

The Standardization of Artificial Intelligence: What Objectives, What Legitimacy?

Colloque Final de l'IFRIS et du LabEx SITES :
« Troubles dans les transitions »

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Jerome De Cooman

jerome.decooman@uliege.be





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I. Introduction



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Merkel (2019)

“It will be the job of the next Commission to deliver something so that we have regulation similar to the **General Data Protection Regulation** that makes it clear that artificial intelligence serves humanity”
(Merkel 2019)

Von der Leyen (2020)

“AI that potentially interferes with people’s rights have **to be tested and certified before they reach our Single Market**. This is a very simple question, because we do it just the same way with for example cars or chemicals, or cosmetics, or toys”



I. Introduction

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II. Conceptual and regulatory framework

I. Meta-regulation

II. New Legislative Approach

III. Legitimacy

I. Input legitimacy

II. Output legitimacy

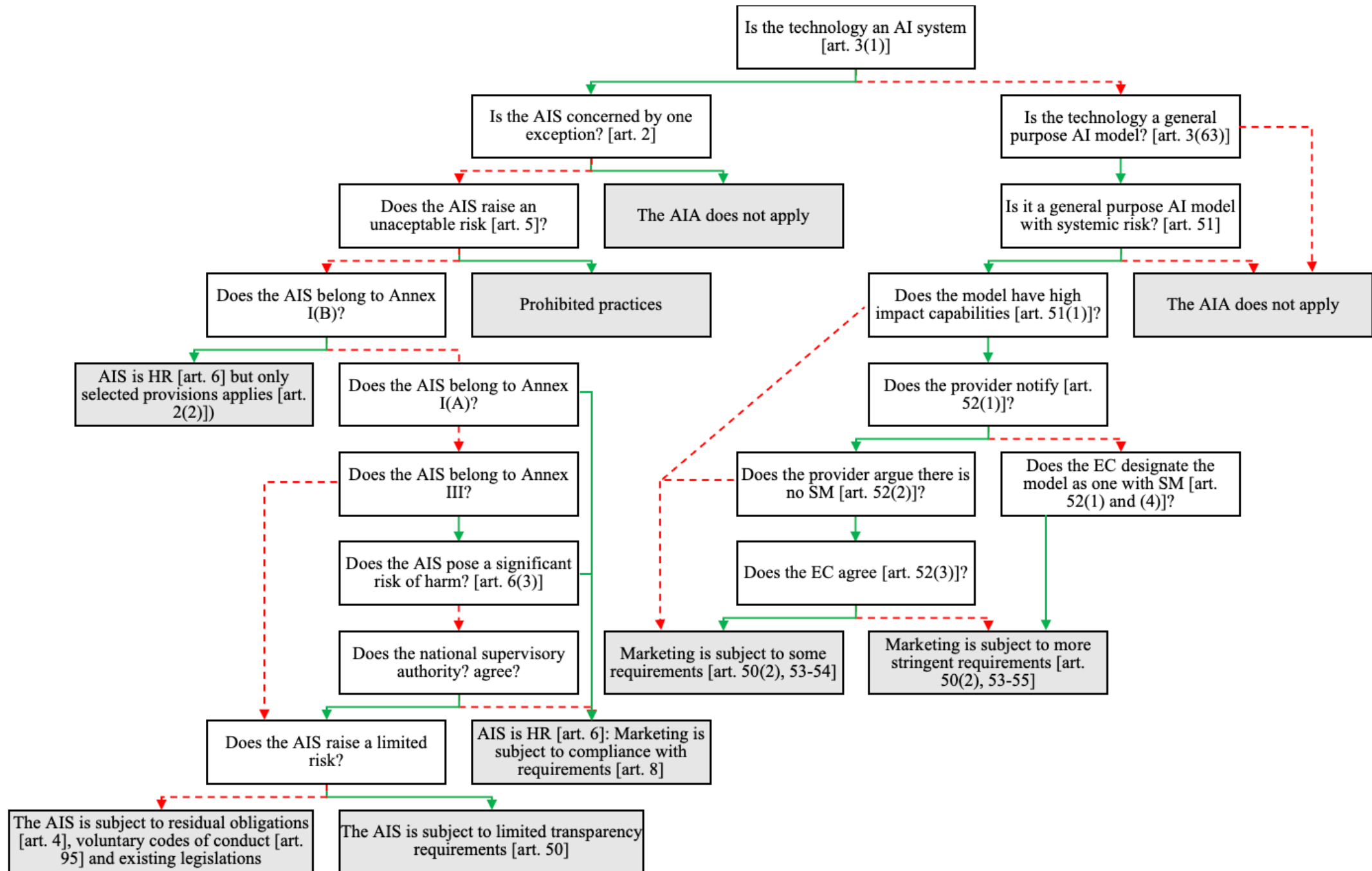
III. Throughput legitimacy

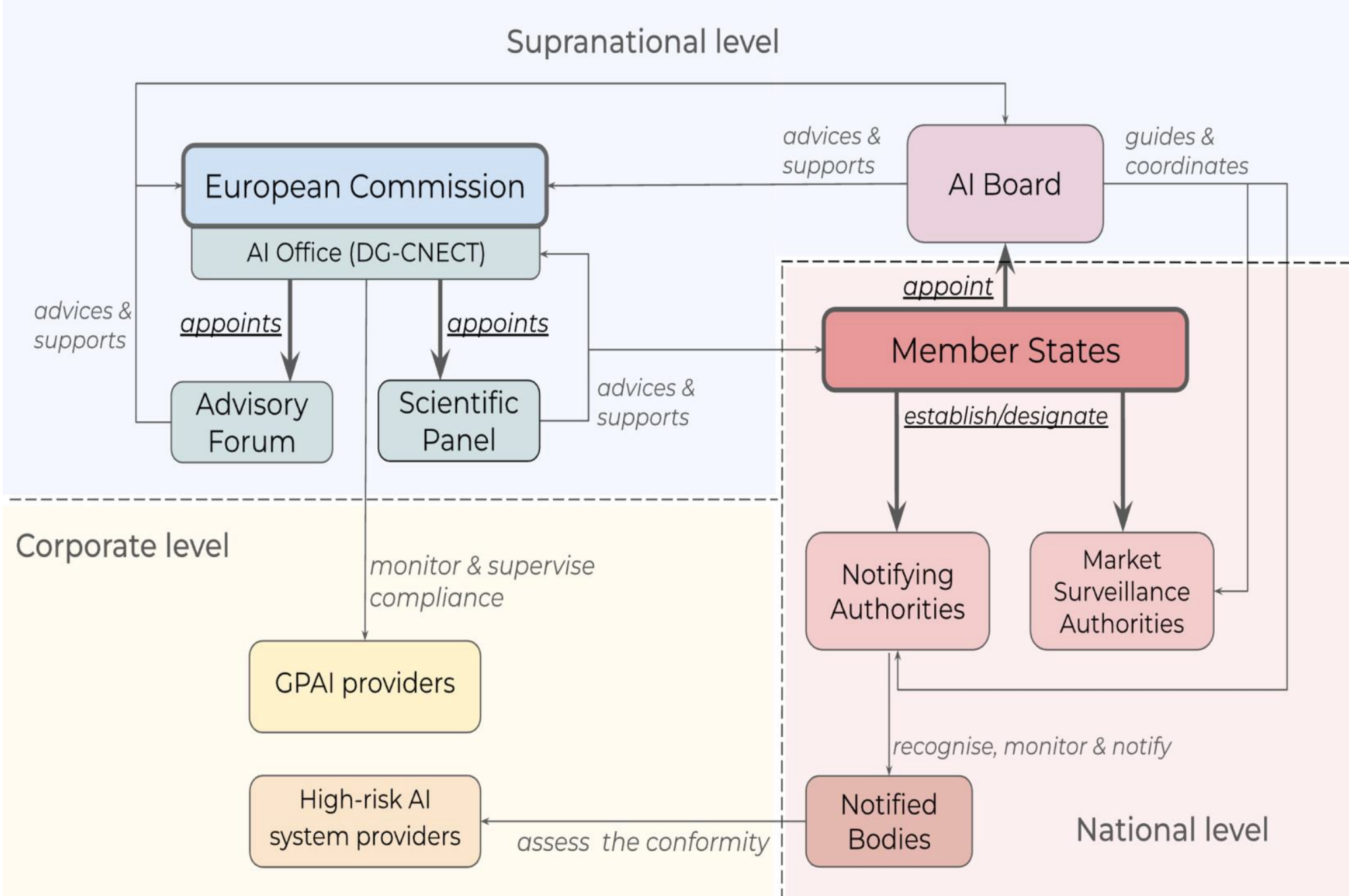
IV. Conclusion

A photograph of a classical building facade, likely the University of Liège. The image shows a large, ornate archway with a Latin inscription. Above the arch is a golden coat of arms featuring a crown and two figures. Below the arch is a relief sculpture depicting several figures in classical attire. The entire scene is set against a white background with a purple diagonal overlay in the bottom left corner.

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II. Conceptual and regulatory framework







II. Conceptual and regulatory framework

- ▶ “**Standardisation** should play a **key role** to provide technical solutions to providers to **ensure compliance with this Regulation**, in line with the state of the art, to promote innovation as well as competitiveness and growth in the single market” (recital 121 AIA).
- ▶ “High-risk AI systems or general-purpose AI models which are in **conformity with harmonised standards** or parts thereof the references of which have been published in the Official Journal of the European Union in accordance with Regulation (EU) No 1025/2012 **shall be presumed to be in conformity with the requirements** set out in Section 2 of this Chapter or, as applicable, with the obligations set out in of Chapter V, Sections 2 and 3, of this Regulation, to the extent that those standards cover those requirements or obligations” (art. 40(1) AIA).



II. Conceptual and regulatory framework

▶ Regulation

- › “Amorphous in nature” (Dunne, 2015)
- › “Escapes[s] a clear definition” (Orbach, 2012)

▶ Regulation is any intentional or unintentional (attempt to) control others’ behaviour by State or non-State actors

- › Regulation is “decentred” (Black, 2001; 1996)
 - » Regulation *tout court* is the product of State actors
 - » *Self*-regulation is the product of non-State actors
 - » *Co*-regulation is the product of their cooperation: co-operation, co-production, co-regulation
 - ▶ Co-regulation is self-regulation where there is a “regulatory ‘gorilla in the closet’ that secure[s] its ultimate success” (Gunningham & Sinclair, 2017)



II. Conceptual and regulatory framework

► Meta-regulation

- › “μετά” suggests something beyond: the regulation of regulation
 - » A cost-benefit analysis of the regulatory activity is “a kind of meta-regulation of regulation” (Reagan, 1983)
 - » Meta-regulation is a “set of institutions and processes that embed regulatory review mechanisms into the everyday routines of governmental policy-making” (Morgan, 1999).
 - » Meta-regulation “captures a desire to think reflexively about regulation, such that rather than regulating social and individual action directly, the process of regulation itself becomes regulated” (Morgan, 2003).
- › Meta-regulation embraces “activities occurring in a wider regulatory space, under the auspices of a variety of institutions, including the state, the private sector and the public interest group” (Grabosky, 2017)
- › Meta-regulation is “multisource regulation” (Drahos & Kryger, 2017)



II. Conceptual and regulatory framework

- ▶ Meta-regulation is smart regulation (Gunningham, Grabosky and Sinclair, 1998)
 - › “A form of *regulatory pluralism* that embraces flexible, imaginative and innovative forms of social control” (Gunningham and Sinclair, 2017)
 - › “The use of multiple rather than single policy instruments, and a *broader range of regulatory actors*, will produce better regulation” (Gunningham and Sinclair, 2017)
- ▶ Co-regulation is meta-regulation and smart regulation
 - › “a model that combines both legislation and self-regulatory instruments in support of the law” (Kamara, 2017)
 - › “a regulatory framework that involves both private parties and governmental actors in the setting, implementation, or enforcement of regulatory standards” (Van Cleynenbreugel, 2021)



II. Conceptual and regulatory framework

- ▶ The AIA is meta-regulation (or co-regulation):
 - › EU legislator sets up essential requirements
 - › Standardisation organisations operationalise them
- ▶ This is the “New” Approach (Council Regulation of 7 May 1985 on a new approach to technical harmonization and standards)
 - › Standard: self-regulation (art. 2(1) Reg. 1025/2012)
 - › Harmonised standard: co-regulation (art. 2(1)(c) Reg. 1025/2012)
- ▶ In 2008, the New Approach → New Legislative Framework (NLF)
 - › The AIA is part of the NLF



II. Conceptual and regulatory framework

- ▶ The AIA is part of the NLF
 - › Essential requirements laid down in Regulation by the EU legislator
 - › Detailed technicalities in the hand of European Standardisation Organisations (ESOs)
 - › EC publishes the reference to harmonised standards in the Official Journal
 - › Compliance with harmonised standards = presumption of compliance with essential requirements
 - » Assessment of conformity (art. 43 AIA)
 - » Declaration of conformity (art. 47 AIA)
 - » CE marking (art. 48 AIA)

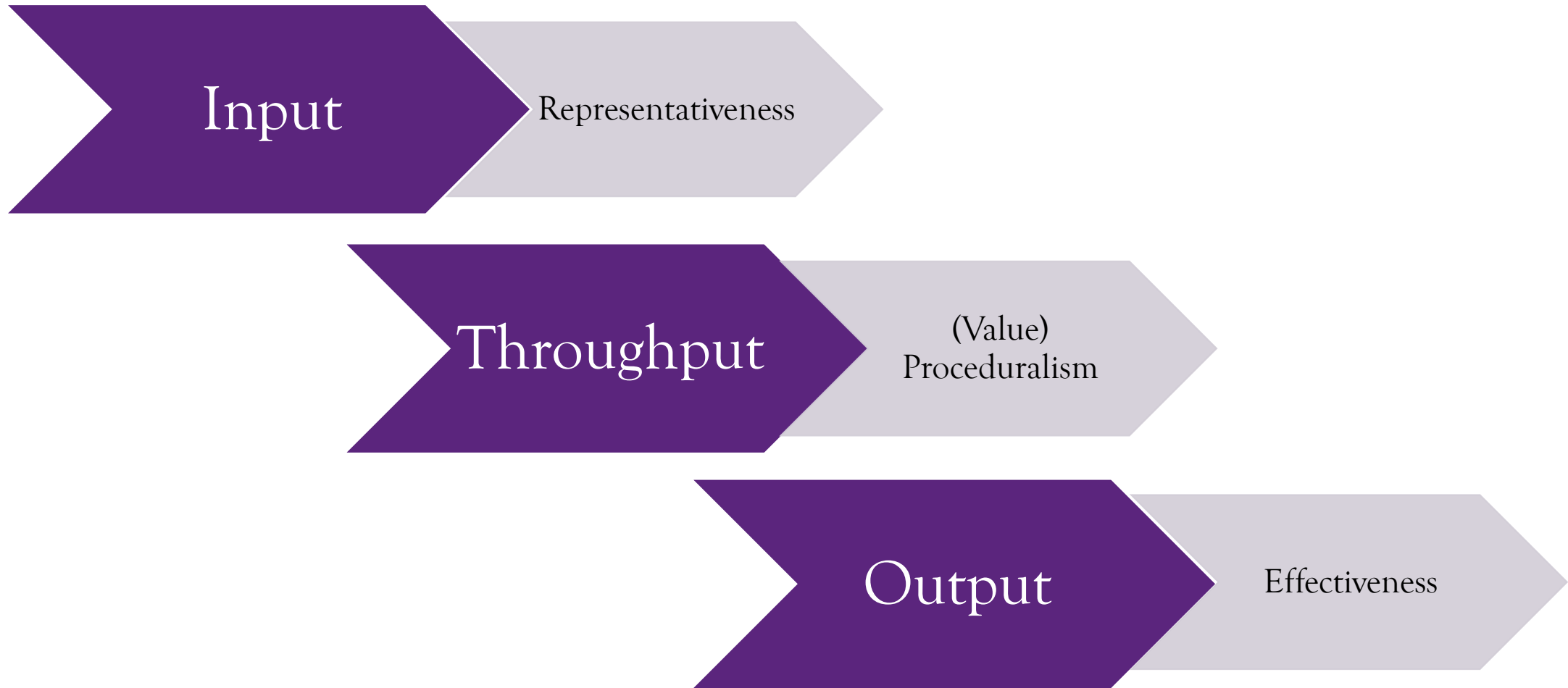
- ▶ Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products
 - › “The manufacturer, having detailed knowledge of the design and production process, is best placed to carry out the complete conformity assessment procedure”
 - › “Conformity assessment should remain the obligation of the manufacturer alone.”



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III. Legitimacy

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A. Input Legitimacy



A. Input legitimacy

“Strange women lying in ponds distributing sword is no basis for a system of government. Supreme executive power derives from a mandate from the masses, not from some farcical aquatic ceremony (...) You can't expect to yield supreme executive power just because some watery tart threw a sword at you.”
(*Monty Python and the Holy Grail*)





A. Input legitimacy

- ▶ Input legitimacy: “the EU’s responsiveness to citizen concerns as a result of *participation by the people*” (Schmidt, 2013).
- ▶ Input legitimacy of *standardisation*: all citizens’ interests are sufficiently taken into account and “protected in privately set standards and therefore also on rules and procedures that allow for equal representation and balancing of all interests at stake” (Senden, 2020).



A. Input legitimacy

► Regulation 1025/2012

- › Works of standardisation bodies have to be transparent (art. 3-4)
- › All stakeholders must both be allowed to participate in the standardisation process (art. 5-7)
- › All stakeholders must have access to standards (art. 5-7)

► Pious wishes?

- › SMEs usually lack the financial resources to effectively participate in the standardisation process
- › Article 5 “does not entail any voting rights for these stakeholders unless such voting rights are prescribed by the internal rules of procedure of the European standardisation organisations” (recital 23)
- › Copyright issue (?)
 - » *Public.Resource.org and Right to Know v. Commission and others*

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B. Output legitimacy



B. Output legitimacy

- ▶ Output legitimacy: effectiveness and efficiency of the rule (Scharpf, 1999).
 - › Telecommunication standards: output legitimate
 - » Interoperability
 - » Cross-border services
 - » Reduce switch cost
 - › Health & Safety Standards: output illegitimate (Martindale & Menache, 2013)
 - » EU law requires medical grade silicon for breast implant
 - » Breast implant (industrial silicon) CE certified by German notified body
 - » 40,000 women in France; 400,00 worldwide



B. Output legitimacy

- ▶ “The purpose of this Regulation is to improve the functioning of the internal market by laying down a uniform legal framework in particular for the development, the placing on the market, the putting into service and the use of artificial intelligence systems” (recital 1 AIA)
- ▶ Legal basis: Art. 114 TFEU (and 16 TFEU)
- ▶ Method of harmonisation:
 - › Full
 - › Maximum
- ▶ *Common* market needs *common* rule, and *harmonised* standards fit this objective
 - › But output legitimacy cannot be presumed a priori (De Bellis, 2020)



B. Output legitimacy

► Standards are still lacking

- › European Commission Implementing decision on a standardisation request to CEN and CENELEC in support of Union policy on artificial intelligence (C(2023)3215), 22 May 2023
 - » Is it ever possible to translate fundamental rights into harmonised standards?

► In addition, compliance (and its evaluation):

- › Remains (mainly) in the hand of providers
 - » Are they “best placed to carry out the complete conformity assessment procedure” when it comes to fundamental rights? (768/2008/EC)
- › Mainly concerns the verification that requested documentation is in place
- › “without scrutiny by an independent regulator, a safety case may not be worth the paper it is written on” (Hopkins, 2012)



B. Output legitimacy

▶ Hypo:

- › An AI provider self-certifies its compliance with harmonised standards...
- › ...but actually does not comply
- › Will be discovered if market surveillance authority evaluates that AI system (post-market monitoring)
 - » But this can only be done if the MSA has “sufficient reasons to consider an AI system present a risk” (Art. 77(3) and 79(2) AIA)

▶ Too soon to conclude AI harmonised standards are output (il)legitimate

- › But fair enough to assume they will not be the most effective way to protect fundamental rights



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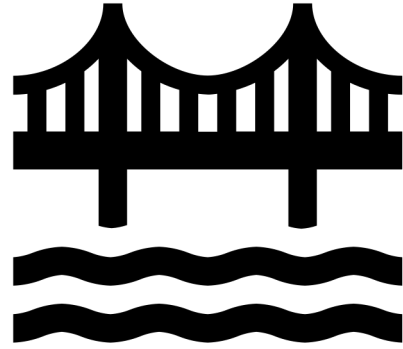
C. Throughput legitimacy



C. Throughput legitimacy

Input legitimacy

Representativeness



Output legitimacy

Effectiveness

Throughput legitimacy



Legitimate



Illegitimate





C. Throughput legitimacy

- ▶ Throughput legitimacy: regulation must be “judged in terms of the efficacy, accountability and transparency of the EU’s governance processes along with their inclusiveness and openness to consultation with the people” (Schmidt, 2013)
- ▶ *Meroni* doctrine (ECLI:EU:C:1958:7): The delegated powers must exclusively consist of well-defined executive powers (rather than delegating powers involving a wide margin of discretion to private actors) that can undergo an objective review by the delegating authority
- ▶ *ESMA* (Case C-270/12): delegation of discretionary power is legal if there is judicial review
- ▶ Judicial review
 - › the institutional bedrock of most rule of law models (Möllers, 2016)
 - › the EU is “a community based on the rule of law.” (ECJ, *Les Verts*, § 23)
 - › Harmonised standards are part of EU law (ECJ, *James Elliott Construction*, § 40)
 - › *Ergo*: harmonised standards *should* be subject to judicial scrutiny



C. Throughput legitimacy

► But:

- › Harmonised standards are part of EU law but are not “acts of EU institutions, bodies, offices or agencies of the Union”
 - » CJEU has jurisdiction to interpret harmonised standards in preliminary rulings (art. 267 TFEU)
 - » CJEU has no jurisdiction in annulment action oriented towards harmonised standards (Art. 263 TFEU)
 - Even if it was the case, the CJEU would be limited to assessing whether the Commission made a mistake when publishing the reference to the harmonised standards in the Official Journal (Ebers, 2021)

► Problem:

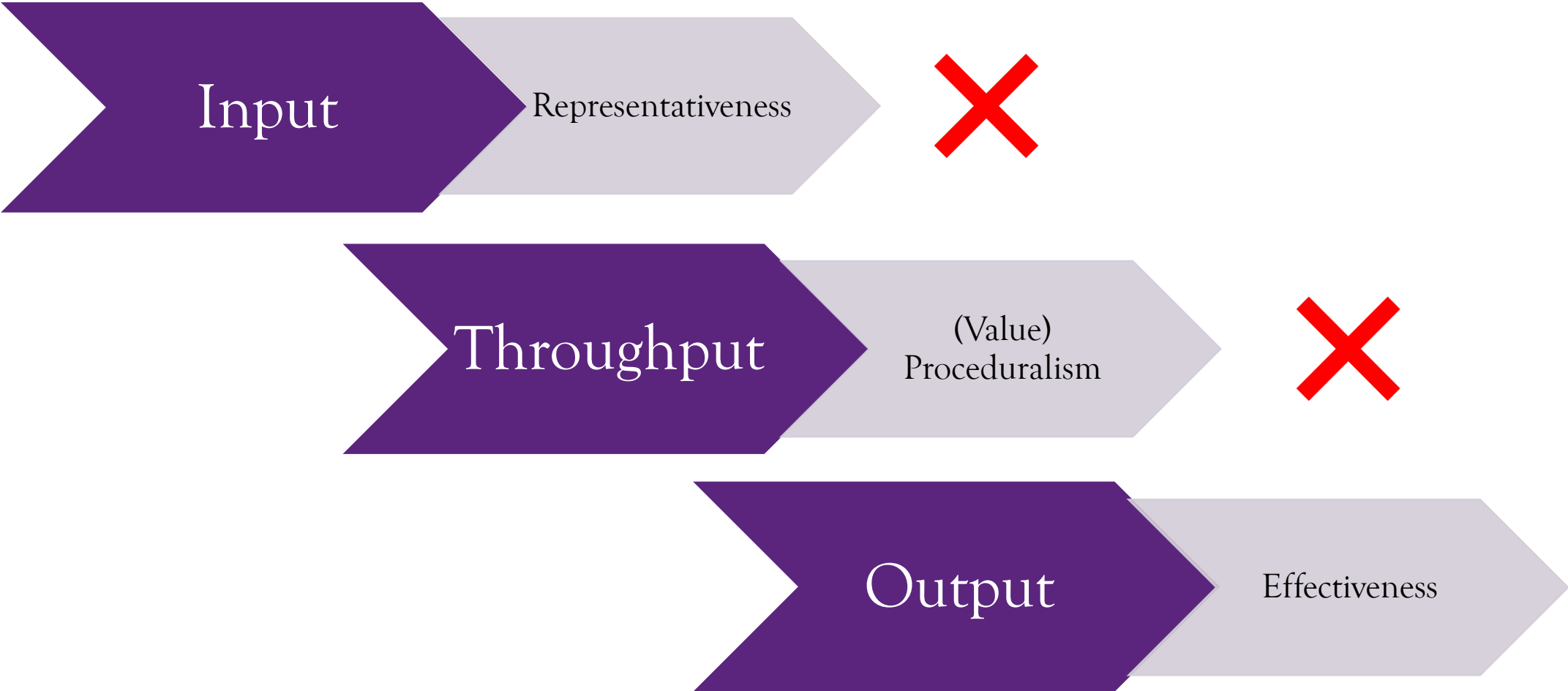
- › No ex ante control (Meroni doctrine) and no ex-post judicial scrutiny
 - » Shaky constitutional grounds



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VI. Conclusion

III. Legitimacy





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