to develop the necessary guidance.

6.2. A SHIFT TO THE EX-ANTE APPROACH

The EU legal framework currently focuses on remedies available to trade secret holders. However, there is a clear lack of focus on an *ex-ante* approach that aims to prevent the misappropriation of trade secrets.[150] One method to shift the framework is through the implementation of risk assessments that force undertakings to identify and categorise their sensitive data. This is a voluntary mechanism solution that could be executed bottom-up if undertakings were to create classification systems. It should be noted that this is already a requirement under the DA.[151] However, to shift the framework, categorisation should become standardised general practice, not only for the purpose of data sharing. This type of categorisation ensures that the correct information is identified before sharing and processing. Enforcing a standardised system[152] would provide undertakings with a clear understanding of how to classify, label, and handle confidential information.[153] For example, a system that uses levels could be implemented, where undertakings would rank their information based on confidentiality levels. Each level of confidentiality could then be paired with recommended protection measures, which would help ensure protection not only by the undertaking but also by third parties who receive the data through sharing. In turn, the classification of information would also lead to taking proper "reasonable steps".[154] However, implementing this system of classification may place a heavier burden on SMEs who lack the resources to develop categorisations. To address this, templates and examples of classifications could be published by the European Commission, law firms, or consultancy firms.

[150] Found in Chapter 5.2 of this thesis.
[151] DA, arts 4(6), 5(9).
[152] Louis Kaplow, 'Rules Versus Standards: An economic Analysis' (1992) 42 Duke Law Journal 557, p. 597.
[153] Katharina Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (United Nations Conference on Trade and Development 2000), pp. 4-5.
[154] Aplin and others, 'The Role of EU Trade Secrets Law in the Data Economy' (n 99), p. 834.

Additionally, while recital 88 of NIS2 recognises the protection of trade secrets through appropriate measures, this requirement remains aspirational and non-binding.[155] The operative part of the NIS2 does not explicitly impose mandatory threat detection and prevention obligations for trade secrets. For this reason, it is proposed that the NIS2 should include a new article which specifies and enforces an obligation of implementing threat detection and prevention measures. The addition of an article on the matter would go a long way to create a stronger and more relevant framework of protection. Potentially, though, the introduction of a new article could be a time- and resource-consuming process, considering the consultation that has to take place with Member States.[156] In this regard, the article could provisionally be issued as a guidance in order to enforce improvements as soon as possible. It could then later be implemented as part of the NIS2 permanently. Importantly, the addition of such an article is feasible considering that the intention is already expressed and codified in the directive.[157]

6.3. Implementation of State-Backed Enforcement and Oversight Mechanisms

A significant gap found in Chapter 5 is the burden placed on undertakings to ensure compliance and protection of their trade secrets.[158] There is a complete lack of state authorities scrutinising compliance and ensuring that undertakings are taking the correct steps to ensure protection. The consequence of this is the creation of inconsistencies, which adds to the issue of legal certainty.

A viable solution to this is to create an EU trade secret authority (TSA) in each Member State. A TSA would be given the discretion to supervise undertakings and perform audits, offer guidance to undertakings, and issue corrective measures or warnings of any specific cyber threats it may be aware of. The TSA should also be equipped with the knowledge and expertise to deal with oversight within different sectors, as certain industries are at greater risk; the NIS2 sector guidelines proposed above in 6.1 would be useful here.[159] The establishment

[155] NIS2, recital 88.
[156] Pistor (n 153), p. 4.
[157] ibid.
[158] Found in Chapter 5.3 of this thesis.

[159] Found in Chapter 6.1 of this thesis.

of such a body in each Member State would help to shift part of the burden of protection onto the State, relieving undertakings, and more effectively ensuring compliance. Additionally, the implementation of certification or audit schemes for compliance could strengthen protection.[160] Namely, an undertaking could be granted a certification by its TSA, based on the "appropriate" measures which they have implemented to protect their trade secrets. Such certification could then serve as proof that an undertaking has taken reasonable steps under Article 2 of the TSD. This type of certification would contribute to decreasing ambiguity and uncertainty surrounding the "reasonable steps" under the TSD.

It is, however, clear that creating a whole new national authority is a large undertaking by the Commission; it would require a great deal of time and resources. Hence, the implementation of a TSA does not necessarily require the creation of a completely new institution. Instead, the current authorities, such as the DPAs and the CSIRTs, could be expanded to include trade secret protection. This is a cost-effective approach as it would mainly require investment in training the current authorities since these bodies already possess the expertise, experience, and operations frameworks for their establishment.[161]

6.4. The Move to a Harmonised Framework

The move to a harmonised framework is a vital goal,[162] however, it is one which is much more difficult to attain. Trade secret laws are dispersed and differ with each national law.[163] Nevertheless, a greater attempt should be made by the EU to propose a regulation for trade secrets in the digital framework.

In regard to the TSD, its current status as a directive is not a strong enough driver of harmonisation; instead, the current legislation should be combined into a regulation to achieve full harmonisation.[164] The implementation of a regulation ensures the direct applicability and the uniform interpretation of the provisions of

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[160] Micheal Blakeney, *Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices* (MIHR Oxford 2007), p. 523.
[161] Claudio Novelli and others, 'A Robust Governance for the AI Act: AI Office, AI Board, Scientific Panel, and National Authorities' (2024) 16(2) European Journal of Risk Regulation, para. 2.2.
[162] European Commission, 'Study on Trade Secrets and Confidential Business Information' (n 5), p. 15.
[163] Aplin and others, 'The Role of EU Trade Secrets Law in the Data Economy' (n 99), p. 838.
[164] John Steidman, 'Trade Secrets' (1962) 23 Ohio State Law Journal 4, p. 18.

the TSD. The implementation also pushes jurisprudence of national case law into a similar path. However, the process of implementing regulations is tough and at risk of rejection at the early proposal stage.

In this regard, the EU could instead adopt an Open Method of Coordination (OMC) approach in the field of trade secret cyber espionage.[165] The OMC is a soft law tool, where Member States cooperate on a certain area of policy directed towards achieving a set of agreed-upon objectives. The OMC increases harmonisation through peer pressure, without enforcing binding obligations, and considering national and regional differences of Member States.[166] This form of coordination monitors the progress of each Member State by requiring NAPs where policy activities are reported and later reviewed by the Commission and the Council.[167] It can thus encourage the alignment between Member States on cybersecurity measures, enforcement in national courts, and national authorities such as the DPAs, and CSIRTs.[168] Fostering alignment builds an environment where there is a greater chance of support for future legislation initiatives; the OMC could therefore act as a stepping stone to a regulation.

Alternatively, the European Commission could adopt a recommendation which coordinates the trade secret protection provisions of the TSD, the GDPR, the NIS2, and the DA. While a Recommendation is non-binding, it would provide a much-needed direction on different standards, definitions, and thresholds. A recommendation is an official act that may set objectives to be attained and would thus hold greater influence than a guidance, meaning that it could achieve harmonisation more effectively.[169] For instance, Article 4(4) of the DA requires that measures be taken to protect trade secrets during data sharing, yet it does not specify what those measures should be or how they relate to the "reasonable steps" standard under Article 2(1) of the TSD. Moreover, issues with a lack of breach notification could also be resolved through a Recommendation. The GDPR

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165 EUR-Lex, 'Open Method of Coordination' < https://eur-lex.europa.eu/EN/legal-content/glossary/open-method-of-coordination.html > accessed 27 April 2025.
166 Beryl ter Haar, *Open Methods of Coordination. An analysis of its meaning for the development of a social Europe* (Leiden University Press 2012), p. 2.
167 ibid 3.
168 Martina Prpic, 'The Open Method of Coordination' (European Parliament Research Service 2014), p. 2.
169 Anthony Arnull, 'EU Recommendations and Judicial Review' (2018) 14(3) European Constitutional Law Review 609, p. 613.

imposes notification obligations on data controllers to notify authorities and data subjects of a personal data breach (which may concern trade secrets) within 72 hours.[170] However, neither the TSD nor the DA impose any notification obligations for breaches involving trade secrets. As a result, cases of unlawful acquisition, use, or disclosure of trade secrets may go unreported. A coordinated framework could introduce a unified notification framework for all breaches involving sensitive business information, thereby improving response times and enforcement.[171]

7. CONCLUSION

This thesis aimed to answer the question "to what extent does the current EU legal framework protect trade secrets against cyber espionage, and what additional measures are necessary to ensure comprehensive protection?" First, assessing the extent of protection; the findings demonstrated that the TSD, the GDPR, the NIS2, and the DA all provide an important, yet insufficient extent of protection of trade secrets. At the core, the TSD remains the primary legislation; however, its implementation as a directive has subsequently led to uncertainty and divergence at the national level. It also suffers from uncertainty in regard to phrases such as "secrecy", "commercial value", and "reasonable steps", which have led to a knowledge gap for undertakings. Furthermore, the GDPR and the NIS2 reinforce the application of strong systems of cybersecurity, though they lack mechanisms targeted at trade secret misappropriation. Finally, the DA, while aiming to consider the role of trade secrets prominently, fails to provide specific and clear definitions of, for instance, a "serious economic harm". These vague terms discourage effective enforcement and add to the overall uncertainty in protection surrounding trade secrets.

Additional gaps aside from the lack of clarity identified in the framework include the *ex-post* approach taken, which ultimately leads to a system playing catch-up and thus sufficient deterrents against cyber espionage are lacking. The measures and mechanisms available to holders of trade secrets are concentrated

170 GDPR, arts, 33-34.
171 European Commission, 'Study on Trade Secrets and Confidential Business Information' (n 5), p. 9.

on remedies; after a breach has occurred, this approach should be shifted to being preventative. The heavy burden placed on undertakings due to the lack of state-backed intervention has also been identified as a major concern. Moreover, it was found that a path to greater harmonisation is necessary since the current framework is fragmented. Chiefly, the gaps discovered uncertainty, lack of preventative mechanisms, and fragmentation all conclude a low extent of protection in the current framework by cohesively working together to debilitate the shield provided to trade secrets in the digital environment.

Second, recognising the challenges established, additional measures are necessary to ensure comprehensive protection. The most feasible and impactful solution would be the Commission issuing a Recommendation harmonising key definitions, standards, and thresholds under Article 2 of the TSD, and Articles 4 and 5 of the DA. In parallel, a bottom-up standardised system of trade secret categorisation should be encouraged to increase coordination of security measures for different levels of confidentiality; accordingly, this would ensure more effective threat prevention. The addition of amending the NIS2 to include an article which obliges detection and prevention measures for trade secrets specifically would also more strongly encourage the categorisation system. Alternatively, a more ambitious, yet time and resource-consuming solution would be to provide current national authorities, such as the DPA, and CSIRT, specialised training in trade secret protection. Alongside training, the OMC should be deployed, fostering the voluntary convergence between Member States. The OMC would aim towards protecting trade secrets against cyber espionage, achieved and monitored through regular reporting, peer review and pressure. Thus, the additional measures necessary to ensure comprehensive protection are manifold, and it will not come down to one specific measure to reform the framework. The solution hinges on the application of different measures enforced in combinations, such as the ones proposed.

Third, looking into the implications of the thesis and future research, this research highlights the current gaps in the framework and therefore contributes to the debate on EU policies in the technological landscape and advocates for a change. The implications of the reforms proposed will work to preserve and even increase investments in trade secrets by undertakings and thus preserve fair competition in the internal market. In order to add to this discussion, future research could expand on the findings of this paper. For instance, by exploring how new forms of information related to machine learning models, algorithms, and quantum computing fit within the definition of a trade secret, as these are not currently fully understood or developed. It would also be beneficial to take a look at the exact ways in which such future technology will impact trade secret protection and what measures could be proposed to avert threats. Additionally, a deeper dive into a comparative analysis of national systems and their current safeguarding of trade secrets in the digital environment could provide valuable insight into which Member States are lagging behind, and those which are leading the era.

Crimmigration Through Judicial Dialogue: The Roles of the CJEU and the ECtHR in Reinforcing or Resisting the Punitive Turn of Pre-Removal Immigration Detention

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1. INTRODUCTION

1.1. BACKGROUND

Migration into the European Union (EU)[2] has seen an overall decline in recent years. Nevertheless, the 2010s, particularly the period from 2014 to 2021, were characterised by a sharp increase in migrant presence across the EU. Indeed, in 2014, the number of registered asylum seekers reached 626,000,[3] representing an increase from 2013.[4] The number of irregular crossings reached 280,000 in 2014, a continuous increase since 2011.[5] To control migration flows, the EU relies on its various legal instruments forming the Common European Asylum System (CEAS),[6] as well as its 2008 Return Directive dealing with the return of irregular migrants.[7]

It was noticed that the greater presence of third-country nationals in the Member States (MSs) led to the criminalisation of these groups.[8] Detention practices in Greece serve as an example of this phenomenon. Firstly, the significant influx of irregular migration in Europe from 2015 to 2021[9] affected Greece specifically because of its geographical position, which makes the country a gateway for the majority of illegal border crossings into Europe.[10] As a result, Greece has become a focal point for scrutiny regarding its immigration system, immigration facilities and treatment of immigrants—all of which raise critical

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2 Leonidas Cheliotis, 'Behind the Veil of Philoxenia: The Politics of Immigration Detention in Greece' (2013) 10(6) European Journal of Criminology 725, 726.

3 ibid.

4 Frontex, 'Annual Risk Analysis 2015' (2015) < https://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf > accessed 14 January 2025.

5 Frontex, 'Annual Risk Analysis 2015' (2015) < https://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf > accessed 14 January 2025.

6 The CEAS includes the following EU legal instruments: the Asylum Procedures Directive, Reception Conditions Directive, Qualification Directive, the Dublin Regulation, the EURODAC Regulation and the European Union Agency for Asylum.

7 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348 (Return Directive).

8 Juliet Stumpf, 'Stumpf J, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56(2) American University Law Review 367, 419.

9 Gerrit Manthei, 'The Long-term Growth Impact of Refugee Migration in Europe: A Case Study' (2021) 56(1) Intereconomics 50, 50.

10 Mary Bosworth and Sarah Turnbull, 'Immigration Detention, Punishment, and the Criminalization of Migration' in S. Pickering and J. Hamm (eds), *The Routledge Handbook on Crime and International Migration* (Routledge 2014) 17.

human rights concerns.[11] Immigration detention, especially pending removal decisions of irregular immigrants, is described as a routine administrative process.[12] However, detention of irregular migrants is often imposed rather arbitrarily, beyond the conditions that allow for administrative detention. For example, in Greece, police systematically detain irregular migrants by 'expansively interpreting "public order risk" to justify their detention.[13] Indeed, these practices confirm that, in Greece, detention is used as a management tool for irregular migration.[14] A notable example of crimmigration in practice is Greece's 2014 mandatory residence'.[15] measure, which enables the prolongation of detention beyond the permitted 18 months.[16] This practice was deemed lawful by the State's legal advisor. Furthermore, most migrants in Greece are detained in ordinary prisons alongside individuals with criminal convictions. In fact, in 2013, half of the total non-Greek prison population was incarcerated in relation to status-related offences such as illegal entry, departure from and stay in the country.[17] This exemplifies that although detention is intended to be an administrative measure, MSs use it punitively. In other words, criminal law mechanisms are used to tackle irregular migration flows, thereby criminalising migrants. This is due to the leeway left for MS by the EU return *acquis*. This mechanism will be analysed in this paper.

The focal point of this research: the discrepancy between the intended administrative approach to detention and its (punitive) manifestation in practice, has now been outlined. This overlap between immigration and criminal law was pinpointed by Juliet Stumpf, who coined the term 'crimmigration'.[18] Crimmigration is a phenomenon whereby immigration law exercises punitive

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[11] Cheliotis (n 2) 735.
[12] Bosworth and Turnbull (n 10) 4.
[13] Eleni Koutsouraki, 'The Indefinite Detention of Undesirable and Unreturnable Third-country Nationals in Greece' (2017) 36(1) Refugee Survey Quarterly 85, 100.
[14] Mary Bosworth and Andriani Fili, 'Immigration Detention in Greece and UK' in R. Furman, D. Epps and G Lamphear (eds.) *Detaining the immigrant other: Global and transnational issues* (OUP 2016) 79.
[15] According to Article 22 of Greek Law 3907/2011, mandatory residence refers to the extension of detention beyond the 18 months permitted, contrary to Greek and EU law. As such, detainees are required to remain in the pre-removal centre until the execution of their removal. This is so to ensure that the deportation ultimately takes place. See Danai Angeli and Dia Anagnostou, 'A Shortfall of Rights and Justice: Judicial Review of Immigration Detention in Greece' (2022) 14 European Journal of Legal Studies 97,121 < https://ejls.eui.eu/wp-content/uploads/sites/32/2022/05/4.-EJLS-Special-Issue-May-2022-Angeli-and-Anagnostou.pdf > accessed 15 January 2025.
[16] ibid.
[17] Cheliotis (n 616) 730.
[18] Stumpf (n 7) 367.

functions and produces punitive effects. In other words, crimmigration denotes the blurring of lines between criminal and administrative law, which has serious human rights implications for migrants. These implications are especially evident in the lack of fair trial guarantees, typically present in criminal proceedings but absent in immigration detention protections are not prescribed.[19] Moreover, crimmigration takes two forms: (1) the application of criminal procedures such as incarceration or fines for immigration-related violations; and (2) the use of punitive measures in formally administrative immigration processes.[20]Some MSs tend to justify the use of criminal measures such as immigration detention by classifying them as administrative acts.[21] Consequently, the Return Directive arguably contributes to crimmigration by incorporating criminal justice measures into immigration procedures, revealing punitive elements akin to criminal sanctions[22]

1.2. Problem Statement

This thesis focuses on immigration detention, particularly pre-removal detention. In general terms, immigration detention is 'the deprivation of liberty under administrative law for reasons that are directly linked to the administration of immigration policies.'[23] Pre-removal detention specifically refers to detention of third-country nationals during a procedure of removal undertaken by the MS.[24] In the EU, pre-removal immigration detention is regulated by the Return Directive (the Directive). First adopted in 2008, the European Commission has submitted a proposal on a Recast Return Directive in March 2025 following strong condemnation.[25] As of June 1st, 2026, the EU legislature has reached an agreement

[19] Lorenzo Bernardini, 'Administrative Immigration Detention as a Punitive Measure: Is it Time for a New Standpoint?' in Angela Di Stasi Rossana Palladino and Angela Festa (eds), *Migrations, Rule of Law, and European Values* (Editoriale Scientifica 2023) 233-234.

[20] Stumpf (n 8) 367.
[21] ibid 3.
[22] Izabella Majcher, 'The Effectiveness of the EU Return Policy at All Costs: The Punitive Use of Administrative Pre-removal Detention' in Neža Kogovšek Šalamon (ed), *Causes and Consequences of Migrant Criminalization* (Springer 2020) 111.
[23] Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff Publishers 2010) 4.
[24] Aniel Pahladsingh, *Crimmigration and the EU Return Directive: Fundamental Rights, Criminal Sanctions and the Legal Position of the Migrant* (Eleven International Publishing 2023) 133.
[25] Izabella Majcher, 'The New EU "Common System for Returns" under the Return Regulation: Evidence-lacking Lawmaking and Human Rights Concerns' (*EU Law Analysis,* 2 April 2025) < eulawanalysis.blogspot.com/2025/04/the-new-eu-common-system-for-

on a new Common European System for Returns (Returns Regulation),[26] which will not be considered by this paper. Criticism has been so severe that ten independent experts from the United Nations Human Rights Council.[27] Of particular concern for the UNHRC is the Directive's provision on prolonged pre-removal detention, namely Art 15, which introduces punitive measures akin to criminal sanctions.[28] To shed light on this problematic legislative discrepancy, this analysis draws on three judgments of the Court of Justice of the European Union (CJEU), wherein the Court identifies and remedies arising from the interpretation of the Directive 5(1)(f) of the European Convention on Human Rights (ECHR), which is equally relevant to this research. Although there are no 'institutional and formalised ties' between these two courts, their jurisprudence does not develop in isolation.[29] This is particularly due to Article 52(3) of the EU Charter of Fundamental Rights that the scope and meaning of Charter Rights should mirror the content of corresponding ECHR rights.

Notably, the ECtHR often adopts a broader interpretation of ECHR rights, thereby expanding their scope of protection, and with that, the corresponding obligations of State Parties.[30] Nonetheless, in the context of pre-removal detention, the puzzling aspect of ECtHR's jurisprudence is its departure from its expansive interpretation in favour of a less protective approach. This potential contrast between the two Courts is of particular interest. Given their informal relationship, it is crucial to examine potential judicial dialogue around pre-removal detention to shed light on the coherence of human rights protection in Europe, particularly as it applies to the practice. This comparison aims at exploring whether, or how, the

returns.html#:~:text=On%2011%20March%202025%2C%20the%20European%20Commission%20published,to%20recast%20the%20Directive%20%28discussed%20here%20and%20here%29 > accessed 9 June 2026.

[26] European Commission, 'Commission welcomes political agreement on Return Regulation' (2 June 2026) < https://home-affairs.ec.europa.eu/news/commission-welcomes-political-agreement-return-regulation-2026-06-02_en > accessed 9 June 2026.

[27] United Nations, 'United Nations Experts Express Concern about the Proposed European Union Return Directive' (18 July 2008) < https://www.ohchr.org/en/press-releases/2009/10/un-experts-express-concern-about-proposed-eu-return-directive > accessed January 15 2025.

[28] Annalise Baldaccini, 'The EU Directive on Return: Principles and Protests' (2009) 28 Refugee Survey Quarterly 114, 135.

[29] Tamas Molnar, 'The Impact of ECtHR Case law on the CJEU's Interpreting of the EU's Return Acquis: More than it First Seems?' (2022) 62(4) Hungarian Journal of Legal Studies 257, 258.

[30] Shai Dothan, 'In Defence of Expansive Interpretation in the European Court of Human Rights' (2014) 3(2) Cambridge Journal of International and Comparative Law 508, 509 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2380082> accessed 5 February 2025.

Courts interact—as well as which of the two is more protective against crimmigration in practice, and which is more permissive. In this regard, the following research question will be addressed: *How do the CJEU (in its interpretation of Article 15 of the Return Directive) and the ECtHR (in its interpretation of Article 5(1)(f) ECHR) interact in their respective jurisprudence on pre-removal detention of irregular immigrants in the context of crimmigration?*

1.3. Methodology

Doctrinal methodology is most suitable for providing an insightful answer to the research question, as it involves the analysis of primary sources, such as jurisprudence on pre-removal immigration detention from the CJEU and the ECtHR, to identify interpretative connections or inconsistencies. The Return Directive will also be examined to explore its features, particularly regarding how the pre-removal detention regime is structured. Academic articles will further shed light on the criticisms and shortcomings of the detention regimes under the Directive and the ECHR, as well as deepen the understanding of the interaction between the two courts. This analysis will offer insights into whether jurisprudence contributes to the punitive enforcement of detention in practice. For these purposes, the following general search terms yielded the most appropriate results: 'crimmigration,' 'pre-removal detention,' 'Return Directive,' and 'immigration detention.' A combination of these terms in databases such as HeinOnline and EBSCOhost yielded the most concrete research results.

1.4. Limitations

This research focuses on the detention of irregular immigrants, as they fall under the personal scope of the Return Directive specified in its Article 2(1).[31] This encompasses third-country nationals who are present in the EU without legal authorization or documentation and have not applied for asylum or any other formal immigration status, or have had their asylum application rejected.[32] Further, this thesis will be limited to specific legal provisions directly related to pre-removal detention, namely Article 5(1)(f) ECHR and Article 15 of the Return

[31] Return Directive (n 7), art 2(1).
[32] Daniel Wilsher, *Immigration detention: Law, History, Politics* (Cambridge University Press 2011) 6.

Directive. Indeed, the two provisions mirror each other. The former provides the exception to the prohibition of deprivation of liberty by stating that detention or arrest are lawful in cases of unauthorised entry or actions of removal against that person. The latter specifically prescribes the rules for detention in case of removal, stating that a third-country national subject to a return procedure can be lawfully detained only where there are no other adequate and less coercive measures, and the person presents a risk of absconding, or the person hampers the return procedure.[33] Furthermore, this thesis will not explore specific examples of ECtHR case law influence on national jurisdictions as this Court has not had as much of a tangible impact as the CJEU did on matters on pre-removal.[34] Although the ECtHR's jurisprudence may have had less direct influence on MSs' practice and implementation of the Return Directive, its interpretation of Article 5 ECHR shapes European-wide standards for lawful detention. In particular, comparing the ECtHR's case law with that of the CJEU allows an assessment of whether the pre-removal detention regime embodies punitive elements, thereby contributing to the drift towards crimmigration.

To tackle the research question, this thesis will first explore the general immigration detention regime under the Return Directive and explain the features of Article 15 of the Return Directive and Article 5(1)(f) ECHR. In Chapters 2 and 3, the research will focus on central cases from the CJEU (*Kadzoev*, *El Dridi* and *Mahdi*) and the ECtHR (*Chahal* and *Saadi*) regarding their interpretation of the chosen provisions. Chapter 4 compares the interpretative approaches of the two courts. This analysis will reveal whether their jurisprudence contributes to the punitive implementation of detention in practice in a way that reinforces crimmigration to establish an (indirect) jurisprudential link between the CJEU and the ECtHR.

2. LEGISLATIVE FRAMEWORKS ON IMMIGRATION DETENTION: FEATURES AND SHORTCOMINGS

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[34] Galina Cornelisse, 'Detention and Transnational Law in the European Union: Constitutional Protection between Complementarity and Inconsistency' in Michael J Flynn and Matthew B Flynn (eds), *Challenging Immigration Detention: Academics, Activists and Policy-makers* (Edward Elgar 2017) 231.

This chapter addresses the two provisions that are the center of this research: Article 15 of the Return Directive and Article 5(1)(f) ECHR. In this context, the features of these two provisions are uncovered to highlight their punitive nature and thus identify the crimmigration elements therein.

2.1. Hidden Nature: Crimmigration Creeping into Administrative Processes

In the introduction, the concept of crimmigration has been defined as incorporation of criminal law sanctions in immigration law. In other words, it refers to the use of punitive measures stemming from criminal law in situations where there are no criminal acts committed to warrant such measure. To understand this convergence, it is important to first highlight the difference between administrative and punitive detention. The central difference is that the former does not require a criminal charge and its imposition rests solely with the executive authorities, although *a posteriori* judicial control is also possible as a remedy.[35] Indeed, because such detention circumvents judicial guarantees and lies solely with the discretion of the executive, it can result in the absence of legal safeguards that are essential, especially for such intrusive measures like deprivation of liberty.[36] As such, this practice can be described as the absorption of 'theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication'.[37] This theory specifies that MSs tackle immigration matters, formally an administrative (or preventive) tool,[38] with punitive elements akin to criminal sanctions which represents an inconsistency in the nature of immigration law.[39]

[35] Izabella Majcher, 'Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions on their Movement under EU Law' (2021) 40(1) Refugee Survey Quarterly 82, 86.
[36] ibid, 87.
[37] Stephen H Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64(2) Washington and Lee Law Review 469, 469.
[38] Majcher, 'Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions on their Movement under EU Law' (n 33) 86.
[39] In particular, the administrative denomination entails non-punitive measure aimed solely at enforcing (administrative) immigration and asylum law. See Arjen Leerkes and Dennis Broeders, 'Deportable and Not so Deportable: Formal and Informal Functions of Administrative Immigration Detention', in Bridget Anderson, Matthew J. Gibney and Emanuela Paoletti (eds.), *The Social, Political and Historical Contours of Deportation, Immigrants and Minorities, Politics and Policy* (New York, Springer 2013) 80.

Crimmigration of migration policies is a creeping phenomenon that MSs utilise in a somewhat furtive manner. Indeed, as briefly explained earlier, MSs tend to justify criminal law elements such as incarceration and fines in a way that describes them as administrative steps to bypass procedural safeguards individuals in criminal proceedings benefit from.[40] This tendency is due to nature of the Directive that opens doors for such MS practice. Furthermore, MSs tend to justify their use of administrative immigration detention by setting forth the argument that such detention is merely preventive, non-punitive and a necessary tool for the enforcement of migration law. Nonetheless, detention that entails incarceration of 18 months according to Article 15(5) Directive (which will be further explained in Section 2.2) represents a measure of criminal law that is inserted in a traditionally administrative field of law. This indicates the hidden and furtive nature of crimmigration law.[41]

2.2. Article 15 of the Return Directive: Identifying Punitive Elements

As mentioned, the Return Directive manages the effective return of irregular immigrants. Since this research focuses on the pre-removal detention regime of the Directive, the discussion will be limited to provisions on the deprivation of liberty under the Directive for this purpose. Firstly, the main features of Article 15 will be described to show how rules on pre-removal detention are the most contentious provisions in the Directive due to their punitive character.[42]

Article 15(1) of the Return Directive sets out the purpose of detention: to facilitate removal. It also establishes a legal guarantee in order to avoid cases of arbitrary detention. Detention is not justified if it is not used to facilitate removal and if it is not for the shortest period possible while the procedure of removal is in progress. In that regard, if there is no reasonable expectation of removal, then release of the migrants must ensue, because the deprivation of liberty is no longer justified (Article 15(4) of the Directive). Furthermore, necessity and proportionality tests are included in Article 15(1) Directive.[43] Indeed, a decision

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[40] Legomsky (n 35) 475.
[41] Majcher, 'Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions on their Movement under EU Law' (n 33) 92.
[42] Steve Peers and others, 'The Returns Directive' in Steve Peers and others (eds), *EU Immigration and Asylum Law (Text and Commentary): Volume 2: EU Immigration Law Immigration and Asylum Law and Policy in Europe,* v.28 (2nd rev edn, Martinus Nijhoff 2012) 500.
[43] Baldaccini (n 26) 129.

for detention must be made when it is necessary to execute the removal and when there are no 'other sufficient but less coercive measures' which are proven to be just as effective.[44]

Furthermore, immigration detention can be justified on only two grounds: 1) if the migrant presents a risk of absconding (Article 15(1)(a)) of the Directive, or 2) where the individual hampers or avoids the removal process (Article 15(1)(b) of the Directive). The way these grounds, especially the risk of absconding, are formulated in the EU legislation opens a leeway for MSs to abuse pre-removal detention, proceeding without ensuring that all procedural safeguards are available to the third-country nationals subject to detention.[45] It is important to note that the Return Directive establishes the grounds for justification of detention alongside the term 'in particular.'[46] This implies that the justificatory reasons are non-exhaustive, thus broadening the possibilities for MSs, enabling them to justify deprivation of liberty in more circumstances.[47] In that regard, MSs take advantage of this non-exhaustive formulation by imposing pre-removal detention based on public order, safety and health.[48] This practical use of the Directive resulting from the wording of the two grounds is criticised for two reasons. First, it enables detention for the mere fact that a person is an irregular immigrant,[49] which makes detention automatic and arbitrary.[50] Second, the additional grounds used by the MSs are not related to immigration and it is dubious whether they are effective in facilitating the removal procedure, which is the purpose of detention in the first place.[51] Thus, these two uses of the Directive are incompatible with the principles of necessity and proportionality enshrined in Article 15(1). Consequently, because immigration detention is officially administrative and is imposed only with preventive aims, it dictates that prevention, necessity and proportionality are three

[44] Return Directive (n 7), art 15(1).
[45] Baldaccini (n 26) 130.
[46] Return Directive (n 7), art 15(1).
[47] Maris Kask, 'Return Directive in Law and Practice: Central Themes and Issues' (DPhil thesis, King's College London 2017) 1, 125.
[48] Izabella Majcher, 'The European Union Returns Directive: Does it Prevent Arbitrary Detention?' (2013) 3(2) Oxford Monitor of Forced Migration 23, 24 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376168> accessed 18 January 2025.
[49] Anneliese Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive' (2009) 11(1) European Journal of Migration and Law 1, 13.
[50] Majcher, 'The New EU "Common System for Returns" under the Return Regulation: Evidence-lacking Lawmaking and Human Rights Concerns' (n 23) 12.
[51] Baldaccini (n 47) 13.

principles that restrict the power exercised by authorities in the deprivation of liberty. Hence, in theory, these three factors prescribe only a narrow possibility for justifying such detention. Nonetheless, in practice, the possibilities for justification are wider and remain the discretion of the MS. Thus, the preventive goal, necessity and proportionality are bypassed which result in pre-removal assuming a more punitive character.[52]

Apart from the non-exhaustive list of justifying grounds, the two explicitly formulated grounds in the Directive are undefined and their practical interpretation can be excessively broad. The use of such broad terms results in the Directive's lack of sufficient safeguards to people subject to pre-removal detention, which reveals the possibility of arbitrariness in detention decisions.[53] The *Kadzoev* case, addressed in Section 3.1, illustrates this issue by showing how Bulgaria utilising these broad grounds by attempting to justify prolonged detention due to public safety concerns. Eventually, the attempt of Bulgaria was declared incompatible with Return Directive by the CJEU, which resisted the use of justifications that are not strictly related to the purpose of removal.[54] In this regard, the definition of risk of absconding is laid out in Article 3(7) of the Directive. It is defined as 'the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a person under return procedures may abscond'.[55] The Directive, however, fails to define the term 'objective criteria'.[56] This means that each MS is left with the discretion to clarify it, resulting in different understandings of the concept of the risk of absconding.[57] For example, in Greece, the risk of absconding is assessed by the:

[52] Majcher, 'The New EU "Common System for Returns" under the Return Regulation: Evidence-lacking Lawmaking and Human Rights Concerns' (n 23) 12.
[53] Majcher, 'The European Union Returns Directive: Does it Prevent Arbitrary Detention?' (n 46) 25.
[54] Case C- 357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)* [2009] EU:C:2009:741 paras 65, 70.
[55] Return Directive (n 7), art 3(7).
[56] Majcher, 'The European Union Returns Directive: Does it Prevent Arbitrary Detention?' (n 46) 24.
[57] Madalina B Moraru, 'Judicial Dialogue in Action: Making Sense of the Risk of Absconding in the Return Procedure' in Madalina B Moraru, Galina Cornelisse and Philippe De Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020) 130.

> *"non-compliance with a voluntary departure obligation, explicit expression of intent for the non-compliance with the return decision, possession of false documents, providing false information to authorities, conviction for criminal offences, the lack of travel documents or identity documents, prior absconding, and the non-compliance with an existing entry ban*"[58]

On the other hand, Slovakia's objective criteria for assessing the presence of such risk include: "the impossibility to immediately identify the non-citizen, the absence of a residence permit or the issuance of an entry ban exceeding three years against the non-citizen".[59] Such variation of the meaning of absconding results from the wide margin of appreciation left to the MSs in defining whether a particular conduct of an individual constitutes a risk to abscond.[60]

Additionally, justifying the risk of absconding denotes a penal law rationale. Such a ground is usually used in criminal law cases to prevent 'criminal suspects who flee to escape criminal process or prosecution.'[61] From a broader perspective, applying the ground of absconding to migrant movements underlies a dubious analogy with people evading criminal proceedings. Motivations to leave a transit country could be related to escaping poor asylum conditions, amounting to inhuman and degrading treatment. Thus, justifying the decision to leave these conditions as absconding is hardly reconcilable.[62] In this regard, the concept of absconding is used to justify detention in cases of the mere exercise of the human right to leave any country.[63] Consequently, at first glance, the reasoning of the Directive for the risk of absconding is sound: the risk of absconding represents the preventive and administrative nature of pre-removal detention because if an

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[58] Greek Law No. 3907/2011 on the Establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC "on common standards and procedures in Member States for returning illegally staying third country nationals" and other provisions of 26 January 2011, art 18.
[59] Slovak Act No. 404/2011 on Act on Residence of Aliens and Amendment and Supplementation of Certain Acts of 21 October 2011, art 88.
[60] Majcher, 'The European Union Returns Directive: Does it Prevent Arbitrary Detention?' (n 46) 25.
[61] Majcher, 'Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions on their Movement under EU Law' (n 33) 97.
[62] Cathryn Costello and Minos Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers' (2016) 35 Refugee Survey Quarterly 47, 70.
[63] Dimitry Kochenov, 'The Right to Leave any Country including Your Own in International Law' (2012) 28(43) Connecticut Journal of International Law 43.

individual presents a high risk of fleeing the country, then pre-removal detention is required to ensure removal if such a measure hampers their escape. This use of the ground retains its administrative rationale if implemented in the appropriate conditions and maintained for the briefest possible time frame.[64] Nonetheless, in practice, the way the ground is understood by national authorities and EU institutions enables the use of detention for deterrence.[65] In fact, detention traditionally pursuing the prevention of absconding has hidden, creeping criminal law objectives. Generally, detention is also used to deter non-citizens from applying for asylum.[66] More specifically, in practice, detention justified on grounds of absconding may pursue more hidden objectives, including deterrence. Besides securing removal, it aims at dissuading individuals from seeking asylum or staying irregularly.[67] Clearly, deterrence—an aim normally tied to criminal law, operates under the denomination of administrative detention. To ensure that detention based on the risk of absconding fully remains an administrative measure, it must comply with human rights standards. The UN Human Rights Committee, the UN Working Group on Arbitrary Detention, and the UN Special Rapporteur on the Human Rights of Migrants have continuously reinforced the principles of necessity and proportionality.[68] These principles protect against automatic and systemic imposition of detention. Since the rationale of administrative detention is to prevent, it can only be justified in the presence of a genuine risk to prevent. This entails a real risk of absconding.[69] These principles in the context of immigration detention will be analysed in detail in the Discussion of the relevant case law.

It is important to highlight that the Directive does not offer sufficient safeguards to secure compliance with these principles. As mentioned above, the

[64] Galina Cornelisse, 'Detention of Foreigners' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law Series: Immigration and Asylum Law and Policy in Europe, Volume: 24* (Brill Nijhoff 2011) 223.
[65] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: The Punitive Use of Administrative Pre-removal Detention' (n 20) 113-115.
[66] ibid.
[67] ibid.
[68]HRC (1997) *A. v. Australia*. 560/1993, para 9(2); HRC(2006) Shafiq v. Australia. 1324/2004, para 7(2); WGAD(2018) Revised deliberation No. 5 on deprivation of liberty of migrants, paras 19-24; SRHRM (2012) Report of the Special Rapporteur on the Human rights of migrants, François Crépeau: detention of migrants in an irregular situation. A/HRC/20/24, para 6.
[69] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: The Punitive Use of Administrative Pre-removal Detention' (n 20) 114.

RD does not clearly define the risk of absconding. Article 3(7) defines it as the presence of objective criteria established by law that give rise to reasons to believe that the person may abscond. Importantly, the RD is silent on the definition of these objective criteria, instead leaving it to national legislation. Consequently, some MSs utilise this uncertainty to adopt an extensive list of indicators of flight risk (can extend to nine to twelve grounds), often comprising non-cumulative criteria.[70] The broader these lists are, the greater the legal bases to justify detention, thus enhancing the likelihood of the systemic and routine use of detention, rather than exceptionally. This is at odds with the governance of administrative detention for the purposes of removal.

The second ground, namely the avoidance and hampering of the removal process, is just as problematic. Just like the previous one, this justification is left undefined by the Directive. Moreover, the legal instrument does not impose an obligation upon the MSs to define conduct that is understood to hamper or avoid the progress of removal in their national laws.[71] In fact, this is reflected in domestic legislation, whereby some MSs do not even define what constitutes avoidance or hampering.[72] Such a *lacuna* in the Directive leaves a broad discretion to the MSs in deciding what type of conduct is understood to hamper or avoid the removal procedure. That said, justifying detention based on hampering or avoidance of the removal process is similar to retribution.[73] Indeed, in case of deliberately obstructing the implementation of removal, resorting to detention looks like a sanction. This punishment serves as a coercive device at the disposal of executive authorities that can use it punitively and sometimes arbitrarily due to the

[70] [Austria] Federal Act on the Exercise of Aliens' Police, the issuing of Documents for Aliens and the Granting of Entry Permits (Aliens Police Act), section 76(3); [Estonia] Obligation to Leave and Prohibition on Entry Act (RT I 1998, 98, 1575), section 6(8); [Malta] Common Standards and Procedures for Returning Illegally Staying Third- Country Nationals Regulations (S.L.217.12; Legal Notice 81/ 2011), 2011, article 2; [Cyprus] Aliens and Immigration Law (Cap 105), 2015, article 18; [Greece] Law 3907/ 2011 on the Establishment of an Asylum Service and a First Reception Service (No. 3907/ 2011), 2011, article 18; [Lithuania] Law on the Legal Status of Aliens (No. IX- 2206), 2004, article 113(5); [Latvia] Immigration Law, 2002, section 51(2); [Norway] Act On the Entry of Foreign Nationals into the Kingdom of Norway and Their Stay in the Realm (Immigration Act), 2008, section 106(a), cited by Izabella Majcher, *The European Union Returns Directive and its Compatibility with International Human Rights Law: Analysis of Return Decision, Entry Ban, Detention, and Removal* (Brill Nijhoff 2019) 393.
[71] ibid.
[72] Greek Law No. 3907/2011, art 30; Czech Act No. 326/1999 on the Residence of Aliens in the Territory of the Czech Republic, art 124.
[73] Wilsher (n 30) 153, 193.

ambiguous framework of the Directive.[74] In that sense, if detention can be justified on account of a retributive ground in the Directive, it presumes a more criminal character.[75]

Another shortcoming of the Return Directive is its duration of detention rules. According to Articles 15(5) and (6), a six-month duration is allowed with the possibility of a twelve-month extension in case of non-cooperation with the process. As briefly mentioned at the beginning of this chapter, the 18-month period imposed merely to facilitate the process of removal or prevent the risk of absconding is overly intrusive, as the people subject to such a practice have not committed a criminal offence to be subject to a measure connected to criminal law.[76] Despite the prompt by human rights experts of the UNHRC in their letter to the French Presidency of the EU, asserting that immigrants are not criminals and, as a rule, should not be detained,[77] MSs continue to take advantage of this possibility provided by the Directive. Indeed, the reinforcement of criminal elements in the Directive is illustrated through domestic legislation of MS, whereby they increase the duration of detention to mirror the maximum period allowed by the Directive. Particularly, Italy proceeded with legislation increasing pre-removal detention from 60 days to 18 months almost immediately after the Return Directive entered into force.[78] This demonstrates that to identify the punitive character of a measure, not only the purpose of detention, but also the effects of detention are relevant. Duration is particularly relevant for finding that detention has a punitive nature. As such, when detention is prolonged for non-punitive purposes, it can take on a punitive effect which is incompatible with the (formally) administrative character of immigration detention.[79]

Another problematic aspect of the pre-removal detention regime under the Return Directive is the absence of robust judicial oversight of the decisions of detention. This is problematic as it allows punitive measures to be imposed under the guise of administrative actions, circumventing the procedural safeguards that

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[74] ibid.
[75] Majcher, 'The New EU "Common System for Returns" under the Return Regulation: Evidence-lacking Lawmaking and Human Rights Concerns' (n 23) 10.
[76] Bosworth and Turnbull (n 10) 4; Baldaccini (n 26) 135.
[77] UN Press Release, 'United Nations Experts Express Concern about the Proposed European Union Return Directive' (18 July 2008) < www.ohchr.org/en/press-releases/2009/10/un-experts-express-concern-about-proposed-eu-return-directive > accessed January 15 2025.
[78] Baldaccini (n 26) 130.
[79] Majcher (n 33) 10.

would otherwise apply in criminal proceedings, and allowing executive authorities to extend detention even when it is not strictly necessary.[80] Indeed, the concerns in this case are centered around the fact that the final version of the Directive analysed in this text dilutes the safeguards that had been set out in its original draft, namely mandatory court order upon the decision of detention, monthly judicial reviews and a maximum duration of six months. In the final version, the rules of control by the courts are weakened. First, the duration can be extended up to eighteen months in comparison to the initial six. Second, a court order is no longer required for MSs to impose detention. Thus, judicial approval is obtained only after the administrative decision is made (Article 15(2)).[81] In this regard, due to the absence of case law defining the characteristics that constitute a judicial authority under Article 15(2) of the Directive, MSs do not seek confirmation that detention is allowed from judicial bodies. Instead, they entrust administrative bodies with such review, which offers less protection to detainees.[82] The criticism can be explained in broader terms. Indeed, a criminal conviction is decided by a judicial authority, whereas immigration detention that does not involve the commission of a criminal offence is decided by executive authorities, which are circumstances that should warrant even a more vigorous judicial control, and not subject to adequate and sufficient supervision.[83]

In that regard, the broad formulation of the grounds for detention and the lack of mandatory judicial control before imposing detention provide administrative authorities with a wide margin of appreciation for depriving irregular migrants of their liberty pending their removal. These factors, alongside the maximal duration allowed for detention without the commission of a criminal act, make the Return Directive more punitive in practice as opposed to its formal administrative purpose.

2.3. Immigration Detention Under Article 5 of the ECHR

[80]Lorenzo Bernardini, 'Administrative Immigration Detention as a Punitive Measure: Is it Time for a New Standpoint?' in Angela Di Stasi, Rossana Palladino and Angela Festa (eds.), *Migrations, Rule of Law, and European Values* (Editoriale Scientifica 2023) 233-234.
[81] Baldaccini (n 47) 14.
[82] Pahladsingh (n 22) 303.
[83] Baldaccini (n 47) 14.

Article 5 ECHR prescribes that everyone has a right to liberty and security. Hence, it ensures protection against unlawful deprivation of liberty and security. However, what is relevant for this thesis is that immigrants are outside of the scope of protection guaranteed in Article 5(1) ECHR due to the exception in Article 5(1)(f) ECHR. This provision prescribes that constraints to one's liberty are allowed for preventing an unauthorised entry into a MS or for effectuating a removal therefrom.[84] According to the wording of Article 5(1)(f), detention is only allowed where deportation actions have been undertaken against an individual. Similarly to Article 15(4) Directive, where removal is no longer possible, the detention is no longer justified under Article 5(1)(f) ECHR and thus no longer a lawful deprivation of liberty pursuant to Article 5(1) ECHR.[85] As seen earlier, the formal administrative classification of immigration detention has a preventive aim (absence of a criminal offence). This understanding aligns with Article 5(1)(f) ECHR, as detention of persons is lawful to prevent their unauthorised entry into the country or of persons subject to deportation or extradition actions.[86] In fact, the Court has confirmed that in migration-related cases, fair trial protection enshrined in Article 6 ECHR does not apply because penal sanctions (in principle) do not ensue due to the administrative nature of the procedure.[87]

Nevertheless, the right guaranteed by Article 5 ECHR is not absolute and can be limited. Thus, what is specifically prohibited by the provision is the arbitrary limitation of the deprivation of liberty.[88] Arbitrariness is assessed through the necessity and proportionality tests. Moreover, because deprivation of liberty is a highly intrusive measure, it is also prescribed that it should be used as a last resort where other less harsh alternatives are unavailable or inadequate to achieve the legitimate aims. [89] However, the ECtHR has diverged from these standards in

[84] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 5 (1)(f).
[85] Majcher, *The European Union Returns Directive and its Compatibility with International Human Rights Law: Analysis of Return Decision, Entry Ban, Detention, and Removal,* (n 68) 428.
[86] Majcher, 'Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions on their Movement under EU Law' (n 33) 88.
[87] *Maaouia v France* App no 39652/98 (ECtHR, 5 October 2000), paras. 39–41.
[88] Amanda Spalding, *The Treatment of Immigrants in the European Court of Human Rights* (1st edition, Hart Publishing 2022) 47.
[89] Nicholas Hatzis, 'Detention of Irregular Migrants and the European Public Order' (2013) 38(2) European Law Review 1, 29 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297435> accessed 10 February 2025.

its case law on pre-removal detention,[90] which will be further explained in Chapter 3. In general terms, access of migration-related cases to the ECtHR was largely hampered by the then European Commission on Human Rights (Commission). The latter was the hub 'for the beginning and end of migrants' applications.'[91] The Commission was deciding on the merits of migration cases to reach the ECtHR which impeded the rights of migrants and explains the novelty of the Court's jurisprudence in this field.[92] Looking at the Court's first judgement on migrants' rights, *ACB v UK*, the Court emphasised State sovereignty through the following rule repeated in subsequent case law: '[T]he Court cannot ignore that the present case is concerned [...] with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a state has the right to control entry of non-nationals into its territory.'[93] This is consistent with the wording of Article 5 ECHR as such. For sub-paragraphs (b), (d), and (e) of Article 5 ECHR, which cover respectively detention to enforce a legal obligation, the detention of minors, and the detention of individuals with mental illnesses, alcohol dependency, or drug addiction, the guiding principle is that deprivation of liberty should only be a last resort. This means that less restrictive alternatives must first be assessed and found insufficient to protect either the individual or the public interest that justifies detention.[94] As such, in these cases, detention must be both necessary and proportionate, taking into account the specific and individual circumstances. However, this restrictive approach has not been applied to sub-paragraph (f).

Consequently, in earlier jurisprudence specifically regarding the lawfulness of detention (cases invoking Article 5(1)(f) ECHR), the Court highlights State sovereignty over rights of migrants.[95] Indeed, such a trend can be observed by the Court's diversion from the principle of necessity and proportionality. For example, according to the ECtHR's jurisprudence, authorities

[90] ibid.
[91] Anita Sinha, 'Defining Detention: The Intervention of the European Court of Human Rights in the Detention of Involuntary Migrants' (2019) 50(3) Columbia Human Rights Law Review 176, 214.
[92] ibid.
[93] *Abulaziz, Cabales and Balkandali v United Kingdom* [hereinafter ACB v. UK] App nos 9214/80; 9473/81; 9474/8 (ECtHR, 28 May 1985), para 67.
[94] *Enhorn v Sweden* App no 56529/00 (ECtHR, 25 January 2005), para. 44; *Hilda Hafsteinsdottir v Iceland* App no 40905/98 (ECtHR 8 June 2004), para. 51; *Varbanov v Bulgaria* App no.31365/96 (ECtHR 5 October 2000), para. 46.
[95] Sinha (n 89) 217.

responsible for detention do not have the obligation to demonstrate the necessity of the measure, but only that it is not excessive or arbitrary.[96] Moreover, proportionality was only applied in those cases to the duration of detention. Consequently, applicants cannot challenge the lawfulness of the initial detention decision based on proportionality.[97] Thus, irregular migrants subject to pre-removal detention do not benefit from the same amount of protection provided by Article 5 ECHR as other detainees. The ECtHR has never specifically outlined the reasons for this discrepancy; however, the rule first established in *ACB v UK* and repeated in subsequent cases can be explicative: 'Contracting States have the right [...] to control the entry, residence and expulsion of aliens'.[98]

Nonetheless, before delving into the jurisprudence, it is valuable to elaborate on the meaning of detention in Article 5 ECHR to later understand the jurisprudence of the Court. First, the ordinary meaning of detention in Article 5(1)(f) ECHR only encompasses short-term pre-removal detention.[99] Indeed, *travaux préparatoires* for the ECHR do not indicate that long-term detention was envisioned or intended by the drafters. There were no established practices for long-term detention; thus, provisions regarding this matter were deemed unnecessary.[100] In that regard, the doctrine of the 'living instrument' guiding the interpretation of the ECHR prescribes that the Court should adapt its rulings to contemporary conditions and developments.[101] The effect of this doctrine has led to the expansion of human rights standards, but nevertheless reduced the level of protection provided by the ECHR.[102] Unlike other provisions in the ECHR, the Court diverged from the living instrument concept in the context of Article 5(1)(f)

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[96] *A and others v United Kingdom* (2009) 49 EHRR 29, para 164; *Saadi v United Kingdom* App no 13229/03 (ECtHR, 29 January 2008), para 72; *Chahal v the United Kingdom* App no 22414/93 (ECtHR, 15 November 1996), para 112.
[97] *Batalov v Lithuania* App no 30789/04 (admissibility decision, November 15 2005).
[98] E.g. *Kurić and others v Slovenia* App no 26828/06 (26 June 2012), para 355; *N v UK* (2008) 47 EHHR 39, para 30; *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25, para 66; *Slivenko v Latvia* (2004) 39 EHRR 24, para 115.
[99] Bas Schotel and Ingo Vanzke, 'The Pre-removal Detention of Immigrants: A Return to Ordinary Meaning' (2025) 26(1) German Law Journal 94, 103 < https://www.cambridge.org/core/journals/german-law-journal/article/preremoval-detention-of-immigrants-a-return-to-ordinary-meaning/2650BBA193582D2AF13B21493E95CF1B > accessed 6 March 2025
[100] ibid, 11.
[101] *Tyrer v The United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), para 31.
[102] Schotel and Vanzke (n 97) 19.

ECHR by allowing practices that weaken safeguards against arbitrary detention, which will be identified in Chapter 3.

This chapter has established that, despite the formally administrative status of immigration detention, in practice, such detention takes on punitive elements similar to criminal sanctions due to the ambiguous wording of Article 15. Similarly, Article 5(1)(f) ECHR allows for such criminal law nature due to the lenient assessment of detention imposed under this provision. With this legislative framework in mind, the next two chapters will examine leading cases from the CJEU and the ECtHR to demonstrate how these legal provisions have been interpreted in the context of pre-removal detention, in this way outlining potential tensions between the two Courts. By laying down, on the one hand, the general legislative framework of the Returns Directive and, on the other, the general framework of Article 5 ECHR, the foundation is established for the jurisprudential comparison of the approaches adopted by the two Courts in the area of pre-removal detention.

3. The CJEU and Pre-Removal Immigration Detention

This chapter focuses on the CJEU's jurisprudence related to immigration detention. In exploring the three landmark cases in the interpretation of Article 15 of the Return Directive, this thesis evaluates how the Court's approach contributes to or diverges from crimmigration. For that purpose, this section begins by examining *Kadzoev*,[103] the first case in which the CJEU addressed the Return Directive and its detention regime. Particularly, the case regards the grounds for justifying detention under the Directive. Then, *El Dridi*[104] concerned the use of criminal sanctions in relation to infringements of migration rules. Finally, *Mahdi*[105] discussed the (lack of) judicial oversight in assessing detention under Article 15 of the Directive.

3.1. Kadzoev

[103] *Kadzoev* (n 52).
[104] Case C-61/11 PPU *Hassen El Dridi, alias Soufi Karim* [2011] EU:C:2011:268.
[105] Case 146/14 PPU *Bashir Mohamed Ali Mahdi* [2014] EU:C:2014:1320.

In light of the features and shortcomings of Return Directive reiterated in Chapter 1, this thesis will examine how the CJEU addressed these shortcomings in an attempt to fill the gaps left by the Directive. *Kadzoev* was the first case of the CJEU to deal with the Return Directive, even before the deadline for implementation had expired. The case concerns the maximum period of detention under Article 15(5) and (6) of the Directive. Mr. Kadzoev, of Chechen origin, arrived in Bulgaria, where he was placed in a detention centre because he did not possess the required documents, and the Bulgarian authorities deemed him ineligible for protection. While awaiting deportation to Russia due to his illegal status, he remained in detention centres. However, he could not be returned to Russia, as the Russian authorities did not recognise him as a citizen. As a result, Mr. Kadzoev remained in detention for more than three years while awaiting permission to return to Russia or another third country.[106]

In this case, the CJEU affirmed two temporal limits to pre-removal immigration detention.[107] First, under Article 15(6) of the Directive, the maximum permissible period of detention is 18 months, which is absolute. This means that this period cannot be exceeded under any circumstances. This is the case even when the authorities temporarily pause the removal process, whereby the time spent in detention counts towards this limit[108] or when '[the migrant] is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the MS for that purpose.'[109]

Second, the temporal limit is also relative. The CJEU clarified that under Article 15(4) of the Directive, detention ceases to be justified if 'a reasonable prospect of removal no longer exists.'[110] Additionally, the Court ruled that the grounds for pre-removal detention cannot include public safety nor public order.[111] Dutch law illustrates how the CJEU's ruling affected immigration detention rules in MSs, particularly regarding detention grounds. The use of Dutch law is used to defend the position of constitutionalisation of irregular migrant rights in the Return

[106] *Kadzoev* (n 52).
[107] Marie-Laure Basilien-Gainche, 'Immigration Detention under the Return Directive: The CJEU Shadowed Lights' (2015) 17(1) European Journal of Migration and Law 104, 115.
[108] *Kadzoev* (n 52), para 69.
[109] ibid, para 71.
[110] ibid, para 63.
[111] ibid, paras 70-71.

Directive regime (developed in Section 5.3). Before this ruling, minor crimes were often used as justification for detention in the Netherlands. The *Kadzoev* ruling played a crucial role in ensuring that public order concerns, such as minor criminal offenses, could no longer serve as independent grounds for detention under the Return regime. Following *Kadzoev*, such concerns are only relevant if they demonstrate that a person is actively avoiding or obstructing deportation or presents a clear risk of absconding.[112] This reflects the Court's broader effort to prevent MSs from treating immigration issues as matters of criminal law, thereby maintaining a clear distinction between irregular migration and crime.[113] This can also be described as the constitutionalisation of their rights.

3.2. El Dridi

El Dridi is another significant case in the context of crimmigration. The ruling demonstrates how the Court's interpretation of the Return Directive serves as a safeguard against the criminalisation of irregular migration. In particular, the judgment prevents MSs from delaying deportation by imposing criminal prosecution and imprisonment before or during the return process.[114] Mr. El Dridi was sentenced to one year in prison under Italian Alien Law for failing to comply with a police removal order and remaining in Italy without legal documentation.[115] The CJEU ruled that the Italian Alien Law, which provided for imprisonment in such cases, was incompatible with Article 15 of the Return Directive. The Court drew an important nuance: if a migrant does not comply with a voluntary departure order within the allotted time frame, MSs cannot impose custodial sentences merely because the third-country national remains in the concerned MS after the expiry of the return deadline. Instead, MSs are required to enforce the return decision. The reasoning behind the ruling is that criminal law measures, such as imprisonment, detract the functioning of the Directive and undermine its primary objective, that is, ensuring removal.

[112] Council of State, 21 March 2011, ECLI:NL:RVS:201:BP9284, cited by Cornelisse, 'Detention and Transnational Law in the European Union: Constitutional Protection between Complementarity and Inconsistency' (n 32) 230.
[113] ibid.
[114] *El Dridi* (n 102).
[115] ibid, para 52.

Nevertheless, the Court established that if coercive measures fail to lead to deportation, MSs retain discretion to adopt other measures, including criminal law measures, aimed at deterring irregular migrants from remaining in their territories. In other words, the Return Directive does not prevent crimmigration from occurring once removal has failed and the migrant remains on the MS' territory 'with no justified ground for non-return.'[116] Thus, upon failed removal, the Return Directive does not preclude the imposition of criminal law sanctions for illegal migrants. However, the Court clearly stated that these criminal law measures cannot include a custodial sentence, because such a penalty would risk 'jeopardising the attainment of the objective pursued by the directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals.'[117] As such, the Court does not completely rule out the use of criminal law in the context of irregular migration, albeit under narrow circumstances. In that regard, this ruling indicates the Court's attempt to set apart detention imposed as a criminal sanction for immigration-related transgressions from measures part of the return proceedings, such as immigration detention.[118]

Conversely, the Court limits the freedom of MSs in the field by invoking that their criminal legislation needs to adhere to EU law. Although the Court confirmed that rules of criminal law and procedure are a national domain, national criminal law can nevertheless be impacted by the requirements set out by EU law. The discretion of MSs is constrained by the principles of effectiveness and loyal co-operation.[119] These principles are at work in the *El Dridi* judgment: the Court observed that MSs are precluded from ordering a custodial sentence on the sole basis that the third-country national remains on the territory illegally after the expiry of a return order. Instead of criminalising an illegal stay, MSs must enforce the removal decision. This conclusion is reached on the grounds that a criminal law approach delays deportation, and by that runs against the objectives of the

[116] Galina Cornelisse, 'EU Migration Law and Detention: Criminalisation, Containment and Courts' in Lilian Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 466.
[117] *El Dridi* (n 102), para 59.
[118] Majcher, *The European Union Returns Directive and its Compatibility with International Human Rights Law: Analysis of Return Decision, Entry Ban, Detention, and Removal,* (n 68) 370-371.
[119] *El Dridi* (n 102), paras 55-56.

Directive that prescribes effective return.[120] Hence, MSs cannot, for example, automatically detain a person solely on the basis of illegal stay by virtue of the grounds for detention provided in the Directive.[121] Criminal sanctions are also precluded when they risk jeopardising the objective of the Directive. In other words, this ruling detracts MSs from the first form of crimmigation, which prescribes the imposition of criminal sanctions for status-related transgressions. This aspect involves the use of criminal measures for immigration-related (administrative) violations.

In another aspect of the ruling, the CJEU observes that there is a gradation of measures to be taken in the return decision. Indeed, MSs are prohibited from imposing the most restrictive measure, pre-removal detention, unless all other measures allowing for more liberty—namely voluntary departure, removal, alternative measures have been exhausted and proven to be ineffective for an effective return.[122] In other words, the Court emphasises the need to comply with the principle of proportionality in the execution of a(n) (effective) return. To ensure compliance with proportionality and effectiveness of return as per the objectives of the Directive, the MSs are precluded from imposing custodial sentences on migrants on the sole ground that they have not complied with a national order for return.[123]

In that regard, the *Achughbabian* case[124] is factually similar to *El Dridi*, with the key difference being the latter concerned penalisation for failing to comply with a return decision, whereas the former dealt with the criminalisation of illegal stay *per se* even before a return procedure was initiated.[125] In *Achughbabian*, the Court reaffirmed that MSs are free to impose criminal sanctions and criminalise illegal stay, as this falls within their sovereign competence.[126] However, such measures must not compromise the Directive's objectives of ensuring effective removal.[127] Clearly, the CJEU reiterated its stance

[120] Rosa Raffaelli, 'Criminalizing Irregular Immigration and the Returns Directive: An Analysis of the El Dridi Case' (2011) 13(4) European Journal of Migration and Law 467, 483.
[121] Article 15(1) provides two grounds: "(a) risk of absconding or (b) the person concerned avoids or hampers the preparation of the return or the removal process".
[122] *El Dridi* (n 102), paras 37-40.
[123] ibid, para 58.
[124] Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne* [2011] EU:C:2011:807.
[125] ibid, paras 19-20.
[126] ibid, para 28.
[127] ibid, para 31.

from *El Dridi*, emphasising that imprisonment cannot delay removal, which must always prevail over criminal detention.[128] These rulings reflect the CJEU's effort to distance Article 15 from a punitive nature. By stressing that immigration detention should not be justified on the mere basis of irregular status, the Court demonstrates its reluctance to allow a broad interpretation of Article 15 that would enable MSs to justify detention in a wider range of contexts, an aspect of Article 15 that was condemned as seen in Section 2.2.

3.3. Mahdi

The *Mahdi* case addresses the lack of judicial oversight in (administrative) decisions regarding pre-removal detention, filling a legislative gap left by the Return Directive. The case concerned a third-country national who was arrested in Bulgaria while attempting to cross the border without legal documents. In addition to issuing a removal order and entry ban, the competent administrative authority imposed pre-removal detention on him.[129] In *Mahdi*, the Court focused on reinforcing a higher standard of procedural safeguards that the Directive does not include. First, the Court held that if a MS wishes to extend detention beyond the initial six months, this needs to be justified in fact and in law in written form, even though Article 15(3) and 15(6) of the Directive do not mandate such a written justification.[130] It follows that a judicial authority must assess both the evidence provided by the administrative authority and the arguments presented by the third-country national. Consequently, the CJEU confirmed that the powers of the judicial body assessing the legality of detention should not be limited to material adduced by the administrative authority calling for detention, including any observations by the third-country national and 'any other element that is relevant for its decision should it so deem necessary.'[131] This preserves the effectiveness of Article 15 (3), (4) and (6) of the Directive.[132] This allows the non-citizen to

[128] ibid, para 38.
[129] *Mahdi* (n 103), paras 19-21.
[130] ibid, para 44.
[131] ibid, paras 62-64; Diego Acosta Arcarazo, 'The Charter, Detention and Possible Regularization of Migrants in an Irregular Situation under the Returns Directive: Mahdi' (2015) 52(5) Common Market Law Review 1361, 1365.
[132] Article 15(4) provides for the release of the detainee where the prospect of removal ceases to exist and 15 (6) provides for the conditions for extending the detention. Limiting the effectiveness of these two provisions jeopardises Article 15(3), ensuring judicial review of detention at reasonable intervals See *Mahdi* (n 103), para 63.

challenge the decision, preserving the administrative character of immigration detention and preventing it from furtively slipping into criminal law proceedings.

Second, although not explicitly reiterated in Articles 15(3) and 15(6) of the Directive on the extension of detention, the Court shed light on the nature and extent of judicial supervision of such an extension. The judicial authority must not only review the legality of detention extensions but also have the power to replace detention with other, less restrictive measures or order release.[133] This remedies a shortcoming of the Directive that did not specifically provide for the nature of judicial oversight of decisions for detention. In fact, this is one of the criticised aspects of the Directive. If there is no judicial oversight clearly defined by EU law, it allows national authorities to engage criminal proceedings against irregular migrants without a sufficient level of procedural guarantees (as applicable in criminal proceedings) because immigration-related detention is administrative in principle.[134]

Furthermore, a one-year extension of detention on the basis of a lack of cooperation from the third country national suggests a punitive approach. In *Mahdi*, the CJEU implicitly confirmed that the failure to obtain identity documents required to execute the removal could be interpreted as non-cooperation where the individual's conduct shows failure to assist in the implementation of the removal, thereby contributing to its delay.[135] In the case, the country of destination refused to issue the identity documents after the detainee's wish to not return there.[136] If this unwillingness is met with extended detention based on non-cooperation, this amount to compelling the individual to change his position. As such, an administrative procedure is used as a coercive tool. According to Wilsher, whereas non-cooperation was traditionally addressed through criminal law, more recent developments have turned to the extension of administrative pre-removal detention.[137] As reiterated above, this shift effectively permits administrative

[133] *Mahdi* (n 103) para 62.
[134] Majcher, *The European Union Returns Directive and its Compatibility with International Human Rights Law: Analysis of Return Decision, Entry Ban, Detention, and Removal,* (n 68) 423.
[135] *Mahdi* (n 103), para 85. See on this point Marie- Laure Basilien- Gainche, 'Judicial Control of Detention: A Deceptive Upheaval?' (*EU Law Analysis*, June 10, 2014) < eulawanalysis.blogspot.com/2014/06/marie-laure-basilien-gainche.html> accessed 20 March 2025.
[136] *Mahdi* (n 103), para 77.
[137] Wilsher (n 30) 66-67.

authorities to impose a measure aimed at ensuring compliance by circumventing procedural safeguards applicable in criminal proceedings.[138]

Finally, the CJEU ruled that the mere absence of identity documents does not automatically justify an extension of detention under Article 15(6) of the Directive on the grounds of risk of absconding. As seen earlier, in *Kadzoev*, the Court restricted the grounds already by striking out the possibility to use public interest. In the present case, the CJEU upholds this position by reinstating that allowing such a broad interpretation would encourage the automatic detention of third-country nationals.[139] In turn, this convolutes a formally administrative procedure such as immigration with criminal law, thus expanding crimmigration in practice. In short, *Mahdi* contains constrains crimmigration trends of the Return Directive by specifying the nature of judicial oversight that provides more guarantees for irregular migrants and reinforces the narrow scope of the grounds for detention. Despite the jurisprudence of the CJEU, 27% of the MSs still list irregular stay and entry as a ground for establishing risk for absconding, which is contrary to the administrative form of detention pending removal. [140]

This chapter has mapped key aspects of the Court's case law in the field, and in doing so has demonstrated the protective nature of the Court's interpretation of the Return Directive by placing limits on MS in the context of pre-removal detention. Thus, it can be said that the CJEU's jurisprudence is a way of retreating from crimmigration, or at the very least, limiting MS' power to impose pre-removal detention. To provide a thorough jurisprudential comparison, the next chapter will address the ECtHR's case law on Article 5(1)(f) ECHR, deepening the discussion on potential interaction between the two Courts.

4. The ECtHR and Pre-Removal Immigration Detention

This chapter focuses on the jurisprudence of the ECtHR in the area of migration detention. Particularly, this chapter outlines two leading cases: *Chahal*[141] and *Saadi*.[142] By discussing the Court's approach in these cases, this thesis will explore

[138] ibid.
[139] *Mahdi* (n 103), para 73.
[140] Majcher, 'The Effectiveness of the EU Return Policy at All Costs: The Punitive Use of Administrative Pre-removal Detention' (n 20) 115.
[141] *Chahal* (n 94).
[142] *Saadi* (n 94).

the degree of protection provided by the ECtHR to irregular migrants' rights to subsequently answer the question on the Court's contribution to crimmigration.

Before that, it is important to note that for deprivation of liberty to be considered non-arbitrary under Article 5(1) ECHR, the Contracting Parties have certain obligations. Namely: (1) detention must be imposed according to a procedure prescribed in national law, (2) such national law must be accessible and foreseeable, (3) detention must be aligned with one of the grounds provided in Article 5(1) ECHR, and (4) such detention must be necessary to achieve stated aim and it must be a last resort measure capable of reaching that aim.[143] This thesis is particularly concerned with the last criterion. In relation to the necessity test, particular attention is drawn to the *Chahal* and *Saadi* cases.

4.1 CHAHAL

For the purpose of this research, the relevant part of this case concerns Karamjit Singh Chahal, an Indian national and Sikh activist who entered the United Kingdom illegally in 1971 and was later granted indefinite leave to remain. On the 14th of August 1990, the UK Home Secretary decided to deport him on national security grounds citing his alleged involvement in Sikh separatist activities and suspected connections to terrorism.[144] Chahal was detained on the 16th of August 1990 pending deportation. He challenged the deportation order and detention through judicial review, but the courts upheld the Government's decision, citing national security concerns. Despite these challenges, he remained in custody from the 16th of August 1990 until the ECtHR's ruling in 1996.[145]

As first mentioned in Section 2.3, unlike other grounds for the exceptions to deprivation of liberty, the ECtHR negates the necessity test for detention under Article 5(1)(f) ECHR, which covers immigration detention imposed to prevent, for example, him committing a crime or fleeing.[146] In fact, all the Court requires with regard to the initial decision to detain is for expulsion proceedings to be in progress and be carried out with due diligence to justify such confinement.[147] This

[143] Andreia Sofia Pinto Oliveira, 'Aliens' Protection against Arbitrary Detention (Article 5 ECHR)' in David Moya and Georgios Milios (eds), *Aliens before the European Court of Human Rights: Ensuring Minimum Standards of Human Rights Protection* (Brill Nijhoff 2021) 106-107.
[144] *Chahal* (n 94), para 23.
[145] ibid, para 25.
[146] ibid, para 112.
[147] ibid, para 113.

standard still grants latitude to Contracting Parties in upholding detention.[148] As a result, even prolonged detention can be compatible with the Convention[149] as was the case in *Chahal*—where, despite a six-year detention, the measure was still considered lawful. It follows from the absence of such a necessity test that Contracting States are not obliged to consider alternative measures to detention or to impose detention only as a last resort.[150]

This case marks the beginning of the Court's broad interpretation of Article 5(1)(f) ECHR, which granted greater discretion to the Contracting States. This approach is difficult to reconcile with the Court's own stance that detention should always align with the provision's purpose, namely preventing arbitrary deprivation of liberty.[151] In practice, this broad interpretation allows for the detention of asylum seekers and immigrants even when it may not be necessary. While the Court's case law on immigration detention does take proportionality into account to some extent, it largely ignores this principle when assessing whether the initial decision to detain is justified.[152] Indeed, proportionality is only assessed to the extent that 'detention should not continue for an unreasonable length of time,' beyond which a 'due diligence' test is applied, replacing the more stringent test of necessity.[153] This raises concerns about the level of protection the Court offers, especially given its repeated emphasis that any deprivation of liberty must align with the general principles of the Convention. One of these key principles is proportionality,[154] which aims to balance individual rights with public interest.

As discussed in Section 2.3 on the original meaning of detention as understood by Article 5(1)(f) ECHR, the ECtHR's approach leads to a regression in the scope of protection provided by Article 5(1)(f) ECHR. *Chahal* is a case in point, exemplifying how the absence of an assessment of necessity and

[148] Majcher, *The European Union Returns Directive and its Compatibility with International Human Rights Law: Analysis of Return Decision, Entry Ban, Detention, and Removal*, (n 68) 425.
[149] Cornelisse, 'Detention of Foreigners' (n 32) 223.
[150] Oliveira (n 147) 109; Cornelisse, 'Detention and Transnational Law in the European Union: Constitutional Protection between Complementarity and Inconsistency' (n 32) 291-292; 297.
[151] Cornelisse, 'Detention and Transnational Law in the European Union: Constitutional Protection between Complementarity and Inconsistency' (n 62) 215.
[152] Galina Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?' (2004) 6(2) European Journal of Migration and Law 93, 102.
[153] Violeta Moreno-Lax, 'Beyond Saadi v UK: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law' (2011) 5 Human Rights & International Legal Discourse 166, 180; *Chahal* (n 94), paras 112-123.
[154] Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?' (n 150) 102.

proportionality legitimises prolonged pre-removal detention. This supports the argument that the Court has distorted the original scope of Article 5(1)(f) ECHR. By granting Contracting States greater discretion and weakening the safeguards of the ECHR, the Court has contributed to a broader acceptance of detention that would otherwise be arbitrary.

This could be due to the fact that by virtue of the harmonised Return regime under EU law, [155] the CJEU leaves less of a margin of discretion in comparison to the ECtHR. The latter is a subsidiary mechanism that leaves a margin of discretion to the contracting parties. Indeed, the ECHR regime does not aim at establishing uniform standard, but provides for a minimum floor for human rights protection, removing flagrant differences existing between national systems.[156] That said, the argument for the approach adopted by the ECtHR is grounded in the comparison that the Court adopts more safeguards for other grounds under Article 5, but does not extend it to Article 5(1)(f), resorting instead to an even more permissive approach as analysed in the next section.

This erosion of legal safeguards aligns with the broader trend of crimmigration, where immigration law increasingly adopts measures traditionally associated with criminal law. By permitting prolonged detention and omitting the principles of necessity and proportionality, the ECtHR has facilitated the blurring of boundaries between immigration control and criminal enforcement, reinforcing a system in which third-country nationals are subjected to prolonged detention under a punitive rather than administrative framework.

4.2 Saadi

More than ten years after *Chahal*, the ECtHR once again assessed the issue of detention pending deportation in *Saadi*. In this case, the Court followed the *Chahal* rule, but it went further by drawing nuances regarding State sovereignty in migration matters and the necessity test. This case concerned an Iraqi national who

[155] Articles 78 and 79 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU). These two provisions set the foundation for the RD. They provide for the EU's common immigration policy, ensuring inter alia "the prevention of, and enhanced measures to combat, illegal immigration."

[156] Article 53 EU Charter of Fundamental Rights; O. Jacot-Guillardmod, "Régles, méthodes et principes d'interprétation dans la jurisprudence de la Cour européenne des droits de l'homme," in La Convention européenne des droits de l'homme: Commentaire article par article, eds. L.E. Pettiti, E. Decaux and P.H. Imbert (Paris: Economica, 1995) 50.

arrived at Heathrow Airport in London and applied for asylum immediately upon arrival. The applicant was granted 'temporary admission' [of entrance] to go to a hotel of his choice under the condition that he report to the authorities at the airport every day. Upon his third instance of temporary admission and reporting, he was detained at an asylum seeker facility for a period of seven days. The Court ruled that this detention was not arbitrary under Article 5(1)(f) ECHR.[157] The criteria considered in the Court's reasoning included the conditions of detention, the obligation to carry out detention in good faith, the requirement that detention must be connected to the goal of obstructing unauthorised entrance into the country, and the requirement that the length of detention not exceed what is reasonably necessary to achieve its aim.[158] However, the necessity criterion was absent from the reasoning; the Court did not impose an obligation on States to use deprivation of liberty as a last resort, nor did it require them to consider effective, less intrusive measures.

This more lenient approach adopted by the ECtHR is especially problematic as it applies only to migration-related detention under Article 5(1)(f) ECHR, whereas other forms of deprivation of liberty under Article 5 ECHR are subject to stricter necessity and proportionality requirements. In other words, the four criteria outlined at the beginning of this chapter for detention to be considered non-arbitrary are applied to measures under subsections (b), (d) and (e) of Article 5 ECHR, but not for detention taken under subparagraph (f), which concerns migration.[159] Moreover, referring to *Chahal*, the Court applied a very limited proportionality test, assessing only the length of the detention rather than whether the measure was proportionate to the objectives pursued by the ECHR.[160] Thus, the *Saadi* ruling indicates that the concept of arbitrariness depends on the nature of detention. The absence of necessity and strict proportionality assessments for migration detention demonstrates that the Court recognises arbitrariness in fewer cases than for other types of detention under Article 5 ECHR.

Similarly to the ECtHR's earlier jurisprudence in the migration field, the *Saadi* case also prioritises State sovereignty. In fact, it reaffirmed Contracting

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[157] *Saadi* (n 94), para 11.
[158] ibid, para 74.
[159] ibid, para 67.
[160] ibid, paras 72, 74; Cornelisse, 'Detention of Foreigners' (n 62) 297.

States' 'undeniable sovereign right to control aliens' entry.'[161] As a complementary part of this right, the Court recognised the States' prerogative to detain irregular migrants who have applied for entry.[162] The ECtHR went even further by establishing that were Article 5(1)(f) ECHR to be interpreted narrowly to permit detention only for persons that show attempt at evading entry would unduly restrict the terms of Article 5 ECHR and States' undeniable right to control migration.[163] This reasoning wrongfully merges the absence of entry permission with detention, making it possible to justify deprivation of liberty solely on that basis.[164] This approach, justifying detention solely on the grounds of migration-status, is what the CJEU diverged from in its jurisprudence. Thus, *Saadi* clarifies that the ECtHR effectively limits the presumption of liberty, a principle central to provisions on deprivation of liberty, in favour of State sovereignty.

Together, these factors from the *Saadi* ruling can explain how the ECtHR contributes to crimmigration. While pre-removal detention is formally an administrative measure, the ECtHR facilitates the power of the State Parties to impose detention pending deportation. By omitting necessity and proportionality tests from its judgments, the Court resort to a more permissive standard under Article 5(1)(f) ECHR compared to detention in other areas. [165] It is clear that the ECtHR treated immigration detention differently from other forms of detention under Article 5 ECHR. As a general rule, deprivation of liberty is imposed as a last resort, after consideration of less restrictive[166] besides being provided by (national) law, detention must also be necessary in individualised cases.[167] As seen above, in *Chahal*, the ECtHR confirmed that for deportation purposes, detention does not have to be necessary for it to be lawful. The risk of absconding or committing an offence need not be proven by the authorities. As such, detainees in a migration

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[161] ibid, para 64.
[162] ibid.
[163] ibid, para 65.
[164] Moreno-Lax (n 151) 181.
[165] Galina Cornelisse, 'Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for its Management?' in Maria J Guia, Robert Koulish and Valsamis Mitsilegas (eds), *Immigration Detention, Risk and Human Rights* (Springer International Publishing 2016) 79.
[166] *Witold Litwa v Poland* App no 26629/95 (ECtHR, 4 April 2000), para. 78 cited by Cornelisse 'Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for its Management? (n 163) 78.
[167] Witold Litwa v Poland App no 26629/95 (ECtHR, 4 April 2000), para. 78 cited by Cornelisse (n 163) 78.

setting receive a lower level of protection [168] their right to liberty than other detainees.[169] This approach is unusual, especially because human rights law prescribes a balancing between individual rights and public interests by conducting a proportionality assessment. This allows the contestation of restrictions to the right to liberty based on suitability, necessity, and the imposition of excessive burden on the detainee. However, as held by the ECtHR, an assessment of the proportionality of a decision to detain an immigrant is not permitted, unlike for other restrictions of ECHR rights, including Article 8(2)[170] on the right to privacy and family life.[171] In this regard, the difference in the level of scrutiny between migration detention and other categories of detention is alluded to in *Saadi*. The ECtHR describes immigration detention as 'necessary adjunct' to the "undeniably sovereign right"[172] of control over territory. This is the foundation of the States' right to control the entry and stay of migrants. The view that territorial sovereignty and integrity are threatened by irregular migration explains the prioritisation of State interests at the expense of the individual rights of migrants. This results in immigration 'exceptionalism', which allows for the loosening of the human rights standards protecting migrants.[173]

Consequently, a dissonance can be observed in which administrative procedures, such as pre-removal detention, acquire a criminal nature in practice. This chapter has outlined key ECtHR case law on pre-removal detention, illustrating how the Court's lenient approach contributes to the development of crimmigration by facilitating the use of migration practices with a punitive character by Contracting Parties. In the next chapter, the respective approaches of the two Courts will be compared to assess the extent of their interaction, alignment, or divergence in the context of pre-removal detention, thus leading to a complete answer to the research question.

5. COMPARISON OF THE COURTS' APPROACHES IN THE CONTEXT OF CRIMMIGRATION

[168] Cornelisse, 'Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for its Management? (n 163) 79.
[169] Cornelisse (n 168) 79.
[170] *Batalov v Lithuania* (n 95).
[171] *Batalov v Lithuania* (n 100).
[172] Saadi (n 99) para 94.
[173] Cornelisse (n 168) 79.

This chapter analyses the interaction and comparison between the two Courts in the field of immigration detention. This is done by identifying and evaluating key points of contact in their respective case law. This will then determine whether the courts contribute to the reinforcement of the criminalisation of the immigration paradigm.

5.1 Judicial Interaction Between the two Courts

This section assesses, in a broader context, whether there is some interaction between the CJEU and the ECtHR in pre-removal detention. Identifying elements of cross-reference—or lack thereof, is helpful for the jurisprudential analysis and for understanding the judicial isolation in this area. While the EU has not yet acceded to the ECHR, there are ways in which the two legal regimes interact and converge.[174] Article 6(3) TEU[175] and 2(3) of the EU Charter of Fundamental Rights[176] confirm that the ECHR guides the development of EU principles of law. This requires that Charter provisions be interpreted in line with corresponding ECHR provisions.[177] Thus, the CJEU takes into account the ECtHR jurisprudence in consideration of human rights protection.[178] However, in relation to the Directive and the area of immigration detention, there is limited interaction between the CJEU and the ECHR. Still, there is a notable link between the Return Directive and international human rights law such as the ECHR, by incorporating ensuing principles into the Directive. Particularly, Recital 22 of the Directive refers to the ECHR in respect to family life and reunification matters.[179] Moreover, the Directive considers international human rights law principles as a benchmark for the EU and MSs to comply with in the implementation of this Directive as expressed most notably in Article 1.[180] Particularly, the Return Directive provides

[174] Andrew Clapham, 'The European Union before the European Court of Human Rights' in Laurence Boisson de Chazournes, Cesare Paolo R. Romano and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers 2002) 73–88.
[175] Consolidated Version of the Treaty on European Union [2016] OJ C 202/13.
[176] Charter of Fundamental Rights of the European Union [2016] OJ C 202/02.
[177] Majcher (n 46) 54.
[178] ibid.
[179] In line with the European Convention for the Protection of Human Rights and Fundamental Freedoms, respect for family life should be a primary consideration of Member States when implementing this Directive
[180] This Directive sets out common standards and procedures ... in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations

for a 'without prejudice' clause (Article 4(1)), which enables the application of the ECHR in cases in which it provides for more advantageous conditions for migrants. As such, the ECHR and its interpretation by the ECtHR can be pinpointed as a 'yardstick' against which the lawful implementation of the Directive is assessed and serves as 'definitional and interpretative guidance' for CJEU and national courts.[181]

Despite these formal links, direct dialogue between the CJEU and the ECtHR on pre-removal detention remains scarce. In fact, the CJEU adopts a more 'EU law-centered argumentative strategy'[182] and thus engages minimally with ECtHR case law. Advocate Generals are more inclined to refer to the ECHR and ECtHR judgements than the CJEU.[183] Such decentralisation of the ECtHR could be explained by the fact that, since the Charter took on primary EU law status, it has become the foundation for EU human rights considerations.[184] Additionally, this reluctance to cite ECtHR judgments could be rooted in a growing desire to develop EU law's autonomy, deciding cases relying primarily on existing EU case law and legislation.[185] This approach results in the development of a self-referential trend, whereby the CJEU refers more frequently to its past judgments related to the Directive rather than to the ECtHR.[186] Indeed, this is observed in the CJEU cases examined in Chapter 3.

5.2. Difference in Approach Between the CJEU and the ECtHR

This section compares the main principles emerging from the discussed rulings to highlight judicial divergence resulting from the established lack of interaction. Such analysis is therefore valuable for understanding the Courts' respective roles in sustaining crimmigration.

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[181] Tamas Molnar, *The Interplay between the EU's Return Acquis and International Law* (Edward Elgar 2021) 101.
[182] Molnar (n 27) 261.
[183] ibid 262.
[184] Joint Communication of Presidents Costa and Skouris (24 January 2011) <curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf> accessed 10 April 2025; Evangelina Tsourdi, 'Alternatives to Immigration Detention in International and EU Law: Control Standards and Judicial Interaction in a Heterarchy' in Madalina Moraru, Galina Cornelisse and Philippe De Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020) 186.
[185] Molnar (n 27) 272.
[186] ibid.

Accordingly, *Kadzoev* lacks any direct reference to the ECtHR. The only (indirect) interaction between the two legal orders is found in the AG Mazák's opinion, where he uses *Chahal* and *Saadi* to draw references for the textual interpretation of the Return Directive. Particularly, the AG refers to *Chahal* in the context of the duration of the detention.[187] However, the Court itself refrains from citing the ECtHR. Instead, by establishing strict time limits on detention and rejecting the ambiguous notion of public order as a ground for detention, the CJEU sets a legal boundary: immigration detention cannot serve broader policy goals, such as dealing with perceived threats to public order. Otherwise, this would insert immigration detention into the criminal law realm by making it quasi-automatic. By clearly delimiting the scope of lawful deprivation of liberty, the CJEU resists contributing to the crimmigration paradigm, which dilutes the lines between criminal and immigration law.

In fact, in *Kadzoev*, the Court confirmed that Article 15 of the Directive is intended to limit the deprivation of liberty of irregular migrants.[188] In that regard, the CJEU aligned with *Chahal* and *Saadi* in observing that pre-removal detention should only be imposed as long as the removal procedures are ongoing and carried out with due diligence.[189] However, the CJEU went beyond ECtHR's requirements[190] by mandating a case-by-case assessment of whether it is likely that the migrant would obstruct or delay return, requiring an assessment of the necessity of the measure to ensure effective removal,[191] and narrowing the grounds for justification.[192] In short, the CJEU arguably made protection more enforceable with its restrictive interpretation of the Directive by setting clear limits on what can amount to lawful detention. This directly resists the development of crimmigration by striking down broad justifications for detention and unnecessary prolongation—elements that align more with criminal deprivation of liberty than administrative measures. As such, this insistence on limiting principles that

[187] Case C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189, View of AG Mazák delivered on 10 November 2009, paras 52-53; ibid 269.
[188] *Kadzoev* (n 52), para 56.
[189] ibid, para 64.
[190] Moreno-Lax (n 151) 198.
[191] *El Dridi* (n 102), para 39.
[192] Valsamis Mitsileglas, 'Immigration Detention, Risk and Human Rights in the Law of the European Union. Lessons from the Returns Directive' in Maria Joao Guia, Robert Koulish and Valsamis Mitsilegas (eds), *Immigration Detention, Risk and Human Rights: Studies on Immigration and Crime* (Springer 2016) 39-40.

constrain executive authorities disincentivises MSs from using detention with a criminal law character as a default, relying on vague grounds for justifications and the absence of procedural safeguards. Accordingly, with its case law, the CJEU bridges the gap created by the Directive, which has resulted in the regular use of detention in return proceedings, despite it not always being necessary or pursuing preventive aims.

This limitation stands in stark contrast to the ECtHR's approach. In *Saadi*, for instance, the ECtHR accepted pre-removal detention as long as it was in good faith and pursued removal-related purposes. More so, the ECtHR highlights that Article 5(1)(f) ECHR does not mandate maximum detention periods,[193] whereas the Directive provides for such periods, and the CJEU has consistently reaffirmed the need for compliance.[194] This stance facilitates the development of crimmigration as a more permissive approach opens the door to justifying unnecessary detention, enabling Contracting Parties to use their wide margin of discretion to implement immigration detention punitively, rather than maintaining its administrative nature.

The Court's resistance to criminalisation of irregular migration is further demonstrated in *El Dridi* and *Mahdi*. In *El Dridi*, there is direct dialogue between the two Courts. Indeed, the CJEU recognised that the time limits set out in Article 15(5) and (6) of the Return Directive aim to reflect both ECtHR case law and the standards laid out in the Council of Europe's 'Twenty Guidelines on forced return' adopted on the 4th of May 2005 by the Committee of Ministers of the Council of Europe.[195] Notably, *El Dridi* is the only case where the CJEU made a direct reference to the ECtHR case law, citing *Saadi*[196] to reiterate that a person subject to a process of deportation should not be detained for an unreasonable period of time, reflecting the ECtHR's narrow test of proportionality discussed in Chapter 3.[197] Nonetheless, the CJEU arguably went further in terms of concrete protections. As mentioned in Chapter 3, while Article 5(1)(f) ECHR allows detention 'with a view to deportation,' it doesn't clearly require that detention be

[193] *J.N. v United Kingdom* App no 37289/12 (ECtHR, 19 May 2016), paras 90-93.
[194] Cornelisse, 'Detention of Foreigners' (n 62) 228; Izabella Majcher, Michael Flynn and Mariette Grange, *Immigration Detention in the European Union: In the Shadow of the "Crisis"* (Springer 2020) 456.
[195] *El Dridi* (n 102), para 43.
[196] ibid.
[197] ibid; Peers and others (n 46) 489.

necessary or proportionate; it merely needs to be connected to removal.[198] The ECtHR's permissive approach has received criticism for enabling unnecessary and potentially excessive deprivation of liberty by giving prominence to States' sovereignty in migration control.[199]

In contrast, the Return Directive explicitly states that detention must be 'as short as possible' and only as long as it is genuinely necessary to ensure effective removal.[200] For example, in *El Dridi*, the Court reinforces necessity and proportionality by demanding that national authorities exhaust all alternative measures before resorting to the most intrusive one. Such an obligation is absent from the jurisprudence of the ECtHR. In fact, from the latter's perspective, detention only becomes unlawful if it's no longer linked to genuine deportation efforts. Nonetheless, for detention to be lawful under Article 5(1)(f) ECHR, it need not be necessary. Accordingly, an obligation to consider less intrusive alternatives does not arise.[201] This aligns with the ECtHR's continued confirmation of State sovereignty in migration control. As a result, this demonstrates ECtHR's substantial deference to Contracting States, which strips migrants of Article 5 ECHR's full protection, as opposed to the CJEU's more restrictive and thus more protective approach.

Furthermore, in *Mahdi*, the CJEU reinforced procedural safeguards and empowered national courts *vis-à-vis* administrative authorities in a way that is lacking from the ECtHR's line of case law.[202] This approach disrupted executive-centred governance of migration detention by enabling judges to monitor decisions to ensure compliance with Article 15 of the Directive, as interpreted by the CJEU.[203] As a result, such stringent control of compliance with necessity, proportionality, availability of alternative measures, and judicial oversight marks a shift away from crimmigration. Embedding a rights-conscious approach into

[198] *Chahal* (n 94), para 112; *Saadi* (n 94), para 64.
[199] Schotel and Vanzke (n 97) 20; Majcher, *The European Union Returns Directive and its Compatibility with International Human Rights Law: Analysis of Return Decision, Entry Ban, Detention, and Removal,* (n 68) 393.
[200] Return Directive (n 7), art 15.
[201] Hatzis (n 87) 31-32.
[202] Galina Cornelisse and Madalina Moraru, 'Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance' (2022) 7(1) European Papers 127, 139 <https://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2022_1_8_Articles_SS1_3_Galina_Cornelisse_Madalina_Moraru_00551.pdf> accessed 1 March 2025.
[203] ibid 142.

national practice by circumscribing State power in the imposition of pre-removal detention through stricter requirements demonstrates the CJEU's rejection of crimmigration and its refusal to accept measures akin to criminal sanctions disguised as administrative practices.

Based on the case law analysed earlier, it is clear that, on the one hand, the general approach of the ECtHR in pre-removal detention defers to the protection of State sovereignty to control migration flows. Evidently, there is dissonance in the practices of the ECtHR: a human rights Court responsible for safeguarding human rights and limiting interferences with said rights allows *unnecessary* deprivation of liberty.[204] On the other hand, based on the landmark CJEU cases, the EU Court seems more reluctant to defer to national sovereignty, instead propelling a more rights-based approach. Moreover, the CJEU reinforces a strict proportionality requirement, stating that detention must be individually assessed and justified only if necessary to prevent the person from evading deportation altogether. This nuanced, rights-conscious approach stands in notable contrast to the ECtHR's more State-centred reasoning stemming from *Chahal* and reinforced in *Saadi*, which accepts prolonged detention, merely because the deportation procedure was carried out with due diligence.[205] Thus, the CJEU's deviation from the ECtHR by demanding that detention be imposed only when necessary and when less intrusive alternatives are inadequate, challenges excessive reliance on detention by placing such limits on MS. Indeed, rulings such as *Kadzoev*, *El Dridi* and *Mahdi* strengthen control over detention imposed by executive authorities.[206] Consequently, these cases directly address the problematic legislative gaps left by the Directive. Such effective responses from the CJEU prevents MSs from bypassing procedural safeguards, which would otherwise facilitate criminal law to sneakily infiltrate a traditionally administrative practice.

Crucially, this strengthening of the detention standards in MSs is observed through the judicial interactions between the CJEU and domestic courts.[207] Taken

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[204] Cornelisse, 'Detention of Foreigners' (n 62) 227.
[205] Cornelisse, 'Immigration Detention: An Instrument in the Fight Against Illegal Immigration or a Tool for its Management?' (n 163) 85.
[206] Cornelisse, 'Detention of Foreigners' (n 62) 229.
[207] Slovenian Administrative Court judgment of 6 March 2015 n. IU 392/2015, cited by Cornelisse and Moraru (n 197) 140. Slovenian Administrative Court cited *Mahdi* to require administrative authorities to consider other less intrusive alternative measures to detention, providing for a step-by-step checklist on how detention should be imposed. Additionally, Belgian courts deem restrictive measures unlawful if alternatives measures were not considered.

together, the cases rendered by the CJEU on one hand, and the ECtHR on the other, reveal distinct judicial approaches. While the ECtHR emphasises territorial sovereignty, accepting immigration detention as a tool for border control and migration management, the CJEU constructs a rights-based framework. Through prioritisation of proportionality, necessity, procedural safeguards, and distancing itself from deferential approaches, the CJEU blocks MSs from overlapping criminal and immigration law. Such judicial divergence creates interpretative tensions, resulting in a weakened common European standard for the protection of irregular migrants. As a result, crimmigraton dynamics are strained. This is so because one Court seemingly rejects its practical prominence enabled by the legislative vagueness of the Return Directive and the other sets its human rights mandate aside, thereby reinforcing crimmigration with its *laissez-faire* practice that fails to enforce strict requirements for immigration detention.

5.3. Complementarity and Contribution to Crimmigration

This last subsection draws on the findings so far to examine how the two Courts contribute to or resist the transition towards crimmigration. This assessment leads to a final discussion on how interpretative incompatibility specifically between these two Courts has a deteriorating effect on human standards in the EU.

Up to this point, this thesis has drawn conclusions that the two legal orders do not converge or 'follow each other' on matters of pre-removal detention, at least not in the landmark cases of the two Courts selected for this research. The absence of jurisprudential complementarity on the matter results in conflicting interpretations of what constitutes lawful immigration detention. This 'clash' undermines rights protection within the European legal order— an effect contrary to the enhanced protection of migrants that interpretative alignment could have produced. Particularly, the absence of interpretative parallels between the CJEU's rights-based approach and the ECtHR's State sovereignty-centred framework results in fragmented legal orders that attach different consequences to immigration detention. Thus, conflicting crimmigration dynamics are created: one Court contributing to its development because of failure to impose strict safeguards, and the other receding its effects by restricting circumstances in which detention is justified.

To support the conclusion that the approach of the CJEU represents an effort to divert from crimmigration, Cornelisse describes the protective function of the Court as 'consitutionalisation' of immigration detention.[208] This trend is characterised by higher constitutional protection for detainees, at least to a level not yet reached by the ECtHR.[209] In line with what has been discussed above regarding the lack of interaction between the two Courts, it is notable that when their application of human rights diverges, it results in inconsistencies that fragment protection standards for immigration detainees. The consistent alignment between the two Courts could result in enhanced protection for pre-removal detainees.[210] For example, the approach of the ECtHR, largely negating the necessity test for immigration detention cannot be followed by EU MS. Their failure to consider and elaborate on the less coercive measures deemed to be less efficient violates EU law, as well as Article 5 ECHR.[211] The latter requires deprivation of liberty in line with national (and thus EU) law. Crucially and in stark contrast to the ECtHR, by imposing proportionality and necessity tests assessed on an individual basis, the CJEU shows its refusal to follow the ECtHR's consistent emphasis on territorial sovereignty.[212] Additionally, in response to the legislative ambiguity and gaps for which the Directive has been condemned, the CJEU has, through its case law, sought to remedy these shortcomings by constructing a framework of judicially enforceable human rights guarantees that 'limit the space for unchecked exercise of administrative power.'[213]

Illustrative of CJEU's contribution to the decriminalisation of irregular detention is its 'vertical judicial interaction' with national courts.[214] The rulings of the CJEU limit MSs in their use of criminal law as a management tool for irregular migration. For example, in *El Dridi*, the CJEU confirmed that the gradual system of detention, starting from the least to the most intrusive measure, reconfigures the Return Directive system by preventing MSs from circumventing procedural steps while simultaneously imposing criminal law measures.[215] Thus, if the

[208] Cornelisse, 'Detention of Foreigners' (n 62) 223.
[209]ibid.
[210] Cornelisse, 'Detention and Transnational Law in the European Union: Constitutional Protection between Complementarity and Inconsistency' (n 32) 232.
[211] *Ammur v France* App no 19776/92 (ECtHR, 25 June 1996), para 50.
[212] ibid 227.
[213] Cornelisse and Moraru (n 197) 148.
[214] ibid 134.
[215] ibid 135.

interpretations of the CJEU and the ECtHR were complementary, this would strengthen human rights protection.[216] However, the tension revealed in the judicial dynamics in the field of immigration detention is too pronounced to infer stronger safeguards. By analysing landmark cases, this research shows that the two Courts have conflicting interpretations of what amounts to lawful detention. Indeed, the rather narrow protection offered by the ECtHR is evidenced by the absence of necessity, proportionality, and judicial control in its assessments. In contrast, the CJEU adopts a more robust and comprehensive review, narrowing MSs' leeway in migration detention. As a result, in light of the CJEU case law, EU law has more teeth in constitutionalising guarantees of protection of migration detainees than the ECHR.[217] The ECtHR contributes to the acquiescence in the use of punitive elements within immigration detention, thereby supporting its function as a migration management tool. In contrast, the EU Court resists conflating administrative and criminal processes by closing legislative gaps in the Directive. This chapter has established that there is minimal interaction between the two Courts regarding pre-removal detention. Despite this lack of direct communication, this research provides an analytical framework that highlights legal tensions and divergences in landmark case law. In short, the CJEU provides a higher threshold for justifying detention, limiting MSs' discretion, while the ECtHR's scope of protection is narrower and deferential to Contracting States. This comparison supports the assertion that the CJEU's approach shows resistance to the drift towards crimmigration by limiting MSs' ability to use criminal law practices in traditionally administrative procedures, while the ECtHR's approach facilitates the criminalisation of immigration detention practices.

6. The Recent Agreement on the Return Regulation: A path reinforcing crimmigration?

[216] Madalina Moraru and Géraldine Renaudiere, 'Electronic Journal on Judicial Interaction and the EU Return Policy, Second Edition: Articles 12 to 14 of the Return Directive 2008/115' (2016) European University Institute Migration Policy Centre, Robert Schuman Centre for Advanced Studies 7, 51 < https://cadmus.eui.eu/bitstream/handle/1814/43924/MPC_REDIAL_2016_04.pdf?sequence=1 > accessed 14 January 2025.

[217] Cornelisse, 'Detention of Foreigners' (n 62) 223.

Proposed in 2025 to replace the 2008 Return Directive,[218] the new Return Regulation accompanies the new Pact on Migration and Asylum, applicable as of June 2026. On June 1st 2026, the European Parliament and Council reached an agreement on the final text of the Regulation.[219] The new regulation aims at reinforcing a more unified approach to returns, resulting in a Common European System for Returns. The new Regulation comes as a response to the inefficiency of the return system in force under the current Directive. Indeed, in 2025, only 20% of the return decisions were enforced.[220] The Return Regulation aims at making returns more expedient and efficient by introducing a mutual trust mechanism: the European Return Order, which will enable an EU-wide enforcement of return.[221]

Related to this contribution, administrative detention is expanded on grounds and duration, raising questions of fundamental rights for migrants. In particular, the provisions on detention diverge from the CJEU case law analysed in this text, thus aligning more with MS practice under the Return Directive regime. Consequently, this perpetuates the criticisms regarding the predecessor of the Regulation.

First, regulated under Articles 29-32 of the proposed Regulation, the grounds for pre-removal detention are broadened. Although detention remains a measure justifiable when the return procedure is in the works,[222] the grounds of detention are framed broadly, giving significant leeway to national authorities. Compared to Article 15(1) of the Directive, more grounds for detention have been introduced, including a threat to public order and security,[223] where verification of

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[218] Proposal for a Regulation of the European Parliament and of the Council establishing a common system for the return of third-country nationals staying illegally in the Union, and repealing Directive 2008/115/EC of the European Parliament and the Council, Council Directive 2001/40/EC and Council Decision 2004/191/EC

[219] European Commission (n 29).

[220] Paolo de Stefani, 'Towards the New Return Regulation: More Obligations, Less, Rights, and Pressures on Third States to Support EU Return Policies. An Analysis of the Return Regulation as Adopted by the European Parliament on March 26, 2026' (*Italian Yearbook of Human Rights*, 17 April 2026) <unipd-centrodirittiumani.it/en/topics/towards-the-new-return-regulation-more-obligations-less-rights-and-pressures-on-third-states-to-support-eu-return-policies-an-analysis-of-the-return-regulation-as-adopted-by-the-european-parliament-on-march-26-2026> accessed 13 June 2026; European Commission Representation in Cyprus, 'Commission proposes new common European system for returns' (11 March 2025) <https://cyprus.representation.ec.europa.eu/news/commission-proposes-new-common-european-system-returns-2025-03-11_en > accessed 13 June 2026

[221] Proposal of the Return Regulation (n 213), Article 9(3).

[222] ibid, art 29(2).

[223] ibid, art 16.

the identity or nationality is required, failure to cooperate with authorities, and non-compliance with alternative measures to detention under Article 31.[224] Crucially, Article 29 of the proposal includes a general ground, allowing national authorities to detain where they deem it necessary to guarantee an effective return. This suggests that although the detention grounds are worded as exhaustive, in practice, this will not be the case.[225] The wording of the proposal gives MSs an even more explicit leeway to define the concepts justifying detention.

In particular, the risk of absconding is understood broadly by the Regulation.[226] The list of indicators based on objective criteria presuming the risk includes a person entering or moving within the EU irregularly, attempting to do so, not complying with restrictive measures under Article 23, re-entering despite an entry ban, or resisting removal. Other indicators include the absence of a fixed address or permanent location, behaviour indicating unwillingness to cooperate with the return process, the likelihood of being untraceable, non-cooperation with the authorities, or the use of false or absence of travel and identity documents.[227] Providing for more indicators to the list in national law is also allowed by the Regulation, so long as they ensure a timely and effective return.[228] Although not expressly codified in the Return Directive, this aligns with the already established practice of MSs under the previous regime, facilitated by the broad and indeterminate provisions.

Second, the "last resort" requirement for detention from the Directive is not expressly codified in the Regulation. Instead, Article 31 provides for less coercive alternatives,[229] which in the proposed framework act as *alternative forms* of detention. Under Article 32(2), detention ceases when the conditions for detention no longer exist. Nevertheless, this does not preclude the application of the measures under Article 31. As a result, the 'alternatives' are instead additional to detention, because they can be applied regardless of whether grounds for

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[224] ibid, art 29 (3).
[225] de Stefani (n 215).
[226] Proposal of the Return Regulation (n 213), Article 30.
[227] ibid, art 30 (2).
[228] de Stefani (n 215).
[229] The obligation to regularly report to competent authorities with a frequency of up to 3 days, based on the individual circumstances; the obligation to surrender identity or travel documents to the competent authorities; the obligation to reside in a place designated by competent authorities; deposit of an adequate financial guarantee; the use of electronic monitoring, including guarantees and procedures provided for under national law.

detention exist. Article 32 does not provide limits for the duration of these measures, opening the possibility of their application extending past the maximum detention period. As such, these measures could be used as a substitute to detention once it is expired pending the removal of the migrant. In practice, they may be applied as an extension of detention, used as a tool to manage migration. [230] This is particularly problematic for the safeguards against the deprivation of liberty, especially for non-removable migrant, subject to return decisions that cannot be enforced by the MS.[231]

Third, regarding duration, the general rule of allowing detention so long as it is necessary to carry out the return is maintained. However, the proposal allows for 12-month detention, with the possibility of another 12-month extension by reason of non-cooperation, delays incurred because of the country of destination, or where other circumstances defined by national law are identified.[232] This legislative shift deviates from *Kadzoev*, where the limit for detention was 18 months, with the CJEU confirming that this limit was 'hard,' precluding extension based on contingencies that are now codified. The 24-month period can be extended indefinitely for people deemed a threat to public security.[233] They can also be detained in prisons rather than designated detention centers,[234] albeit separately from 'ordinary prisoner.' This addition blurs the distinction between administrative migration detention and criminal law enforcement. Such an extension resembles a criminal law sanction imposed without conviction instead of a migration-management tool. Clearly, this overlap contributes to the reinforcement of crimmigration.

Clearly, the new Regulation would allow for systematic detention of migrants, favouring efficiency of the measures at the detriment of fundamental rights. Indeed, the expanded possibilities to justify and extend detention constitutionalises detention, furthering it from the requirement of being a last resort measure and furthering it from its administrative nature. The overlap with

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[230] Vittoria Patergnan, 'Alternatives to detention under the Return Regulation Proposal: The illusion of freedom' (*European Law Blog,* 9 September 2025) < doi.org/10.21428/9885764c.f2299f18> accessed 9 June 2026.
[231] ibid.
[232] ibid 32(3).
[233] ibid Article 16 (3) (d).
[234] Majcher, 'The New EU "Common System for Returns" under the Return Regulation: Evidence-lacking Lawmaking and Human Rights Concerns' (n 23).

criminal law measures remains and is even exacerbated, thus raising questions as to whether the EU return regime will deviate from crimmigration practices.

7. Conclusion

This research was guided by the following research question: How do the CJEU and ECtHR, in their interpretations of, respectively, Article 15 of the Return Directive and Article 5(1)(f) ECHR, interact in a way that reflects a more punitive approach to pre-removal detention (rather than its intended administrative character)?

This thesis first outlined the legislative gaps of Article 15 of the Return Directive. These legislative *lacunae* open doors for MSs to use immigration detention in punitive ways, resulting in measures that resemble criminal law sanctions. This incorporation of criminal law elements into what is traditionally an administrative measure reflects a growing trend towards the criminalisation of migration. This transition, known as crimmigration, is enabled by the Directive's legislative ambiguity, which grants MSs broad discretionary powers. Then, this research turned to the general immigration detention regime under Article 5(1)(f) ECHR, highlighting its structural weakness: unlike other grounds for detention under Article 5 ECHR, it does not require necessity or proportionality in a broad sense. This signals reinforcement of State sovereignty in this field and weakening of safeguards for irregular migrants.

With this legislative framework in mind, the thesis addressed leading case law from the CJEU and the ECtHR on pre-removal detention, thereby setting up the comparative analysis which was the ultimate goal of this research. Based on these landmark rulings, this research highlights the main differences in judicial approaches. On the one hand, the CJEU, through *Kadzoev*, *El Dridi* and *Mahdi*, develops a more robust framework for assessing the lawfulness of detention. Indeed, it imposes strict temporal limits on detention, narrows the scope of the grounds justifying detention, requires consideration of less intrusive alternatives, and demands judicial oversight, thus catering to the problematic legislative aspects of the Directive. These rulings collectively illustrate the CJEU's efforts to restrict overreliance on immigration detention, thereby countering the drift towards crimmigration. On the other hand, the ECtHR in *Chahal* and *Saadi* explicitly prioritised State sovereignty in migration management. This is particularly puzzling given the human rights mandate of the ECtHR, which dictates that the Court safeguard against unjustified limitation of ECHR rights. Instead, the jurisprudence in pre-removal detention indicates a clashing approach with the acceptance of arbitrary and prolonged deprivation of liberty. Moreover, it consistently affirms that authorities need not demonstrate the necessity of detention for it to be lawful under the ECHR and imposes a narrow assessment of proportionality. Additionally, it enables prolonged detention so long as removal procedures are ongoing and carried out with due diligence. This lenient and State-deferential approach results in wider discretion to Contracting States, facilitating the use of punitive measures under the guise of administrative law, thereby allowing the persistence of crimmigration. Finally, the research compared these approaches to assess each Court's role in allowing crimmigration to develop in European states.

The answer to this research question is twofold. First, direct interaction between the two courts in jurisprudence relating to pre-removal detention is limited. The CJEU scarcely refers to the jurisprudence of the ECtHR. However, this research still assesses the approaches of the two Courts and identifies distinct and clashing requirements for lawful detention. Second, the Courts adopt conflicting approaches: the CJEU adopts a more protective, comprehensive approach characterised by more stringent procedural controls and safeguards. Conversely, the ECtHR takes a more State-deferential and lenient approach, resulting in wide State discretion. Based on this analysis, the thesis concludes that the CJEU's jurisprudence demonstrates a more significant effort to divert from crimmigration by making the justification of detention more arduous on MSs and subject to more procedural constraints. Conversely, the ECtHR prioritises State sovereignty and omits limiting principles from its jurisprudence.

Importantly, this diverging case law results in legal inconsistencies within the European human rights framework, contributing to the fragmentation of human rights standards and, accordingly, to the persistence of crimmigration. More specifically, the practical implications of this divergence result in fragmentation of the human rights standards due to the incoherences between EU and ECHR standards. Not only does this create confusion in terms of implementation and uncertainty for national courts, but importantly, it weakens human rights standards as a result of different levels of protection depending on which approach dominates at the national level. The literature on judicial interaction suggests that the road to stronger safeguards for irregular migrants lies in the consistency between the jurisprudence of the two Courts, thereby strengthening the obligations that EU MSs must observe. Although the impact of the pre-removal detention jurisprudence on the national level was beyond the scope of this research, some national cases were included to exemplify that the CJEU's jurisprudence has had a more significant effect on national detention reforms or practices. An identified gap in the literature concerns the discussion on ECtHR case law and its impact on national pre-removal detention regimes. In this regard, the effect of this Court on national systems or, otherwise, the reason for the scarcity of concrete domestic instances reflecting the ECtHR's approach, presents a valuable research avenue.

Court-Capturing Strategies: The Constitutional Judicial Review Under Authoritarian-leaning Governments

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1. INTRODUCTION

1.1. PROBLEM STATEMENT

In democratic systems, constitutional courts serve as guardians of the constitutional order. Through judicial review, they examine the compatibility of the legislation with the constitution and are often empowered to declare non-compliant legislation void, thereby preserving democratic principles such as the Rule of Law.

However, a paradox arises when democratically elected authoritarian-leaning governments implement reforms that undermine the democratic system. By overhauling the judiciary and eroding the separation of powers, they weaken the system of checks and balances, creating a regime in which the government has significant, if not complete, influence on the highest courts, blatantly compromising judicial independence.

1.2. JUDICIAL INDEPENDENCE

Judicial independence can be understood as the freedom of judges to establish the outcome of legal cases in accordance with the substance of the law, free from external influences such as political beliefs or social pressures.[2] To analyse how this independence is challenged, the paper will consider changes to the procedure of judicial appointments and disciplinary measures. In addition, it will distinguish between reforms aimed at the political capture of the courts and reforms directed at limiting the institutional power of those Courts.

This analysis centres on court-capturing, which is an influence of the executive or legislative branch over the judiciary that leads to the inhibition of its independence. It also diminishes the Court's effectiveness to act as a "check" on the other branches of the State's power.[3] While "court-capturing" remains the primary strategy employed, "court-curbing" and "court instrumentalising" also require consideration. In addition to the primary court-capturing mechanisms

[2] The definition originated during the development of the American judicial system in *Bradley v Fisher,* 80 U.S. (13 Wall.) 335, pp. 347 (1871).
[3] Margaret L. Satterthwaite, Katarina Sydow and Ben Polk, 'Unchecking Power and Capturing Courts: How Autocractization Erodes Independent Judicial Systems' (2024) 75(6) Rutgers U.L Rev. 1147, pp. 1151, 1158-1164 <https://access-heinonline-com.mu.idm.oclc.org/HOL/Page?handle=hein.journals/rutlr76&id=1215&collection=usjournals&index=> accessed 10 September 2025.

being analysed, Section Two analyses those secondary strategies, which further promote politicisation of the Courts and limit their institutional power. Court-curbing involves reducing the Court's power, through, e.g., allowing the legislative branch to override judicial decisions, while court instrumentalisation refers to undue political pressure, during which the judges posing a challenge to the governmental agenda are punished and face disciplinary actions.[4]

1.3. Research Question

To analyse mechanisms of court-capturing, this study examines two jurisdictions at the time of governance of authoritarian-leaning coalitions to answer the following research question: *To what extent is it possible to identify a pattern in the court-capturing strategies of authoritarian-leaning governments when comparing the judicial reforms implemented in the Israeli Supreme Court and the Polish Constitutional Tribunal?*

This paper assesses the Polish Constitutional Tribunal during the governing coalition *Zjednoczona Prawica* (2015-2023) and the Israeli Supreme Court at the time of the 37th Government (2022-). Both judicial bodies will be referred to as "Constitutional Courts", despite their different competences. The Polish Constitutional Tribunal is a body whose mandate is limited to constitutional review, whereas the Israeli Supreme Court is the highest instance court in the State for all legal matters, including constitutional review.

These jurisdictions are comparable as they are characterised by the rule of authoritarian-leaning governments that introduced reforms undermining judicial independence. Yet, this comparison is unique as it departs from well-established comparative pairings in the existing literature, such as Poland and Hungary, by adding novel cross-regional perspectives (Central Europe v. Middle East) and contrasting EU and non-EU States. Therefore, the examined jurisdictions have been deliberately chosen to create a test of the general nature of the court-capturing strategies. The paper presents States with diverging cross-regional and supranational positions, adding a dimension of comparison that previous pairings lack, namely, the possibility of examining whether the strategies employed could be shaped by the political culture of a certain region or by EU-driven Rule of Law

[4] Satterthwaite, Sydow and Polk (n 3) pp. 1164-1172.

pressures, or whether, notwithstanding those positions, governments utilise analogous strategies.

Moreover, comparing these two States will test whether the strategies employed are fundamentally similar despite key differences in state characteristics, or whether they are adapted to a specific institutional context – a bicameral, civil-law system embodied by Poland, or a unicameral, mixed jurisdiction with strong common-law influences represented in Israel.

1.4. Significance and Aim

The aim of identifying a pattern is to explore whether a general model of judicial capture by authoritarian-leaning governments exists. The generality of the model is justified as it will be derived from a comparative analysis whose scope covers distinct regional, political, legal and supranational contexts. The paper argues that if a model exists, it reflects a broader pattern of how authoritarian-leaning governments seek to control the Courts, rather than expressing a narrow, context-specific phenomenon. Nonetheless, it must be noted that the limitation of such a model is a small sample size, as it is based on two case studies. While further comparative research might be required to confirm the general nature of the model established, this paper will attempt to provide a strong initial basis.

Such a model could be used to identify actions detrimental to the democratic order and to develop self-defence recommendations within the framework of "militant democracy", a notion developed by Karl Loewenstein in 1937.[5] This theory entails that democratic systems must implement pre-emptive measures that exceptionally restrict certain rights, such as rights of anti-democratic parties, to prevent such parties from seizing power and eroding the democratic order and the Rule of Law. In the context of the model, the Courts could become key institutions in implementing militant-democratic self-preservation.

1.5. Methodology and Structural Outline

First, a legal-doctrinal methodology will be employed to analyse the legal framework governing Constitutional Courts before and after reforms. It will be

[5] Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) The American Political Science Review, pp. 417-432, <https://doi-org.mu.idm.oclc.org/10.2307/1948164> accessed 22 May 2026.

done by relying on primary sources, such as legislation on the Polish Act on the Constitutional Tribunal and the Israeli Basic Laws. In addition, secondary sources, such as academic journals, will be used for in-depth analysis of legal consequences. Additionally, a comparative methodology will be used to discern a pattern in court-capturing strategies. This methodology is particularly suited to the research question posed, as identifying the pattern of court-capture requires a detailed comparative analysis of the similarities and differences between those States' reforms.

2. Judicial Reforms

2.1. Poland

2.1.1. Background

The judicial landscape in Poland started to change in 2015, when the parliamentary elections were won with an absolute majority by the party-list of *Prawo i Sprawiedliwość* (PiS, *Law and Justice*), allowing for sole governance in the State. This, along with the election of the PiS-affiliated President Andrzej Duda, allowed the party to gain complete influence over the legislative and executive branches in the same year.[6] A series of reforms were subsequently introduced, in particular those targeting the Constitutional Tribunal (CT), seeking to extend that influence to the judicial branch as well.

In the years 2015 to 2023, during the period of governance of PiS, the Polish government was described as illiberal with democratic backsliding tendencies.[7] This was because of not only reforms that undermined the independence of the judiciary, but also the efforts to control the media outlets, creating pro-government content on national television, or replacing the leadership of the State-owned companies with party loyalists.[8]

2.1.2. Reforming Judicial Appointments and Paralysing the Court

[6] Anna Grzymala-Busse, 'Poland's Path to Illiberalism' (2018) 117(797) Current History 96 <www.jstor.org/stable/48614331> accessed 10 September 2025.
[7] Wojciech Przybylski, 'Explaining Eastern Europe: Can Poland's Backsliding Be Stopped?' (2018) 29(3) Journal of Democracy 52 <https://muse.jhu.edu/article/698917> accessed 31 October 2025.
[8] ibid pp. 59-61.

One of the cornerstone strategies of court-capturing is the manipulation of the sphere of the court's composition. It can relate to either influencing the procedure of appointing the judges, or to the expansion of the number of existing judges, especially when new vacancies are filled by those who are loyal to the government.[9] Such manipulation often leads to the politicisation of the Court. In the reforms of the CT, both court-capturing strategies have been used.

The crisis in the CT began in October of 2015, when PiS refused to recognise the judicial nominations of the judges of the CT that had already been made during the governance of their predecessors. During the crisis, the judicial appointment of CT judges was ruled by Section Three of the Act of 25 June 2015 of the Constitutional Tribunal of Poland,[10] as well as Art. 194(1) of the Constitution. The judges were to be elected by the lower chamber of the Parliament (*Sejm*) from proposed candidates for a term of nine years. The previous parliament chose five new judges just before the parliamentary elections. However, at that time, only three positions were vacant, as the next two were to become vacant on the first day of the new parliament's term. In the judgment of December 2015, [11] the CT ruled that such an appointment was constitutional only in the case of three judges elected, with the other two positions being unconstitutionally nominated.[12]

Exploiting the ongoing constitutional uncertainty, PiS issued a decision that marked the initial move towards court-capturing the CT. The new parliament, in November of 2015, adopted a resolution which declared all five judges to be unlawfully appointed, notwithstanding the fact that three of them were, in fact, correctly nominated. In December of 2015, five new judges, proposed by PiS under Art. 19(1) of the Act of 25 June 2015 of the Constitutional Tribunal of Poland, were appointed. Through implementing such a resolution, not only did the government pack the CT with the loyal judges, but it also elected three judges for seats which had already been filled. The situation gave rise to the existence of the

[9] Satterthwaite, Sydow and Polk (n 3) pp. 1159-1161.
[10] The Act of 25 June 2015 of the Constitutional Tribunal of Poland, (*Ustawa z dnia 25 czerwca 2015 r. o Trybunale Konstytucyjnym)*, DzU 2015 poz 1064.
[11] K 34/15.
[12] Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal to a Governmental Enabler' (2018) 11(2) HJLR 63, pp. 65-67 <www.researchgate.net/publication/325744703_Polish_Constitutional_Tribunal_Under_PiS_From_an_Activist_Court_to_a_Paralysed_Tribunal_to_a_Governmental_Enabler> accessed 21 September 2025.

so-called “doubled judges” or “quasi-judges”: government-appointed judges who claimed seats already occupied by lawfully appointed judges. It is critical to note that these appointments could not have been conducted without coordinated actions of the two-headed executive — the Government and the President. Duda swore in the new judges without undue delay, irrespective of the pending judgment of the CT on the constitutionality of the October 2015 appointments. Sadurski argues that this precedent added a non-existent presidential veto to the Constitution regarding the election of the CT judges.[13] The 2015 crisis in the appointment of the CT judges effectively undermined the separation of powers in Poland as it facilitated political interference in the composition of the Court.

Shortly after the swearing in of the new judges, the parliament amended the Act of the CT of Poland on 22nd December 2015.[14] A mandatory quorum was raised to 13 judges, compared to nine that was set by the previous provision. The decisions were to be made by a two-thirds majority, contrary to the simple majority laid down in Art. 190 (5) of the Constitution. Those changes were largely made to enable the inclusion of the five newly elected judges in the decision-making process. However, as reported by the Venice Commission, they could also raise the possibility of paralysing the court, making the Tribunal ineffective in issuing judgments and declaring the laws unconstitutional.[15] As a result, this amendment was significant as it decreased the Court’s ability to act as a constitutional check.

Consequently, it is argued by Sadurski that the Court was mainly aimed at becoming a helper of the majoritarian government. In his view, PiS did not use widespread court-curbing strategies which would undermine the competences and powers of the CT, since this could be proven to be counter-productive.[16] Court-capturing of the CT was an essential step in further facilitating reforms that aimed to subordinate the judicial branch to the government, which consequently undermined the independence of the judiciary and the separation of powers. It also allowed for passing controversial bills that, in a healthy and functioning

[13] Sadurski (n 12).
[14] The Act of 22 December 2015 amending the Constitutional Tribunal Act, (*Ustawa z dnia 22 grudnia 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym)*, DzU. 2015 poz 2217.
[15] Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland [2016] CDL-REF (2016)009, paras. 67-79 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)009-e> accessed 31 October 2025.
[16] Sadurski (n 12) p. 82.

democracy, would have been found unconstitutional by the Court.[17] This view was further affirmed by Koncewicz, who pointed out that the issue of the adoption of unconstitutional bills by the government ceases to exist when there is no judicial body that would enforce constitutional principles to counter them. He further argued that the separation of powers, enshrined in Art. 10 of the Polish Constitution, as well as the independent judiciary laid down in Art. 173, were violated.[18]

2.1.3. Disciplinary Measures

Parallel to court-capturing, the Polish government followed the strategy of court instrumentalisation, which targeted the judges who posed challenges to the government, which ultimately sought to politicise the Court.

In amendments to the Act of the Constitutional Tribunal proposed by PiS on the 22nd of December 2015, greater powers were granted to the executive branch to hold disciplinary proceedings against the judges of the CT. Before the reform, the disciplinary proceedings were held internally by the President of the CT.[19] After the reform, pursuant to Art. 28a, the President of Poland and the Ministry of Justice could invoke disciplinary proceedings. This gave PiS a way of putting pressure on the judiciary branch. Yet, as Sadurski argues, the CT, since the 2015 crisis, has been acting as a "government enabler" that is no longer independent and is almost certainly unlikely to adjudicate against the political will of the government.[20] Pach also described the Tribunal as a "quasi-party" body[21]. This explains why the so-called "Muzzle Law" (2020) established new types of disciplinary torts for judges of the Supreme and lower courts that, contrary to the CT, were not under the full control of the PiS. Those torts raised the liability of judges for "actions questioning the existence of the professional relation to the

[17] One of the CT's controversial decisions was K 12/18 on Act on National Council of Judiciary (*Krajowa Rada Sądownictwa*).
[18] Tomasz Koncewicz, 'Farewell to the Separation of Powers – On the Judicial Purge and the Capture in the Heart of Europe' (*Verfassungsblog,* 19 July 2017*)* < https://verfassungsblog.de/farewell-to-the-separation-of-powers-on-the-judicial-purge-and-the-capture-in-the-heart-of-europe/ > accessed 31 October 2025.
[19] The Act of 25 June 2015 of the Constitutional Tribunal of Poland, (*Ustawa z dnia 25 czerwca 2015 r. o Trybunale Konstytucyjnym),* DzU 2015 poz 1064, Art.29.
[20] Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) ch. 4-5.
[21] Maciej Pach, *Polish Constitutional Law* (Wolters Kluwer 2024) (*Polskie Prawo Konstytucyjne*) pp. 435-438.

judge" or "effectiveness of the appointment of the judge".[22] Changes to disciplinary procedures thus further sabotaged the separation of powers by putting political pressure on the independent figure of the judge.

Ultimately, the events after October 2015 show that PiS has employed a court-capturing strategy that exploited the ongoing constitutional crisis and led to the appointment of new CT judges, who were loyal to the government. The government further amended the CT's decision-making process in order to include the newly appointed judges in the procedure and potentially paralyse the Court. Lastly, the Polish government has introduced a court-curbing strategy by changing the procedure of disciplinary proceedings, therefore putting political pressure on judges.

2.2. ISRAEL

2.2.1. Background

The 37th Government of Israel was formed in December 2022. In the November elections, the right-wing and populist Likud party emerged as the biggest faction in the Israeli Parliament (*Knesset*) but did not win an outright majority.[23] Consequently, it formed a coalition with other far-right factions, such as Religious Zionism, and several ultra-orthodox parties.[24]

This coalition, described as "radical" government by Asseburg and Lintl,[25] exhibited "anti-democratic tendencies" through targeting the critical media,[26] reducing the checks on the government, and subordinating the State's apparatus. It has not been different with the judicial branch, which was targeted in 2023 by

[22] Aleksandra Kustra-Rogatka, 'The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts' (2023) 19 EuConst 25, p. 49 <www.cambridge.org/core/journals/european-constitutional-law-review/article/hypocrisy-of-authoritarian-populism-in-poland-between-the-facade-rhetoric-of-political-constitutionalism-and-the-actual-abuse-of-apex-courts/F35B51886CCD9C3A414B37A47FB6B3A5> accessed 31 October 2025.
[23] Assaf Shapira, 'Political Parties and Democracy: The Israeli Case' in Thomas Poguntke and Wilhelm Hofmeister (eds), *Political Parties and Crisis of Democracy Organization, Resilience and Reform* (Oxford University Press 2024) pp. 271-274 <https://doi.org/10.1093/oso/9780198888734.001.0001> accessed 8 November 2025.
[24] ibid p. 280.
[25] Muriel Asseburg and Peter Lintl, 'Israel's Radical Government' (Stiftung Wissenschaft und Politik (SWP), No.18 April 2025) 1 <www.swp-berlin.org/10.18449/2025C18/> accessed 28 September 2025.
[26] Shapira (n 23) p. 280.

the Justice Minister, Yariv Levin, with a legislative package aimed at institutional overhaul. The Supreme Court (SC), the highest instance court competent for constitutional judicial review, was particularly affected.[27] Moreover, Israel's unitary system lacks alternative institutional counterweights to executive power, leaving the judiciary as the primary oversight of the government. Consequently, undermining judicial independence under these circumstances is a greater threat to democracy than it is in other States.[28]

2.2.2. Changes to the Composition of the Judicial Selection Committee

One of the main court-capturing strategies introduced by Levin's legislative package was amending the composition of the Judicial Selection Committee that nominates the Supreme Court's judges.

Before the proposed reform, the Committee was composed of three Supreme Court judges, two Israeli Bar Association members, two Knesset members, and two Ministers.[29] Decisions by a super-majority of seven to nine aimed to ensure that none of the branches controlled the nomination process, as members from different branches, for example, from the judiciary and parliament, had to agree. The proposed amendment aimed to shift the choice of the nominations solely to the executive. According to the government, the rationale of this amendment was to increase the representation of democratically elected members.[30] Yet, Castillo-Ortiz and Roznai argue that due to the weak system of checks and balances in Israel, the real aim was to capture the judiciary and grant the government "almost absolute powers".[31]

However, the changes to the composition of the Judicial Selection Committee did not become law immediately. Their controversial nature forced the

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[27] Shapira (n 23) p. 280; Asseburg and Lintl (n 25) pp. 1-4.
[28] Yaniv Roznai and Amichai Cohen, 'Populist Constitutionalism and the Judicial Overhaul in Israel' (2023) 56(3) Israel Law Review 502, pp. 509-512 <www.cambridge.org/core/journals/israel-law-review/article/populist-constitutionalism-and-the-judicial-overhaul-in-israel/604758F6B3366CE6F8C100E1B386E6CA> accessed 16 September 2025.
[29] Basic Law of Israel The Judiciary 1984, Art.4(a)-(c).
[30] Rivka Weill, 'War over Israel's Judicial Indpendence' (*Verfassungsblog*, 25 January 2023) <https://verfassungsblog.de/war-over-israels-judicial-independence/> accessed 10 November 2025.
[31] Pablo Castillo-Ortiz and Yaniv Roznai, 'The Democratic Self-Defence of Constitutional Courts' (2024) 18(1) ICL 1, pp. 20-21 <www.degruyterbrill.com/document/doi/10.1515%2Ficl-2024-0001/pdf?stream=true> accessed 10 September 2025.

government to change them substantively, and the bill was adopted in March 2025. In the final version of the legislation, the participation of the Bar Association was abolished, with two of its members replaced by public representatives, who were lawyers chosen by the Knesset. Importantly, the decision no longer required a super-majority but a simple majority that demanded the consent from one opposition member. The influence of the government still remained significant, with Ministers and coalition members in the Committee. In addition, the amendment granted veto power to political representatives, breaking the equilibrium that had been preserved before 2023.[32] Moreover, Weill pointed out that a politicised Judicial Appointment Committee can further challenge judicial independence by removing judges, with a vote of nine members of which seven are directly or indirectly controlled by the government.[33] As dismissal can be without a cause, this could in a way resemble the disciplinary measure, targeting those judges whose rulings are against the political will of the government. Such influence over the appointments and dismissals shows the strong politicisation of judicial appointments.

2.2.3. The "Reasonableness" Doctrine

Parallel to the court-capturing strategies, the government adopted two court-curbing mechanisms that aimed to reduce the power of the judicial branch itself. One of them was challenging the “Reasonableness” doctrine.

This doctrine is to be understood as the ability of the Court to assess the “reasonableness” of the decisions made by the executive branch.[34] It serves as a residual power used to secure checks and balances and review conformity with the widely understood Constitution. The doctrine covers government decisions, such as the appointments of Ministers. The Knesset, on 24th July 2023, passed the bill that abolished this doctrine, no longer allowing the SC judges to use it. Unsurprisingly, the abolishment of the reasonableness doctrine was met with criticism. Some argued that it would make the government “free” to violate the law in its decisions. Others believed that the amendment itself is unconstitutional,

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[32] Amir Fuchs, ‘The Dangerous Politicization of Judicial Appointments’ (*The Israel Democracy Institute*, 2 March 2025) <https://en.idi.org.il/articles/58580> accessed 10 November 2025.
[33] Weill (n 30).
[34] Roznai and Cohen (n 28) pp. 516-517.

as it undermines the Rule of Law in Israel.[35] However, contrary to the reform that changed the composition of the Judicial Appointment Committee, legislation abolishing the doctrine was declared to be void by the Israeli High Court of Justice (HCJ) in January 2024.[36] The Court reaffirmed that the SC has authority to strike down Basic Laws if they violate the core values of the State, and then ruled narrowly that the reform compromises the separation of powers. The amendment was declared to be against the constitutional and democratic identity of Israel.[37] As Castillo-Ortiz and Roznai argue, the judgment is of a crucial nature not only domestically but also internationally. It can serve as guidance for other courts in exercising their self-defence within the realm of militant democracy. It can also become a tool for the preservation of the democratic order that those States aim to guard in the first place.[38]

2.2.4. The "Override" Clause and Constitutional Review

The other court-curbing strategy amended the requirements for majority vote in the Constitutional Review process and introduced the "Override Clause".

The Israeli Supreme Court's competence to declare the laws passed by the Knesset as unconstitutional was confirmed in the decision of *Mizrahi Bank* in 1995.[39] Such unconstitutionality is usually to be declared with a vote of a simple majority, 8 to 15 judges, yet the Court, on an *ad-hoc* basis, may decide a higher threshold if it is necessary.[40] The proposed reform aimed to increase the voting threshold to a super-majority, 13 to 15 judges. As argued by Roznai and Schnitzer, it would lead to the review process being ineffective.[41] In addition, the proposal would change the minimum threshold of the sitting bench from 80% of the judges

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[35] Rivka Weill, 'Game of Chicken, Israel's Litigation Over Striking Down the Reasonableness Doctrine' (*Verfassungsblog*, 13 September 2023) <https://verfassungsblog.de/game-of-chicken/> accessed 10 November 2025.
[36] *Movement for Quality Government in Israel v Knesset* (2024), HCJ 5658/23.
[37] ibid.
[38] Castillo-Ortiz and Roznai, (n 31) ch. 6.
[39] *United Mizrahi Bank v Migdal Cooperative Village* (1995), CA 6821/93.
[40] Ittai Bar-Siman-Tov, 'Judicial Review in Israel: Typology, Developments and the Theory and Practice of Judicial Activism' (2024) p. 16 <http://dx.doi.org/10.2139/ssrn.4782873> accessed 10 November 2025.
[41] Yaniv Roznai and Shani Schnitzer, 'Navigating the judicial ship through stormy waters: President Esther Hayut and the Israeli constitutional crises, 2018-23' (2025) 23(1) ICON p. 180, 193 <https://academic.oup.com/icon/article/23/1/179/8148804?searchresult=1> accessed 16 September 2025.

to the full bench.[42] Thus, those changes, combined with the “loyalty” of the judges elected by the newly composed Judicial Appointment Committee, would effectively diminish the chance that a government-enacted bill will be found unconstitutional by raising the voting threshold, requiring the full-bench presence and shifting the composition of the SC toward the government.

Yet, one of the most controversial changes proposed by Levin’s reform was the “Override Clause”, which would allow the Knesset to override the decisions of the SC. The parliament would need a vote of a simple majority of its members, 61 of 120, in order to declare the decision void and re-enact the law. As the threshold is not high and achievable by a coalition, this would allow the government to be completely in charge of the override clause and pursue any desired policy, notwithstanding the judicial decision.[43] Navot takes one step further and believes that threatening the SC with the nullification of the constitutional review leads to the inhibition of opposition to the government.[44] Despite the fact that the amendment was not yet enacted, it undoubtedly gives a final blow to the Israeli system of checks and balances, taking away the Court’s crucial power. It exemplifies a court-curbing strategy that weakens the separation of powers and undermines the independence of the judiciary.

Ultimately, the analysis of Levin’s legislative package shows that the Israeli government employed a court-capturing strategy by changing the composition of the Judicial Selection Committee. The reform granted the government the power to select and dismiss the SC’s judges, considerably increasing its influence over the judiciary. Moreover, through the amendment of voting thresholds and the so-called “Override Clause”, the Israeli executive aimed to curb the institutional power of the SC. Lastly, abolishing the “Reasonableness Doctrine” aimed to further constrain the Court’s ability to use its powers. However, the self-defending ruling of the HCJ shows that resistance to detrimental judicial reforms is possible.

3. Pattern Analysis

[42] Suzie Navot, ‘An Overview of Israel’s ‘Judicial Overhaul’: Small Parts of a Big Populist Picture’ (2023) 56 Israel Law Review 482, p. 485 <https://doi.org/10.1017/S0021223723000262> accessed 10 November.
[43] Roznai and Cohen (n 28) p. 516.
[44] Navot (n 42) p. 492.

Through comparing and contrasting the findings of Section Two, this section aims to identify a pattern demonstrating the mechanisms through which Constitutional Courts are captured by authoritarian-leaning governments.

3.1. The Extent and Nature of the Pattern

In both States, the principal strategy for court-capturing was to enhance the influence of the executive or legislative branch on the judicial appointments. Although in both the Israeli SC and Polish CT the reforms resulted in the judges being elected *de facto* by the governments, the processes through which they were achieved differed. While the Israeli government legitimately passed a bill that altered the composition of the Judicial Selection Committee, the Polish government exploited ongoing constitutional ambiguity to appoint judges affiliated with PiS. Yet, both governments aimed to create a judicial body loyal to the government — a Court that will not question the government's decisions, effectively enabling near-absolute power that is no longer confronted by a traditional system of checks and balances. Capturing the judicial appointments was an indispensable step to pave the way for more extreme bills aimed at undermining the independence of the judiciary.

Despite the shared core court-capturing strategy, a key divergence exists. The Polish government, *in iure,* did not pursue diminishing the role or powers of the Constitutional Tribunal. Instead, it made the Court its institutional tool, at the same time retaining its moderately strong role in the judiciary branch. In contrast, the Israeli Supreme Court was targeted for power reduction through the abolition of the "Reasonableness Doctrine" and introduction of the "Override Clause". Yet, to accurately determine the factual differences, one must consider the practical effect of these mechanisms. Although the Polish government focused on court-capturing through judicial appointments rather than broad court-curbing as seen in Israel, both governments aimed to render the Courts ineffective. By appointing government-loyal judges, the Court is unlikely to declare the bills unconstitutional, thereby weakening its effectiveness. Similarly, taking away the Court's power to invalidate government bills diminishes when decisions can be easily overruled by the parliament, reducing the Court's effectiveness. Moreover, both Poland's and Israel's authoritarian-leaning governments further promoted the Court's inefficiency by altering voting rules. The mandatory quorum was increased, as a higher threshold of voting majority was introduced.

Lastly, one could point out that Israel, contrary to Poland, did not pursue court-instrumentalisation through the introduction of disciplinary measures. However, it is feasible to argue that the politicised Judicial Appointment Committee, with its power to dismiss judges without cause, serves a disciplinary purpose. While Poland officially introduced a new rule for the President of Poland and the Ministry of Justice to have the capacity to commence disciplinary proceedings, Israel has done so in a more indirect way. Nevertheless, both resulted in putting political pressure on the Court.

The comparison above answers the research question by depicting a recurring pattern of court-capturing strategies employed by authoritarian-leaning governments in both the Israeli Supreme Court and the Polish Constitutional Tribunal. This pattern is characterised by a fundamental increase in the influence of the government over the judicial appointments, a diminishment of the effectiveness of the Court's ability to declare the legislation unconstitutional, and the use of direct or indirect disciplinary measures that amount to political surveillance and pressure on the judges.

The recurring pattern suggests that similar mechanisms have been implemented by both authoritarian-leaning governments across different forms of state governance, political contexts, legal systems, institutional frameworks and geographical regions. The findings of the comparison can support the argument that the cornerstone of the democratic system and the Rule of Law is the figure of the independent judge. Authoritarian-leaning governments seek to eliminate this figure and corrupt the values it embodies to consolidate power over all branches of the State. While such reforms have already advanced in Poland, they are pending in Israel, where there is a possibility of inhibiting them.

3.2. Implications of the Pattern on Global Jurisprudence

The pattern identified can be used in evaluating the democratic character of judicial reforms worldwide. By applying this model, actors such as courts, international organisations, legal scholars or civil society groups can determine the actions of governments that could be a potential threat to democratic order and the Rule of Law. The pattern identified may be used as the analytical framework that monitors the judicial reforms and is the detection tool for democratic backsliding. However, this pattern also prompts crucial questions: At which point does the government start to control the Court? When does judicial dependence emerge? And importantly, when does democracy itself begin to erode within a State?

Scholars have previously tried to answer those questions. Sadurski stated it is incredibly difficult to assess the exact moment when a State loses its democratic character. He argues that the enactment of new laws, decisions, or reforms cannot definitely pinpoint the moment when democracy is lost, as this can only be assessed retrospectively.[45] However, when observing the pattern, it can be presumed that changes to judicial appointments, due to their far-reaching consequences, can be viewed as an early warning sign that requires attention. This does not mean that all changes to appointment procedures are inherently undemocratic, yet it calls for scrutiny. It is a case since once those changes have been made, the authoritarian-leaning governments proceed with other reforms, which would not have been possible without a loyal court. On the contrary, the procedural rules impacting the effectiveness of the Court either facilitate or hinder adjudication, but they do not primarily serve to establish governmental control.

Among the alarming judicial reforms across the world, the question of whether the Courts should apply self-defence measures arises again. Some argue that Constitutional Courts, when facing court-capturing, should not only have a right, but a duty to protect themselves from undemocratic overhauls imposed by authoritarian-leaning governments — a concept grounded in the notion of "militant democracy".[46] The pattern established in this paper could further provide guidance when such self-defence can be proved to be necessary. Nevertheless, what needs to be examined in such cases is the context of the attempted reforms to assess the appropriateness and direction of these defensive actions.

[45] Sadurski (n 20) ch. 5–6.
[46] Castillo-Ortiz and Roznai (n 31) p. 3.

4. CONCLUSION

This paper was set to examine whether the pattern could be identified in the court-capturing strategies implemented by authoritarian-leaning governments in Poland and Israel. The comparative analysis confirmed the existence of such a pattern, thereby achieving the aim of the paper and enabling the development of a general pattern of court-capturing strategies.

The key findings in Poland and Israel were derived through doctrinal methodology that sketched the legal framework affecting the constitutional courts. In Poland, the PiS government focused on reforming judicial appointments through exploiting the ongoing Constitutional Crisis and swearing in loyalist judges. Consequently, by raising the mandatory quorum and voting threshold, it effectively paralysed the CT. Lastly, through disciplinary measures conferred on the President of Poland and the Ministry of Justice, political pressure was put on the judges, diminishing the last remains of an independent judiciary. In Israel, reforms similarly targeted judicial appointments through politicising the composition of the Judicial Selection Committee. Similarly, the Israeli SC was paralysed through a higher quorum and voting threshold. The indirect measures of a quasi-disciplinary nature were in place through the dismissal of judges. Yet, contrary to Poland, the Israeli government attempted court-curbing through the abolishment of the "Reasonableness" doctrine and the introduction of the “Override Clause”, which were ultimately struck down by the Supreme Court in the act of self-defence. Taken together, these findings demonstrate a recurring pattern of court-capturing strategies of authoritarian-leaning governments in Poland and Israel. This pattern can be reflected in three parts: increasing the influence of the government over the judicial appointments, diminishing the effectiveness of the Court’s ability to declare the legislation unconstitutional, and using direct or indirect disciplinary measures.

While this paper has shown that court-capturing strategies can be identified across States that differ significantly from one another, the general model developed raises further avenues for research on the doctrine of judicial self-defence. Future research could examine the Court’s role in defending both itself and the democratic order of the State from the judicial overhauls attempted by authoritarian-leaning governments. It also calls for further examination of possible policy recommendations within the framework of militant democracy, including how self-defensive actions should be shaped in a specific context.