European Union and its Neighbours in a Globalized World 13

Annegret Engel
Xavier Groussot
Gunnar Thor Petursson *Editors*

New Directions in Digitalisation

Perspectives from EU Competition Law and the Charter of Fundamental Rights

European Union and its Neighbours in a Globalized World

Volume 13

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* * *

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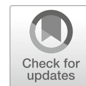
New Directions in Digitalisation: An Introduction



Annegret Engel and Xavier Groussot

Abstract This chapter provides a brief overview of the aims of this book, how it is structured and the various chapters to be found therein. It summarises the main arguments made by the contributing experts, who come from both EU competition law as well fundamental rights backgrounds. It further provides an analysis of the new directions in digitalisation and their implications for future research.

1 Background

The internet has long been neglected and exempt from being regulated at EU level. In particular, this concerns the application of fundamental rights. The specific challenges for the digital sphere are numerous; worldwide scope, easy access, interoperability, rapid technological change, fluctuating market conditions, anonymity, disinformation, lack of traceability and thus enforcement, to name but a few. Fundamental EU values, in particular including democracy and the respect for human rights, have suffered as a direct result of these growing problems in the digital sphere. More recently however, the EU has started to more actively regulate the new technologies in order to avoid European values being undermined by an unregulated internet and to provide fair market conditions and competition.

In the specific field of competition law, the development of new technologies has created many challenges and raised questions for the legislator how to regulate big market players: their cross-border nature, vicissitudes, and enormous market powers allow some of them to be able to escape legal scrutiny under the current set of *ex post* rules. The Digital Markets Act (DMA)[1] introduces an *ex ante* mechanism for

[1] 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).

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competition law and claims to be aligned with the procedural and institutional rights granted in the Charter, in particular Articles 16, 47 and 50 thereof, stating that the DMA "respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union".[2]

2 About This Book

This edited collection brings together experts from both EU competition law as well fundamental rights backgrounds, discussing the most recent developments in EU legislation on digitalisation. Most prominently, it explores the recently introduced Digital Markets Act (DMA), including a discussion on other related legislative acts and the respective case law in the field of competition law and fundamental rights. The book is divided into three parts, (i) the competition dimension, (ii) the fundamental rights dimension, and (iii) the future directions.

2.1 Part I: The Competition Dimension

The first part unlocks the main competition law aspects related to the new legislation in digitalisation, discussing inter alia issues on competence, enforcement mechanisms, pre-emption, and legal certainty.

First, in her chapter on the "Licence to Regulate", Annegret Engel brings to the fore the omnipresence of Article 114 TFEU as legal basis for legislation in digitalisation and the resulting marginalisation of other special legal bases, such as Article 103 TFEU for competition law. She highlights the potential conflicts arising from this overlap for the DMA in particular, as well as in the Digital Single Market in general. Her main argument is that the correct choice of legal basis is by no means obvious and that the advantages presented by certain *lex specialis* should not be overlooked. Annegret also points out that the internal market provision does not entail the necessary digital competence needed for any legislation in digitalisation. She suggests that Article 352 TFEU would be better suited to fill this gap and, in combination with Article 103 TFEU, should have served as legal basis for the DMA.

Second, in his chapter on "The Objectives of Regulating the Digital Economy", Björn Lundqvist convincingly makes the case for distinguishing digital market law as a new legal discipline. He argues in favour of the establishment of a separate and *sui generis* property rights regime for this new discipline and illustrates this in his chapter with perspectives from the Nordic legal tradition. With particular reference to the DMA, Björn calls for the development of an access and transfer right based on the obligations imposed on gatekeepers therein, subject to the principle of

[2] Ibid, recital 109 of the preamble.

proportionality and with respect to fundamental rights and general principles of the EU. However, instead of the current piecemeal approach the EU is taking with regard to the digital economy, Björn suggests a more holistic approach in order to create a more robust legal framework, while at the same time avoiding any unnecessary overregulation in the field.

Third, in his chapter on "EU Digital Competition Law", Oles Andriychuk delves into the subject matter of the DMA and elaborates on the distinction between *ex-ante* and *ex-post* approaches to competition law. He argues that both approaches are inseparably linked and mutually supported, despite being antagonistic in their underlying philosophies. His main focus is on the emerging *ex-ante* approach under the DMA, which he describes as micromanaging and interventionist. Oles argues that such an approach has become necessary due to the systemic failures inherent in the digital economy, which traditional *ex-post* mechanisms of competition law would be unfit to provide a sufficient remedy for. He supports the Commission's role as a centralised enforcer of this new approach, actively promoting competition in the digital economy through non-ecosystem inter-platform competition, thus rejecting any other priority as merely treating symptoms rather than the causes of the systemic failures.

Fourth, in their chapter on "pre-emption and the DMA", Julian Nowag and Carla Valeria Patiño explore the level of fairness as regulated under the DMA and to which extent this pre-empts further Member States' action in the digital market. The authors argue that this will create delimitation conflicts between the EU and national levels, as well as with other areas of law, which can only be resolved through judicial review before the courts. The only area of law, which Julian and Carla identify to be exempt from such pre-emption of fairness, is competition law. This, they argue, may lead to the paradoxical situation where Member States may now have an incentive to include fairness into their national legislation on competition law, rather than – as previously – merely the notion of efficiency.

Fifth, in her chapter on "The Power to carry out Dawn Raids" under the DMA, Helene Andersson provides some practical insights into existing enforcement practices under competition law and compares them to the investigatory tools available under the DMA. Her particular focus is on so-called down raids, which describes the power of the enforcer to carry out unannounced inspections, which, in practice, may conflict with certain fundamental rights. Helene argues that under the DMA, the main function of this tool is its deterrent effect, with potentially limited practical use despite a theoretically wide scope. She suggests a rather cautious application of the investigatory powers granted under the DMA, which must still meet the standards of general principles of EU law, such as the principle of proportionality, legal certainty, and legitimate expectations, which in turn are subject to judicial review.

2.2 Part II: The Fundamental Rights Dimension

The second part deals with selected issues of fundamental rights and analyses them in light of the DMA and other recent legislation in digitalisation, including the freedom to conduct a business, user autonomy, and the principle of *ne bis in idem*.

First, in their chapter on "The Interaction between Free Movement Law and Fundamental Rights", Ulla Neergaard and Sybe de Vries analyse the Court of Justice's role in upholding the rule of law with evidence from the judgment on the Hungarian NGO Transparency Law in Case C-78/18. In particular, the authors suggest that the principles of free movement should be considered a fundamental right in itself, thus treating both Treaty principles and Charter rights in a combined framework rather than separately, as illustrated in the Hungarian case. Ulla and Sybe argue that a more holistic approach, which would respect the interplay between free movement laws and fundamental rights, could provide a new standard of review in cases of Charter infringements and ultimately also benefit the interpretation of other legislation in digitalisation, such as the DMA.

Second, in her chapter on the "Digital Markets Act in the light of fundamental rights", Inês Neves provides an in-depth analysis of the various rights and interests affected by the introduction of the DMA as well as the DSA. Her main focus is the freedom to conduct a business and the way in which this is affected by and conflicts with other rights enshrined in the Charter. Inês argues that this freedom is heavily restricted under the DMA through the imposition of obligations on gatekeepers, thus affecting the freedom to contract or the freedom to compete. She nevertheless rejects a hierarchy of EU fundamental rights. Instead, Inês suggests a greater emphasis on the application of the principle of proportionality when balancing rights, which must be dealt with in practical terms and before the courts on a case-by-case basis.

Third, in her chapter on "Enhancing Autonomy of Online Users", Beata Mäihäniemi discusses the concept of user autonomy in the Digital Single Market and particularly the DMA. She identifies two main dimensions: self-empowerment with regard to data gathering as well as autonomy without manipulation. She also argues that user autonomy should be considered a fundamental right, and, based on this premise, evaluates the DMA's attempt in restricting unfair data gathering and dark patterns through the introduction of certain obligations on gatekeepers. In this regard, Beata acknowledges the legislator's effort with the new legislation in digitalisation, however, still suggests that the DMA might not go far enough in order to achieve the aim of full user autonomy, pointing out that platform design can successfully jeopardize the concept of consent.

Fourth, in their chapter on the "Principle of *Ne Bis in Idem*", Annegret Engel, Xavier Groussot, and Emilia Holmberg analyse pre- and post-DMA case law with the aim to potentially identify a shift in the application of the principle, thus affecting the enforcement practices under the DMA and competition law. The authors claim that while there might not be a revolution visible in the current line of case law due to the distinction between *ex-ante* and *ex-post* mechanisms, certain enforcement related problems are still to be expected. In particular, they argue that overlapping national

regulation could conflict with the DMA and thus jeopardize the latter's uniformity objective. Annegret, Xavier, and Emilia suggest that currently pending cases before the CJEU, such as *Volkswagen*, will already provide an opportunity to clarify some of these issues, inter alia the relationship between the 'SCCST test' and the 'test of effectiveness'.

Fifth, in her chapter "Between Online and Offline Due Process", Giulia Gentile focuses on procedural rights in a comparative analysis between the digital and non-digital worlds. She rightfully asks the question how coherence in applying fundamental rights could be achieved between the two. In particular with regard to the Digital Services Act, which introduces content moderation and take-down procedures in order to enhance fairness, Giulia argues that this might not come without a range of practical challenges. She highlights that compliance with judicial independence or the right to be heard could be affected negatively online, while at the same time pointing out that a separation of online and offline due process would risk fragmentation in the application and enforcement of fundamental rights. Despite these challenges, Giulia suggests a human-centric approach to regulation.

Sixth, in his chapter on the "Limitation of Fundamental Rights", Gunnar Thor Petursson is taking stock of the methodological implications of the EU Charter, focusing on Article 52(1) thereof and the limitations this provision entails. With regard to privacy rights, personal data protection, and digital rights, he analyses the most recent case law of the CJEU, arguing that the 'provided for by law' condition as well as the 'essence test' have been pivotal in the application and limitation of fundamental rights. Nevertheless, Gunnar Thor observes continued flaws in the methodology as a result of insufficient coherence in the CJEU's approach. He suggests further clarification on the new legislation in digitalisation is needed, including an open, structured, and reliable balancing of rights in order to guarantee the effective preservation of EU values and the rule of law.

2.3 Part III: Future Directions in Digitalisation

The third and final part focuses on future developments in the area of digitalisation, particularly with regard to fundamental rights and the rule of law.

First, in his chapter on the "European Declaration on digital rights", Edoardo Celeste explores the EU's ambitions for digital sovereignty and evaluates the Declaration's contribution to digital constitutionalism. He argues that the purpose of the Declaration is both programmatic and educational, in that it provides guidance for the EU and national legislators in the digital era as well as that it creates awareness of the EU's vision both internally and externally. If read carefully, Edoardo illustrates how the Declaration can thus indicate the next steps to be expected in this area at EU and national level. In addition, he also points out that the Declaration is to be considered human-centric and as such contributes to the EU's identity of a Union of values. He suggests that this approach is crucial in providing the necessary legitimacy for the EU.

Second, in their chapter on "Making the Rule of Law Great Again", Annegret Engel and Xavier Groussot discuss the building of a digital rule of law in the EU from a legislative and judicial perspective. The authors observe a clear upward trend for the application of Charter rights in horizontal situations and the principle of proportionality in both legislation and litigation in digitalisation. This, they argue, might even be accompanied by some kind of invisible dialogue between the legislator and the judiciary in the EU, as illustrated in the *Ligue des Droits Humains* case. Annegret and Xavier suggest that such an approach could constitute a constitutional junction between the legislative and judicial organs of the EU in the quest for the protection and promotion of the rule of law in the digital era and in a time of 'rule-of-law anxiety'.

3 Analysis: New Directions and Research Agendas

This edited book shows that the legal impact of the new legislation on digitalisation is enormous regarding the application of the EU Charter of Fundamental Rights and EU competition law. Both the DMA and DSA—which were first considered to constitute a single text before being separately explicated—acknowledge the obligation to respect the EU fundamental rights and the EU Charter. Though the text of the DSA is more 'human rights' orientated than the DMA, it appears clear to us from the different contributions of this volume that the DMA will bolster the application of the EU Charter in many ways and certainly much more than the GDPR, which focuses in essence on the fundamental rights of data protection. The DMA offers a much broader playing field for the EU Charter than the GDPR.

The impact of the DMA on the application of the EU Charter will be substantive, procedural and institutional as exemplified by many contributions of this volume. The same conclusion can apply in relation to the whole set of new legislation on digitalisation, for instance, in the contribution 'Making the Rule of Law Great Again', the authors have argued that digitalisation will bring a development of the horizontal direct effect of the EU Charter due to the nature of the litigations in the digital field that often oppose Tech Giants to individuals which find themselves in a position of vulnerability. Here the impact will be 'institutional' and related to the scope of application of the EU Charter.

As to the substantive provisions of the EU Charter, due to the broad scope of the new legislation on digitalisation, it is legitimate to think that the CJEU will have to deal with an increased number of cases on the interpretation of substantive provisions of the EU Charter, such as the right to dignity (Article 1 of the EU Charter), freedom of expression (Article 7 of the EU Charter), the right to data protection (Article 8 of the EU Charter), the freedom to conduct business (Article 16 of the EU Charter), or the right to property (Article 17 of the EU Charter). Notably, as it resorts from the contributions of Björn Lundqvist, Ulla Neergaard, Sybe de Vries and Inês Neves, it seems plausible to argue that Articles 16 and 17 of EU Charter will have an increased role to play in the litigations concerning the DMA and DSA since the new

regulations impose quite strong restrictions on the freedom to a conduct business and the right to property. Also, both the DMA and DSA, which are adopted on the basis of Article 114 TFEU, have a natural connection with the application of the economic freedoms. Therefore, the future litigations will bring back the doctrinal discussion post-Schmidberger on the relationship between economic freedoms and the fundamental rights under the EU Charter.

Furthermore, we will also see an increased use of the procedural provisions of the EU Charter. This is illustrated in this volume for instance by the contribution of Helene Andersson on dawn raids or the contribution of Giulia Gentile on online and offline due process The CJEU case law pre-DMA and pre-DSA on digitalisation such as *Digital Rights*,[3] *Schrems I*[4] *and II*,[5] *Quadrature du Net*[6] and *Ligue des Droits Humains*[7] have demonstrated the centrality of effective judicial protection and Article 47 of the EU Charter in the litigations. This procedural move will in our view not only continue but be increased with the application of the DMA and DSA. Particularly the DMA, which is competition orientated, will bring about the old and multiple questions and conundrums of the competition law proceedings in the context of digitalisation. Therefore, not only effective judicial protection will be at issue and in need of interpretation by the CJEU, but also the right to a fair hearing more broadly in addition to specific rights enshrined in the Charter, such as Article 48 (presumption of innocence), Article 49 (proportionality of sanctions), and Article 50 (*ne bis in idem* principle).

Here, the entry into of force of the DMA has already generated an intensive debate on the issue of duplication of sanctions and proceedings in light of the double jeopardy clause enshrined in Article 50 of the EU Charter. A key transversal research question in the area of procedure and digitalisation is whether the application of the procedural provisions of the EU Charter (the so-called due process clauses) in competition law proceedings should be the same in the context of digitalisation and non-digitalisation. It seems evident to us that new research agendas will have to take into consideration with great care the impact of the new legislation in digitalisation on the application of the EU Charter and EU competition law. In this sense, this edited volume only constitute the start of new research in this field and points towards certain directions to be taken in future research.

Another aspect, which is in our view important to be taken in consideration and to be developed in further research agendas, is the impact of ‘digital regulation’ as a phenomenon *per se* in EU law and in law in general. This edited volume shows that the European Union has massively regulated the field in order to update previous EU

[3] Joined Cases C-293/12 and C- 594/12 *Digital Rights Ireland and Seitlinger and Others* EU:C:2014:238.

[4] Case C-362/14, *Schrems*, ECLI:EU:C:2015:650.

[5] C-311/18, *Facebook Ireland and Schrems* (Schrems II), EU:C:2020:559.

[6] Joined Cases C-511/18, C-512/19, and C-520/18, La Quadrature du Net and Others v Premier ministre and Others, EU:C:2020:791.

[7] Case C-817/19 *Ligue des Droits Humains*, EU:C:2022:491.

legislation for the digital context. We have seen that the EU has intensively relied on the use of Article 114 TFEU to regulate the field. We have also seen that the EU has developed 'soft law regulation' as exemplified by the Chapter of Edoardo Celeste on the European Declaration on digital rights. What is the impact of these binding and non-binding regulations in EU law? Does this massive regulation inexorably lead to the disappearance of the non-harmonised field of EU law? What is the relationship between the various regulations, and also between the regulations which are in force and the others which are not in force yet? All these questions show in our view the complexity of legislation in digitalisation and the need for further research as well as litigation in the digital era.

As an example of the complexity of this field, the Case C-634/21 *Schufa Holding,* which is currently pending, concerns a decision taken by Artificial Intelligence (AI) as to credit worthiness. It illustrates the complexity of knowing whether a decision taken by AI as to credit worthiness falls under the scope or not of a decision adopted on the basis of Article 22 GDPR and has by itself a legal value and thus not only an 'information value'. What makes it so interesting is that not only the GDPR covers AI situations, but they are also supposed to be covered by Article 14 of the AI Act which has not yet been adopted. In his Opinion, AG Pikamäe only considered the value of the AI decision and that Article 22 GDPR is applicable since

> the automated establishment of a probability value concerning the ability of a data subject to service a loan in the future constitutes a decision based solely on automated processing, including profiling, which produces legal effects concerning the data subject or similarly significantly affects him or her, where that value, determined by means of personal data of the data subject, is transmitted by the controller to a third-party controller and the latter, in accordance with consistent practice, draws strongly on that value for its decision on the establishment, implementation or termination of a contractual relationship with the data subject.[8]

This case shows the complexity of the next generation of digital cases knocking on the door of the CJEU and the importance of the resulting judgments in interpreting such a legal matter. In this edited volume, for instance, Oles Andriychuk delves into the subject matter of the DMA and its complexity by elaborating on the distinction between *ex-ante* and *ex-post* approaches to competition law in the digital field. In a similar vein, Julian Nowag and Carla Valeria Patiño explore the complex level of fairness as regulated under the DMA and to which extent this pre-empts further Member States' action in the digital market.

In addition, the new legislation in digitalisation brings many interesting (research) questions related to the political ambitions behind it, covering not only legal matters *per se* but also questions related to the issues of 'power' and digital sovereignty'. The latter is specifically discussed in Part III of this edited volume and in our view requires further research from both EU internal and external perspectives. In other words, future research should study the impact of EU legislation in digitalisation on

[8] Opinion of Advocate General Pikamäe, Case C-634/21, OQ v Land Hesse, Joined Party: SCHUFA Holding AG, EU:C:2023:220, para 59.

the internal (legal and political) order of the EU as well as its impact outside of the EU. Regarding this last point, we would like to underline that a book written by Anu Bradford will be published at the end of August 2023 on 'Digital Empires: The Global Battle to Regulate Technology' that studies inter alia what could be the impact in the world of the 'regulatory approach' adopted by the EU when it comes to digital legislation.

To conclude, in this edited book, though we have focused only on a limited number of selected new directions on EU fundamental rights and competition law, we have hopefully opened the door to many new research questions and have shown the crucial necessity to undertake further research in this fascinating field of study.

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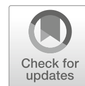
Part I
The Competition Dimension

Licence to Regulate: Article 114 TFEU as Choice of Legal Basis in the Digital Single Market



Annegret Engel

Abstract This chapter discusses Article 114 TFEU as the choice of legal basis in the Digital Single Market. It argues that the EU's competence in the internal market has developed into a default option for harmonising measures in digitalisation, exacerbated by the Union's new regulatory approach. With particular reference to the area of competition law and the recently introduced Digital Markets Act, Article 114 TFEU might constitute the Commission's preferred choice for pragmatic reasons, yet not necessarily undisputedly so. The chapter will present and discuss a number of pressing alternatives available from a constitutional perspective, most importantly Article 103 TFEU under the policy area of competition law. As will be argued, a *lex specialis* might indeed entail advantages over the generic use of horizontal legal bases, such as Article 114 TFEU, despite often being overlooked in the quest for the correct choice of legal basis. With the Digital Single Market being prone to rapid change in technologies demanding swift regulatory replies and harmonised enforcement, the role of special legal bases seems even more marginalised to the detriment of intergovernmental flexibility and the constitutional setup of competence categories as codified by the Treaty of Lisbon.

1 Introduction

Article 114 TFEU has long served as legal basis for the adoption of a great variety of Union measures owing to its horizontal scope and application. Measures under this provision are adopted in accordance with the ordinary legislative procedure "for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market." The objectives of the internal market are set out in Article 26 TFEU; paragraph 2 provides that the internal market "shall comprise an area without internal frontiers in which the free movement of goods, persons, services

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and capital is ensured". In the past, the extensive interpretation of Union powers under the internal market provisions and Article 114 TFEU as choice of legal base, including by the European courts in legal basis litigation, has provoked criticism by academic scholars and EU constitutional lawyers alike.[1]

The creation of the Digital Single Market and the likening with the (offline) internal market raises additional questions of competence and thus legal basis. Most importantly, the actual 'product' of the internet—the data—raises questions of tangibility and classification. Does it fall under the free movement of goods or services? Or could it even be considered as capital? In this context, some commentators have advocated in favour of recognising data flow in the EU as the fifth freedom to the internal market,[2] while others have been more critical of such a shortcut conclusion.[3] Indeed, Article 16 TFEU mentions the free movement of data, however, constitutes a separate legal basis albeit of general application to the other provisions in the treaty.

Aside from this fundamental question of classification, data is often used in a specific context and therefore concerns specific policy areas elsewhere recognised in the treaties. As a result, the choice of Article 114 TFEU would be in conflict with those other legal bases available, in the same way as it would in the offline world. This could affect, for example, the area of competition law, environmental policies, public health, or digital finance. As such, maybe the Digital Single Market should not be treated differently to the offline internal market, unless justification can be found in the specific features characterising the Digital Single Market that would merit such a distinction.

This chapter will be exploring the use of Article 114 TFEU as choice of legal basis for the Digital Single Market. First, a brief overview will be provided of the Digital Single Market and the EU's regulatory approach with the help of Article 114 TFEU as a harmonisation mechanism. The second and main part will consist of a case study in competition law. This will include an in-depth analysis of the choice of legal basis for the Digital Markets Act. As will be argued, Article 114 TFEU could well be challenged based on constitutional grounds, with several alternatives available. Third, the role of special legal bases in the EU constitutional order shall be evaluated considering the omnipresence of Article 114 TFEU, also in other policy areas concerned. A final section will provide some concluding remarks.

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[1] An extensive discussion on the different competences and the courts' legal basis litigation can be found in Engel (2018).

[2] De Vries (2020), p. 14.

[3] Adams-Prassl (2022).

2 (Over-)regulating the Digital Single Market with Article 114 TFEU as Preferred Choice of Legal Basis

In the early days of the internet and the digital market that arose therein, market players largely benefitted from an unregulated terrain. It is often said that legislation can hardly keep up with new technologies, but here, the European legislator simply overslept the new development for an entire decade or so. The enormous challenges posed by the digital age, particularly with regard to the respect for fundamental rights as well as their enforcement *vis-à-vis* internationally operating market players,[4] may have contributed to the initial deterring effect to even attempt to legislate. However, this de-regulatory approach has now become unsustainable[5] and indeed prompted a complete U-turn at EU level in favour of a new regulatory and centralised approach for the digital era,[6] with the goal to create a level playing field between the online and offline world.[7]

The Commission's new regulatory activism in the digital field is largely based on a broad interpretation of its own competences in the internal market, thus increasing harmonisation by means of legislation in the digital single market. Not only does this increase the Commission's own influence by regulatory force, but also the potential for judicial challenges—and thus the role of the European courts—with regard to those legislative acts further down the line. Indeed, there is evidence that regulatory expansion is happening at a broader level in the internal market as a whole, away from the traditional de-regulatory approach which relied on the removal of obstacles to trade at national judicial level.[8]

As could be argued, the field of digitalisation particularly benefits from the shift towards a more regulatory approach, since it is prone to transient technological developments and the generally lengthy litigation processes before national and European courts cannot keep up in delivering timely justice in the new digital era. However, there is a fine balance to be struck between regulating too little and regulating too much. The latter may quickly develop into a meander of rules and regulations which obscure a clear vision and thus prevent compliance as well as the

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[4] Speech by EVP Margrethe Vestager at the Council's High-level Presidency Conference: 'A Europe of Rights and Values in the Digital Decade', 8 December 2020. See also European Declaration on Digital Rights and Principles for the Digital Decade, proposed by the European Commission, COM(2022) 28 final, published on 26 January 2022.

[5] E.g. Berg (2000); and Shipchandler (2000).

[6] As spelled out in the Declaration for the Future of the Internet, signed by the EU, the U.S. and more than 60 other international partners, published on 28 April 2022, available online file:///C:/Users/an1141en/Downloads/Declaration_for_the_Future_for_the_Internet_Launch_Event_Signing_Version_FINAL_20220428_UP5Fn1plmtpsmAPVJW1rqEkZL8_86262.pdf.

[7] See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions '2030 Digital Compass: the European Way for the Digital Decade', COM/2021/118 final.

[8] See Sadl et al. (nyp).

adequate achievement of its objectives; a problem which can be observed also in other areas of EU law.[9] This in turn may cause conflicts between the different levels in multi-level governance and at the different stages of the legislative and judicial processes.

Indeed, the Commission's regulatory push may have come at the expense of the division of competence categories as codified by the Treaty of Lisbon. In particular, it appears that Article 114 TFEU has become a rather frequently employed legal basis for acts in digitalisation, notwithstanding the availability of more specific legal bases in the treaties for the respective policy area. A scan of the legislative measures currently in force,[10] which mention the Digital Single Market at least once in either title or text, reveal the predominance in choice for employing the internal market competence. In fact, out of 37 measures in total—25 Regulations and 12 Directives – 16 were adopted on Article 114 TFEU as their single legal basis:

- Digital Services Act[11]
- Digital Markets Act[12]
- Data Governance Act[13]
- Regulation on roaming on public mobile communications networks[14]
- Regulation on addressing the dissemination of terrorist content online[15]
- Directive on certain aspects concerning contracts for the sale of goods[16]
- Digital Services Directive[17]
- Cybersecurity Act[18]

[9] See e.g. in the area of EU climate policy, Böhringer et al. (2016).

[10] Introduced within the last ten years under the ordinary or special legislative procedure, excluding any delegated or implementing acts.

[11] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[12] 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).

[13] Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act).

[14] Regulation (EU) 2022/612 of the European Parliament and of the Council of 6 April 2022 on roaming on public mobile communications networks within the Union (recast).

[15] Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online.

[16] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

[17] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

[18] Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act).

- Directive on the accessibility requirements for products and services[19]
- Directive establishing the European Electronic Communications Code[20]
- Regulation establishing BEREC[21]
- Regulation on cross-border parcel delivery[22]
- Regulation on national enforcement of consumer protection laws[23]
- Regulation on electronic identification and trust services for electronic transactions[24]
- Directive on high-speed electronic communications networks[25]
- Regulation on online dispute resolution for consumer disputes[26]

A further four measures were adopted on a multiple legal base in combination with Article 114 TFEU:

- Regulation establishing the EU Single Window Environment for Customs[27]
- Regulation on health technology assessment[28]

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[19] Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services.

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

[21] Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009.

[22] Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services.

[23] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.

[24] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

[25] Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks.

[26] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

[27] Regulation (EU) 2022/2399 of the European Parliament and of the Council of 23 November 2022 establishing the European Union Single Window Environment for Customs and amending Regulation (EU) No 952/2013.

[28] Regulation (EU) 2021/2282 of the European Parliament and of the Council of 15 December 2021 on health technology assessment and amending Directive.

– Copyright Directive[29]
– Regulation establishing a single digital gateway[30]

Additional legislation in the Digital Single Market is currently planned with Article 114 TFEU as their proposed legal basis, some of which will be discussed further below.

3 Case Study: The Competence Shift in Competition Law—Challenging the Choice of Article 114 TFEU as Legal Basis for the Digital Markets Act

One of the more prominent legislative packages, which was recently introduced, is that of the twin regulations of the Digital Services Act (DSA)[31] and the Digital Markets Act (DMA).[32] Both measures were adopted under the internal market competence.[33] This is particularly surprising for the DMA, which constitutes a generational shift in the EU's enforcement strategy in competition law, and yet, is firmly placed within the ambit of Article 114 TFEU, rather than Article 103 TFEU, as the sole legal basis. According to Article 1(1) of the DMA, its purpose is "to contribute to the proper functioning of the internal market (. . .) ensuring for all businesses, constable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users." Despite this clear internal-market objective, the DMA cannot disguise the fact that it is simultaneously aimed "to complement the enforcement of competition law" in the Digital Single Market.[34] The competition law competence in the form of Article 103 TFEU, however, is entirely missing from the legal base. This raises a range of questions, such as why Article 103 TFEU was omitted by the legislator, whether it should have been added to Article 114 TFEU in a dual legal base, and whether this practice

[29] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[30] Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012.

[31] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[32] 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).

[33] For a more detailed discussion on this legislative package, see Engel and Groussot (2023, forthcoming).

[34] Recital 10 of the DMA Preamble.

constitutes a more profound shift in the digital era. The following section will attempt to answer these questions.

3.1 *Article 103 TFEU: Unfit for Ex-ante Competition Law Enforcement?*

Recital 5 of the DMA preamble provides a first indication of the omission of Article 103 TFEU in the legal base, restricting traditional competition law and its competence to an *ex-post* enforcement of rules, with specific requirements for either dominance (Article 102 TFEU) or anti-competitive behaviour (Article 101 TFEU) and resulting in extensive investigations on a case-by-case basis. The DMA, however, establishes an *ex-ante* mechanism under which a number of *per-se* practices[35] are deemed to be illegitimate if conducted by so-called gatekeepers.[36] The latter are thus obliged to comply with a certain behavioural conduct[37] which—ideally—would prevent traditional *ex-post* mechanisms even having to come into play.[38] However, does this merit such an artificial distinction between *ex-ante* and *ex-post*,[39] and, as a result, introducing the DMA as an exclusive internal market measure, despite it potentially having the same effect as traditional competition law measures, except for an earlier enforcement?

Indeed, in its Special Report 24/2020, the European Court of Auditors notes that the Commission's *ex-ante* tools are limited to merger control, thus making it more difficult to respond in a timely manner to competition problems in the digital economy.[40] However, as could be argued, this is a rather narrow interpretation of the relevant treaty provisions. While Articles 101 and 102 TFEU do indeed require the above mentioned market conditions to exist, a more flexible reading of the respective legal base of Article 103 TFEU would allow greater scope. Here, the first paragraph of Article 103 TFEU refers to giving effect to the relevant competition law principles set out in Articles 101 and 102 TFEU, which could be interpreted

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[35] Chapter III of the DMA.

[36] Gatekeepers are defined in Article 3(1) of the DMA as undertakings which (i) have significant impact on the internal market; (ii) provide a core platform service which is an important gateway for business users to reach end users; and (iii) enjoy an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.

[37] Articles 5 and 6 of the DMA. These obligations may only be suspended exceptionally according to Article 8 of the DMA or for reasons of public interest according to Article 9 of the DMA. See also Gerbrandy (2020).

[38] See in this volume Oles Andriychuk, EU Digital Competition Law: Starting from Scratch.

[39] See e.g. Basedow (2021); see also Georgieva (2021); and Larouche and De Streel (2021), who describe the DMA as 'a lost child of competition law' at p 545.

[40] European Court of Auditors, Special Report 24/2020, "The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight", https://www.eca.europa.eu/Lists/ECADocuments/SR20_24/SR_Competition_policy_EN.pdf, para 59.

as also including *ex-ante* mechanisms. In addition, the purposes listed in the second paragraph of Article 103 TFEU are non-exhaustive and therefore do not exclude any such mechanism *per se*.

Further elaboration on the reasoning for the choice of legal basis can be drawn from the Impact Assessment Report (hereafter IAR) on the DMA, which analyses existing market failures as well as fragmentation between national enforcement regimes aimed at tackling the digital challenges in competition law. It argues that the "patchwork of existing or proposed regulatory solutions" at Member State level "creates legal uncertainty for companies operating in the internal market (. . .) and risks creating an appreciable distortion of competition in the internal market".[41] Article 114 TFEU is thus presented as the legitimate legal basis for the DMA, ensuring the "functioning of the Single Market for digital services, in particular in relation to gatekeeper platforms as well as functioning of digital markets".[42] By the same token, however, the IAR acknowledges the strong competition law objective inherent in the DMA in "promoting effective competition in digital markets, in particular a fair and contestable online platform environment."[43]

One could argue that those statements in the IAR are directly contradicting each other. While fair competition—both *ex-post* and *ex-ante*—certainly has an effect on the functioning of the internal market,[44] it is questionable whether they should therefore be treated under Article 114 TFEU alone. The mere existence of the competition law provisions in the treaties and Article 103 TFEU as a possible choice of legal basis suggest otherwise. In addition, Article 114 TFEU cannot derogate from a more specific legal base—which Article 103 TFEU constitutes—due to its "safe where otherwise provided in the Treaties" condition. Despite the courts' often favourable and broad interpretation of the internal market provision as opposed to other more specific competences available,[45] its landmark ruling in *Tobacco Advertising* is still good law and effectively marks the outer boundaries of Article 114 TFEU. As established in this case, "a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition" was held insufficient for the justification of Article 114 TFEU as the correct choice of legal basis.[46]

Even more so, according to the courts' established *lex specialis derogat legi generali* principle, if two potential legal bases are available the more specific one

[41] Commission Staff Working Document, Impact Assessment Report, Accompanying the document, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD(2020) 363 final, para 101.

[42] Ibid, para 100.

[43] Ibid, para 108.

[44] See also Article 116 TFEU.

[45] See Engel (2018).

[46] Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising)*, EU:C:2000:544, para. 84.

should be chosen. This is particularly the case if the 'centre of gravity' theory[47] does not lead to a definite result due to a significant overlap in the scope of the respective legal bases and the aims they pursue, such as with the competition law and the internal market. Thus in adopting the DMA on Article 114 TFEU as the single legal base, the legislator has—what Trüe called—effectively reversed the *lex specialis derogat legi generali* principle into *lex generalis derogat legibus specialibus*.[48] Despite their codification in the Lisbon Treaty in an attempt to provide greater clarity and legal certainty in the quest for the correct choice of legal basis, this could still render specific competences, such as competition law, marginalised in the process of a continuous expansion of the scope of horizontal legal bases, such Article 114.[49] Therefore, Article 103 TFEU should have, at the very least been added to Article 114 TFEU in a dual legal base for the DMA.

3.2 Competition Law with an Effect on the Internal Market

The adoption of the DMA on a dual legal base, consisting of Articles 103 and 114 TFEU conjointly, would have also been more in line with previous legislation in this area. The combination renders itself compatible despite some divergence in their legislative procedures. On the one hand, the Union's competition law competence is of an exclusive nature according to Article 3(1)(b) TFEU and requires merely consultation of the European Parliament in the legislative process according to Article 103 TFEU. On the other, the Union's competence for the internal market is shared with the Member States according to Article 4(2)(a) TFEU and measures based on Article 114 TFEU are adopted under the ordinary legislative procedure, involving the European Parliament as co-legislator and qualified majority voting in the Council according to Article 294 TFEU. These differences can be accounted for by applying the most stringent rules in the legislative process.[50] For example, Directives 2014/104/EU[51] and 2019/1/EU[52] are both adopted on this dual legal base.

In Directive 2019/1/EU, the legislator considered the dual legal base of Articles 103 and 114 TFEU to be appropriate as the measure "covers not only the application of Articles 101 and 102 TFEU and the application of national competition law in

[47] As was first established in Case C-70/88 *European Parliament v Council of the European Communities*, EU:C:1991:373.

[48] Trüe (2002).

[49] See e.g. commentary by Kellerbauer and Meeßen (2019).

[50] See e.g. Case C-166/07, European Parliament v Council of the European Union, EU:C:2009:499.

[51] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, [2004] OJ L 349/1.

[52] Directive 2019/1/EU of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L 11/3.

parallel to those Articles, but also covers the gaps and limitations in the tools and guarantees of [national competition authorities] needed to apply Articles 101 and 102 TFEU, because such gaps and limitations negatively affect both competition and the proper functioning of the internal market."[53] Similarly, the earlier Directive 2014/104/EU elaborated that an "uneven enforcement of the right to compensation in Union law may result not only in a competitive advantage for some undertakings which have infringed Article 101 or 102 TFEU but also in a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is enforced more effectively", before concluding that such "differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market", which was thus deemed to justify Articles 103 and 114 TFEU as the correct choice of legal basis.[54]

These justifications for the choice of legal basis in both directives seem heavily reliant on their effect rather than their content. However, only the latter—the content—should be the determining factor for the 'centre of gravity' theory,[55] if general criteria of legal basis litigation apply. In fact, according to Article 3(1)(b) TFEU, the scope of the Union's competence in competition law extends to the establishment of such rules necessary for the functioning of the internal market and thus should not even require the additional legal basis of Article 114 TFEU for the adoption of measures in this area.[56] For example, Regulation 1/2003[57] was adopted on the single legal basis of Article 103 TFEU only, while still acknowledging the effects competition law has on the internal market.[58]

In addition, according to Protocol (No 27) on the Internal Market and Competition,[59] which is annexed to the TEU, 'the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 [TFEU]', to ensure that competition is not distorted. Article 352 TFEU serves a gap-filling function, provided that "action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers".[60] It is thus questionable whether Article 114 TFEU was indeed needed as legal base for the adoption of the DMA, be it single or in conjunction with Article 103 TFEU.[61] In particular with

[53] Ibid, recital 9.

[54] Recital 8 of Directive 2014/104/EU.

[55] The distinction between incidental effects and predominant aim and purpose was first drawn in Case C-70/88, European Parliament v Council of the European Communities, EU:C:1991:373.

[56] See also Lamadrid de Pablo and Bayón Fernández (2021).

[57] 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, OJ L 1, p. 1-25.

[58] Ibid, recitals 1, 8, and 9.

[59] [2008] OJ L 115, p. 309.

[60] Paragraph 1.

[61] See also discussion in Engel (2023, forthcoming).

reference to the DMA and the above discussed *ex-ante* mechanism for competition law, Article 352 TFEU could have been the more appropriate legal basis to fill this gap.

3.3 The Union's 'Digital Competence'

In addition to the explicit relevance for competition law according to Protocol (No 27), Article 352 TFEU would have also been appropriate as the Union's 'digital competence'. At this point, it must be emphasised that such a 'digital competence' does currently not exist anywhere in the treaties. According to the principle of conferral in Article 5 TEU, "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."[62] This is crucial, particularly if one regards the digital market distinct from the internal market regarding their nature, scope, and conditions as outlined above. The overlap that occurs however, may give reason to consider Article 352 TFEU as a suitable choice of legal basis if it serves to attain Union objectives.

While Article 352 TFEU is comparable to Article 114 TFEU as both are horizontal Union competences, they differ in some essential respects. Unlike the clear internal market focus of Article 114 TFEU, Article 352 TFEU is not limited to any policy area and therefore could potentially have a much wider scope, thus constituting a last resort for anything beyond the internal market,[63] including a 'digital competence'. This potentially unlimited scope is compensated by the procedural restrictions entailed in the provision. More concretely, Article 352 TFEU requires unanimity voting in the Council, which effectively equates to a conferral of powers since each and every Member State would have to approve the proposed measure in the legislative process before it could thus take effect.

From a pragmatic point however, and irrespective of the added intergovernmental legitimacy such unanimity voting would have, Member States' veto powers would risk prolonging the legislative process, especially so in a European Union of 27 members. Therefore, despite its theoretically ideal fit to fill the 'digital competence' gap, the necessary, but impractical, procedural requirements thus render Article 352 TFEU unfit for the digital era.

[62] Paragraph 2.

[63] See e.g. discussions by Butler (2019). See also Dashwood (2009).

4 Quo vadis, lex specialis?

Special legal bases are an endangered species; they always have been. And despite the codification of competence categories by the Treaty of Lisbon, the competence creep continues.[64] Horizontal legal bases, such as Article 114 TFEU, have received extensive application to the detriment of more specific legal bases. With the challenges posed by the digital age, this development seems to be further exacerbated (as illustrated above) and may have wide-reaching consequences for a number of other policy areas concerned.

One example is the proposal for an Artificial Intelligence Act (AI Act), which is envisaged to be adopted on the sole legal basis of Article 114 TFEU,[65] thus being placed clearly within the area of the internal market rather than any other policy field. While there might not be a more special legal base available due to the rather broad nature of the act, Article 352 TFEU would at least be a valid alternative to consider here. As was already discussed in Sect. 3.3., the latter provides the Union with a gap-filling function in case 'the Treaties have not provided the necessary powers'. The unanimity requirement constitutes, however, a higher threshold and the possibility for each Member State to be able to exercise its veto power against the proposed measure. Therefore, again, from the Commission's perspective, Article 114 TFEU might be the more pragmatic legal base to be employed, despite Article 352 TFEU arguably being the more fitting choice from the perspective of constitutional theory.

A similar proposal was recently made in the area of digital finance, with a provisional agreement having been reached for a new regulation on crypto currencies (MiCA).[66] The package for a digital finance strategy in the EU also includes a proposal for a Digital Operational Resilience Act (DORA)[67] as well as a proposal on distributed ledger technology (DLT).[68] All of these measures are proposed as regulations to be adopted on Article 114 TFEU as the single legal base, despite having a clear finance-related focus. Potential alternatives to Article 114 TFEU could thus be found in the areas of economic and monetary policies. Admittedly, these two rather conflicting policy areas have previously caused judicial uproar between the German Federal Constitutional Court and the European Court of Justice

[64] For an early account of this development under the pre-Lisbon era, see Weatherill (2005).

[65] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM/2021/206 final.

[66] Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM(2020) 593 final.

[67] Proposal for a Regulation of the European Parliament and the Council on the digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014, COM(2020) 595 final.

[68] Proposal for a Regulation of the European Parliament and the Council on a pilot regime for market infrastructures based on distributed ledger technology, COM(2020) 594 final.

in the *Weiss* saga,[69] which may explain, but not necessarily justify, the use of Article 114 TFEU in order to avoid further conflict and legal basis litigation in this field.

Another policy area, which could potentially be affected by this development—though less related to the digital field and more pertinent in the aftermath of the COVID-19 crisis—is public health and its specific legal base of Article 168 TFEU. This provision would normally suffice for the adoption of a measure in this field. However, a recent regulation in this area was adopted on a dual legal base together with Articles 114,[70] a combination with the internal market provision which was previously held to be incompatible.[71] With the allegorical foot in the door, Article 114 TFEU could pre-empt the future use of Article 168 TFEU in this conjunction and ultimately become the single legal base for similar measures in the longer term – similar to what has been observed in the field of competition law.[72] As a result, this would circumvent the prohibition of harmonising measures contained in Article 168(5) TFEU and thus further contribute to the expansion of the EU's institutional dimension by means of secondary legislation.

These examples here are all evidence of the versatility in applying Article 114 TFEU as a legal base in the digital sphere and beyond, its clear horizontal scope, as well as the resulting decline of special legal bases despite their codification post-Lisbon. In addition to this constitutional dilemma, the choice of Article 114 TFEU also entails practical consequences for future legislation due to its potential pre-emptive effect. According to Article 2(2) TFEU, a shared competence between the Union and the Member States, such as the internal market, means that "Member States shall exercise their competence to the extent that the Union has not exercised its competence." It is thus foreseeable that Member States might ultimately forfeit their capacity to legislate in the digital sphere in the medium to long-term considering the Commission's increased regulatory activity in this field. This could be particularly significant for policy areas where Member States have retained some legislative and procedural flexibility, which is now overtaken by supranational harmonisation.

[69] Case C-493/17 *Weiss and Others*, EU:C:2018:1000 and BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR980/16. See also discussion in case note by Engel et al. (2020).

[70] Regulation (EU) 2021/2282 of the European Parliament and of the Council of 15 December 2021 on health technology assessment and amending Directive 2011/24/EU, OJ L 458.

[71] Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising)*, EU:C:2000:544.

[72] A similar effect may also occur in the environmental policy area, with Article 114 TFEU already complementing Article 192 TFEU as a legal base for the adoption of a variety of legislative acts. See e.g. recent Regulation (EU) 2019/1010 of the European Parliament and of the Council of 5 June 2019 on the alignment of reporting obligations in the field of legislation related to the environment, and amending Regulations (EC) No 166/2006 and (EU) No 995/2010 of the European Parliament and of the Council, Directives 2002/49/EC, 2004/35/EC, 2007/2/EC, 2009/147/EC and 2010/63/EU of the European Parliament and of the Council, Council Regulations (EC) No 338/97 and (EC) No 2173/2005, and Council Directive 86/278/EEC, OJ L 170.

Under the *status quo*, the fate of *lex specialis* in the EU constitutional order is thus uncertain; their continued marginalisation in the legislative process in favour of Article 114 TFEU is evident. Similarly, the judiciary places more importance on the 'centre of gravity' theory rather than on the *lex specialis derogat legi generali* principle in legal basis litigation, which again favours the application of horizontal competences, such as the internal market. As could be argued, some of these special legal bases might not survive the next round of treaty amendments—such being only a matter of time—[73] which will have to address the lingering competence issues created by the Lisbon Treaty. Most likely, this will be resolved by widening the scope of Article 114 TFEU even further, to then also incorporate some of the special policy areas currently still independent.

5 Concluding Remarks

This chapter has explored the ever-growing application of Article 114 TFEU as a legal basis for the adoption of Union measures in the Digital Single Market, with particular focus on the area of competition law and the Digital Markets Act. As has been shown, the EU's increasingly regulatory approach in digitalisation has led to a demand for swift action which ensures harmonisation on a broad level across the Member States. Nevertheless, the current constitutional setup and division of competences as codified under the Treaty of Lisbon also provide special legal bases for the areas concerned which require consideration from the EU legislator in the quest for the correct choice of legal basis. In fact, a default use of Article 114 TFEU would not only encroach upon other legal bases available, but also breach the principle of conferral according to Article 5 TEU.

The specific conflict between Article 103 and 114 TFEU was illustrated in the case study surrounding the choice of legal basis for the Digital Markets Act. Here, the EU's competence in competition law was deemed unsuitable for the *ex-ante* enforcement mechanism provided for in the DMA. However, as has been shown, this argument is unconvincing due to the arbitrary distinction between *ex-ante* and *ex-post* in this context. Instead, a dual legal basis comprising of both provisions would have been justifiable in this case and in line with previous legislation in this area. In addition, it is also argued that the internal market angle provided by Article 114 TFEU is of less importance than the lack of a 'digital competence'. Such could only be provided for by Article 352 TFEU which is of a gap-filling nature, particularly for measures with a competition law relevance according to Protocol (No 27).

Overall, the chapter has raised concerns as to which role, if any, is left for *lex specialis* in the grand scheme of Union competences, considering the default choice of horizontal provisions for the adoption of measures in the Digital Single Market and beyond. It is argued that the codification of competence categories by the Treaty

[73] See e.g. Dawson (2023).

of Lisbon has not achieved the desired result of protecting certain policy areas from the continued competence creep. The inherent possibility for pre-emption of Member States' powers under shared competences, such as Article 114 TFEU, may lead to further erosion of intergovernmental legal bases, such as Article 103 TFEU, in the digital era. This constitutional dilemma will have to be addressed in the next amendment of the treaties.

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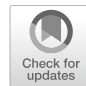
The Objectives of Regulating the Digital Economy Indicate That There Is a Right to Data in the Digital Markets Act with Direct Effect and Applicability



Björn Lundqvist

Abstract The chapter discusses the objectives for regulating the digital economy and why we should view the new regulations and acts being derived from the legislative work of the EU as the emergence of a new legal discipline, the market law for the digital economy, or, short, digital market law. The energy and speed with which EU institutions are developing these diverse (and sometimes dysfunctional) sector-specific regulations for the digital economy certainly call for a more holistic approach. A general approach to the legal system now being developed in a piecemeal fashion to protect a number of freedoms and objectives for the digital economy, ensuring that a sturdy legal platform for the new paradigm is put in place without over-regulating the data-driven economy. Foremost, the new legal discipline needs its own property rights regime. As will be argued in the chapter, the general objectives for establishing a market law for the digital economy calls for a sui generis property regime for data, and the author argues that an access and transfer right to data based on the obligations stipulated in the Digital Markets Act should be developed and acknowledged as a proper property right.

1 Introduction

Data-related technology advancements have brought about a paradigm shift and have created a data-driven economy that requires a legal framework to regulate the economic behaviour of its participants—both companies and consumers. However, legislators' hands-off attitude, intended to promote a 'free' and unregulated Internet, has not realized the original Internet dream of a borderless and radically democratic space. Instead, this laissez-faire approach to the digital economy has created a

This chapter is based on and a development of chapter 5 The Objectives of Regulating the Data-Driven Economy in my recently published book Regulating Access and Transfer of Data (CUP 2023).

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lawless arena where the strong prevail. These powerful participants also dominate in terms of data—the Internet's most valuable asset—and through their actions, large platforms are in fact hindering the free flow of information by 'hoarding' data (or, as the Commission formulated it, 'data lock-in').[1] These barriers seem destined to increase in the future.

To be precise, the Internet movement did not imply a totally lawless Internet. Gradually, rules regarding privacy, copyright, consumer protection, civil actions and jurisdiction were either implemented in the virtual environment or developed with time and experience. However, the Internet escaped the sector-specific regulation normally applied to network services, with laws on authorization, conditions for providing the services and, services' extent, content, or scope of their reach. Moreover, the free Internet did imply that as a rule, intermediaries should not be liable for the content they convey unless the intermediaries (i.e. platforms) produced that content themselves or did not take action when alerted to the content's illegality.[2] Indeed, though it should be acknowledged that sector-specific rules for an industry often lead to rigid legal instruments and seldom are successful, the hands-off' policy of a free Internet implied that even basic legal systems for establishing a functional liberal economy should be frowned upon or even rejected. The public became uncertain as to whether some users (often young persons) should be made liable for illegal downloads, while the political Internet movement was critical of the notion of property as such. Against this backdrop, the introduction of functional property systems for the Internet seems generally to have stalled or even to have been rejected.[3] Indeed, the grassroots Internet movement reflected the policy of a 'free' and liberal Internet, while legislators argued over who should be held liable for infringement when illegal content was uploaded on the Internet. The consequences of these parallel worlds are clear: basic rules for implementing a liberal economy have been lacking, or implementation of rules for the Internet-based, data-driven economy has been sluggish at best.

Historically, as the free economy was envisioned and developed starting with the first industrial revolution, certain freedoms were considered essential to the proper function of such an economy. The main objective of these freedoms is to uphold and protect the liberal economic system as such.[4] However, from a realistic perspective,

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[1] The EU Commission's aim in reference to the suggested data producer rights is to prevent data lock-ins and promote competition on open markets, to achieve a multitude of choices for consumers. See Commission, 'Communication from the Commission of 10 January 2017—Building a European Data Economy' COM(2017) 2 final, 13.

[2] Savin (2020), p. 1.

[3] In the Nordics, the original idea of a free internet was most clearly perceived in the long Pirate Bay saga, where basic rules for a liberal economy were surprisingly difficult to implement. For the story of Pirate Bay, which illustrates the force of the free Internet movement, see https://en.wikipedia.org/wiki/The_Pirate_Bay_trial.

[4] Bernitz (1979), p. 56 et seq; Bernitz (2015), p. 33 et seq.

these freedoms implied the objective of guaranteeing functioning and competitive markets.[5]

The number of freedoms and scope can be disputed, but certain freedoms were considered necessary to the establishment of something akin to a liberal economy with functioning and competitive markets. The first is the freedom to conduct and establish businesses, i.e. to establish, develop and terminate business operations, without requirements on certain certified competences or licences (in contrast to the guild-based or regulated economy that preceded the first industrial revolution). The second is the freedom to compete, i.e. to access markets, vie with other firms for custom—and to enter into business conduct that could negatively affect other firms' success, while such behaviour would still be considered competition on the merits. The third is the freedom to enter into contracts and trade with any party, with the content of the contracts being determined solely by the involved parties. The fourth, 'consumer' freedom, means that purchasers should master the market and freely select products and services. These days, however, few if any would dispute that in a liberal tradition one foundation for these freedoms is the right to property.[6] Today, these freedoms, are in conjunction with the four freedoms of the EU, form a European economic constitution.[7]

These freedoms are protected to a certain extent by human-rights conventions and charters but are often inherent in the general legal system. For example, Article 16 of the EU Charter protects the freedom to conduct a business and the freedom to enter into contracts, and to select business partners.[8] Hence, freedom to compete is protected by Article 16 but is also spelled out in Article 120 TFEU. However, the full picture of these freedoms is rather intrinsic, and they must be exercised with the application of other social freedoms and principles. For example, the protection of property must be applied proportionally with the freedom of information (Article 10 ECHR).[9]

The notion of a European Economic Constitution is very controversial, as is its perceived limitation as societies and governments acknowledge the importance of the social dimension and the need for balancing economic rights and freedoms against other fundamental rights. It should be noted, however, that the notion and effect of the European Economic Constitution has greatly increased in importance

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[5] Drexl (2018), p. 49 et seq.

[6] Bernitz (1979), p. 53 et seq. In reference to ordoliberal theory of economy and property, see the contributions in Peacock and Willgerodt (1989); Friedman and Friedman (1998), p. 605. Von Mises (2006), p. 18.

[7] Bernitz (2015), p. 33 et seq. Wahl (2019), pp. 273–287; Blanke (2012). See also Everson and Correia Gonçalves (2014), p. 446.

[8] See Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28 paras 42 and 43. See also C-426/11 *Alemo-Herron* ECLI:EU:C:2013:521 para 32.

[9] C-283/11 *Sky Österreich* ECLI:EU:C:2013:28. See also C-469/17 *Funke Medien* ECLI:EU:C:2019:623.

with the latest ECJ case-law developments regarding intellectual property regimes and the charter.[10]

In the Nordic legal tradition, 'market law' (*marknadsrätt*, *marknadsret*) was developed in the late 1960s and during the 70s as a specific discipline for creating a framework for the free-market economy.[11] When introduced, the legal discipline included competition law, intellectual property law, and unfair competition law, including rules for the marketing of goods and services to consumers. A large number of European directives now deal with the protection of consumers from various marketing methods (misleading advertising, comparative advertising, distance contracts, e-commerce etc.). The influence of EU law is perhaps even stronger in competition law, which is fully developed in reference to EU competition law.[12]

Market law in the Nordic discipline was distinguished from the core European notion of general economic law (*Wirtschaftsrecht* or *droit économique*), as being more precise and a more functional approach to creating a framework for free markets, intended to protect *inter alia* the freedom to compete and the right to establish and conduct a business (*näringsfrihet*), including freedom of contract. The various legal systems worked together towards a vision of the discipline's main function: to keep competition free and fair, with a firm basis in private rights, as a property system, and to complement this system with rules regarding unfair competition, e.g. prohibitions against unfair trading terms, protection for trade secrets and know-how etc.

The identification of the legal discipline of market law has not been promoted after the introduction of EU law, which is based on the broader concept of economic law, and certain important objectives such as efficiency are now decisive for market law regulation in Nordic EU Member States. Nevertheless, as with market law, the use of legal disciplines—with a smaller set of main goals or objectives—has several advantages. It makes the legal systems more transparent and more prone to legal certainty, and can also provide more effective guidance when the legislator regulates new forms of industries.

We need a legal discipline of 'digital market law' to regulate and develop the digital or the narrower data-driven economy, and it is very interesting that the Commission is now proposing a digital market law regulation. The 'digital market law' discipline should consist of the new regulations being enacted by the EU,

[10] Increasingly, national courts have begun to consider the impact of the Charter of Fundamental Rights on EU copyright law. In *Funke Medien*, *Pelham GmbH*, and *Spiegel Online v Volker Beck*, the ECJ discussed a series of important questions about the relationship between the Charter, copyright law, and national constitutional norms. Generally, it should be acknowledged that the ECJ has ruled that freedom of information and of the press cannot justify a derogation from the rights of copyright holders beyond allowed exceptions and limitations. C-469/17 *Funke Medien* ECLI:EU:C:2019:623; C-476/17 *Pelham GmbH* ECLI:EU:C:2019:624; and C-516/17 *Spiegel Online v Volker Beck* ECLI:EU:C:2019:625.

[11] Bernitz (1969), p. 63 et seq. See also Bernitz (1979), p. 55 et seq.

[12] Engelbrekt (2007).

e.g. Data Act,[13] Digital Markets Act,[14] Digital Service Act,[15] the Platform-to-Business (P2B),[16] Data Free Flow Regulation,[17] the Open Data Directive,[18] PSD2[19] and the other sector specific regulations or rules catering to the digital economy. The energy and speed with which EU institutions are developing these diverse (and sometimes dysfunctional) sector-specific regulations for the digital economy certainly call for a more holistic approach. A general approach to the legal system is now being developed in a piecemeal fashion to protect a number of freedoms and objectives for the digital economy, ensuring that a sturdy legal platform for the new paradigm is put in place without over-regulating the data-driven economy.

Several authors in academia discuss the objectives for establishing a regulatory theory for the data economy, which seems to reflect the constitutional framework of fundamental rights in its entirety.[20] The four objectives are (i) establish functioning and competitive markets, (ii) promote innovation, (iii) protect consumer interests with a particular focus on protecting the privacy of natural persons and (iv) promote additional public interests. Under the objective of establishing functioning and competitive markets, Drexl includes freedom of contract, the right to compete, and freedom to conduct a business, while including a multitude of different public interests and objectives as part of the objectives for protecting consumer interests

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[13] Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act), COM(2022) 68 final (23.2.2022).

[14] 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), 12.10.2022, p 1–66.

[15] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) OJ L 277, 27.10.2022, p 1–102.

[16] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

[17] Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union.

[18] The Directive on the re-use of public sector information Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, OJ L 172, 26.6.2019 56–83 (The old PSI directive: Directive 2003/98/EC, known as the 'PSI Directive') entered into force on 31 December 2003. It was revised by Directive 2013/37/EU, which entered into force on 17 July 2013.

[19] In order to accelerate retail banking innovation and simplify payments, the European Commission is mandating standardized API access across the EU. The initiative is part of the European Commission's update of the Directive on Payment Services (PSD). The revision to the Directive on Payment Services (PSD2) requires banks to provide access to third parties. See Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (Text with EEA relevance). Cf. Commission, A Digital Single Market Strategy for Europe, COM(2015) 192 final, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192.

[20] Drexl (2018).

and promoting public interests. The objectives also form an integrated 'test' for regulating the digital economy, including what appears to be a 'test' to establish a property right for data.[21] However, from a Nordic market law perspective, the need for a property right should be established primarily in the light of the first and second objectives—establishing a functioning and competitive market and promoting innovation—because generally, the economic freedoms in a liberal economy can be included under these objectives. This perspective notwithstanding, the economic freedoms as well as a new property regime and its application must be applied proportionately with other social freedoms and principles.

Indeed, the four objectives stated above reflect the core European notion of a general economic discipline (*Wirtschaftsrecht* or *droit économique*), but in this case for the digital economy. The aim is inter alia to include the constitutional framework of human rights in its entirety. From the viewpoint of a Nordic legal tradition, a narrower approach could be developed when regulating the digital or data-driven economy, where objectives still need to be weighed against each other. *Inter alia*, for establishing a legal discipline, not every part of the legal discipline needs to fulfil each objective; only the sum of the parts must meet the objectives, i.e. a legal discipline as such must cater to all rights in reference to the liberties and freedoms that are at stake. Moreover, there might be freedoms and objectives that are only remotely connected to business conduct in data-driven markets, and thus can be protected by other parts of the general economic legal system. Indeed, an economic regulation for the governing of a digital economy should be enacted when the need arises in reference to the economic freedoms indicated above—to conduct and establish businesses and compete (i.e. to access markets), and consumer freedom that allow consumers to master the market and freely select the products and services to their liking and according to their needs. Nevertheless, rights such as privacy, cannot form an objective for creating a digital competitive economy as such; they can only be a counterweight to limiting economic freedoms.

Given the general picture of the development of a market law for the digital economy depicted above, it is interesting that the basic notion of a property regime has been discussed in a limited way only on an EU level. As will be argued in the chapter, the general objectives for establishing a market law for the digital economy calls for a sui generis property regime for data, and there are rules and principles that lend themselves to the notion of property. Both the proposed Data Act and the Digital Markets Act are comprehensive regulations for platforms that are active on the Internet and that apply data-driven business models, and they fulfil the four objectives for a general economic legal system as well as stipulating rules akin to a property right to data. This chapter will due to lack of space focus only on the Digital Markets Act, and whether there are obligations stipulated in said act that could be interpreted as rights. Indeed, the rigorousness in the obligations stipulated together with principles of EU law supremacy, direct applicability and direct effect create rules akin or similar to rights.

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[21] Ibid.

2 The Obligations to Share Data in the Digital Markets Act

The Digital Markets Act has the potential for establishing functioning and competitive markets when the contractual and technical restrictions imposed by gatekeepers on business users are eliminated. The obligations are clear and the aim of the obligations is to empower the business user to be able to enter and compete on markets. The business users will be able to compete with the gatekeepers on their own markets due to the obligation for the gatekeepers to give equal access to data generated by the business users. The obligation to grant access and transfer of data will also prevent gatekeepers from having a competitive advantage due to asymmetric information. Take for example to obligations in reference to access and transfer data. According to Article 6(2), (9) and (10) of the Digital Markets Act, the designated gatekeeper shall:

2. The gatekeeper shall not use, in competition with business users, any data not publicly available, which is generated or provided by those business users in the context of their use of the relevant core platform services or of the services offered together with or in support of the relevant core platform services, including data generated or provided by the end users of those business users.[22]
9. The gatekeeper shall provide end users and third parties authorised by an end user, upon their request and free of charge, with effective portability of data provided by the end user or generated through the activity of the end user in the context of the use of the relevant core platform service, including by providing, free of charge, tools to facilitate the effective exercise of such data portability, and including by the provision of continuous and real-time access to such data.
10. The gatekeeper shall provide business users and third parties authorised by a business user, upon their request, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated and nonaggregated data, including personal data, that is provided for or generated in the context of the use of the relevant core platform services or services offered together with, or in support of, the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users. The gatekeeper shall provide for such access to, and use of, personal data only where the data are directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end user opts in to such sharing by giving their consent.

[22] Moreover, the preamble (46) states that to prevent gatekeepers from unfairly benefiting from their dual role, it should be ensured that they refrain from using any aggregated or non-aggregated data, which may include anonymised and personal data that is not publicly available to offer similar services to those of their business users. This obligation should apply to the gatekeeper as a whole, including but not limited to its business unit that competes with the business users of a core platform service'.

The question is whether these obligations, when read in combination, stipulates something akin to an access and portability right for business users. These provisions state that the gatekeeper is *de facto* not allowed to use the data generated by the business user on the platform, in competition with the business user. Paragraphs (9) and (10) continue and state that the business users instead has the right to access and use the data it has generated on the platform. Interestingly, the obligation in Article 6 (2) compared to the obligations in (9) and (10) does reflect that business users have some sort of preferential right to the data generated, vis-à-vis the platform provider.

However, can the business user use these obligations as a right to be claimed in Court? That depends under EU law on the applicability and direct effect of the said obligations.

As far as primary law is concerned, the Court established the conditions for direct effect in the *Van Gend en Loos* judgment.[23] The case states that EU law not only create obligations for EU Member States, but also rights for individuals. Individuals may therefore take advantage of these rights and directly invoke EU law before national and European courts. The obligations must be precise, clear and unconditional and they must not call for additional measures, either national or European.[24]

The principle of direct effect also relates to regulations, directives and decisions, i.e. secondary EU law. which are derived from the principles and objectives set out in the treaties. However, the application of direct effect depends on the type of act.

Regulations—such as the Digital Markets Act—are directly applicable in the Member States, as specified in Article 288 of the Treaty on the Functioning of the European Union, and have, as a general rule, direct effect. It states that regulations "shall be binding in its entirety and directly applicable in all Member States". The ECJ has confirmed that they are in principle directly effective stating that "Owing to their very nature and their place in the system of sources of Union law, regulations operate to confer rights on individuals which the national courts have a duty to protect"[25] If a specific right is conferred therefore a regulation can be both vertically and horizontally directly effective. However, in line with the general principles, this applies only under the condition that the rules are sufficiently clear, precise and unconditional.

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[23] Case C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration, ECLI:EU:C:1963:1.

[24] In *Becker*, the Court rejected direct effect where the Member States have a margin of discretion, however minimal, regarding the implementation of the provision in question. In *Kaefer and Procacci v French State*, the Court affirmed that the provision in question was unconditional because it left no discretion to the Member States and therefore had direct effect. Cf. Case C-8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* ECLI:EU:C:1982:7 and joined cases C-100/89 and C-101/89 *Peter Kaefer and Andréa Procacci v French State,* ECLI:EU:C:1990:456. For further reference, cf. The direct effect of European Union law at eur-lex, https://eur-lex.europa.eu/EN/legal-content/summary/the-direct-effect-of-european-union-law.html.

[25] Case C-253/00 *Munoz* ECLI:EU:C:2002:497 para. 27.

It should however be clear that the Digital Markets Act firstly requires that an undertaking is designated as a gatekeeper under Article 3 for the regulation to become applicable. Secondly, the Commission can thereafter render decisions under Article 6 in reference to the gatekeeper. Obligations for gatekeepers under Article 6 are thus susceptible of being further specified by the Commission. However, the Commission has a discretion in rendering implementation acts under Article 8. It reads "[t]he Commission may adopt an implementing act, specifying the measures that the gatekeeper concerned is to implement in order to effectively comply with the obligations laid down in Articles 6 and 7." This would imply that the obligations under Article 6 (2)(9)(10) is hard law, directly applicable, with potential of having direct effect. The Commission can only specifying the measures in an implementing act. That would imply that the Commission has no margin of discretion as to be able to soften or strengthening the obligations vis-à-vis the gatekeeper in such an implementation act.

Thirdly, there are inherent limitations to the obligations stipulated in Article 6(2)(9)(10). The gatekeeper can try to prevent access to data by claiming that it is walled in by intellectual property rights. Indeed, copyright owners regularly resort to technical protection measures (TPMs), cf. Art 6 InfoSoc,[26] to prevent access to copyright-protected content. 'Hacking', or breaching technical measures to gain access to data, can be a violation of Art. 6 InfoSoc. Thus, Art. 6 InfoSoc also protects the platforms from being 'hacked' to gain access to unprotected data. APIs can be copyright protected. Platforms can also claim that the datasets they collect are trade secrets as defined under the new EU directive,[27] or in the case of personal data, might be off-limits under the GDPR.[28] For the data generated on the platforms, the gatekeepers would most likely acquire some intellectual property rights when storing the data in databases or in a public centralized blockchains, such as sui generis database protection, which may also limit or even prevent the porting of whole datasets.

The question is whether these three raised issues would cause the obligations stipulated under Article 6(2)(9)(10) to be considered not to be directly applicable or having direct effect. I would argue to the contrary. These obligation amount to a bilateral, preferential right to direct and constant access each data point created by the business user on the platform. The obligations a clear and precis in reference to when they are applicable, and when not. The questions of limitations in reference to intellectual property protection, GDPR and trade secrets do not deter that the

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[26] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc).

[27] Cf. Article 3 of the Trade Secret Directive and preamble 16, stating that "Reverse engineering of a lawfully acquired product should be considered as a lawful means of acquiring information, except when otherwise contractually agreed. The freedom to enter into such contractual arrangements can, however, be limited by law."

[28] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

obligations are clear and precis. Finally, the Commission has neither under Article 3 nor under Article 6 any margin of discretion when either deciding on designation of gatekeeper or implementation acts under Article 6. Indeed, the obligations under Article 6 as wells as the requirements for establishing a gatekeeper under Article 3 bind the large tech firms as much as the Commission.

Given the direct applicability and effect of the said obligation in the Digital Markets Act and the principle of EU law supremacy create the foundation for establishing a property right, an access and transfer right (ATR) for the benefit of business users.

3 Constitutional Aspects of the Enactment of an Access and Transfer Right

Ownership is not defined the EU-law level, and the Member States' legal systems define ownership differently.[29] There is a dichotomy between civil and common law understanding of ownership. While civil law recognizes a limited number of property rights and a limited number of legal objects that can be subjected to these property rights, common law is more flexible and allows private parties more freedom in the types of ownership interests which they can create.[30] In civil law jurisdictions, property is based on law or legal acts. Ownership is thus an absolute dominion encompassing all the listed rights over the relevant object.[31] By contrast, in the common law tradition, the notion of ownership includes a variety of different rights over the same property. Ownership can be a sliding scale. As Janeček identifies, under common law, you can have more or less ownership depending on how large the bundle of your property rights in the object is.[32] Moreover, civil law jurisdictions consider property or ownership to be absolute, erga omnes, while common law recognizes personal property (in personam) and real property rights—in rem.[33]

As discussed above, a fundamental thrust of arguments that support introduction of a property right to data is how technology advancements have brought us to a point where data and information is separated from individuals' personalities and skills. The new paradigm implies that data can be controlled, collected, and stored, i.e. that it has left the room of thoughts and ideas to become tangible items,[34] at least

[29] Janeček (2018), pp. 1039–1052, 1041. See also van Erp (2017), p. 242 et seq.

[30] Janeček (2018), pp. 1039–1052, 1041 et seq.

[31] Van Erp (2017), p. 242 et seq.

[32] Janeček (2018), pp. 1039–1052, 1041.

[33] Ibid.

[34] Kim (2017), p. 697.

in the virtual world. Data is the new raw material for many diverse services.[35] Data is also the cornerstone developing models to predict future events.

Indeed, one fact cannot be avoided in this context: a property legal system is an allocation-of-power regime that distributes and disseminates power. Such allocation of power can be based on various factors: as a reward for labourer investment, as an expression of personality, as a basis for economic freedom or in terms of economic utility (efficiency based).[36] In several aspects, various justice-related arguments are presented to alter the paradigm of dominance of the strong and powerful over the weak in an unregulated scenario, or when the legal system promotes the wrong group over other groups in society.[37] With this viewpoint, the economic rights inherent in property are not an end in themselves, but a means to protect something else—often the investment in capital or time to create tangible goods, or intangible information—which on a grander scale implies that property protects the distribution of opportunities and the function of the liberal market economy as such.[38] In essence, a property right is the foundation of a legal system and a major function in the protection of the liberal economy. Clearly defined property rights enable transactions and efficient allocation of resources. Indeed, a property regime reflecting an access and transfer right (ATR) is necessary, because it reflects a reward for labour and is an expression of personality, or a reward for an investment, while it directs the data to the entities that need it for trade and innovation, i.e. business user's data to business users. The new right system also diffuses the inherent power of information resting in the hands of a few and disseminates data among several stakeholders, to the benefit of innovation, progress and the creation of markets for trading data. An ATR will increase trade in data; the ATR will function as a tool to increase the volume of data in the market. Moreover, the market for licensing of ATRs will introduce a new market, created by enacting ATRs, which could become an additional layer for competition and prosperity.

The previous attempt in academia to promote a producer data right has argued that producers should have an exclusive right to individual data points, and indeed, any information they produce.[39] Moreover, the proponents for such a property regime have been unclear as to whether the protected subject matter is information or merely syntactical elements of data. These two aspects may indeed create a risk that the producer data right develops into a stranglehold on the right to information, with the potential to greatly increase transaction costs. It could increase the bureaucracy of data-driven markets, and it is unclear whether such a right would truly benefit innovation and the creation of data markets and data-driven markets.[40]

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[35] OECD (2015), p. 7.

[36] For a similar list see Richter (2018), p. 552 et seq.

[37] Calabresi and Douglas Melamed (1972), p. 1093.

[38] Bernitz (1969), p. 54 et seq. See also Bernitz (1979), pp. 53–76.

[39] Stressing that data includes any and all information, see Hugenholtz (2017), p. 75.

[40] Several authors discuss this, see for example ibid and Drexl (2018).

The concept proposed above for an ATR would not entail such risks. ATR does not imply an exclusive right, only right to access and transfer, i.e. copy the data; in addition, it provides a clear distinction: information is protected, but not the syntactical elements of data (i.e. 1s and 0s). The access and transfer rights are not vested in individual data points. Business providers and subcontractors would obtain access to datasets consisting of the data generated by or at least reflecting their intellectual or quantitative investments in the dataset or database provided on the platform.

Such a right will boost and increase innovation because it will teach business providers how to create better products; the data from the marketing segment will become available to these providers. Indeed, this right will transform the marketing and distribution process into an R&D effort, where information regarding customer satisfaction is obtained in real time, by the entities with the greatest need of such information. These entities will innovate based on the information received because market forces will incentivize them to act immediately in reference to the data obtained. Interestingly, this will boost innovation, perhaps even beyond traditional levels. Their data-driven products and business models need to be developed continuously. Access to data generated by business users will no longer be the prerogative of platforms.

The ATR also creates something more: it increases potential access to information in the commons. Implementing strong ATRs will transfer data from the gatekeepers to users that can transfer or sell data, or even make the data available to the commons. Indeed, data will be more available than before, giving journalists, activists and civil society the possibility to access data, because data will be traded and marketed to a larger extent than when platforms hoard data. The vision or dream of having a free and democratic Internet, where data and services were freely available for all, is more likely to be fulfilled with an ATR than without.

As discussed above, the legislator's hands-off attitude, intended to foster a 'free' and unregulated Internet, created a lawless arena for the digital economy; this approach will not promote freedom. For a liberal economy to develop properly, certain freedoms must be present and protected: the freedom to conduct and establish businesses; the freedom to compete; the freedom to enter into contracts and trade with any party, along with the freedom of the involved parties to determine contract content; and purchaser freedom, allowing purchasers to master the market and freely select products and services according to their liking and needs. These freedoms must be in place, in conjunction with the four freedoms of the controversial notion of a European economic constitution.[41]

However, for these freedoms to materialize in a liberal economy, private property regimes must be put in place.[42]

[41] Bernitz (2015), p. 33 et seq. Generally regarding European Economic Constitution, Wahl (2019), pp. 273–287; Blanke (2012). See also Everson and Correia Gonçalves (2014), p. 446.

[42] Bernitz (1979), pp. 53–76. Friedman and Friedman (1998), p. 605. See also von Mises (2006), p. 18.

These freedoms for regulating the digital economy are protected to a certain extent by human rights conventions and charters but are often inherent in the legal system. The right to property is stipulated in Article 17 of the Charter of Fundamental Rights; everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. Intellectual property shall be protected. Article 16 of the EU Charter protects the freedom to conduct a business and the freedom to enter into contracts, and to select business partners.[43] Article 11 of the Charter provides the right to freedom of expression and information, subject to certain restrictions that are in accordance with law and necessary in a democratic society. This right includes the freedom to hold opinions, and to receive and impart information and ideas. Freedom to compete is spelled out in Article 120 TFEU. Article 8 of the EU Charter stipulates that every person has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of consent from the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data that has been collected concerning him or her, and the right to have the data rectified.

It should be noted that the idea and (direct) effect of the European Economic Constitution in EU national legal systems has greatly increased in importance owing to the latest ECJ case-law development in refence to the Charter of Fundamental Rights.[44] It seems that the ECJ are developing the notion of economic freedoms and the European Economic Constitution under the indulgence of the Charter. Weak, passive rights are starting to develop into strong, active rights.[45] Indeed, ATR stipulated in Article 6(2)(9)(10) has its Constitutional foundation foremost in the Articles 16 and 17 of the EU Charter, i.e. right to conduct a business and right to property, thus the obligations in Article 6(2)(9)(10) are derived from the principles and objectives set out in the EU Charter. Indeed, supremacy of the EU Charter vis-à-vis Member State law, and that the Digital Markets Act, in general, and Article 6(2)(9)(10), in specific, are directly applicable imply that also a horizontal and vertical [property] right, the ATR, is hidden in the combination of obligations in

[43] See C-283/11 *Sky Österreich* paras 42 and 43 and C-427/11 *Alemo-Herron* para 32.

[44] See e.g. case C-414/16 – Egenberger, ECLI:EU:C:2018:257, para. 76 et seq; case C-569/16 and case C-570/16 – Bauer and Willmeroth, ECLI:EU:C:2018:871, para. 85 et seq. Increasingly, national courts have begun to consider the impact of the Charter of Fundamental Rights also on EU copyright law. In C-469/17 *Funke Medien*, C-476/17 *Pelham GmbH*, and C-516/17 *Spiegel Online v Volker Beck*, the ECJ discussed a series of important questions about the relationship between the Charter, copyright law, and national constitutional norms. Generally, it should be acknowledged that the ECJ rules on freedom of information and of the press cannot justify a derogation from the rights of copyright holders beyond allowed exceptions and limitations under EU, e.g. those stipulated in the InfoSoc.

[45] Gill-Pedro (2020).

Article 6(2)(9)(10) read together with the rights in Articles 16,17 and possibly 21 of the EU Charter.[46]

In reference to the legal systems discussed in this chapter, numerous rights are being triggered. They therefore need to be applied in conjunction with other rights and in a proportionate manner. For example, as Drexl argues, control over the use of data depends on the constitutional right to data protection acting as a specific justification that, from a fundamental-rights perspective, can explain the exception to the principle of freedom of information. As for protection of trade secrets, the justification relates to the procompetitive effect of such protection, which according to Drexl is weaker. Drexl continues, arguing that a data ownership right, which would result in exclusive control by the data owner without any additional substantive requirement for protection and without the requirement of secrecy, would risk violating the principle of freedom of information.

It should be noted that the access and transfer right proposed does not entail an exclusive right; it is an access and transfer right that increases the number of holders of data. Interestingly, when letting go of the exclusivity requirement as a right in the bundle of rights we collectively call ownership, a property right to data based on the rights to access and transfer become much more acceptable. Indeed, much of the controversy in reference to creating a property right to non-personal data can then be circumvented.[47] The risk of introducing such an ATR is far less.[48]

Moreover, ATRs will boost competition and create contestable markets. Indeed, an ATR give business users the possibility to have a (more) levelled playing field vis-à-vis gatekeepers since it give equal access to data. This would imply that the

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[46] The CJEU has ruled that some, but not all, provisions of the Charter of Fundamental Rights of the European Union (Charter) are capable of horizontal direct effect between private parties. See discussion, e.g. Opinion of General Advocate Cruz Villalón case C-176/12 – Association de médiation sociale, ECLI:EU:C:2013:491, para. 28 et seq.; Bobek (2020), p. 61 et seq.; Fornasier (2015), p. 29.

[47] See for example Osborne (2016); Duch-Brown et al. (2017); Gärtner and Brimsted (2017), p. 461; van Erp (2017), p. 235; Zech (2016), pp. 51–79; Drexl et al. (2016), p. 12; Kerber (2016), p. 989.

[48] The EU Commission also envisioned something similar. Instead of creating the data producer right as a right in rem, the Commission purport that it could be conceived of as a set of purely defensive rights. This option would follow the choice made in the design of the protection given to know-how by the Trade Secrets Protection Directive. Its objective would be to enhance the sharing of data by giving at least the defensive elements of an in rem right, i.e. the capacity for the de facto data holder, to sue third parties in case of illicit misappropriation of data. This approach thus equates to a protection of a de facto ‘possession’ rather than to the concept of ‘ownership’ According to the Commission, a number of civil law remedies could be introduced such as:

(i) the right to seek injunctions preventing further use of data by third parties who have no right to use the data,
(ii) the right to have products built on the basis of misappropriated data excluded from market commercialisation and (iii) the possibility to claim damages for unauthorised use of data.

Cf. Commission, ‘Staff Working Document on the free flow of data and emerging issues of the European data economy’ COM(2017) 9 final, 33 et seq 10 January 2017. See also Kerber (2016), p. 989.

Charter's Article 16 right to conduct a business, Article 17 right to property and Article 21 non-discrimination act as constitutional justifications for enacting an ATR legal system, while also creating a constitutional balance against other rights that might be triggered by the enactment of an ATR legal system—such as the right to freedom of expression and information, and the right to the protection of personal data. However, as stated earlier, it is difficult to see how the freedom of expression and information would be seriously violated by ATRs that would increase information in the public arena, rather than decrease the amount of freely available information in the current situation. A different matter, however, is the right to privacy. As the right has been defined by the GDPR, privacy is enhanced by limited personal data in the public sphere, and the natural person should be granted some right to personal data; the introduction of an ATR legal system could restrict these rights. The issue therefore is whether this is constitutionally sound. In several jurisdictions the right to privacy is a fundamental right of great importance, while the right to property and conducting a business are weak rights. However, this is not the case in the EU. The Charter explains that the right to privacy can be restricted by law, and under EU law, by giving consent for firms to collect their personal data, individuals are clearly in control of their right to privacy.

The right to conduct a business has seen an interesting rise in the hierarchy of human rights stipulated in the Charter. From its original state as a weak and passive right, it has ascended to become much greater prominence in the European Economic Constitution now being enhanced by the ECJ.[49] Previously, the right to conduct a business was weak and unclear because it could not be used to strike down national legislation. However, it should be noted that then-Advocate General (now Judge) Nils Wahl, in the opening to his Opinion in *AGET Iraklis*,[50] stated that: '[t]he European Union is based on a free market economy, which implies that undertakings must have the freedom to conduct their business as they see fit.'[51] It should also be acknowledged that Judge Wahl developed this further in an essay, stating that 'the freedom to conduct a business forms part of the EU's economic constitution according to which Member States have undertaken to commit to a specific form of political economy and market within the European Union.'[52] However, Judge Wahl is not the only person who seems eager to increase the ambit and importance of Article 16 of the Charter. In *Alemo Herron*,[53] which concerned an employee dispute, the ECJ seems to have used the right to conduct a business as a method to set aside national legislation that prevents an undertaking from using this right to exploit the market.

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[49] Gill-Pedro is among the first to see the signs that this understanding of Article 16 may be gaining traction in the ECJ. See Gill-Pedro (2020).

[50] Opinion of AG Wahl, C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* EU:C:2016:429 para 1.

[51] Ibid.

[52] Wahl (2019), p. 276. See also Lenaerts (1997).

[53] Case C-426/11 *Mark Alemo-Herron and others v Parkwood Leisure Ltd* ECLI:EU:C:2013:521.

In light of the above, it should be clearly considered that the ECJ could be positive to an ATR, although it might restrict the right to privacy in a limited way. A balance must be struck between the right to property and the right to conduct a business on the one hand, and on the other the freedom of information and expression, enshrined in Article 11 of the Charter and Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the right to privacy and data protection set out by the Charter. The welfare gains of enacting an ATR and the positive effects that some believe would be realized by increasing the amount of data available in society seem to outweigh the decreased protection of privacy and data protection, as articulated in Articles 7 and 8 of the Charter and in the GDPR; the latter also seems to facilitate exemption mechanisms that could in turn facilitate introduction of an ATR legal system.[54]

However, to begin generally with the three fundamental rationales for intellectual property protection—the incentive function, the disclosure function and the need for creation of proper markets—they should be considered fulfilled. Internet and the data-driven economy would greatly benefit from having a *sui generis* property regime, as the principles of a regulatory system for a free liberal economy would be complete. Indeed, ATRs could be the protection against the EU's current interventionistic, sector-specific regulation approach, which seems to lack a holistic idea or aim and instead reflects a development towards a regulated economy. At the very least, an ATR legal system would complement the sector-specific regulation movement and make certain aspects of this movement less important. Innovation would be promoted, and indeed incentives to promote data creation and public availability of data would be enhanced by a property system, which is indeed necessary. The greatest benefit of an ATR property system is in regard to the establishment of markets, where the consumers will evaluate the product, the data or the ATRs, and the transfer of such data will be based on the market value of the data or right. Furthermore, the establishment of property-based markets also clarifies the application of competition law, where relevant markets can be identified and analysed. ATR would place data as an item in the value chain or as a commodity firmly within the established boundaries of the liberal market economy and legal system.

At this point, the four objectives reflecting the test for a general economic regulation, used in this case for regulating the digital economy, also seem to call for the enactment of an Access and Transfer Right. It seems clear that giving the business providers the right to communicate or distribute the dataset to the public

[54] According to Article 6(1)(f) of the GDPR, access and sharing of personal data can be lawful without user's consent when: 'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests of fundamental rights and freedoms of data subject [user] which require protection of personal data'. Moreover, it should be recognized that Articles 5(1), 6(4) and 89 could enable firms to conduct R&D based on personal data, under certain circumstances and without the need for consent. It should also be noted that both Article 15(4) GDPR and Article 20(4) GDPR provide that these two rights 'shall not affect the rights and freedoms of others'.

would establish functioning and competitive markets for data, while also increasing innovation in the product or service markets, i.e. the core markets of the business providers. Consumers benefit from more competition and better products, while their inherent rights for protecting the privacy of natural persons are not infringed. Moreover, freedom of information is upheld and even promoted by having more data in the public domain, and by not protecting or having individual data points as business secrets held outside the public domain.

4 Concluding Remarks

We need a legal discipline for the digital economy. The 'digital market law' discipline should consist of the new regulations being enacted by the EU, e.g. Data Act, Digital Markets Act, Digital Service Act, the Platform-to-Business (P2B), Data Free Flow Regulation, the Open Data Directive, PSD2 and the other sector specific regulations or rules catering to the digital economy. A general approach to the legal system now being developed in a piecemeal fashion to protect a number of freedoms and objectives for the digital economy, is needed. It would ensure that a sturdy legal platform for the new paradigm is put in place without over-regulating the data-driven economy.

A fundamental party of a legal discipline for the digital economy would be a new form of modern property rights system to data. From a Nordic legal perspective, the need for a property right should be established primarily in the light of the need for the establishment of a functioning and competitive market and for the promotion of innovation. This perspective notwithstanding, the economic freedoms as well as a new property regime and its application must be applied proportionately with other social freedoms and principles in mind. However, as has been presented above, a limited sui generis property right for users to access and transfer data they have generated on platforms may very well fulfil the 'test' implicitly given in the objectives for regulating the data-driven economy. Indeed, the embryo of such a property right can be seen in the obligations stipulated in the Digital Markets Act, where business users are given rights inherent in the bundle of rights we call property. They can also use this right in Court when utilizing the principles of EU law. Especially the principle of EU law supremacy, the rule regarding direct applicability of EU regulations and the doctrine of direct effect entails that the obligations in Article 6(2)(9)(10) actually reflect a sui generis property right to data. Not an exclusive right, but a right erga omnes to access and transfer the data generated by business users.

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EU Digital Competition Law: Starting from Scratch

Oles Andriychuk

Abstract The paper discusses the theoretical foundations underpinning the regulatory reform of competition in digital markets introduced by the Digital Markets Act. The area is subject to paradigmatic recalibration, opening up various opportunities as well as raising challenges to the effective functioning of competition in digital markets. The purpose of the paper is to articulate some of these metamorphoses and to offer the preliminary conceptualisation to these processes.

1 Introduction

There are two types of competition policy: fundamentally similar in their normative objectives; fundamentally different in their functional apparatus. The first—known as an *ex-post* one—imposes on the enforcers a mandate to police the markets. The enforcers are akin to the guardians, watching the performance of undertakings and responding as soon as an anticompetitive conduct is being identified. The perpetrators of the anticompetitive conduct are wrongdoers, and the mission of the law is to cease, desist, restore, penalise, and compensate. When we speak of "EU Competition Law"—we usually mean precisely this regulatory philosophy: responsive in its function, criminological in its nature.

The second, emerging, type—known as an *ex-ante* competition policy—has a very different DNA. It deals with systemic market failures, where the main actors are not formally speaking wrongdoers. They do not infringe competition law—yet (usually due to the omnipresent and omnipotent market power of a handful of the largest market players) markets still do not function as expected. As such, the function of the enforcers in this modality is much broader and ambitious, discretionary, and hardly definable. It is much less axiomatic and much less deterministic. It is much more micromanaging, and much more interventionist. When we speak of

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the EU Digital Markets Act (DMA)[1]—we speak about precisely the second type of competition law.

Digital economy serves as the best example of such markets. It is simply not enough merely to detect, prevent, deter, and sanction anticompetitive conduct. Not only because the defence bar had learned too well how to use different juristic, economic, and behavioural strategies delaying and mitigating the outcomes of every ex-post investigation. Even if the mechanism of ex-post enforcement would be finetuned, it would still be insufficient to revive competition in digital markets. The function of ex-post competition law is to *protect* competition—not to promote it. Even if functioning ideally, the issues of market design go beyond its mandate.

Both types are expected to complement each other—serving the same final goal: enabling a better functioning of competition in the markets.

Both approaches *are* competition law and policy inasmuch as both regulate the phenomenon of economic competition, they are usually being pursued by the same cluster of people belonging to the same epistemic community, they understand each other in terms of the theories of harm, pedigree of the problems and maybe even the desirable outcomes. These two approaches both deal with competition—but they deal with it very differently. The traditional ex-post cluster is much more refined, established, technocratic, conservative and mature. The emerging one is more ambitious, risky, popular/populistic, interventionist and dirigiste.

Both approaches in this regard may be seen as antagonistic as philosophically they adhere to two very different ideologies. Yet, dialectically, they are also inseparably linked and may well be seen as mutually supportive.

The purpose of this chapter is to offer an analysis of the key systemic elements of the second approach – called for the sake of convenience "digital competition law" (acknowledging that ex-post rules are also applicable to and widely used in cases related to the digital economy, but implying that the new EU regime for regulating competition in digital markets contain sufficient features for being categorised in this way).

2 Reasons for the Centralised Enforcement of the DMA

Supporting the DMA for reasons other than facilitating new entries in the market, would almost inevitably lead to a conclusion that the more power is disseminated across various competition enforcers, the greater results could be achieved. Here one can clearly see an extrapolation of the logic of *ex-post* competition policy where the competences of the Commission have been redelegated to the national competition

[1] 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), Official Journal of the European Union L 265/1, 12.10.2022.

authorities during the modernisation era. This rationale can only work however as far as the restorative legal instruments are concerned. Having twenty-eight agencies observing the compliance with competition rules is indeed better than having only one.

The very gist of the DMA is underpinned by a different logic. It does not aim to *restore* competition (or rights)—but to *create* pro-competition conditions (and opportunities). The obligations imposed on gatekeepers are only the *means* for achieving these *goals*. They are not the ends in themselves. The opportunities of business- and end users emerging from the introduced obligations on gatekeepers are more a fortunate coincidence—than a naturally existing, predetermined right. Of course, both restorative and proactive approaches are mutually-invigorating, they dialectically presuppose, drive and reinforce each other. They remain however being underpinned by different philosophies and equipped by different toolkits.

An imaginary situation where all anticompetitive agreements and abuses of dominant position are at once eliminated would lead to the obvious and categorical market improvements. Irrespective of the ideological and methodological positions of the observers, all antitrust stakeholders would consensually agree that such hypothetical metamorphosis would be very welcoming (if we are indeed serious about the restorative function of competition policy as such).

The same imaginary situation where all DMA obligations for gatekeepers are at once complied with in their totality, including all possible incarnations of anti-circumvention provisions, would paralyse the markets.[2] This situation is neither achievable (which is also correct for the *ex-post* rules) nor normatively desirable (contrary to the *ex-post* rules). Aiming for the rules which prevent digital markets from manifesting their universal, systemic, unavoidable features is a dangerous utopia. Such a *Civitas Solis* would evaporate the very entrepreneurial environment of the digital economy. It is neither realistic, nor should it be desirable.

On the contrary, the rationale of the DMA is inherently punitive, not compensatory or restorative. The rules are designed in a vague, open-ended fashion intentionally. It is not a bug of the DMA; it is its distinctive feature. The all-inclusiveness of the obligations accompanied with the wide discretionary power of the enforcer to interpret the scope of individual obligations of individual gatekeepers on essentially an *ad hoc* basis, constitutes the juristic backbone of the new participatory modality of digital competition law.

Such modality envisages proactive enforcers, which are not spending the lion share of their scarce time for competing with the leading juristic and economic minds representing the omnipotent defendants in designing the most sophisticated theories of harm and their proves and disproves, but rather acting strategically and tactically in a smart, market-shaping fashion.

Obviously, this modality and this new enforcement culture—or rather mission—requires a fundamental recalibration of the regulatory philosophy of digital markets,

[2] Andriychuk (2023a), pp. 123–131.

and we see the DMA alongside its UK counterpart[3] as the cornerstone and the pioneer of this recalibration. The new policy is not about an axiomatic compliance. It is about an asymmetric and pragmatic enforcement. To an extent, it is also a selective enforcement. One can (and should) discuss the risks of this approach to cross the tiny red line demarcating the pragmatism of smart regulation from the blatant protectionism and dirigisme. These philosophical questions are yet beyond the scope of this chapter.

Another aspect of the challenge is whether the enforcers themselves are capable and competent enough to pursue this new role—and whether such new regulatory philosophy is susceptible to various imperfections, captures and mutations. This question is equally of the paramount importance, and we also leave it without attempting to address in this chapter. These questions however would never receive sufficient attention if the focus of the discussions would be placed on fairness rather than contestability elements.

Contrary to many other jurisdictions, the EU/UK can opt neither for the categorical *laissez-faire* non-interventionism nor to the blatant winner-picking protectionism. The EU/UK approach while containing some *prima facie* elements of both orthodoxies is equidistant from them. On the one hand, the spirit of entrepreneurial discovery requires sufficient level of economic freedom.[4] On the other, even from the perspectives of the pure semantics, the idea of market *ipso facto* presupposes its regulation and the design of the rules of trade in the marketplace.[5]

Additionally, from a legal theoretical perspective, the selectivity of enforcement is part and parcel of legal interpretation—the indispensable component of any democratic legal system.[6] The asymmetric selectivity—the smartness—of the enforcement of digital competition law is driven not by a materially definable mercantile societal interest but by an ideally presupposed and predetermined reasonableness—akin to the Dworkinian notion of political morality, steering the normative aspects of the enforcement in the *right* direction.[7]

As argued elsewhere, '[t]he power of the DMA is not in the ability of the Commission to enforce the catalogue of obligations in its totality. It is rather in the ability of the Commission to identify an instance of non-compliance (and then an instance of systematic non-compliance) whenever it is necessary. And even more so, this power is in the Commission's ability to turn a blind eye to the practice whenever

[3] For a comparative analysis of EU and UK legislation on ex-ante digital competition law see Andriychuk (2023b).

[4] Von Hayek (1978), p. 180: '[C]ompetition is valuable only because, and so far as, its results are unpredictable and on the whole different from those which anyone has, or could have, deliberately aimed at. [... T]he generally beneficial effects of competition must include disappointing or defeating some particular expectations or intentions'.

[5] Andriychuk (2021a), pp. 519–525.

[6] Kelsen (1990) p. 130: 'In terms of the positive law there is simply no method according to which only one of the several readings of a norm could be distinguished as "correct"'.

[7] Dworkin (1975), pp. 1057–1109.

it is not strategically important in the enforcer's judgement'.[8] Such multifaceted bargaining mechanics presupposes the centralised enforcement.

There are thus two overarching—and mutually supportive—reasons for the Commission to be the sole enforcer of the DMA: the *constitutional* and the *institutional*.

The former reason concerns the geopolitical legitimacy mandate designated by the Member States and their People to the EU with regards to pursuing the broader digital agenda. In the times of the 4th Industrial Revolution, the role of digital technologies becomes decisive for defining the future constellation of the global economic powers, and thus the intellectual centre responsible for the strategic shaping of the pan-European approach to digital markets should be distilled as much as possible from the compartmentalised and often heterogeneous interests of various national and local stakeholders. In this sense, the new regulatory wave appears to indicate the dissatisfaction of the EU with its consensually (and very conventionally) acknowledged role of being the global ethical trendsetter of the responsible digital policy. If its aim is to create a political entity with the domicile of powerful digital companies, it should act swiftly and determinedly, and probably go outside of the ethical role-modelling box (without of course abandoning it).

The latter reason refers to the procedural logic of the DMA itself. It concerns less the effectiveness of the EU digital agenda in general, but more the effectiveness of the Act specifically. This Regulation consists of a number of delicate, interdependent elements, reinvigorating each other if applied harmoniously and harming each other if applied in a fragmented way. The following sections of the chapter explore the procedural mechanics of the DMA, analysing different versions of the Act through the prism of its harmonious centralised effectiveness.

3 Goals of Digital Competition Law

While agreeing that in many respects all traditional goals of competition law are complementary, priorities matter.

3.1 Consumers

The role of consumers in general, or their welfare specifically, is much less prominent in the emerging ex-ante paradigm than in the traditional welfare-centric theories of competition law. There are at least three legitimate reasons for this priority shift. All three support each other.

[8] Andriychuk (2021b).

The first concerns the excessive use of the rhetoric of consumer welfare, surplus, wellbeing and similar proxies. Underpinned with such an appealing ethos, this value is hard to resist and easy to apply. The decline of Law & Economics and the methodology associated with the movement is also associated with a more critical approach in examining the function of consumer-focused terminology in competition policy.

The second reason is more neutral. It is not related to the reaction of the excessive reliance on the consumers in the previous period but concerns an objective postulate that the very idea of competition is primarily focused on the composition and structure of the markets, the format of rivalry taking place in these markets, and the effective functioning of the economic and political principles adhered to in a specific society more generally. Consumers would ultimately be the final beneficiaries of these fair and contestable markets, but their welfare cannot be used as a direct measurement of the legitimacy of the processes taking place in these markets.

Third, from a behavioural perspective, consumers cannot be the main direct beneficiaries of the rules, as a critical mass of them appears to be happy with the *status quo*. A well-described 'privacy paradox'[9] explicates consumers declaring their interest in privacy while ignoring this aspect in their digital routine. The paradox may be extended to other aspects of consumer psychology. Not only are many consumers complacent about online privacy, but they are equally ignorant of and/or disregard other behavioural patterns shaped by the content providers. The literature on hard and soft online addictions, path dependencies, dark patterns, echo chambers and filter bubbling, is disappointingly pervasive and alarming. Consumers (we all) (are happy to) live in the digital universe with the parameters predefined for us by algorithms.[10] Even those mindful of closing direct privacy doors are being fed with recommendations and choices made for them by the omnipotent 'algorithms of everything', trained on other focus groups or in other jurisdictions.[11] Most online products and services are delivered to consumers for free.

All of the above explains why the focus of the new rules has shifted from consumers to the markets. Protecting and promoting the competitive process in the markets appears to be the main goal and function of digital competition law. This conclusion, however, does not make it clear which specific dimension of the competitive process in the digital markets should be given a priority. The remaining rubrics address these options in turn.

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[9] Buiten (2021), p. 286: "[P]rivacy paradox' [is a situation, in] which consumers state that they value privacy despite not acting in accordance with this'.

[10] Graef (2021), pp. 78–82.

[11] A landmark German 'Facebook Saga' is developed on this systemic feature: Bundeskartellamt, 6th Decision Division B6-22/16, Decision under Section 32(1) German Competition Act (GWB), 6 February 2019.

3.2 Intra-Platform Competition

The main and most obvious aspect of the competitive process that the reforms aim to protect and promote is competition inside the entrenched platforms. Managing effective competition within established gatekeepers appears to be the most realistic and most obvious aspect of the new rules. For decades the rules governing digital markets were soft and undifferentiated. The competitive process within platforms was characterised by numerous systemic misuses of power. While usually complying with the letter of the non-interventionist law, the gatekeepers still were able to establish, cement and strengthen their strategic status, not least by practices which the DMA and comparable proposals in other jurisdictions aim to limit or prohibit. Clearly and uncontroversially, competition inside platforms must be protected and promoted. As the current *ex-post* competition rules are not able to meet this target, they are being complemented with the *ex-ante* competition *sensu lato* rules.

As the rules address only gatekeepers, the improvement of intra-platform competition may take place mainly vertically: i.e., the relationships between gatekeepers and business users would become more principled and less arbitrary. The balance of power will shift from the gatekeepers to the enforcers. The gatekeepers would be expected to pursue their business activities as if *de-facto* assigned with a special responsibility *vis-à-vis* the markets in general and business users in particular.

Most of the obligations of the DMA may be read as aiming to protect and promote the competitive process *within* (not *between*) the entrenched platforms. This dimension of the legislation does not challenge the established position of gatekeepers in the digital markets. It (only) aims to force the gatekeepers to act more responsibly and comply with the rules, which would ultimately benefit not only their business users, but would also have a spillover effect on consumers and society more generally. These rules neither question nor challenge the exclusive status of the entrenched gatekeepers. The intra-platform competition policy, while remaining future proof in the sense of having obligations that are open to further adjustments, can be seen as focused on the current processes taking place in the digital markets rather than looking strategically ahead at the composition and the structure of the gatekeeping markets.

3.3 Inter-Platform Competition

The second dimension of competition which the reform would significantly affect concerns inter-platform competition. Unlike the impact on intra-platform competition, which can be seen as tactical and immediate, the dimension of inter-platform competition is a more strategic and long-term endeavour. The strict prescriptive rules of the DMA will have a direct and explicit impact on how the gatekeepers treat their business users. However, the interests of the competitive markets are not exhausted by the positive changes in that dimension. Without meaningful competition *between*

(and not only *within*) gatekeepers it would be hard to carry out a strategic recalibration of the digital markets. Strategically, inter-platform competition is the most important and most difficult to achieve. While effective rules protecting and promoting intra-platform competition may be considered as dealing with the problems after they have emerged, the effective functioning of inter-platform competition could prevent many of the current and future systemic challenges before they occur.

Despite its strategic importance, an effectively functioning inter-platform competition would be very difficult to achieve, mainly because of the inherent susceptibility of the digital markets to tipping. In addition, not only consumers, but also an institutionally more rational and less vulnerable category—business users—are often satisfied with the *status quo* and thus are critical about regulatory improvement of the intensity of inter-platform competition. Some of the (most successful) business users enjoy a privileged or established and stable position within a specific platform. Triggering inter-platform competition upstream may bring additional fragmentation and costs for the entrenched downstream business users. Equally, such a recalibration of the digital markets could bring synergies and opportunities for their rivals. This, in fact, is another reason for promoting inter-platform competition.

Despite all of the practical difficulties, inter-platform competition is a strategic goal of digital competition law. Structurally, it consists of two important dimensions: (a) inter-ecosystem competition; and (b) non-ecosystem inter-platform competition.

3.3.1 Inter-Ecosystem Competition

The inter-ecosystem competition appears to be the easiest to achieve, the most 'tempting' but equally most problematic dimension of inter-platform competition. If the systemic features of market tipping can ever be overcome at all, the most plausible entrants into the entrenched digital markets would be incumbents from other segments of the digital economy. This is explained by the trend among all gatekeepers to expand by leveraging their entrenched expertise, data, algorithms, and unique market status to the neighbouring markets. It is in the long-term strategic interests of the incumbent of one core platform service (CPS) to challenge the entrenched position of an incumbent in another CPS. Such an entry would also bring a number of synergies to its business- and end-users. Schematically, the final aim of each of the gatekeepers is the creation of a closed online ecosystem, providing all or most of the CPSs within a single platform ecosystem. Such a platform would aim to satisfy all the digital needs of the customers and consumers within its internal ecosystem, discouraging and making unnecessary any—even sporadic—exit.

Assuming – with an obvious degree of stylisation—that each of 8 CPSs has one gatekeeper, this gatekeeper faces the threat of a real entry from the remaining seven gatekeepers. Such a gatekeeper is simultaneously a threat to each of the remaining seven gatekeepers. It would not be too difficult to claim that this form of competition between ecosystems is capable of meeting most—if not all—of the benchmarks of traditional competition law, economics, and policy. The competitive process would flourish, business- and end-users would benefit from such a rivalry, and the structure

of the markets would also meet the minimum quantitative parameters. Such markets could bring innovations. Various instances of exploitation of business- and end-users would be minimised by the availability of a real CPS alternative (and maybe more than one). Despite all of its potential attractiveness, such a scenario, is however, fundamentally problematic from the perspective of EU digital competition law as it would cement the status quo—making the gap between the handful of ecosystems and all other operators of CPSs permanent. As submitted by the German *Monopolkommission*, 'it is precisely the formation of digital ecosystems that enables conduct which permanently harms competition'.[12]

3.3.2 Non-Ecosystem Inter-Platform Competition

The non-ecosystem inter-platform competition appears to be the format of inter-platform competition which the EU enforcers should aim to protect and promote. This thesis has two justifications: ideological and pragmatic.

The *ideological* dimension concerns the systemic shortcoming of the inter-ecosystem competition related to its *de-facto* building of two-tiered digital markets. While all the traditional parameters of measuring competition could indeed be satisfied, and competition may indeed be intense and innovative with several ecosystems competing with each other, the markets would be fundamentally divided. The real competitive dynamic would take place between gatekeepers, and any meaningful entry by a non-incumbent would move from being very unlikely to becoming purely hypothetical. The ethos of EU digital competition law cannot be maintained while having essentially an elite club of gatekeepers competing—even if beneficially for society—only with each other. The cemented and increased barriers between gatekeepers and all other undertakings disable any meaningful new entry. This situation makes the format of inter-ecosystem competition unacceptable from the perspective of the fundamental philosophical foundations of European (and for this matter the UK) competition law. By analogy with sports, if the choice is between a closed professional league and a promotion/relegation system, the latter always prevails.

The second reason concerns not *ideological*, but *pragmatic* aspects. It deals less with the structure of digital competition as such and more with its concrete composition. The ability to protect—or rather nurture—the system, which would make the new non-ecosystem entry plausible, is the main strategic task of EU digital reform.[13]

[12] Monopolkommission, 'Recommendations for an effective and efficient Digital Markets Act', Report by the Monopolies Commission pursuant to section 44 subsection (1), sentence 4, of the German Act against Restraints of Competition, 05 October 2021, p. 5.

[13] Monopolkommission, 'Recommendations for an effective and efficient Digital Markets Act', Report by the Monopolies Commission pursuant to section 44 subsection (1), sentence 4, of the German Act against Restraints of Competition, 05 October 2021, p. 5: '[T]he objective of contestability should be understood in such a way that undertakings which are not gatekeepers are able to overcome barriers to entry and expansion in digital markets'.

Its importance may be explained by the objective *ideological* factors of fairness of opportunities. It can be additionally explained by the subjective *pragmatic* factors of digital sovereignty.[14]

Not engaging in a substantive analysis of the role of digital sovereignty in EU/UK competition policy, it suffices to note that while not being an *internal* goal of competition policy, the concept can clearly be seen as an important *external* factor, having an increasing impact in the area. The emerging shift from insulation to a greater openness of competition law implies that competition scholars cannot disregard the importance of online platforms not only for economic competition, but also for all other aspects of the digital society. In some sense, protecting and promoting European/UK online platforms is a matter of strategic importance for these societies. Sooner or later, directly or implicitly, these strategic interests will find their new *modus vivendi* within digital competition law. Remaining an external factor, the concept of digital sovereignty does not have to be—and is not—fully compatible with the core principles of competition law. Yet a closer interaction of the two previously antithetical public policies is inevitable. This explains why, despite all the difficulties associated with the promotion of the non-ecosystem inter-platform competition, this dimension of the competitive process will always be present in the list of strategic normative goals of digital competition law.

4 Conclusion

The systemic market failures can only be tackled by treating the cause of the problem. Remedying the consequences of the mutated markets offers nothing but a symptomatic (often palliative) care. The cause of the problem is the entrenched position of gatekeepers in core platform services. The consequences of the problem are the unfair situation of business users. Facilitating new horizontal entries top-down—rather than remedying endless instances of unfairness for business users bottom-up—is the only type of regulatory response capable of recalibrating the *status quo* and thus to threat the cause of the problem. As with any invasive treatment, these measures do not guarantee the cure. Often, they can make the situation even worse. There is no other choice however as the problems have gone too far. Any other treatment would be nothing but a symbiosis of yoga, homeopathy, and self-medication.

After articulating our normative position in the first half of the chapter, we have focused on exploring different versions of the DMA in terms of their compatibility with the proposed hypotheses. Our conclusion is that the original version of the Commission fits best the ideas of contestability—which in our view is the cornerstone of emerging digital competition policy.

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[14] Andriychuk (2021b), pp. 261–286.

We have selected for the analysis in the second half some novelties introduced by other participants of the legislative process and explained why in our views most of these novelties, while remedying some problems, open the doors for others. Introducing changes to the balanced, complex, and well-calibrated mechanism of the proposal was a really challenging endeavour—not least due to the level of political stakes and engagement, the cacophony of positions and interests promoted by different stakeholders for different purposes in different cycles.

Overall, our impression is that all analysed versions of the DMA have helped to refine it further, and that with some reservations explained above the consolidated version of the DMA would still allow for sufficient enforcement competence for the Commission.

The main question remains normative—not procedural. All will ultimately depend on the presence of sufficient will and skills within the enforcers to pursue effectively, proactively, and pragmatically the new EU pro-competition policy for digital markets.

The adaptation period for the enforcers to embrace fully the new paradigm may be long and thorny—but as with any revolutionary instrument, the question is not *if* but *how*. The new instrument is clearly hazardous, but we have little doubts that this approach is the only way to shape digital markets.

The DMA should be primarily focused on designing digital markets in a way facilitating horizontal entries by non-gatekeepers into the markets of core platform services. Obligations for gatekeepers are primarily the means enabling horizontal entries, and only ancillary the ways of facilitating the functioning of business users. Obligations for gatekeepers are intentionally drafted in an open-textured fashion and as such are not envisaged to be enforced in their totality by all relevant stakeholders, including national competition authorities, national sectoral regulatory agencies and affected parties—only by the Commission. Only centralised enforcement would allow a smart and strategic reshaping of the status quo, contributing to achieving a new pro-competition regime for digital markets. Any priority other than non-ecosystem inter-platform competition would treat the symptoms of the systemic market failures without remedying the cause of the failures.

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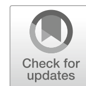
Enough of Fairness: Pre-Emption and the DMA



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Abstract This chapter looks at the DMA through the prism of pre-emption and the relationship between EU and national law. It explains the fundamentals of pre-emption in EU law and shows the consequences for the DMA and national rules that are to ensure fairness in the digital market space. It argues that fairness in the digital market with regard to business users and consumers has been exhaustively regulated by the DMA. Thus, existing and future national rules that aim to address additional fairness matters are pre-empted and cannot be applied to gatekeepers. The only option Member States have is to introduce further fairness related matters into their competition laws which elevates the well-known debates about the relationship between competition law and fairness to a new level.

1 Introduction

This chapter is a rather constitutional discussion, looking at the relationship between EU law in form of the DMA and the competences of the Member States. It focuses on the doctrinal elements of the ECJ's jurisprudence that explain the relationship between these two spheres of law. In particular, the chapter focuses on the concept of pre-emption and how it relates and would be applied in relation to the DMA and national laws adopted by the Member States. The chapter first explains the background of the DMA and its inception in order to further concretise the question. It, then, explores and analyses the concept of pre-emption to establish its basic features. Subsequently, it examines the implication of pre-emption in the context of the DMA, in other words it scrutinises the extent to which Members States rules are pre-empted

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by the DMA. Finally, it highlights the consequences of the pre-emptive effect of the DMA. It argues that a rather confusing situation is created which will lead to a number of issues, in particular a situation where Member States are not able to adopt further 'fairness regulation' in the digital field at national level. Moreover, the chapter shows that one of the few options left for Member States is to introduce more fairness elements into national competition laws. In this way, the DMA might be an incentive to change the way competition law is conceived at national levels in Europe.

2 Background and Question

In the last couple of decades, internet-based technology has developed at breakneck speed transforming the society that we live in while the law has had problems in catching up.[1] This problem in catching up with technological developments might not be surprising as some have described the development of the digital economy as the fourth industrial revolution.[2]

Competition law has been no different. It has been trying to catch up with the technological developments and a never-before-seen growth and power of companies such as Apple, Alphabet or Meta and the like.[3] The conduct of these digital companies has given rise to a different form of economic logic; the economy is shifting to what is called the attention economy and the usage of user-harvest data.[4]

The activities of these digital companies do not only affect the EU but also raise concern in other regions of the world. China has for example developed the Draft Antitrust Guidelines for Platform Economy (Platform Guidelines) which take up some elements of the EU's approach.[5] Similarly, Chile published a draft law in September 2021 in an effort to regulate their own digital market.[6]

The EU's original attempt to deal with the digital economy was Directive 2000/31 which however, even when combined with application of traditional competition law, proved to be insufficient to regulate the digital market.[7] EU Member States started to address this gap by introducing new competition provisions such as Section 19a of the German competition act that came into force in 2021. This provision imposes special obligations on undertakings with 'paramount significance for competition across markets.' Similar discussions about changes to the competition law have also taken place in other Member States, for example the Netherlands

[1] See Chesterman (2020).

[2] Philbeck and Davis (2018), p. 17.

[3] Nicoli and Iosifidis (2023), p. 24.

[4] Li and Li (2021), p. 3.

[5] For an overview, see Liu and Vryna (2022).

[6] See e.g. Chahuán et al. (2021).

[7] For a good overview, see de Streel and Husevoc (2020).

in the case of the Guidelines for promoting a transparent and fair online platform economy for undertakings developed by the Authority for Consumers and Markets and France with its Decree No. 2017-1434, which regulates obligations applicable to platforms and marketplaces. EU, then, decided to adopt the DMA. It introduces an innovative ex-ante system in contrast to the traditional ex-post assessment in competition law[8] and regulates so-called 'gatekeepers'. In this way, the legislation creates a new category of companies within the digital market which are presumed to have a critical relevance for the market and to which special obligations apply. The DMA, thereby, abandons the requirement of showing dominance or market power under Article 102 TFEU and replaces it with a set of quantitative criteria such as the amount of users in the EU.

Given the DMA's close relationship to competition law there were debates about the legal basis and whether it should be adopted under Article 103 TFEU which provides for the adoption of 'regulations or directives to give effect to the principles set out in Articles 101 and 102' TFEU. Viewing the DMA through the lens of competition law also seems to make sense as an important concern about gatekeeper companies is that they operate in an environment with winner-takes-all markets.[9] Interestingly, the legislation was in the end adopted under Article 114 TFEU, the EU's harmonisation provision, rather than competition law's Article 103 TFEU. Although there was criticism regarding the legal base,[10] using Article 114 TFEU offered an easier legislative procedure[11] and allowed the Council and the Parliament could act as co-legislators.[12]

Yet, given the cross-border nature of the often global platforms and the different attempts and discussions about regulating the behaviour at Member State level, it seems understandable why harmonisation was a key concept for the DMA. Moreover, a harmonisation approach also relates to the EU's ambition to create a single digital market.[13] Thus, the DMA, as proposed in December 2020 and signed into law in September 2022, aims to 'contribute to the proper functioning of the internal market'.[14]

Against this background our question is what does this shift from a competition law basis to the internal market basis mean for Member States and their competences to regulate vis-a-vis the EU. In other words, we examine whether and to what extent Member States will still be able to adopt rules to add issues that are related to big tech and gatekeepers in particular. To do so, we are exploring what kind of national rules

[8] See Ibáñez Colomo and Kalintiri (2020).

[9] In this direction Ruutu et al. (2017).

[10] Lamadrid and Ibáñez Colomo (2020). See also in this volume Annegret Engel, Licence to Regulate: Article 114 TFEU as Choice of Legal Basis in the Digital Single Market.

[11] Article 114 TFEU has less requirements than 103 TFEU and unanimity according to Art 293(1) TFEU is not required where the Council amends the proposal by the Commission.

[12] Lamadrid de Pablo and Bayón Fernández (2021), p. 576.

[13] See Communication from the Commission (2015).

[14] Preamble para 7.

are pre-empted by the DMA, in light of the typical internal market concern of double regulatory burdens and harmonisation.[15]

3 Pre-Emption

Having set out the basic premises on which the DMA rests, we now turn to exploring the relationship between the DMA and national law. However before engaging in this exercise in more detail, we need to establish the basic principle that governs this relationship: pre-emption.

Pre-emption in the EU is a concept that cannot only be compared to but is also deeply influenced by the US doctrine of pre-emption. In the USA, it that governs the relationship between US federal and state law.[16] Arena traces the concept of pre-emption back to its Latin roots of *premptio* where *pre* means in advance and *emptio* means acquisition or purchase and its roots in US constitutional law of 1917.[17] In the EU, the concept is also deeply intertwined with supremacy and it can be seen as the other side of the coin.[18] While the principle of supremacy is used to establish the relationship between EU and national law, or more precisely the relationship between the two fields of law, pre-emption is concerned with the questions of whether or not a conflict exists.[19] It is also related to questions of competence, as the competence questions informs the analysis.

While pre-emption is far less studied than supremacy in the EU context,[20] Schütze distinguishes between three different forms of pre-emption. The first is field pre-emption, the second rule pre-emption, and, finally, obstacle pre-emption.[21] And while the delimitation of the different forms of pre-emption are not always watertight,[22] the distinction helps thinking about the overlap and interaction between EU and national law.

Field pre-emption exist only in very rare cases, where the EU has the exclusive competence in an area.[23] Thus, the exercise of that Union competence sets a direct limit to national powers. It excludes national law in its entirety[24] with the case

[15] For a general overview regarding the issue of dual burden and harmonisation see.e.g Perišin (2008).

[16] For a general comparison on pre-emption in the EU and US, see e.g. Schütze (2016).

[17] Arena (2016), p. 28; for an overview of US law in that regard and its development, see also Gardbaum (1994).

[18] Arena (2018), p. 326.

[19] Waelbroeck (1982), p. 551.

[20] For the few studies see e.g. Arena (2016); Schütze (2016); Waelbroeck (1982).

[21] Schütze (2016), p. 1038; Arena (2018), p. 324.

[22] Schütze (2016), p. 1043.

[23] Schütze (2016), p. 1023 Arena (2018), p. 327.

[24] Schütze (2016), p. 1040.

Ratti[25] being an example of this kind of pre-emption. While field pre-emption might be more easily established in the few areas where the Treaty provides for the exclusive competence of the EU, field pre-emption can also exist in other situations. *Ratti* concerned a clash between EU law and the Italian legal system. In this case, Mr. Tulio Ratti argued that he did not have to comply with the stricter Italian law, given that his products (solvents) were fully compliant with EU law (Directives 73/173 and 77/728). As the implementation deadline for the Directive had passed, the Court held that, Mr. Ratti was bound only by Directive 77/728. In this sense, the ECJ closed the possibility of a Member State to rely on its own failure to implement the Directive in time.

With the rationale of strict regulatory uniformity in certain matters, the question is whether EU rules can be seen as exhaustive field pre-emption as for example in cases of exhaustive/complete/maximum harmonisation measures.[26] The rationale for this field pre-emption in such cases is that once the compromise between the different interests and Member States is reached at EU level, Member States should not unilaterally upset this compromise.[27]

Originally, this examination of exhaustiveness was easier as the Court would distinguish between regulations which would always pre-empt the field while directives would never amount to field pre-emption.[28,29] This distinction gave rise to the idea that regulations had 'exclusive' and 'exclusionary' effect.[30] However, this basic distinction between directives and regulations is not used anymore which nowadays makes the assessment more difficult.[31] Often the relevant EU regulations or directives do not state whether they are intended as exhaustive/complete/maximum harmonisation and the ECJ must interpret the EU rules[32] in detail as—unlike in the US constitutional law—there is no list of *indica* that the ECJ uses.[33] Yet, it might be said that one positive *indicia* for field pre-emption is exhaustiveness of the EU rules.[34] This contrasts with partial harmonisation measures. In these situations, certain aspects are regulated by the EU while others are left to the Member States.[35]

Where the area is not in the exclusive competence of the EU, but competences are shared and the EU rules are only aimed at partial harmonisation, the other forms of

[25] Case 148/78 *Criminal proceedings against Tullio Ratti* EU:C:1979:110.

[26] Arena (2018), p. 331.

[27] For such an explanation see Weatherill (2002), pp. 52–57.

[28] Arena (2018), p. 332.

[29] For Directives rule or obstacle pre-emption could exist.

[30] Arena (2016), p. 28.

[31] Arena (2018), p. 332. See also Arena (2016), p. 30, who sets out a number of cases which shifted from the simple directive vs regulation distinction to a more sophisticated analysis.

[32] Arena (2016), pp. 40–42.

[33] Ibid.

[34] Arena (2016), pp. 42–43.

[35] Arena (2016), pp. 52–55.

pre-emption are relevant. In such situations, the Member States retain power and their pre-emption does not apply as long as their rules do not contradict the EU rules.[36] Pre-emption can, then, take the form of rule pre-emption or obstacle pre-emption.

The clearest form of pre-emption in this area is rule pre-emption which describes situations, where national rules directly contradict specific EU rules.[37] A case where this form of pre-emption can be observed is in *Gallaher*[38] regarding the labelling of tobacco products in the UK. In this case, the Court held that, even though Member States could impose stricter rules to their own products (in this case, warnings and health information in cigarette packets), this did not apply to products imported from other EU countries where these complied with the minimum requirements established by EU law.

More difficult are situations of obstacle pre-emption. These are situations where the conflict is more indirect.[39] The national measure jeopardises EU law, by limiting the scope, otherwise impeding the functioning or attainment of the objective of the EU measure.[40] In such cases, the Court has to examine the EU law and the national law in greater detail to determine whether the national law creates obstacles to the functioning and the objectives of the specific EU law.[41] Such an assessment can be observed in *Bussone*[42] concerning EU law on the standardisation around marketing and labelling of eggs. The court held that the Directive had direct effect and that a Member State could not make the application more difficult by means of national law even if that national law was adopted after the Directive.

The analysis of 3 rule pre-emption and in particular obstacle pre-emption is more complicated because the ECJ will not only have to establish the object of the EU law measure but will, also, have to examine whether EU law foresees explicit or implicit derogations.[43]

Overall, the task in cases of pre-emption is to establish the scope of EU law and then, in a second step, to examine the national measure with the view of determining whether there is an overlap in scope.[44]

[36] Schütze (2016), p. 1037; Arena (2016), p. 32.

[37] Schütze (2016), p. 1042.

[38] Case C-11/92 *Gallaher* EU:C:1993:262.

[39] Arena (2018), p. 324.

[40] Schütze (2016), p. 1042; Arena (2018), p. 327.

[41] Ibid, 1041.

[42] Case 31/78, *Francesco Bussone* v. *Italian Ministry of Agriculture* EU:C:1978:217.

[43] Arena (2018), p. 303.

[44] Arena (2018), p. 349.

4 Pre-Emption and the DMA

With this background and understanding in mind, we now explore what kind of pre-emption would be applicable in the context of the DMA and to what extent it would prevent national rules. This assessment will first involve an examination of the DMA and its legal basis to establish its scope and the relevant areas of pre-emption. In a second step, we will identify what kind of national rules are pre-empted by the DMA.

In the first step, it is necessary to take into account the legal basis of the DMA. One reason for field pre-emption would have been if the DMA had been adopted under 103 TFEU, the EU's exclusive competence for competition matters. However, in the end it was adopted under the internal market provisions of Article 114 TFEU so not as a new set of competition rules,[45] even though it has been classified as an ex-ante mechanism of addressing competition in digital markets.[46]

The adoption of the DMA under Article 114 TFEU provides us with the insight that the EU wanted to regulate in an area of shared competence and that the DMA is adopted as a form of harmonisation in the face of potentially divergent national rules covering the field. In this way it centralises the rules applicable to this area at EU level.[47] Some have, thus, described the DMA as a form of minimum harmonisation,[48] which would allow Member States to adopt their own more stringent standards.

If the DMA would be a form of minimum harmonisation, field pre-emption would most likely be out of the question and we would have to investigate obstacle and rule pre-emption. However, such a finding might be premature and a more detailed look at the DMA and its rules is required before one can come to such a conclusion. A first indication as to whether a regulatory regime is exhausted can be found in the comprehensiveness and detail of the rules adopted.[49] The DMA contains rather detailed and extensive rules for gatekeepers and has been adopted as regulation rather than as a directive. This seems to cast some doubt as to whether it is only intended as minimum harmonisation. Moreover, the DMA itself is rather clear as it specifies in its preamble that:

> [. . .] the purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular. [. . .] Moreover, while gatekeepers [. . .] can adopt, and in some cases have adopted, different business conditions and practices in different Member States, which is liable to create disparities between the competitive conditions for the users

[45] De Streel (2021).

[46] Beems (2022), p. 1.

[47] Hoffmann et al. (2022), p. 4.

[48] Ibid 7.

[49] Arena (2018), p. 332.

> of core platform services provided by gatekeepers, to the detriment of integration of the internal market.[50]
>
> By approximating diverging national laws, it is possible to eliminate obstacles to the freedom to provide and receive services, including retail services, within the internal market. A targeted set of harmonised legal obligations should therefore be established at Union level to ensure contestable and fair digital markets featuring the presence of gatekeepers within the internal market to the benefit of the Union's economy as a whole and ultimately of the Union's consumers.[51]
>
> Fragmentation of the internal market can only effectively be averted if Member States are prevented from applying national rules which are within the scope of and pursue the same objectives as this Regulation. [. . .][52]

These explanations seem to contradict a finding of minimum harmonisation and instead seem to indicate a form of field pre-emption. This finding is also supported by Article 1 that sets out the subject matter and scope of the DMA. It explains in Article 1(5) that Member States cannot 'impose further obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets.'

There is a narrowly drafted exception for obligations imposed under competition law. Article 1(6) specifically holds that national merger rules can still be applied and that national competition laws can also still be applied insofar as they mirror Article 101 and 102 TFEU. Moreover, national competition laws can also impose other unilateral conduct obligations on gatekeepers, if those obligations are also imposed on non-gatekeepers or the obligations are specifically aimed at gatekeepers and impose further obligations on them. This reading of Article 1(6) is confirmed by the Preamble which sets out that:

> At the same time, since this Regulation aims to complement the enforcement of competition law, it should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour, including its actual or potential effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question, and to national rules concerning merger control.[53]

Thus, for the area of competition law, the DMA might well be described as minimum harmonisation, which in turn would mean that only obstacle or rule pre-emption apply.

However, outside of the area of competition law the situation is rather different. At first sight Article 1(5) contains a broad reaffirmation of Member States' competence to regulate. The Article emphasises that Member States are free to impose 'obligations on undertakings, including undertakings providing core platform

[50] Preamble para 7.

[51] Preamble para 8.

[52] Preamble para 9.

[53] Preamble para 10.

services, for matters falling outside the scope of this Regulation, [. . .] and do not result from the fact that the relevant undertakings have the status of a gatekeeper within the meaning of this Regulation.' Yet, a closer look indicates a much narrower scope. Outside the area of competition law, the pre-emptive effect of the DMA is only subject to two limitations. First, the Member States are not allowed to use the status of gatekeeper under the DMA to impose further obligations on such gatekeepers. The second limitation comes from the fact that Member States are able to regulate only 'matters falling outside *the scope*' of the DMA. While this might read like a generous reaffirmation of Member States' competences, a more detailed examination reveals a very broad area where Member States are not able to regulate. This broad area emerges from *the scope* of the DMA as set out in Article 1(1) and 1(2) DMA. Within that broad *scope* the Member States cannot regulate.

Article 1(1) DMA explains that '[t]he purpose of this Regulation is [. . .] laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users.' It then further elaborates in Article 1(2) DMA that [t]his Regulation shall apply to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective [. . .] of the law otherwise applicable to the provision of service.'

The scope of the DMA encompasses thus the following:

> Contestability and fairness in markets in all situations where gatekeepers provide services in the digital sector to business and end users.

This scope is the area where the DMA foresees field pre-emption.

5 The Competence Confusion, the End of Fairness, and the Resulting Pressures on Competition Law

Whether intended or not, with the DMA a strange legal landscape emerges. A landscape where the competence allocation between the EU and Member States becomes particularly unclear. A landscape where the concept of fairness in the digital world is unable to evolve and where Member States are generally prevented from protecting consumers and businesses from new unfair practices by gatekeepers. A landscape where Member States' only option to address such fairness issues in digital markets is the expansion and reshaping of their competition laws.

Given that scope and the rules of pre-emption explained above, the ECJ will have to interpret the scope of the DMA to determine whether or not Member States can regulate a certain area where gatekeepers are involved.

The ECJ will have to interpret and clarify what the different terms setting out the scope of the DMA mean, terms such as 'digital sector', 'business user' and 'end user'. While the interpretation of these terms might be rather straightforward, more effort is required to determine what 'contestability of markets' means. The preamble

provides some help in this regard and sets out in para 32 that the term has to be understood as to 'relate to the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services.' It also mentions the low contestability in the digital market with 'network effects, strong economies of scale, and benefits from data'. With some help and insights from competition law and economics we can imagine that the meaning of this term can also be sufficiently clarified.

However, things become rather difficult where the Court has to come to a binding interpretation of the term 'fairness in markets'. Fairness is already a rather difficult concept to interpret in specific cases such as Article 102 TFEU cases.[54] And while the preamble explains what 'unfair' within the context of the DMA may mean, the interpretation of the term fairness will pose challenges. The preamble of DMA explains:

> For the purpose of this Regulation, unfairness should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage. Market participants [. . .] should have the ability to adequately capture the benefits resulting from their innovative or other efforts. Due to their gateway position and superior bargaining power, it is possible that gatekeepers [. . .] unilaterally set unbalanced conditions [. . .] and may also consist in excluding or discriminating against business users [. . .][55]

This explanation seems to provide only the bare minimum for orientation. Thus, unfairness relates to the power of gatekeepers of their users and business partners and a resulting imbalance concerning rights and obligations between them. However, this is only of little help to determine the precise competences that the EU exercised and which the Member States would be barred from using. First, this explanation is not a part of the definitions of the DMA but only contained in the preamble. Second, it does only tell us what unfairness is. Third, and related, not all matters that do not come under definition of *un*fairness are automatically fair.

In this situation, the ECJ will have the impossible task of determining the competence allocation between the EU and Member States. It will be extremely difficult to determine what competences to regulate Member States retain, if the DMA has exhaustively regulated 'fairness' in the 'market' with regard to the relationship between 'gatekeepers' and their 'business users' and 'end users'.

In the most stringent reading vast areas of law such as consumer protection law or other rules that protect small businesses can be seen as ensuring fairness in the market. The only limiting principle that the scope of the DMA provides in this regard is 'in the digital sphere'. This also seems to call into question rules that may also be associated with fairness considerations, such as a fair and equal moderation policy in the name of protecting freedom of expression or media plurality. In the end, nearly all kinds of areas of law somehow regulate 'fairness'. The term 'fairness' is, thus,

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[54] See e.g. Pera (2022).

[55] Preamble para 33.

ill-suited to determine the competence allocation between the EU and Member States.

The difficulty with this term and possibly vast areas that Member States can now no longer regulate with regard to gatekeepers bring about another unintended consequence. On the one hand, fairness and the resulting obligations for gatekeepers seem now to be fixed. Only a (unlikely) change of the DMA in the future can address new fairness concerns. Member States will be broadly prevented from addressing those absent amendments to the DMA. On the other hand, unintended consequences might be new pressures on competition law to take up more fairness concerns.

If Member States do not have the power to adopt new laws to impose additional obligations on gatekeepers to ensure fairness in their relationship with end and business users, they might turn to competition law to achieve those aims. In fact, the DMA specifically allows for more stringent obligations to be imposed on gatekeepers as long as they are contained in the national competition law. Thus, Member States are free to adopt new rules to ensure fairness under their competition law. It seems the only 'safe passage' for new fairness concerns regarding gatekeepers. Where such fairness matters are placed in the national competition law, the Member States are free to impose further obligations on the gatekeepers based on Article 1(6) of the DMA. While it goes beyond the scope of this paper to discuss the pros and cons of bringing in more fairness considerations into competition law,[56] it would certainly change the character of competition law in the EU and would increase divergence in an area of law, that is characterised by a high level of uniformity.

6 Conclusion

This chapter has examined the DMA from a constitutional perspective by looking at the relationship of EU law in the form of the DMA and national rules. This relationship has been analysed through the prism of pre-emption. The chapter first explained the concept of pre-emption and its different forms how the concept needed to determine whether a conflict between EU and national law exists. The focus has, then, shifted to examining what these abstract findings mean more concretely in the context of the DMA. In particular, the chapter explored the concept of field pre-emption and how the DMA fully harmonises an entire area of law by imposing not only minimum harmonisation but rather full harmonisation which leaves little room for Member States to regulate gatekeepers by imposing additional obligations except in the context of competition law.

[56] On the debate in general see Ayal (2014), with regard to the EU competition e.g. Pera (2022); Marco Colino (2019); Lamadrid de Pablo (2017); Dunne (2021); and specifically with regard to the digital market, see Graef (2018); for the debate in the US see e.g. Fox (1986) Erickson (1987), Scherer (1990), Hughes (1994), Horton (2013), Cote (2021).

The chapter has shown how the DMA is aiming to regulate not only contestability but also 'fairness in the marketplace' with regard to the relationship between gatekeepers and its business and end users. This broad area of coverage and the ambition to regulate 'fairness in the marketplace' leads to substantial challenges. First, it is unclear how a concept like fairness can be effectively used by the ECJ to demarcate the boundaries of EU competences with those of the Member States. The vagueness of the concept of fairness also when paired with limiting factors such as 'with regard to gatekeepers and relationship to their business and end users' means there are no clear boundaries as nearly all areas of law can be said to be related to fairness. In turn, this seems to call into question vast areas of law such as consumer protection laws and their application to gatekeepers covered by the DMA. This raises the serious question as to whether Member States will ever be able to impose any further obligations on gatekeepers via other areas of law. The only exception foreseen in the DMA is competition law. Combined with the broad area of Member States regulatory space pre-empted by the DMA, this exemption may lead to a situation where Member States have an incentive to include further fairness related matters into their national competition laws. An area of law that has often been successful at resisting notions of fairness focusing instead of notions of efficiency.

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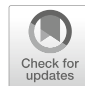
The Power to Carry Out Dawn Raids Under the Digital Markets Act: Nothing More Than a Scarecrow?



Helene Andersson

Abstract In recent years, there has been an increased focus among legislators on effective enforcement and a perceived conception that this requires both tough sanctions and powerful investigatory tools. When the European Commission (the Commission) proposes new sectoral legislation, such proposals often include a range of tough enforcement powers. The recently adopted Digital Markets Act (the DMA) is no exception. To the contrary, already the recitals declare that in order to ensure effective implementation and compliance with the regulation, the Commission should have strong investigative and enforcement powers. One of these powers is the power to carry out unannounced inspections, *dawn raids*.

The dawn raid is a powerful tool often relied on by the Commission in its antitrust investigations. It allows the enforcer to enter the premises of a company—and sometimes also the homes of its employees—to identify and seize documents or data of relevance to its investigation. It is the intrusive character of the dawn raid that makes it so powerful, but this intrusiveness also entails an inherent risk that fundamental rights of those targeted are not properly safeguarded. Taken by surprise and with the officials at your doorstep, you may not be in the best position to safeguard your rights.

This Chapter examines the power to carry out inspections under the DMA and the extent to which the Commission will be able to use it without infringing the fundamental rights of targeted companies. Unlike the antitrust rules, the DMA introduces an intricate monitoring system, requiring targeted companies to demonstrate their compliance with the regulation while at the same time providing the Commission with extensive monitoring powers, allowing it to carry out inspections also in situations where the targeted company is not suspected of any wrongdoing.

Given the strict regulation and supervision of gatekeepers under the DMA—coupled with the Commission's power to supplement the DMA and add additional obligations on the gatekeepers—it is argued that what on paper appears to be a tool

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that could be used in a variety of situations, the dawn raid will only be available in a limited number of situations and may then not even be that useful. Instead, it is the threat of a dawn raid that will most likely provide any value to the Commission's enforcement of the DMA.

1 Setting the Scene

Ever since the turn of the millennium, digital markets have been in the spotlight of antitrust enforcement. The Commission has launched numerous high profile cases against tech giants, alleging that they are abusing their market power by, inter alia, engaging in self-preferencing in the ranking of search results,[1] the bundling of apps (and other alleged leveraging strategies),[2] the collection, usage and sharing of data,[3] as well as by limiting access to mobile ecosystems and app stores.[4]

The duration and complexity of these investigations, many of which remain ongoing, have been met with concerns that Article 102 TFEU does not equip the Commission with the tools required to protect competition in fast-evolving digital markets. These concerns have been further accentuated by the growth in size and importance of online platforms, their significant economies of scale and network effects, and the risk that market power in digital markets can become quickly entrenched. The OECD has even gone as far as to declare that digital markets pose fundamental challenges to abuse of dominance enforcement.[5]

As a response to these concerns, the DMA was adopted to establish a uniform ex-ante regulatory regime designed to make digital markets fairer and more competitive, but also to prevent a fragmentation of the EU's internal market through national legislative initiatives which, absent an EU initiative, would be adopted to tackle the perceived problems.[6]

Under the DMA, companies that meet certain thresholds are designated as gatekeepers and will have to comply with the strict rules set by the regulation in

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[1] See e.g. *Google Shopping*, Case AT.39740.

[2] See e.g. *Google Android*, Case AT.40099.

[3] See e.g. Advocate General Rantos' opinion in Case C-252/21, *Meta v Bundeskartellamt*, EU:C:2022:704.

[4] See e.g. case AT.40437—Apple—App Store Practices. On 28 February 2023, the Commission issued a second statement of objections to Apple clarifying its competition concerns in this case. For an in-depth discussion of the role played by app stores, see Bostoen and Mandrescu (2020).

[5] See e.g. the report published in 2020 by the OECD, *Abuse of Dominance in Digital Markets*, OECD (2020), www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf.

[6] In some Member States, legislative steps in this direction had already been taken. In Germany for example, the 10th amendment to the German Competition Act (GWB) entered into force in 2021 providing the German Competition Authority with a new statutory basis (Article 19a) to interfere against large tech companies engaging in certain forms of conduct, such as self-preferencing or bundling. For more information, see https://www.bundeskartellamt.de/EN/Economicsectors/Digital_economy/digital_economy_node.html.

relation to the 'core platform services' that they provide.[7] Gatekeepers will not only have to adapt their behavior or business practices to meet the strict requirements in the DMA,[8] they are also required to set up a compliance function within their organization. In addition, they have extensive reporting duties to the Commission, allowing the Commission to closely monitor the measures that gatekeepers take to comply with the DMA and to assess the effectiveness of such measures. The Commission may carry out market investigations to determine whether the obligations imposed are enough or whether more is needed to ensure fairness or contestability. Should more be deemed necessary, it may either adopt delegated acts targeting the entire market or fine-tune the obligations imposed on each individual gatekeeper.[9]

Thus, unlike the antitrust rules where the Commission will only act or interact with companies once it suspects them of wrongdoing, the DMA establishes an elaborate scheme which envisages close and regular contacts between the Commission and the gatekeepers and where the Commission has both the opportunity and power to monitor and steer their behavior. It is thus very much up to the Commission to determine what should be required by each gatekeeper and when a gatekeeper is considered to do what is necessary to ensure fair and contestable markets.

A gatekeeper which fails to comply with the new rules or disagrees with the Commission on how they should be interpreted has a lot to risk. Just like under the antitrust rules, non-compliance may come at a high price. The Commission may impose fines of up to ten percent of the annual global turnover and decide on both behavioral and structural remedies on companies failing to comply with the rules. Repeat offenders risk paying as much as 20 percent of their annual global turnover in fines and may also have to divest part of their business to restore fairness and contestability.[10] In addition, the DMA allows the Commission to amend the obligations that the regulation imposes on gatekeepers. Gatekeepers are thus put in a position of legal uncertainty, as the rules may quickly change should the Commission deem them to be ineffective.

While the DMA and the EU competition rules are closely related, the DMA is in many ways a different creature than the competition rules. They both target the same types of behavior, but the Commission's powers are far greater under the DMA and

[7] The core platform services are listed in Article 2(2) of the DMA.

[8] Articles 5 through 7.

[9] See e.g. Article 12.

[10] The Commission's recently adopted statement of objections against Google in the AdTech case concerning alleged abuse of Article 102 TFEU indicates that the Commission is indeed willing to order divestitures should this be considered necessary to restore competition, or, in the case of DMA, fair and contestable markets. In its statement of objections, the Commission preliminarily finds that a behavioral remedy is likely to be ineffective to prevent the risk that Google continues such allegedly self-preferencing conducts or engages in new ones. The Commission's preliminary view is therefore that only the mandatory divestment by Google of part of its services would address its competition concerns. Case AT.40670. See https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207.

the regulation grants the EU enforcer extremely broad margins of both discretion and appreciation. In addition—while the two regimes both provide for tough sanctions, where those available under the DMA even exceed the sanctions available to the Commission under the antitrust rules—the burden of proof, or at least intervention, is to some extent placed on the gatekeeper, which has to be in constant communication with the Commission to demonstrate compliance with the requirements set out in the regulation.

Consequently, while the legislator has seen it fit to equip the Commission with tough enforcement and investigatory powers, the Commission needs to handle these powers with great care and make sure that any measures adopted are proportionate and respect the rights of the gatekeeper.

The following section provides an overview of the provisions in the DMA aimed to ensure that gatekeepers comply with the obligations set out therein, showing the magnitude of the information that the Commission will receive and thus also the heavy burden that has been placed on the gatekeepers.

2 Ensuring Compliance

The DMA introduces an elaborate scheme of duties and monitoring powers to ensure compliance. Gatekeepers have extensive reporting duties and the Commission has corresponding monitoring powers. In addition, the Commission has been vested with far-reaching investigatory powers should it either suspect a gatekeeper of non-compliance or question the effectiveness of the rules in place. This section provides a brief overview of these duties and powers.

2.1 Reporting Duties Under the DMA

Once designated a gatekeeper, you have extensive reporting duties and are required to demonstrate to the Commission that you do what is necessary to ensure compliance. However, the duty to report to the Commission kicks in already prior to such designation as those meeting the thresholds set out in Article 3(2) are required to notify the Commission thereof. This should be done no later than two months after the thresholds are met and the company must then provide the Commission with all the information supporting such finding. This means that companies active in digital markets that are of a certain size or have a certain number of users will constantly have to assess whether they meet the thresholds set out in the DMA.

Within six months from having been designated a gatekeeper, the company shall provide the Commission with an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core

platform services.[11] This is in order to ensure an adequate level of transparency of profiling practices employed by gatekeepers.

Article 8 of the DMA imposes a general obligation on the gatekeeper not only to ensure but also to demonstrate compliance with the obligations laid down in Articles 5 to 7 of the regulation. The obligations in the DMA may seem straightforward, but there will most likely be many situations where a gatekeeper is not sure of what is expected. Article 8 allows the gatekeeper to seek guidance from the Commission on how to interpret these obligations, but the Commission is not required to provide such guidance. Instead the provision stipulates that the Commission shall have discretion in deciding whether to engage in such a process, respecting the principles of equal treatment, proportionality and good administration.

Article 11 is dedicated to reporting, declaring that, within six months from having been designated as gatekeeper, a report shall be submitted to the Commission describing in a detailed and transparent manner the measures implemented to ensure compliance. That report shall be updated at least once every year. The Commission has recently published a draft template for such reporting which lays down detailed rules, requiring the gatekeeper to explain inter alia how the assessment has been made and how it complies with the DMA. According to the draft, the gatekeeper should submit a fair amount of documentation in support of its assessment, including supporting data, internal documents, reports from the compliance function as well as any feedback received from business-users or end-users.[12]

Whenever a gatekeeper intends to acquire or merge with a company that provides digital services, it shall inform the Commission of such acquisition or merger. The notification must be made prior to implementation.[13]

While the reporting duties are thus extensive—imposing a heavy burden on the gatekeepers to regularly gather, structure and provide the Commission with information on their activities and which steps they take to ensure compliance—the Commission has further powers to monitor their actions.

2.2 *Monitoring Powers*

As a gatekeeper you will not only have to ensure compliance but also introduce a compliance function which should be independent from the operational functions and composed of one or more qualified compliance officers.[14] It shall have the

[11] Article 15. Detailed rules are laid down in an implementing regulation. See Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council [2023] OJ L 102/6.

[12] See https://digital-markets-act.ec.europa.eu/dma-commission-launches-consultation-template-compliance-report-2023-06-06_en.

[13] Article 14.

[14] Article 29.

authority and resources as well as access to the management body necessary to monitor compliance with the DMA. The head of the compliance function should not be removed without prior approval of the management body. Article 28 lists the tasks of the compliance function which include the obligations to organize, monitor and supervise the measures and activities aimed to ensure compliance with the DMA and to cooperate with the Commission for the purposes of the regulation. Thus, not only does the gatekeepers have reporting duties under the DMA, the regulation also governs how compliance should be monitored and secured within the gatekeepers' organizations.

In addition, the DMA introduces the concept of preservation or retention orders. Article 26 requires the Commission to take all necessary measures to monitor the effective implementation and compliance with the regulation. Those actions, the article declares, may include the imposition of an obligation on the gatekeeper to retain all documents deemed to be relevant to assess the implementation of, and compliance with the regulation. For this purpose, the Commission may appoint independent external experts or auditors as well as officials from national competition authorities, the provision stipulates.

In theory, there should thus be little or no room for gatekeepers to engage in practices that run foul of the DMA and the Commission should have access to all the information it needs to monitor their compliance. From this perspective, it appears that in most cases, the investigatory powers granted to the Commission under the DMA will be used to examine and assess the need for complementary obligations rather than to investigate how gatekeepers comply with the obligations imposed.

2.3 *Investigatory Powers Under the DMA*

The DMA grants the Commission broad powers to monitor and investigate any measures taken by the gatekeepers under the regulation, the effects that the DMA have on the market as well as the need for additional obligations to be imposed on gatekeepers.

As for the investigatory powers granted to the Commission, this notion has two dimensions. It can define what the Commission may investigate, but it can also govern the tools that the Commission may then use. Here the lines are somewhat blurred, and the DMA fails to provide a clear structure.

2.3.1 The Powers to Investigate: What?

What is clear is that the Commission may not only investigate suspected infringements of the DMA but may also assess the effectiveness of the regulation as such. For this purpose, it may carry out investigations to determine whether new services should be added to the list of core platform services, but also whether the obligations set out in Articles 5 to 7 are adequate to ensure fair and contestable markets.

If the Commission considers that new services should be added to the list of core platform services, it will have to present a legislative proposal to the European Parliament and the Council which may then decide to extend the scope of the DMA.[15] While the Commission may thus not itself add new services, the DMA empowers it to update the regulation through delegated acts in a number of other areas.[16] For example, the Commission may specify the methodology for determining whether the gatekeeper thresholds are met,[17] and it may also adopt delegated acts to supplement the DMA with regard to the obligations laid down in Articles 5 to 7.[18] While the adoption of a delegated act must be preceded by a market investigation, it is thus up to the Commission to fine-tune the obligations laid down in the DMA and to add new obligations. This in turn means that in case a gatekeeper and the Commission disagree on what the gatekeeper should be required to do under the regulation, the Commission has the upper hand as it may, at least in certain circumstances, amend the regulation to serve its purposes in this respect.

In addition to delegated acts, which are of general application, the Commission may adopt implementing acts addressed to individual gatekeepers. Thus, according to Article 8, the Commission may adopt an implementing act specifying what the gatekeeper should do to effectively comply with Articles 6 and 7. A decision to suspend the obligations imposed on a gatekeeper or to exempt a gatekeeper from an obligation for grounds of public health or security should also be adopted by way of an implementing act. On the same note, if the Commission finds that a gatekeeper circumvents the obligations laid down in the DMA, it shall adopt an implementing act specifying the measures that the gatekeeper should take to ensure compliance.[19] If a market investigation results in the finding that a company should be designated as gatekeeper or has engaged in systematic non-compliance of the DMA, any decisions taken should also be in the form of implementing acts.

Thus, the Commission has extremely broad powers to fine-tune the regulation and adjust the obligations imposed on individual gatekeepers. While this may be necessary to make the DMA agile and fit for rapidly evolving markets, it does also impose a great responsibility on the Commission, which must ensure that the powers granted are not used in an arbitrary or discriminatory manner.

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[15] Article 19 of the DMA. The Commission may also suggest that existing services should be removed.

[16] According to Article 290 TFEU, a legislative act, such as the DMA, may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

[17] Para 3(6).

[18] Article 12.

[19] Article 13(7).

2.3.2 The Powers to Investigate: How?

The regulation lacks a clear structure in this respect, introducing the concept of market investigations without distinguishing between these and other types of investigations. The notion is not defined, nor is it explained if and to what extent a market investigation differs from any other investigation. While the title suggests otherwise, these investigations do not necessarily focus on the markets in question or the conditions governing such markets, but rather on the behavior of the individual gatekeeper and the gatekeeper's compliance with the DMA.

Market investigations are governed by Articles 17 to 19 and can be used by the Commission to (i) designate gatekeepers, (ii) investigate systematic non-compliance, and (iii) identify new services and new practices to be covered by the DMA. Thus, it is only Article 19, governing the identification of new services or practices, that concerns investigations of the market rather than the behavior or status of individual companies.

Article 20 governs other types of investigations, declaring that if the Commission envisages the adoption of a decision finding non-compliance with the DMA or the adoption of a fine, it should open proceedings against the gatekeeper.

2.4 The Investigatory Tools Available

Articles 21 to 23 of the DMA provide the Commission with a set of investigatory tools. Under these three provisions, the Commission may (i) request information, either by a simple request or a decision, (ii) take statements and carry out interviews, and (iii) carry out inspections.

Inspections may be carried out at the premises of undertakings or associations of undertakings, but not at private premises such as the homes of employees or managers.[20] During the inspection, the Commission may enter and seal off premises, examine and take copies of books or records, irrespective of the medium on which they are stored, require the undertaking to provide access to and explanations of its organization, functioning, IT systems, algorithms, data-handling, and business practices. The officials may also ask any representative or member of staff for explanations of facts or documents relating to the subject-matter and purpose of the inspection, and to record the answers by any technical means. The powers largely mirror those granted to the Commission in antitrust investigations, and just as under Regulation 1/2003,[21] the DMA imposes an obligation on targeted companies to

[20] In this respect, the enforcement powers are narrower than under the EU antirust rules as Regulation 1/2003 allows the Commission to carry out inspections also in private homes if it is investigating a serious infringement of Article 101 or 102 TFEU and there is reason to believe that evidence is kept at the home of an employee or company representative.

[21] 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 L1/1.

submit to the inspection. Failure to do so may lead to fines of up to 1% of the annual global turnover of the company group.[22] Thus, failing to cooperate with the inspectors during the inspection may come at a high price.

Unlike under the antitrust rules, the power to carry out inspections appears to be available to the Commission also where the Commission does not suspect any wrongdoing, as a tool to monitor and evaluate the effectiveness of the obligations laid down in the DMA. According to Recital 80, the Commission has not only been granted the powers to request information, take statements and carry out inspections to investigate, enforce and monitor the rules laid down in the DMA. In addition, the recital states explicitly, the Commission may use these powers for the purpose of carrying out market investigations, including for the purpose of updating and reviewing the DMA.

While the wording of the regulation suggests that the Commission should be allowed to use these powers also absent a suspicion of wrongdoing and in order not only to check compliance but also to assess the effectiveness of the obligations laid down in the regulation, the Commission will have to use the powers cautiously and make sure that any inspections are carried out in a manner that respects the rights of targeted companies. In the following it will be examined whether the Commission should be allowed to use the inspection as a tool also absent any suspicion of wrongdoing or whether this would infringe the right to respect for your home and private life under Article 7 of the Charter.

3 Fundamental Rights in an EU Setting

Fundamental rights have not always been considered part of the EU legal order,[23] but are by now a well-integrated and vital part of Union law. Today, respect for human rights and the rule of law even belong to the values on which the Union is based,[24] and 15 years have passed since the Charter of Fundamental Rights of the European Union (the Charter) was elevated to primary EU law and thus given the same value as the Treaties. Since then, the Court of Justice of the European Union has had ample opportunity to interpret its provisions and to give life and meaning to the Charter.

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[22] Article 30(3).

[23] When the Court of Justice was first requested to deal with these issues, it refused to do so. The case, which concerned the application of the ECSC—a treaty with even more limited scope than the Treaty of Rome—was *Stork & Cie*. When adopting a certain decision, the High Authority had allegedly infringed German constitutional law, and the applicant sought the annulment of the decision based on this ground. In its ruling, the Court declared that it was not empowered to rule on the matter as fundamental rights did not form part of EU law but only of the national laws of the Member States. Case 1/58, *Stork & Cie v ECSC High Authority*, EU:C:1959:4, para. 43

[24] According to Article 2 TEU, the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

While the Court of Justice first showed some hesitance towards acknowledging that the Charter was linked to the European Convention on Human Rights and Fundamental Freedoms (the ECHR),[25] references to the ECHR standard are now frequent, and the Court of Justice explicitly uses the ECHR as a benchmark for the EU standard of protection, acknowledging that, according to Article 52(3) of the Charter, the EU standard should meet or exceed the ECHR standard.[26]

Among the great number of cases involving Charter rights, a fair share deal with the Commission's powers to carry out dawn raids within the framework of antitrust investigations. In addition, the European Court of Human Rights (the Strasbourg Court) has been given the chance to provide guidance on the safeguards needed to surround inspections carried out by competition authorities.

3.1 Dawn Raids from a Fundamental Rights' Perspective

While the dawn raid is indeed an effective investigatory tool, providing the enforcer with the possibility to search through both the offices and the IT environment of the company, it must be handled with care to ensure that the rights of targeted companies and employees are safeguarded properly. The power to enter, search through and seal off the premises of a company, take copies of documents and ask for explanations on the spot is very intrusive and should not be used unless necessary, this especially if it is carried out without warning. In antitrust cases, unannounced inspections are often considered necessary as there is a risk that companies engaging in illegal behavior would otherwise seek to hide or destroy evidence. Over the years, both the Court of Justice and the Strasbourg Court have been given ample opportunity to determine where the line should be drawn between the apparently diverging interests of effective enforcement and the protection of fundamental rights.

It is clear from the two courts' jurisprudence that inspections carried out within the framework of antitrust investigations may be problematic from at least two different perspectives. If carried out without due regard to the Charter or if the rules surrounding them do not provide adequate procedural safeguards, inspections may infringe the targeted company's defence rights and/or its right to privacy, or inviolability of the home, laid down in Articles 47 and 7 of the Charter and Articles 6 and 8 of the ECHR respectively. Whereas the defence rights mainly concern the right and possibility for targeted companies to challenge the inspection decision as such or any measures taken on its basis, the right to privacy has a somewhat wider

[25] See e.g. Case C-617/10, *Åkerberg Fransson,* EU:C:2013:105, where the Court referred to its own ruling in *Bonda* rather than the Strasbourg Court's ruling in *Engel v the Netherlands* when reiterating the Engel criteria determining when a sanction or procedures is to be considered as criminal in character. Case C-489/10 *Bonda EU:C:2012:319,* and *Engel and Others v the Netherlands*, Application no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

[26] Article 52(3) of the Charter. See e.g. Case C-682/20 P, *Les Mousquetaires SAS and ITM Entreprises SAS v. European Commission*, EU:C:2023:170, para 41.

scope requiring dawn raids to be surrounded by adequate procedural safeguards against arbitrariness or abuse. As will be discussed below, if a dawn raid is carried out without a suspicion of wrongdoing, or if the Commission would (be allowed to) seize documents unrelated to the investigation, this would be contrary to Article 7 of the Charter.

3.1.1 Dawn Raids and the Right to Privacy

The two courts' case law on dawn raids and the right to privacy in antirust cases can briefly be summarized as follows: For the Commission or a national competition authority to carry out a dawn raid, it must suspect the company of wrongdoing. The authorities are thus not allowed to venture out on fishing expeditions as this would be considered both arbitrary and disproportionate. In order to eliminate the risk of such expeditions, the competition authority must state clearly what it suspects the company of doing and may then only search for evidence of such infringement. The EU Courts have consistently held that the duty on the part of the Commission to state the subject-matter and purpose of the inspection serves to ensure that it is justified.[27] During the inspection, the Commission may not copy or seize documents or evidence unrelated to the investigation. While the officials may stumble upon information indicating that the targeted company is engaging also in other forms of illegal behavior than the one described in the inspection decision, the authority will then have to open another investigation and carry out a second dawn raid to seize those documents.[28]

3.1.2 The View of the EU Courts

In *Roquette Frères*, the Court of Justice had to assess the scope of review that a national court is required to carry out when the Commission requests assistance from national enforcement authorities before a dawn raid. There, the Court of Justice declared that it must be open to the national court not to grant the coercive measures applied for, where the suspected impairment of competition is so minimal, the extent

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[27] See e.g. Case C-247/14 P, HeidelbergCement AG v European Commission, EU:C:2016:149, para 19, where the Court of Justice also refers to its rulings in Joined Cases 97–99/87, Dow Chemical Ibérica SA and Others v Commission of the European Communities, EU:C:1989:380, Case C-94/00, *Roquette Frères*, EU:C:2002:603, Case T-135/09, Nexans France and Nexans v Commission, EU:T:2012:596; and Case T-140/09 Prysmian and Prysmian Cavi e Sistemi Energia v Commission, EU:T:2012:596, and Case C-583/13 P Deutsche Bahn AG and Others v European Commission, EU:C:2015:404.

[28] See the Court of Justice's ruling in *Deutsche Bahn* where it annulled an inspection decision on the ground that it had been adopted on the basis of information gathered during the previous inspection where the officials had sought not only for evidence of the suspected infringement covered by the decision, but also for evidence of another, unrelated infringement. Case C-583/13 P Deutsche Bahn AG and Others v European Commission, EU:C:2015:404.

of the likely involvement of the undertaking concerned so limited, or the evidence sought so peripheral that the intervention appears manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation.[29]

In *Nexans*, the General Court explicitly stated that the Commission must have reasonable grounds to suspect the infringement stated in the inspection decision, and that a search carried out at the premises of a company with the ultimate aim of detecting any infringement—and not just the one indicated in the inspection decision—would be incompatible with the company's right to privacy.[30] This was recently confirmed by the Court of Justice in the French supermarket cases.[31] There, procedural irregularities during the investigation made the Court of Justice set aside the General Court's ruling and annul the inspection decisions in their entirety. This because the Commission had not kept records of the meetings held with complainants prior to the dawn raids. The Court considered this to be contrary to Article 19 of Regulation 1/2003. Consequently, the Commission could not rely on the information gathered during these meetings. As the information had formed the basis for the inspection decisions, the Court of Justice declared that the Commission had lacked reasonable grounds for adopting an inspection decision.

3.1.3 The View of the Strasbourg Court

The Strasbourg court has also provided guidance in this respect, both in antitrust cases and in cases concerning other forms of unlawful behavior by companies. In *Wieser & Bicos*,[32] it assessed the procedural safeguards surrounding a dawn raid that was carried out at the premises of a pharmaceutical company suspected of illegal trade in medications.[33] Here the Strasbourg court noted that the applicants' submissions concentrated on the necessity of the interference, whether the measures taken by the authorities were proportionate to the aim pursued and the procedural safeguards adequately complied with. In this respect the Strasbourg court noted that in comparable cases, it had examined whether the domestic law and practice afforded adequate and effective safeguards against abuse and arbitrariness. Elements taken into consideration were then whether the search was based on a warrant issued by a judge and based on reasonable suspicion, whether the warrant was reasonably limited, and—where the search was conducted at a lawyer's office—whether it was carried out in the presence of an independent observer. Finding that the Austrian

[29] Case C-94/00, *Roquette Frères*, EU:C:2002:603, para 80.

[30] Case T-135/09, Nexans France and Nexans v Commission, EU:T:2012:596, para 65.

[31] Case C-682/20 P, Les Mousquetaires and ITM Entreprises v *Commission*, EU:C:2023:170 and Case C-290/20 P, Casino, Guichard-Perrachon and Achats Marchandises Casino v Commissio*n*, EU:C:2023:171.

[32] Wieser and Bicos Beteiligungen GmbH v Austria, judgment of 16 October 2007, Application No 74336/01.

[33] The company was owned by a practicing lawyer, Mr Wieser, and had its seat at Mr Wieser's offices.

authorities had not paid regard to the procedural framework in place it established a violation of Article 8 of the ECHR.

More recently the Strasbourg court struck down on the safeguards surrounding a dawn raid where entire mailboxes had been copied by the Competition Authority during a dawn raid. In *Kesko*,[34] it found that the applicant's right to respect for its 'home' and 'correspondence' laid down in Article 8 ECHR had been violated. The applicant had complained against the Lithuanian Competition Council's (the LCC) copying of entire mailboxes during a dawn raid, arguing that these contained information that was irrelevant to the investigation.

The action was dismissed as the measures taken by the LCC were not considered challengeable since they had not given rise to any "legal consequences", the Lithuanian courts concluded. This partly because the applicant had failed to identify which of the documents copied that lacked relevance to the investigation. Finding that the measures taken by the LCC could be assessed together with the challenge against the final decision in the underlying cartel case, and that there was a possibility to lodge a claim for damages against the state, the Supreme Administrative Court was satisfied that the applicant had indeed had access to the court, and that there was therefore no infringement of the ECHR. The LCC later discontinued the cartel investigation and closed the case against the applicant. This meant that no court would assess the legality of the measures taken by the LCC during the dawn raid.

In its assessment of the application, the Strasbourg court found that, given the very large amount of information seized during the inspection, placing the task of examining each document and its relevance on the applicant was disproportionate. Furthermore, it considered that the need for a judicial review of the measures taken was rendered all the more important by the fact that the cartel investigation had been discontinued. On this basis, it established an infringement of Article 8 ECHR.

To conclude, in antitrust cases dawn raids may not be carried out unless the authority has reason to suspect the company of wrongdoing, and the company must also be protected against disproportionate measures taken by the authorities during the raid. One such safeguard is the right to have both inspection decisions and any measures taken on their basis reviewed by a court.[35] To guarantee an effective application of the right to judicial review, the authorities need to adopt inspection decisions that are reasoned, thereby allowing the courts to assess whether the inspection is justified. How do these requirements fit with the DMA and the possibilities to carry out inspections provided for under the regulation?

[34] UAB Kesko Senukai Lithuania v. Lithuania, judgment of 4 April 2023, Application No 19162/19.

[35] See also the Strasbourg Court's rulings in *Compagnie des Gaz de Pétrole Primagaz v. France*, judgment of 21 December 2010, Application No29613/08 and Société Colas Est and Others v France, judgment of 16 April 2002, Application No 37971/97.

4 Inspections Under the DMA

Recital 83 declares that the Commission should be empowered to conduct inspections of any undertaking or association of undertakings. The power to carry out inspections is thus not limited to the premises of actual or potential gatekeepers. Nor does the recital mention anything about necessity or provide examples of situations where an inspection could be considered a suitable option.

Article 23 adds somewhat more flesh to the bones, declaring that, in order to carry out its duties under the DMA, the Commission may conduct all necessary inspections of an undertaking or association of undertakings. An inspection may thus not be performed unless it is the only way for the Commission to carry out its duties under the regulation. This is also in line with Article 52(1) of the Charter which allows for limitations to the Charter provisions only if they are necessary and proportionate. In order to determine the boundaries that should surround the Commission's powers under the DMA, it must thus first be determined when a dawn raid, or unannounced inspection, can be considered necessary under the regulation.

4.1 Investigating Suspected Infringements of the DMA

Here the Commission's duties differ from those under the antitrust rules. When carrying out inspections within the framework of an antitrust investigation, the dawn raid—and the element of surprise—is considered necessary to ensure that the company suspected of wrongdoing is not allowed the opportunity to hide or destroy evidence. The Commission typically has some indication of a cartel behavior but needs to carry out a dawn raid to gather the evidence necessary to prove such infringement. As for the application of the DMA, the extensive reporting duties coupled with the monitoring powers provided for under the regulation will most likely imply that the Commission already has the evidence in its possession, or at least possesses enough information to send out a request for information without fearing that the gatekeeper may decide to hide or destroy information. In those situations, a dawn raid cannot be considered necessary.

That said, there may of course be situations where the Commission suspects a gatekeeper of non-compliance without possessing the evidence required to verify this or without being confident that the gatekeeper cooperates and provides the required information through a request for information. In those cases, the dawn raid as such should be justified under Article 7 of the Charter. These situations are likely to be limited in number, and the greatest value of the dawn raid as a tool to guarantee compliance is most probably that gatekeepers, knowing that the powers exist and are available to the Commission, will cooperate with the Commission and not attempt to circumvent the rules.

4.2 Inspections in Other Situations

As discussed previously, the Commission's duties are much broader under the DMA than under Regulation 1/2003 governing the application of Articles 101 and 102 TFEU. While the latter regulation imposes an obligation on the Commission to investigate and sanction infringements of the two Treaty provisions, the DMA not only requires the Commission to investigate suspected infringements of the obligations laid down in the regulation.

The Commission has also been handed a number of other duties. It should assess the effectiveness of the DMA, fine-tune the obligations imposed on gatekeepers and propose amendments of the regulation to the EU legislator. There may thus be other situations than those governing suspected infringements where the Commission may consider it necessary to carry out an inspection—be it pre-announced or un-announced—at the premises of a gatekeeper. It may want to monitor a gatekeeper's adherence to a retention order, inspect how the compliance function carries out its duties, gather information that enables it to assess the effectiveness of a certain obligation imposed on a gatekeeper or otherwise monitor the gatekeeper's actions.

While the Commission may consider such actions necessary to fulfil its obligations under the DMA, it may not carry out the inspections unless they are also considered proportionate. This means, inter alia, that there must be a proper relation between the benefits gained by the measure in question and the harm caused to the rights of the individual (proportionality *stricto sensu*). The benefit from realizing the objective should exceed the harm to the right. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be considered reasonable and demonstrably justified.[36]

Having been entrusted with the power to carry out inspections not only within the framework of infringement proceedings, it may be tempting for the Commission to carry out inspections in situations other than those governing suspected infringements of the DMA. However, it is important that it resists such temptation unless there are no other, less intrusive, options available, and even in those situations it will have to weigh the inconvenience caused to the gatekeeper against any gains made. If the monitoring of a certain obligation requires an on-site inspection, such inspection should be limited to what is absolutely necessary and the gatekeeper should be informed of the inspection in advance allowing it to prepare for the visit.

[36] See e.g. Barak (2012), p. 223; and Cohen-Eliya and Porat (2013), p. 2.

4.3 Limited Possibilities of Judicial Review Under the EU System

With the DMA now in force, the Commission is likely to attempt to break new ground and carry out inspections in other situations than those that we are used to from antitrust investigations. During the years to come, the Court of Justice will therefore have an important role to play in defining the boundaries of the Commission's powers in this respect. Unfortunately, the Court of Justice has historically been unwilling to take on this role.

In fact, there is an important shortcoming in the EU system, as there are only limited possibilities to have measures adopted during an inspection reviewed by the courts. Ever since the ruling in *IBM*,[37] the Court of Justice has held that implementing measures, paving the way for a final decision in the underlying competition case, may not be challenged unless they bring about a distinct change in the parties' legal position. Most measures taken by the Commission during an inspection, such as the copying of material, are not considered to bring about such change.[38] In *Les Mousquetaires*, delivered as late as in March 2023 the Court of Justice defended this approach, declaring that the EU system provides other procedural safeguards that weigh up for the limited possibilities to challenge implementing measures.

In this case, the Court of Justice noted that, in addition to turning to the Hearing Officer, targeted companies may challenge the inspection decision. Second, the lawfulness of any measures taken may be reviewed when the final decision in the underlying competition case is challenged. Third, the parties have the option to obstruct during the raid and challenge the Commission's decision to sanction the obstruction. Fourth, certain measures, such as the seizure of privileged documents, could be challenged directly. Fifth, the parties could apply for interim measures, and finally, there is the possibility to bring an action in non-contractual liability against the Commission. While the different routes may not in or of themselves provide adequate procedural safeguards, taken together they do, the Court of Justice concluded.

The Strasbourg court has taken a somewhat different view on the right to challenge implementing measures. It has consistently held that, for a legal system to ensure adequate procedural safeguards, the parties must be able to challenge both the inspection decision and any measures taken on its basis.[39] in its ruling in *Kesko*

[37] Case C-60/81, *IBM v Commission of the European Communities*, EU:C:1981:264, para 10.

[38] See e.g. Case T-135/09, Nexans France and Nexans v Commission, EU:T:2012:596, and more recently the Court of Justice's ruling in Case C-682/20 P, *Les Mousquetaires SAS and ITM Entreprises SAS v. European Commission*, EU:C:2023:170.

[39] See e.g. *Ravon and Others v. France*, judgment of 21 February 2008, Application No 18497/03, *Compagnie des Gaz de Pétrole Primagaz v. France*, judgment of 21 December 2010, Application No29613/08 and Société Colas Est and Others v France, judgment of 16 April 2002, Application No 37971/97.

referred to in Sect. 3.1.1 above, delivered less than a month after the Court of Justice's ruling in Les *Mousquetaire*s, the diverging views between the two courts became even more apparent.

While the Strasbourg court's rulings are case-specific, determining whether the rights of the applicants have been infringed in each individual case, they are not entirely without general application. Article 52(3) of the Charter requires the EU standard of protection to meet or exceed the ECHR standard. Thus, the EU is required to ensure that companies targeted by a Commission inspection, be it in an antitrust investigation or under the DMA, will not end up in a situation like that in *Kesko* where the Strasbourg court considered the procedural safeguards to be inadequate given the applicant's limited possibilities to have the seizure of e-mails reviewed by the Lithuanian courts.

In *Kesko*, one must assume that the parties had a right to challenge the inspection decision, although it should be noted that this usually requires that there is something wrong with the decision as such—not the measures taken on its basis. Nor is it unlikely that the applicants could also apply for interim measures or face sanctions if they decided to obstruct the investigation. We know that they had a right to have the measures assessed when challenging the final decision in the underlying cartel case and that there was a possibility to claim damages from the Lithuanian state. In addition to the ex-ante review carried out by the Lithuanian court, at least three of the six procedural safeguards listed by the Court of Justice in *Les Mousquetaires* were thus available. Yet, the Strasbourg court did not find these to be adequate.

As for the application of the DMA, one must consider the fact that in some situations, there may not even be a final decision to challenge given that the Commission may choose to carry out inspections also in other situations than within the framework of infringement proceedings. This makes the acknowledgement of the right to challenge any measures taken by the Commission during inspections appear all the more pressing.

Given the above, it is crucial that the Court of Justice now shoulders the responsibility to ensure that the inspections carried out by the Commission under the DMA may undergo a proper judicial review, allowing gatekeepers to challenge both the inspection decisions and the measures taken on their basis. This is especially so given the extremely broad powers of the Commission under the regulation coupled with the possibility for it to add new obligations on gatekeepers. Gatekeepers have an extremely heavy burden to bear under the regulation and should not have to fear that the Commission is allowed to use its power to carry out inspections in an arbitrary or disproportionate way.

5 Concluding Remarks

While this chapter has focused on the right of the Commission to carry out inspections within the framework of the DMA, it is also important to stress that the whole package of investigatory powers granted to the Commission under the regulation

should be used cautiously and to remind the Commission of the fact that while the wording of the DMA may grant the Commission wide margins of both discretion and appreciation, the Commission is still bound by the principle of proportionality and a number of other general principles including those of legitimate expectations, legal certainty and legality.

It can be questioned whether companies should be required, under pain of a fine that can amount to as much as 1% of the group's annual global turnover, to submit to inspections, fully cooperate with the Commission and provide it with any information, data or algorithms that it deems necessary to assess not only whether an infringement has occurred but also whether the legislation put in place by the EU legislator is actually effective or should be strengthened. Technically, the Commission could use these powers also against companies that are not even gatekeepers. Add to that the fact that the Commission, should it find that the rules are ineffective, may use the powers delegated to it under the DMA to revise the regulation by supplementing the obligations imposed on gatekeepers, thereby further increasing the burdens imposed on them.

Recital 79 declares that, in the event that gatekeepers engage in a practice that is unfair or that limits the contestability of the core platform services that are already designated under the regulation but without such practices being explicitly covered by the obligations laid down by the regulation, the Commission should be able to update the DMA through delegated acts. Article 12 mirrors the recital.

Allowing the Commission to supplement the regulation by adding new obligations on gatekeepers will ensure that the DMA remains agile and fit-for-purpose, but this is not unproblematic from a constitutional point of view. Article 290 TFEU allows the European Parliament and the Council to delegate certain powers to the Commission. According to the Article, a legislative act, such as the DMA, may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act in question. The DMA grants such powers to the Commission allowing it to supplement 'the existing obligations laid down in this Regulation where, based on a market investigation, the Commission has identified the need for updating the obligations addressing practices that limit the contestability of core platform services or are unfair'.[40]

The regulation thus leaves it to the Commission to determine whether a certain practice not covered by the DMA is unfair or limits the contestability of the core platform service. Second, it lists situations where the Commission may decide to supplement the obligations in place, allowing it to add to the already heavy burden of the gatekeepers. While the scope of these delegated acts is clearly circumscribed in certain circumstances, it is much broader in others. To give an example, the Commission may add further conditions where an obligation imposes certain conditions on the behavior of a gatekeeper or extend an obligation that applies to one core platform service also to other core platform services. It can be questioned

[40] Recital 97.

whether these powers should really be considered as non-essential elements of the DMA. If not, this would mean that the EU legislators have overstepped the powers granted to them by Article 290 TFEU. In any event, it is important that the Commission acknowledges the limits to its power in this respect and that the investigatory powers granted to it are not used to overstep the boundaries set by the Treaties. This especially since the investigatory powers, like all other powers granted to the Commission under the DMA, are wide.

Unfortunately, this cannot be guaranteed unless the EU Courts meet their responsibility to review not only inspection decisions, but also any measures taken on their basis. Absent of any proper judicial review, the EU standard will not meet the ECHR standard and gatekeepers cannot be guaranteed adequate procedural safeguards against abuse or arbitrariness from the Commission. The combination of wide powers and limited judicial review could prove to be a dangerous cocktail.

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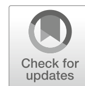
Part II
The Fundamental Rights Dimension

The Interaction Between Free Movement Law and Fundamental Rights in the (Digital) Internal Market



Ulla Neergaard and Sybe de Vries

Abstract Considering that after about 30 years of the Internet's existence and continuing appraisals thereof and other technological advances such as new business models, artificial intelligence, etc., the chapter takes as its point of departure that it has little by little having become time to embrace the darker realities of digitalisation. Therefore, in particular, it analyses the interaction between free movement law and fundamental rights by taking Case C-78/18 about the Hungarian NGO Transparency Law as a stepping-stone to assess how the law stands today, both in general terms and with regard to the (digital) internal market in particular, thereby enabling insights into how an old regime embraces new realities. The case is of interest because the Court of Justice of the European Union had to clarify if the Charter should apply to national laws that are not directly implementing EU Law, but are restricting the EU's fundamental freedoms, and because it constitutes a very important step in upholding the rule of law and democracy in the EU's Member States.

1 Introduction

Reflecting on how to handle the technology of the future, one of the greatest science fiction authors, Isaac Asimov (1920–1992), formulated more than 80 years ago (in 1942) the following "Three Laws of Robotics" (as quoted as being from the "Handbook of Robotics, 56th Edition, 2058 A.D."):

1. A robot may not injure a human being or, through inaction, allow a human being to come to harm.
2. A robot must obey the orders given it by human beings except where such orders would conflict with the First Law.

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3. A robot must protect its own existence as long as such protection does not conflict with the First or Second Laws.[1]

The "Laws" have ever since then been influential in many different ways, including e.g. in debates as to the ethics of artificial intelligence. Thus, the underlying theme of the present chapter, namely how to strike the right balance between the advantages of digitalisation and the disturbances it may lead to—especially regarding the preservation of the rule of law including fundamental rights—thereby has roots far back in time. Unsurprisingly, no clear solutions have yet truly been found, and the attempts to regulate the area in question has continuously grown with respect to the level of complexity and challenge.

One example of a regulation having a high degree of complexity in this regard in an attempt to face huge challenges in relation to digitalisation is the recently adopted Digital Services Act (DSA). It is based on Article 114 TFEU, which is the legal basis for internal market legislation.[2] In line therewith, the dominant rationale behind it is from the very outset referred to as the functioning of the internal market:

> Member States are increasingly introducing, or are considering introducing, national laws on the matters covered by this Regulation, imposing, in particular, diligence requirements for providers of intermediary services as regards the way they should tackle illegal content, online disinformation or other societal risks. Those diverging national laws negatively affect the internal market, which, pursuant to Article 26 of the Treaty on the Functioning of the European Union (TFEU), comprises an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured, taking into account the inherently cross-border nature of the internet, which is generally used to provide those services. The conditions for the provision of intermediary services across the internal market should be harmonised, so as to provide businesses with access to new markets and opportunities to exploit the benefits of the internal market, while allowing consumers and other recipients of the services to have increased choice. Business users, consumers and

[1] Quoted from Asimov (2013). The "Laws" were originally introduced in 1942, but must be seen as having had a "dynamic" role in the authorship as they have been altered over the years by him, who also at some point added a "Fourth Law".

[2] See further e.g.van Drunen et al. (2022), pp. 192–193, who explain that: "Article 114 TFEU entitles the European Commission to take measures that are necessary to ensure the establishment and functioning of the internal market. The realization of the European Digital Single Market continues to be a primary objective for the European Commission,. . . on its 'path to a Digital Decade' that must 'ensure that the European Union achieves its objectives and targets towards a digital transformation of our society and economy in line with the EU's values'. . . Article 114 TFEU is an important, albeit limited competence. Article 114 TFEU marks a careful balance between the regulatory competences of the European Commission vis-à-vis national competences, and as such touches upon more fundamental questions about the conferral of powers, the interests of the Union vis-a-vis those of individual Member States, but also national sovereignty and democratic legitimacy within the EU. . . The Court of Justice has made it clear that the internal market competence cannot be read as 'a general power to regulate the internal market' as this would be contrary to the principle of subsidiarity. . . Instead, the internal market competence must be focused on the 'abolition of all obstacles to the free movement of goods, persons, services, and capital'."

> other users are considered to be 'recipients of the service' for the purpose of this Regulation.[3]

At the same time, the Charter of Fundamental Rights of the European Union (hereafter the Charter) plays a primary role:[4]

> Responsible and diligent behaviour by providers of intermediary services is essential for a safe, predictable and trustworthy online environment and for allowing Union citizens and other persons to exercise their fundamental rights guaranteed in the Charter of Fundamental Rights of the European Union (the 'Charter'), in particular the freedom of expression and of information, the freedom to conduct a business, the right to non-discrimination and the attainment of a high level of consumer protection.[5]

These recitals lead directly to the expression of the aim of the DSA itself to be, as stipulated in Article 1(1), the following:

> The aim of this Regulation is to contribute to the proper functioning of the internal market for intermediary services by setting out harmonised rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected.

Thus, it is quite clear that the (digital) internal market and the Charter are intrinsically interlinked in this new and significant regulation.[6]

Another example of a relevant regulation having a high degree of complexity, yet attempting to face some of the newest challenges of digitalisation, would be the similarly recent and significant Digital Markets Act (DMA), which also has Article 114 TFEU as its legal basis. The very first recital in it thereby rather unsurprisingly refers to the internal market:

> Digital services in general and online platforms in particular play an increasingly important role in the economy, in particular in the internal market, by enabling businesses to reach users throughout the Union, by facilitating cross-border trade and by opening entirely new business opportunities to a large number of companies in the Union to the benefit of consumers in the Union.[7]

Its overall aim—as stipulated in Article 1(1)—accordingly is to contribute to the proper functioning of the internal market:

> The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair

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[3] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, Recital 2 of the Preamble.

[4] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

[5] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, Recital 3 of the Preamble.

[6] There are 21 references to the internal market and 37 references to the Charter in the DSA.

[7] 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, Recital 1.

> markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users.

At the same time, it is stated in Recital 109 that the regulation respects the fundamental rights and observes the principles recognised by the Charter, in particular Articles 16, 47 and 50 thereof. Accordingly, it is stipulated that the interpretation and application of the Regulation should respect those rights and principles.[8]

Contributing to the functioning of the internal market also in this area—as it is so clearly seen in the two regulations in question—being at the centre of attention is by no means surprising. However, at the same time, after about 30 years of the Internet's existence and continuing appraisals thereof and other technological advances such as new business models, artificial intelligence, etc., the regulations are also expressions of it little by little having become time to embrace the darker realities of digitalisation.[9] As to the foundational aims of strengthening the internal market, big advantages thereof have been seen and supported, but along therewith also an increasing awareness of the challenges have arisen, in particular regarding the protection of fundamental rights. However, finding an appropriate balance between the aims of advancing the internal market and protecting the fundamental rights has often proved not always to be an easy task.

Furthermore, the two regulations are next to other, recent legislative initiatives within the context of the Digital Single Market, including the AI Act, the Media Freedom Act or the Political Advertising Act, illustrative of the change that the EU's internal market law has undergone over the last decades.[10] Rather than constituting an obstacle, internal market law offers opportunities, perhaps even as a "normative corridor" for the accommodation of objectives such as sustainability, digitalisation, fundamental rights protection or social protection. This development also shows—as put forward by van Drunen and others—how difficult the concept of the internal market as a strictly economic/market law project is to maintain in the digital environment.[11] Furthermore, it shows—as also stated by van Drunen and others—that in the digital environment and data-driven services in particular, the economic aspects of the internal market are often two sides of the same coin, and the actors, means and mechanism for political and commercial advertising are increasingly difficult to separate, and often identical.[12] Particularly with respect to the Media

[8] There are 29 references to the internal market, but only 1 to the Charter in the DMA.

[9] See e.g. Neergaard (2020), pp. 83–105.

[10] See further e.g.: Proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), COM(2021) 206 final; amendments adopted by the European Parliament on 14 June 2023 at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html; Veale and Zuiderveen Borgesius (2021). Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act), COM(2022) 457 final; and Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, COM(202) 731 final.

[11] van Drunen et al. (2022), p. 194.

[12] van Drunen et al. (2022), p. 194.

Freedom Act, media plurality and the internal market, the EU Commissioner for the Internal Market, Thierry Breton, very much to the point has stated that "[t]he EU is the world's largest democratic single market. Media companies play a vital role but are confronted with falling revenues, threats to media freedom and pluralism, the emergence of very large online platforms and a patchwork of different rules."[13]

Having these reflections serve as a stepping-stone, the focal point of the chapter is more precisely to explore this interplay between the internal market freedoms and fundamental rights further. However, the exploration is, in principle, limited to primary law, and in that respect even further limited to an analysis of the rather intriguing judgment regarding the Hungarian NGO Transparency Law, which relates to delicate issues of the rule of law.[14] Outlining, exploring and analysing the approach taken by the Court of Justice of the European Union (hereafter the CJEU) in the cross-cutting field of free movement and fundamental rights may enable insights into how an old regime embraces new realities. Thereby, valuable insights as to the impact of fundamental rights on free movement may be gained, which again may have a significance in the area of the more specific digital internal market. In other words, it is of value to understand the general principles of EU Law before moving forward to the more specific layers of law.

In line with that, more specifically, the chapter will first introduce the core issues of the judgment (Sect. 2). Then the focus will turn to a discussion of the judgment and its larger implications (Sect. 3). Finally, the Chapter will provide some general conclusions (Sect. 4).

2 Core Issues of the Judgment

To a large degree, the interaction between free movement and fundamental rights in EU Law is unclear and most of all quite complex as well as unsettled.[15] Overall, rules on free movement and fundamental rights may mutually affect each other, i.e. where fundamental rights, like the freedom to conduct a business, strengthen economic freedoms, or may be in conflict with each other.[16]

Historically, fundamental rights are commonly viewed as originally having been introduced in EU Law and developed by the CJEU, mainly in the context of free movement as general principles of EU Law. Nevertheless, free movement may simultaneously be viewed as a general principle and a fundamental right or freedom in its own right. The CJEU has frequently referred to free movement rules as having

[13] European Commission: "European Media Freedom Act: Commission proposes rules to protect media pluralism and independence in the EU", 16 September 2022. Available viaec.europa.eu/commission/presscorner/detail/en/ip_22_5504.

[14] Case C-78/18, *Commission* v *Hungary*, ECLI:EU:C:2020:476.

[15] For a general overview, see e.g. Nic Shuibhne (2017), pp. 215–238.

[16] de Vries (2015a), pp. 235–260.

a "fundamental character."[17] As one reflection thereof, in the Charter there is a reference to free movement in the preamble, as it is here stated that the Union "... ensures free movement of persons, services, goods and capital, and the freedom of establishment." In addition, free movement is mentioned explicitly in Article 45 of the Charter. Although free movement arose in a market law context, today the fundamental right context has gained more and more ground. Under all circumstances, these two sets of legal regimes are today quite intertwined, which is also clearly demonstrated in the Hungarian NGO Transparency Law Case, which will now be further introduced and analysed.

The case results from infringement proceedings launched by the Commission under Article 258 TFEU in December 2017. It is noteworthy—and probably also rather unusual—that the Commission was supported by Sweden. Also worth mentioning is that it is a Grand Chamber decision. It is one of altogether six so-called values-related infringement proceedings against Hungary at the time.[18] Besides addressing the crucial question of how the CJEU should handle infringements of the freedoms of the internal market, which at the same time also impinge on the fundamental rights enshrined in the Charter, it is also of significance for other reasons. One of these is that the CJEU had to clarify if the Charter should apply to national laws that are not directly implementing EU Law but are restricting the EU's fundamental freedoms. Another is that it constitutes a very important step in upholding the rule of law and democracy in the EU's Member States.

More specifically, as a result of political changes in Hungary since 2010, media and civil society pluralism have increasingly been under threat in Hungary.[19] One of the elements in that development has been Hungary's enactment in 2017 of the so-called NGO Transparency Law. This law imposed obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold, and which provided for the possibility of applying penalties to organisations that did not comply with those obligations.[20] Although the Hungarian law at the surface claimed simply at ensuring transparency of civil organizations (NGOs) in Hungary that receive foreign funding, the reality was that its requirements were very strict and problematic in a wider context. It immediately gave rise to national protests, and eventually the Commission also reacted, initiating action under Article 258 TFEU for Hungary's failure to fulfil its obligations. It was more precisely claiming that Hungary had in actual fact introduced discriminatory, unjustified and unnecessary

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[17] See e.g. Case C-265/95, *Spanish Strawberries*, ECLI:EU:C:1997:595; and de Vries (2015b), p. 83.

[18] See e.g. Council of the European Union (2018) Annex a Commission non-paper providing factual information on the values-related infringement proceedings in relation to Hungary. Available via asktheeu.org/en/request/6115/response/19716/attach/html/6/st14022.en18.pdf.html. For a broader perspective, see e.g. Bayer (2020).

[19] Kirst (2020).

[20] Case C-78/18, *European Commission, supported by the Kingdom of Sweden, v Hungary*, ECLI:EU:C:2020:476. Para. 1.

restrictions on foreign donations to civil society organisations, in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter.[21] As to the substance of the judgment, at stake are thus two main sets of rules, namely one free movement rule and some Charter provisions. These two central trajectories of the judgment are now under scrutiny in the following.

2.1 Free Movement of Capital

The first trajectory of the judgment in many respects constitutes a classic application of the free movement of capital rules. In general, the free movement rules can be seen as stipulated to exercise control over measures adopted at the national level that are apt to jeopardize the aim of establishing the internal market.[22] Common to the CJEU's scheme of thinking applied in the majority of the free movement judgments is—simply expressed and on the condition that the provisions are considered applicable in the case at hand—a two-pronged test. The first prong of the test contains an assessment as to whether a given national measure involves discrimination on the grounds of nationality and/or constitutes a hindrance (restriction of) for the free movement. The other prong of the test includes an assessment of whether a given national measure can be upheld by reference to overriding interests of public interest, which would then cause the measure in question, despite otherwise being in conflict with one or more of the free movement rules, to be considered as justified. Here, the concept of overriding interests is applied as a collective term including both the exceptions foreseen by the Treaty, often referred to as the express exceptions, and the judge-made justifications, as well as the fundamental rights. These interests may—when various conditions, including in particular, the principle of proportionality are fulfilled—serve as implying that an otherwise unlawful measure, after all, can stand as lawful. Thereby, in reality, the rules concern the distribution of competences deciding on when the internal market or the autonomy of the Member States prevail.

Thus, in its judgment, after having stated that there are capital movements with a cross-border dimension under Article 63(1) TFEU,[23] the CJEU examines whether certain provisions of the NGO Transparency Law constitute a restriction on the free movement of capital as prohibited by Article 63 TFEU (i.e. first prong of the test). In that regard, it concludes that the obligations of registration, declaration and publication imposed on the "organisations in receipt of support from abroad" under Paragraphs 1 and 2 of the NGO Transparency Law and the penalties provided for in Paragraph 3 of that law constitute such a restriction.[24] In reaching that conclusion,

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[21] Case C-78/18, Para. 1.

[22] The explanation in this paragraph originates largely from Neergaard (2020), pp. 83–105.

[23] Case C-78/18, Para. 51.

[24] Case C-78/18, Para. 65.

the CJEU emphasizes that the provisions at issue, seen as a whole, treat not only the associations and foundations established in Hungary, which receive financial aid that is sent from other Member States or from third countries differently from those which receive financial support from a Hungarian source, but also treat the persons, who provide those associations and foundations with financial support sent from another Member State or third country differently from those, who do so from a place of residence or registered office located in Hungary.[25] In that connection, the CJEU states that the national provisions at issue constitute indirectly discriminatory measures, inasmuch as they establish differences in treatment, which do not correspond to objective differences in situations.[26]

As to whether the restriction is justified (i.e. the second prong of the test), the CJEU first refers to itself having consistently held that a State measure, which restricts the free movement of capital, is permissible only if, in the first place, it is justified by one of the reasons referred to in Article 65 TFEU or by an overriding reason in the public interest and, in the second place, it observes the principle of proportionality, a condition that requires the measure to be appropriate for ensuring, in a consistent and systematic manner, the attainment of the objective pursued and not to go beyond what is necessary in order for it to be attained.[27] After a careful scrutiny of the arguments of Hungary, the CJEU concludes that the NGO Transparency Law can be justified neither by an overriding reason in the public interest linked to increasing the transparency of the financing of associations nor by the grounds of public policy and public security mentioned in Article 65(1)(b) TFEU.[28] Therefore, it finds that Hungary has failed to fulfil its obligations under Article 63 TFEU.[29]

2.2 Articles 7, 8 and 12 of the Charter

Of significance to the issues at stake here—because Hungary had argued that the NGO Transparency Act was justified according to EU Law (namely both by an overriding reason in the public interest and by reasons mentioned in Article 65 TFEU)—the CJEU with reference to its own case-law, held that the Member State therefore must be regarded as implementing EU Law within the meaning of Article 51(1) of the Charter.[30] As a consequence, it thus must comply with the

[25] Case C-78/18, Para. 61.

[26] Case C-78/18, Para. 64.

[27] Case C-78/18, Para. 76.

[28] Case C-78/18, Para. 96.

[29] Case C-78/18, Para. 97.

[30] In Case C-78/18, Para. 101, the CJEU more precisely referred to Case C-201/15, *AGET Iraklis*, ECLI:EU:C:2016:972, Paras. 63 and 64; and Case C-235/17, *Commission v Hungary*, ECLI:EU:C:2019:432, Paras. 64 and 65.

fundamental rights enshrined in the Charter.[31] The "test" hereafter is two-pronged, the first prong entailing an examination as to whether the provisions in question impose any limitations on the rights and freedoms laid down by the Charter, and second, if they do, whether those limitations are justified in the light of the requirements set out in Article 52(1) of the Charter.[32]

As to the first prong regarding the existence of limitations on the rights enshrined in the Charter, the CJEU in its analysis more precisely considers: (a) the right to freedom of association as enshrined in Article 12(1) of the Charter, which sets out that everyone has the right to freedom of association at all levels, in particular in political, trade union and civic matters;[33] and (b) the right to respect for private and family life in conjunction with the right to protection of personal data as enshrined in Articles 7 and 8 of the Charter.[34] It finds that the provisions of the NGO Transparency Law at stake limit these rights.

As to the second prong regarding the existence of justifications, the CJEU first explained that it is apparent from Article 52(1) of the Charter, inter alia, that any limitation on the exercise of the rights and freedoms recognised by the Charter must genuinely meet objectives of general interest recognised by the Union.[35] As it had already held—in connection with the free movement of capital trajectory[36]—that the NGO Transparency Law could neither be justified by an overriding reason in the public interest linked to increasing the transparency of the financing of associations, nor by the grounds of public policy and public security mentioned in Article 65(1)(b) TFEU[37]—it followed that the limitations on the rights enshrined in Articles 12, 7 and 8(1) of the Charter could not be justified either.[38] Accordingly, Hungary was held to having failed to fulfil its obligations under Articles 7, 8 and 12 of the Charter.[39]

In sum, Hungary was with respect to both trajectories held to having breached EU Law. This has led to several positive comments, among which could be referred to Commissioner Didier Reynders, who has stated:

> A strong, vibrant and independent civil society is key to upholding the common European values of the rule of law, fundamental rights and democracy. Civil society organisations in EU must be free to enjoy their right to freedom of association, which includes the freedom to seek, secure and utilise resources. This has been confirmed by today's judgement. I am

[31] Case C-78/18, Paras. 101–102.

[32] Case C-78/18, Para. 103.

[33] Case C-78/18, Para. 110.

[34] Case C-78/18, Para. 120.

[35] Case C-78/18, Para. 139.

[36] Case C-78/18, Para. 96.

[37] Case C-78/18, Para. 140.

[38] Case C-78/18, Para. 141.

[39] Case C-78/18, Para. 142.

pleased to see that the Court fully upheld the Commission's arguments in its ruling, protecting the freedom of association of civil society organisations in the EU.[40]

3 Discussion: Choice of Legal Avenue

The judgment adds important bricks to the puzzle of the interaction between free movement law and fundamental rights, and in that respect also constitutes a reflection of inherent, yet rather important legal choices directing this interaction. These legal choices are firstly concerned with the CJEU's reinforcement of free movement law as an important "hook" to bring the Charter on board. Thereby, free movement law does not function as a constraining factor for the protection of fundamental rights, but is rather used as a foundation for strengthening fundamental rights. Secondly, the legal choices are concerned with the question as to how the CJEU in cases, where free movement law and fundamental rights are applied simultaneously more precisely should be balanced against one another.[41] These various issues will be further discussed in what follows.

3.1 Free Movement Law as the Avenue to Protect Fundamental Rights

Crucially, the judgment confirms—despite it otherwise being well-known that the Charter according to its Article 51 is only applicable, when Member States are implementing EU Law—that the free movement rules may nevertheless have that effect.[42] In the present case, Hungary did not in an "ordinary" understanding

[40] European Commission, "Statement by Commissioner For Justice, Didier Reynders, on the Judgment of the Court of Justice of the European Union in Case C 78/18 Commission v Hungary", 18 June 2022, <ec.europa.eu/commission/presscorner/detail/en/statement_20_2765>. Others have received it more critically, see e.g. Bárd et al. (2020).

[41] See e.g. Kirst (2020). Also see e.g. Case C-390/12, *Pfleger*, ECLI:EU:C:2014:281, Para. 57. In this case, which concerned an Austrian authorization scheme for games of chance, the CJEU did not really clarify its position in this respect, but merely observed that a restrictive national measure within the meaning of Article 56 TFEU (free movement of services) may also restrict the freedom to choose an occupation, the freedom to conduct a business and the right to property simultaneously. It may also be of interest to compare with how the Supreme Court of the United States interprets the freedoms enshrined in the Bill of Rights.

[42] See about the interpretation of the provision, in particular Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, Paras. 20–21: "That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 DEB [2010] ECR I-13849, paragraph 32). According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on

implement any EU measures via the disputed NGO Transparency Law. Thereby, not only free movement of capital rules were viewed as violated, but also the Charter, as Member States might fall within the scope of application of the Charter without implementing EU Law as such. As Kirst has explained, this approach may by now be considered as in line with the earlier case law of the CJEU.[43] More precisely, it may be viewed as a—far-reaching and rather progressive—doctrine consisting of the following: if a Member State justifies a restriction of the four freedoms by invoking a general interest/justification recognized by the EU, the restriction can be scrutinised against Charter rights.[44]

In a way, this could be claimed to have some roots in the pre-Charter case law of the CJEU, particularly in *ERT*, where in the process of justifying a Greek television monopoly restricting the free movement of services, the freedom of expression as enshrined in Article 10 of the European Convention of Human Rights had to be taken into account.[45] In that regard, also the *Pfleger* case is of interest, too, as the CJEU here confirmed this approach with respect to the Charter.[46]

In a similar vein, it may be added that free movement law (together with the General Agreement on Trade in Services (GATS)) played a crucial role in the decision by the CJEU to strike down the Hungarian Higher Education Law, also called the "Lex CEU", which, according to the CJEU, threatened academic freedom, the freedom to fund educational establishments, and the freedom to conduct a business, as enshrined in Articles 13, 14(3) and 16 of the Charter.[47] This judgment, which was delivered a few months after the judgment concerning the Hungarian NGO Transparency Law, shows how the freedom of establishment, the Services Directive and the GATS triggered the application of the Charter.[48]

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the Member States when they act in the scope of Union law'. Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter."

[43] Kirst (2020).

[44] Kirst (2020).

[45] Case C-260/89, *Elliniki Radiophonia Tileorassi AE (ERT),* ECLI:EU:C:1991:254.

[46] Case C-390/12, *Pfleger*, ECLI:EU:C:2014:281.

[47] Case C-66/18, *Commission* v *Hungary*, ECLI:EU:C:2020:792.

[48] It was more precisely decided that (Paras. 212–215): "So far as the actions of the Member States are concerned, the scope of the Charter is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only 'when they are implementing Union law'. In the present case, first, as has been noted in paragraph 71 of the present judgment, the GATS forms part of EU law. It follows that, when the Member States are performing their obligations under that agreement, including the obligation imposed in Article XVII(1) thereof, they must be considered to be implementing EU law, within the meaning of Article 51(1) of the Charter. Second, where a Member State argues that a measure of which it is the author and which restricts a fundamental freedom guaranteed by the FEU Treaty is justified by an overriding reason in the public interest recognised by EU law, such a measure must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental

This line of case law, including in particular the Hungarian NGO Transparency Law, may thus be seen as developmental elements in sum having the effect of enforcing the broad scope of application of the Charter into the realm of the four freedoms.[49] Under all circumstances, this development should be contrasted with the CJEU otherwise having been demonstrating hesitance with regard to the applicability of the Charter, possibly most significantly in cases involving fundamental social rights.[50] Thereby, the special, one could even say progressive, role of free movement rules in enhancing the scope of application of EU Law has once again been confirmed. This has raised the question in legal scholarship and elsewhere as to whether the EU free movement rules, despite being considered as fundamental rights in their own right, have by now become "over-constitutionalised".[51]

In the EU's digital order, the public and economic spheres, or market and non-market values, are increasingly intertwined. Thus, it is in a digital environment difficult to maintain the concept of free movement law as a strict economic project. In other words, the digital infra-structure further highlights, how closely economic, political and cultural aspects are intertwined.[52] Using EU free movement law as an empowering tool for the realisation of fundamental rights' protection within the EU legal order might thus be considered as understandable, when viewed from such a perspective.

3.2 A New Standard of Review of Charter Infringements as a Better Avenue?

According to the two-pronged test—referred to above in Sect. 2.1—which is commonly applied by the CJEU in its free movement case law, fundamental rights have mainly had a role to play in serving as justification to an otherwise unlawful

rights enshrined in the Charter (judgment of 18 June 2020 *Commission* v *Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 101 and the case-law cited). The same applies with respect to Article 16 of Directive 2006/123. Consequently, the measures at issue must comply with the fundamental rights enshrined in the Charter."

[49] Kirst (2020).

[50] Case C-333/13, *Dano*, ECLI:EU:C:2014:2358. During the economic and financial crisis, for instance, the CJEU found different referrals by national courts, in particular Portuguese courts, in which questions were asked about the application of Charter provisions, inadmissible on the grounds that the reforms to national labour standards were not a matter for EU law: Case C-64/16 Associação Sindical dos Juízes Portugueses; Case C-128/12 Sindicato dos Bancários do Norte; see e.g. Case C-264/12, *Fidelidade Mundial*, ECLI:EU:C:2014:2036. See also e.g. Barnard (2015), pp. 174–175.

[51] See e.g. Garben (2020), pp. 335–370. Also see Opinion of Advocate General Henrik Saugmandsgaard Øe in Case C-235/17, *Commission v. Hungary*, delivered on 29 November 2018, ECLI:EU:C:2018:971, who advises against such a development.

[52] van Drunen et al. (2022), p. 194.

restriction (i.e. in the second prong review).[53] For obvious reasons, this is not the pathway of relevance here, as what is at stake is rather a breach of fundamental rights than a protection thereof.[54]

Yet, Advocate General Sánchez-Bordona suggests in his Opinion an alternative to the pathway chosen by the CJEU to integrate the fundamental rights more closely into the free movement scheme of thinking. In fact, he proposes a completely new standard of thinking. In that regard, he argues that the two complaints inherent in the case should not be examined "separately", i.e. along the two trajectories pursued by the CJEU at the end, but rather in an integrated way.[55] Also, he states that it is possible to link the freedoms laid down in the Treaties and the rights laid down in the Charter in a way, which enables the integration of both in a single set of review criteria.[56]

For a fuller understanding, it is of significance that Advocate General Sánchez-Bordona refers to the Opinion in Commission v Hungary (concerning right of usufruct over agricultural land) of Advocate General Saugmandsgaard Øe.[57] In that Opinion, the latter notes that, for the first time, the Commission was seeking from the CJEU a declaration that a Member State—also Hungary—had failed to fulfil the obligations imposed by the Charter.[58] Advocate General Sánchez-Bordona also explains that the thorny question at the time was the fact that, according to the Commission, the CJEU was required to rule on an alleged infringement of the Charter independently of, and separately from, an infringement of the freedom of movement, also alleged to have been committed by Hungary in those proceedings.[59] Against that background, Advocate General Saugmandsgaard Øe maintains that the CJEU could not examine the possible infringement of the Charter independently of the question of the infringement of freedoms of movement, more precisely stating:

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[53] See e.g. Case C-341/05, *Laval*, EU:C:2007:809, Para. 93, where the CJEU stated that: "...the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty...".

[54] In *Pfleger* the CJEU, although referring to the Charter next to Article 56 TFEU, did not further elaborate on the infringement of the Charter provisions and focused on Article 56 TFEU instead; see Case C-390/12, *Pfleger*, ECLI:EU:C:2014:281. To some degree, Case C-370/05, *Festersen*, EU: C:2007:59, which dates from before the Charter got binding effect, could serve as an example in this regard.

[55] Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI: EU:C:2020:1, Para. 49.

[56] Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI: EU:C:2020:1, Para. 81.

[57] Opinion of Advocate General Henrik Saugmandsgaard Øe in Case C-235/17, *Commission v. Hungary*, delivered on 29 November 2018, ECLI:EU:C:2018:971, Para. 64.

[58] Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI: EU:C:2020:1, Para. 74.

[59] Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI: EU:C:2020:1, Para. 76.

> . . .That institution takes the view, in essence, that, where national legislation that derogates from a freedom of movement is also capable of restricting the fundamental rights guaranteed by the Charter, the possible infringement of the Charter must be examined *separately*. I do not share that view. As I concluded in *SEGRO and Horváth*,. . . in accordance with the rule in *ERT*, the question of a potential infringement of a fundamental right guaranteed by the Charter, just like a potential infringement of observance of the principles of legal certainty and legitimate expectations invoked by the Commission in its first complaint,. . . *cannot be examined by the Court independently of the question of the infringement of freedoms of movement*. . . .[60]

He adds that, under the *ERT* case-law, the question of fundamental rights and that of freedoms of movement are inextricably linked, why it is not possible, from the point of view of both methodology and legislation, to separate those two questions, as the Commission had suggested in that case.[61] In fact, he argues that to follow the Commission does not follow from the simple logic of the ERT case-law and is to him a new extension—or even a distortion—of that case-law.[62]

This main reasoning from the Opinion of Advocate General Saugmandsgaard Øe was not followed by the CJEU. Rather, the CJEU preferred to examine in turn the infringement of Article 63 TFEU and the infringement of Article 17 of the Charter.[63] The present case on the Hungarian NGO Transparency Law follows the same logic, thus also rejecting the points of view put forward by the Advocate General Saugmandsgaard Øe.

Advocate General Sánchez-Bordona explains that thereby the CJEU is undoubtedly seeking to link the fundamental freedoms safeguarded by the Treaties and the fundamental rights laid down in the Charter, but that there is a certain risk of overlap in their analysis as Advocate General Saugmandsgaard Øe had also pointed out.[64] Although Advocate General Sánchez-Bordona does not agree that that overlap would have excessive practical consequences, he believes that it is possible to link the freedoms laid down in the Treaties and the rights laid down in the Charter in a way, which enables the integration of both in a single set of review criteria.[65] It is against that background that he then suggests an integrated test, which more precisely has the following content:

> It will therefore be necessary to establish:
> – whether that legislation is concerned with a movement of capital and, if so, the conditions to which it makes that movement of capital subject;

[60] Opinion of Advocate General Henrik Saugmandsgaard Øe in Case C-235/17, *Commission v. Hungary*, delivered on 29 November 2018, ECLI:EU:C:2018:971, Paras. 75–76.

[61] Opinion of Advocate General Henrik Saugmandsgaard Øe in Case C-235/17, *Commission v. Hungary*, delivered on 29 November 2018, ECLI:EU:C:2018:971, Para. 91.

[62] Opinion of Advocate General Henrik Saugmandsgaard Øe in Case C-235/17, *Commission v. Hungary*, delivered on 29 November 2018, ECLI:EU:C:2018:971, Para. 95.

[63] Case C-235/17, *Commission v Hungary*, ECLI:EU:C:2019:432.

[64] Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI:EU:C:2020:1, Para. 80.

[65] Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI:EU:C:2020:1, Para. 81.

– whether, if it is found that the legislation genuinely places conditions on capital movements, the conditions imposed amount to a breach of the fundamental rights relied on by the Commission, in which case they will constitute a restriction of the freedom safeguarded by Article 63 TFEU;
– lastly, whether that restriction can be justified under EU law, which would preclude it from being classified as improper and would, therefore, rule out the infringement alleged by the Commission.[66]

He explains that the traditional freedoms protected by the Treaties can no longer be interpreted independently of the Charter, and the rights laid down therein must be treated as an integral part of the substance of those freedoms, and in that connection, the EU safeguards those freedoms in a legislative context defined by the fundamental freedoms laid down in the Charter.[67] Accordingly, he states that:

> . . . if the compatibility of national legislation with any of those traditional freedoms is called into question, the Charter will be applicable both where the Member States seek to rely on one of the exceptions which the Treaties lay down in that regard and in any other situation in which the fundamental rights are affected. In other words, those rights do not come into play by way of Article 65 TFEU but instead do so directly and primarily by way of Article 63 TFEU.

This proposal by the Advocate General fits into the anthropocentric character that EU Law has acquired through a growing focus on the importance of personal, individual rights of EU citizens, first in the CJEU's case law starting far back in time with *van Gend & Loos* and now with regard to the Charter itself. The Advocate General himself also explicitly refers to the importance of the citizen in the EU legal order in his opinion:

> The entry into force of the Charter constituted the final transition from the previous legislative system to another which revolves around the figure of the citizen, that is to say an actor who holds rights which afford him a legal framework in which he can live autonomously and have the freedom to pursue the attainment of his own goals.[68]

More concretely and in comparison with the "classic" two-pronged test within the area of free movement law, the proposed new test may be seen as expanding the first prong to include both a free movement review and a fundamental right review, *and* when both may be present then to transform the second prong into one single, identical review.

Already because, as explained above, free movement rules can be seen as fundamental rights in themselves, or as being enshrined in a number of specific provisions of the EU Charter, the integrated test on the surface indeed has some

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[66] Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI: EU:C:2020:1, Para. 101.

[67] Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI: EU:C:2020:1, Para. 88.

[68] Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI: EU:C:2020:1, Para. 87.

conceptual and pedagogical attraction.[69] Furthermore, the proposed integrated assessment of both the EU Charter and Treaty freedoms prevents that Member States in the process of justifying a restriction on free movement on public interest grounds would be able to escape the application of the Charter.[70]

An integrated test does, however, also contain certain drawbacks. Most importantly, it may be problematic to integrate the justification element as suggested, because the review under free movement law is generally considered to be of a lighter character, i.e. in the sense of being easier to fulfil by the Member States, than the test prescribed by Article 52(1) of the Charter.[71] In that regard, it may be recalled that Article 52(1) of the Charter reads as follows:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

However, whereas the Advocate General embroidered on Article 52(1) of the Charter and assessed whether its conditions are fulfilled, as has been explained, the CJEU chose not to introduce the proposed "new" standard of review for integrated Charter and free movement infringements. This may be compared with the CJEU's reasoning in *Pfleger*, wherein it held that:

> . . . an unjustified or disproportionate restriction of the freedom to provide services under Article 56 TFEU is also not permitted under Article 52(1) of the Charter in relation to Articles 15 to 17 of the Charter. It follows that, in the present case, an examination of the restriction represented by the national legislation at issue in the main proceedings from the point of view of Article 56 TFEU covers also possible limitations of the exercise of the rights and freedoms provided for in Articles 15 to 17 of the Charter, so that a separate examination is not necessary.[72]

A too strict application of the conditions of Article 52(1) of the Charter in respect to breaches of free movement rules, which as mentioned originates from an economic/market law approach, would, in cases where important other, non-economic fundamental rights are invoked to justify breaches of the Treaty freedoms, endanger the protection of non-market interests, public values and fundamental rights. Hence, carefulness is desirable here.

In the end, though, both the CJEU and the Advocate General in this case reached the same overall conclusion, although to some degree applying different schemes of thinking. Where the CJEU looked at both overriding reasons of general interest and public policy enshrined in the Treaty as justification grounds for the Hungarian Transparency Law, the Advocate General mainly focused on public policy and

[69] I.e. e.g. the freedom to conduct a business (Article 16), the freedom to choose an occupation (Article 15) or the right to property (Article 17).

[70] Kirst (2020).

[71] van der Woude et al. (2022), p. 392.

[72] Case C-390/12, *Pfleger*, Paras 59–60.

placed his key analysis on Article 52 of the Charter. The CJEU quickly came to the conclusion that the Hungarian measure was neither suitable to attain its aim, nor constituted a clear link with public policy, based on the established free movement doctrine. The Advocate General, having his doubts about the causal link between the measure and the policy aim pursued as well, still discussed in rather detail all the conditions of Article 52 of the Charter and the various elements of proportionality. This suggests that the outcome in application of the two schemes may sometimes differ.

Under all circumstances, the above discussion has demonstrated the many complexities and important interpretational choices inherent in the interaction between free movement law and fundamental rights. Certain matters have been settled, but undoubtedly, the last words have not been said.

4 Conclusions

The CJEU has in Case C-78/18 about the Hungarian NGO Transparency Law, as just one example, by now clearly demonstrated its willingness to stand up to its role as protector of the rule of law and in that regard in particular fundamental rights. In line therewith, the digitalisation of societies also emphasizes the growing importance of fundamental rights and the potentially diminishing role of the four freedoms. However, at least in the case at hand, it is demonstrated how the old free movement regime has moved further up in importance in that regard, something which was not necessarily predictable.

In general, the process of digitalisation appears to blur the boundaries between the public and commercial domains, thereby interestingly at times enlarging the (commercial) space of the internal market.[73] The economic, cultural and political aspects are by now often very closely intertwined, which is demonstrated in e.g. the DSM.[74] A fundamental rights approach thus appears crucial in tackling not only actions of public authorities and national legislators, such as in the present case on the Hungarian NGO Transparency Law, but also of private actors, including the big tech firms and platforms, which through their power do not only impact market access but also enable to influence the democratic process.[75]

Against that background, it seems fair to expect that the CJEU will actively do as much as it can, within the limits of EU Law (as it understands these), to protect what it may find needed with respect to the many digital challenges. Somehow, the fundamental rights—“helped” by free movement rules—may thus be seen as

[73] See in this respect also Habermas (2022), who (according to Patberg (2023)) explains that it may be detrimental to democracy that the public space is increasingly shaped by social media, which follow the logics of marketing and commodification and not genuine journalistic work.

[74] van Drunen et al. (2022), pp. 181 and 194.

[75] Gerbrandy (2020), p. 309.

functioning as a shield with some similarity to Asimov's "Three Laws of Robotics" at least with regard to a certain degree of "interpretational flexibility". Under all circumstances, the basic principles developed by the CJEU regarding the interaction of free movement law and fundamental rights in primary law will and should eventually be of essential importance in relation to the interpretations of the DMA and the DSA.

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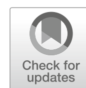
A Reading of the Digital Markets Act in the Light of Fundamental Rights



Inês Neves

Abstract The Digital Markets Act or DMA is a Regulation of the European Union. It introduces a set of obligations directed at companies designated as 'gatekeepers'. The DMA aims to ensure contestable and fair markets in the digital sector by protecting business users and end users of core platform services. Non-compliance with the obligations laid down in the DMA can lead to behavioural and structural measures in addition to fines and penalties. The DMA's enforcement is centralised in the European Commission. Civil liability in the context of private enforcement is not excluded. Although usually read and interpreted through the lens of 'economic' competition law and related areas (unfair commercial practices, consumer protection, data protection and privacy), the DMA's obligations reflect judgements of practical concordance (harmonisation or fair balance) between fundamental rights. Gatekeepers' freedom to conduct a business is a fundamental right enshrined in Article 16 of the Charter of Fundamental Rights of the European Union. In the DMA, it is harmonised with various conflicting and colliding rights and interests (including other players' freedom to conduct a business). The freedom to compete is inherent in the two-fold objective of ensuring contestability and fairness for the markets in the digital sector. Even if the DMA is not competition law, it is a close relative, at least. Balancing conflicting rights and interests must comply with what we call 'conflicts dogmatic' and obey the Charter of Fundamental Rights. Although the freedom to conduct a business is a highly capillary right, there is no abstract hierarchy between fundamental rights (or between holders of rights). It is possible to legitimise the DMA without ignoring the freedom to conduct a business as a fundamental right and businesses as fundamental rights holders. The purpose of this text is to uncover the fundamental rights behind the DMA.

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1 Introduction: The European Path Towards a Fair and More Open Digital Ecosystem

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[1] (hereinafter 'Digital Markets Act' or 'DMA') aims to achieve 'a contestable and fair digital sector in general and core platform services in particular, with a view to promoting innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for end users in the digital sector' (Recital 107).[2] To this end, it imposes a set of ('technical') obligations[3] and intricate procedural rules on gatekeepers,[4] i.e., undertakings providing core platform services, with a significant impact on the internal market and an entrenched and durable (current or foreseeable) position.[5]

This is a Regulation resulting from the Digital Services Package, which also includes Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services[6] (hereinafter 'Digital Services Act' or 'DSA'). In both cases, the European Union seeks to carry out a wide-ranging reform of the digital area through directly applicable acts not requiring transposition by the Member States. The aim is to protect citizens and businesses through a fair and more open digital ecosystem.[7] The EU uses these Regulations to fulfil positive obligations[8] arising from several fundamental rights enshrined in the Charter of Fundamental Rights of the European Union ('CFR').[9] Indeed, digitalisation comes with threats to fundamental rights of both citizens and businesses. Even if the Union's nature is debated, it has a catalogue of fundamental rights from which positive duties to protect derive. The complexity in this case is that, in order to ensure such duties, other fundamental rights may be limited. A conflict or collision arises. It must be solved according to a fair balance.

The need to update the European legal order to the effects of digitalisation on societies, markets and economies, as well as to new business models and commercial practices, is also one of the incentives. Competition law has a limited scope and more

[1] Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ 2022 L 265, 12.10.2022.

[2] Recital 107. The notions of 'end users' and 'business users' are advanced in Article 3(20) and (21).

[3] Leiser (2023), p. 4.

[4] Witt (2023), p. 11

[5] For the definitions of 'gatekeeper' and 'core platform service', see Article 2(1) and (2) as well as Article 3 of the DMA.

[6] Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, OJ 2022 L 277.

[7] Leiser (2023), p. 4.

[8] On these, Möller (2012), pp. 37–38.

[9] Charter of Fundamental Rights of the European Union, OJ 2012 C 326.

than two decades have passed since the Directive on electronic commerce.[10] Both were (as they are) no longer fit for the digital age and new economic realities.[11] In fact, the digital economy has several merits and offers new possibilities. It is not without challenges and risks, however. In order to tackle them, it is vital that companies behave within accurate and up-to-date frameworks. It is fair to say that these acts show that the social function often voted to the freedom to conduct a business and to the freedom of companies has never been so important. The novel acts wish to eliminate the 'profits first, society last' governance model'[12] and to end the 'Too big to regulate' era.[13] This is clear as regards their subjective scope since both the DMA and the DSA opt for a 'size-based criterion rather than a proper risk-focused model'.[14] The new paradigm of digital markets and society requires more interdisciplinarity as well. According to some, 'Thinking and acting in disciplinary and institutional silos is not helpful when it comes to regulating digital platforms whose business models require the collection and use of personal data. Coherent regulation of digital platforms requires an interdisciplinary and interinstitutional approach'.[15] The DSA and the DMA are sensitive to that. They provide for new actors with composite nature, such as Boards (the 'European Board for Digital Services' in Article 61 et seq. of the DSA) and high-level Groups (the 'high-level group for the Digital Markets Act' in Article 40 of the DMA). Despite variances, both confirm the need to apply different sectoral regulations with partially overlapping subjective scope coherently.

While the DMA and the DSA are massive steps in the digital transition, several open questions and doubts exist. First of all, these are ambitious reforms which concern companies operating globally. Will there be a 'Brussels effect'?.[16] How will foreign States and companies that operate globally 'accept' these acts? Will companies export European frameworks for their global operations?[17] It should be recalled that legal transplantation is dangerous when not adapted to local particularities. Scenarios of tension with other jurisdictions, of which the USA is an example, are

[10] Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 2000 L 178.

[11] Witt (2023), p. 2.

[12] Leiser (2023), p. 11.

[13] Geese (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 66 et seq.

[14] Mantelero (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 110. The Author refers to a contrast with the proposed Artificial Intelligence Act.

[15] Witt (2023), p. 35.

[16] Nunziato (2023) p. 5 et seq. See also Zingales (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 222–224 and Keller (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), pp. 229–237, stressing the need to see the DSA as a 'starting point'. On the 'Brussels effect' in general, see Bradford (2012).

[17] Witt (2023), p. 41.

certainly a risk.[18] How this 'tension' will be solved is a question that only the future can tell. In any case, the EU must be transparent and clear regarding the 'why' of its action to avoid misunderstandings. After all, this is a topic of shared global interest.

The uncertainty or expectation surrounding the DSA and DMA does not stop here. Indeed, they are not simple regulations addressing particular challenges of the digital ecosystem. Their precepts entail harmonisation exercises between several fundamental rights. By dealing with constitutional issues of society and digital markets, they make complex balances and seek to reconcile different values and imperatives. One example of that tension is the one 'between regulation on the one hand and leaving room for innovation and free entrepreneurship on the other hand'.[19] It should be stressed that, unlike acts such as the General Data Protection Regulation ('GDPR'),[20] neither the DMA nor the DSA resume themselves to one or two conflicting fundamental rights. Instead, as they target digital markets and services where several fundamental rights, interests and objectives meet, there are different 'fair balances' to be made and reconciled with each other.[21] This is acknowledged, at least as regards the DSA since 'Balancing freedoms whilst addressing harms is a fine line which, if not approached correctly in the DSA's implementation, risks further infringing rights, especially for those already historically marginalised within society'.[22]

Besides this quantitative layer of complexity, additional factors impose particular care when conducting exercises of concordance between conflicting rights. They reflect two dimensions of businesses as rights holders and vehicles for realising others' rights.[23] Let us begin with the one related with the treatment of companies

[18] In the Supreme Court case law, see *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985). If States may require disclosure of factual and uncontroversial information about companies' services, unreasonable or overly burdensome obligations may offend the First Amendment by deterring commercial speech. Disclosure obligations are thus required to relate to a legitimate state interest, such as protecting consumers and ensuring informed and free choice. See, most recently, *Nat'l Inst. of Fam. & Life Advocs.* at 138 S. Ct. 2361, 2377 (2021) and *Netchoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022). On this tension already during the discussions of the proposals—see Blockx (2023), pp. 1–5.

[19] Wilman (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 17.

[20] Regulation (EU) 2016/679 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, OJ 2016 L 119.

[21] In this sense, Wilman (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 20.

[22] Allen (2023), in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 124.

[23] Considering that 'Social media platforms (such as Facebook, YouTube and Twitter) have become primary vehicles of freedom of expression. From ordinary users to professional media companies, many different actors utilise the (theoretically) free platform services to impart information and ideas, as well as to receive information. They have also become important places of public discourse, which is a pillar of the democratic process, and spaces for the formation of political opinion'—see Bayer (2022), p. 757.

and their fundamental rights. The factual dependence in which users of digital services find themselves vis-a-vis the provider companies tends to be read in the light of the typical scheme of relations between individuals and public authorities (freedoms vs. powers). The most straightforward answer would be to deny enterprises as subjects and their freedoms as fundamental rights. In such a scenario, the discourse and dogmatics of fundamental rights would not intervene. It is believed that this shortcut is contrary to the rule of law. Denying businesses' fundamental rights just because they mimic public powers ignores that factual asymmetries also arise between human beings. It is a matter of concrete *status*. Fundamental rights are not objects of 'free' political choice, nor are they prone to administrative discretion (even more so when associated with legal uncertainty). Fundamental rights are constitutional imperatives. Normative acts or regulatory frameworks that delimit or restrict business freedoms cannot be legitimised through easy paths. This does not deny the need to regulate digital markets and the digital environment. It does not jeopardise the legitimacy of normative acts that provide for prohibitions and impositions on the companies concerned. However, it is sustained that such acts must be justified and proportionate. They must be enacted, interpreted and applied in terms compliant with fundamental rights and the freedom to conduct a business in particular. At least partially, both the DMA and the DSA affect companies' freedom of decision regarding *whether*, *how*, *when, with whom* and *under what terms* to pursue their economic activity. As they entail interferences with these liberties, their validity depends on the conditions that every fundamental right imposes on interferences. It is a basic assumption. Sometimes we have to go back to basics.

Different questions can capture a second dimension of increased complexity. How special are digital companies when it comes to balancing the freedom to conduct a business (which entails the freedom to compete[24]) with conflicting and colliding rights and interests? How can a proper 'fair balance' be achieved when digital companies are at stake? Most digital players intermediate businesses and end users. Almost all are 'spaces' where citizens and other businesses exercise their fundamental rights and interests. This means that, more than subject-holders of the freedom to conduct a business, gatekeepers and providers of intermediary services are vehicles for the exercise of others' rights. Although this tends to be seen through a negative lens that conceives 'big companies' or digital platforms as 'private powers' in the exercise of state or quasi-judicial adjudication decisions,[25] it is

[24] Even though there are doubts as to its nature of a fundamental right - Bernsdorff (2003), §§13–14—we believe that is not only a general principle and objective of EU policies, but a true fundamental freedom as well, from which positive duties arise. These positive duties can be achieved through competition law. The fact that competition is a limit to the freedom to conduct a business does not exclude that is also a dimension of that same right. The argument of confusion does not apply, because the freedom to conduct a business of a certain (dominant) player (or gatekeeper) may collide with the freedom to conduct a business (as a 'freedom to compete') of other undertakings.

[25] Ortolani (2023b) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), pp. 153–154. From the same A., Ortolani (2023a), pp. 3–7.

believed that their role has a hybrid nature. Both the legislator and enforcers cannot neglect its 'bright' side. Two conclusions can be drawn from this. The first one has already been dealt with. Companies in the digital sector have a special role in society with increased responsibility attached. The novelty lies in the second postulate. The rights and interests of consumers, end users and business users must be introduced into the equation. In other words, when conducting fair balance exercises, a dualistic logic A-B, holder-holder or company-users cannot be followed. Conversely, the proper framework would be an *A-B-C-D*... logic capturing multiple conflicting rights and holders. In other words, complex scenarios of conflict or collision between different fundamental rights and interests call for a polygonal perspective[26] where all measures implying the company are analysed from their stakeholders' and users' angles as well. Both the legislator and enforcers have to be mindful of this and measure the impact of their options and measures on citizens and other businesses. To circumscribe the framework of analysis to businesses' rights would be well wide of the mark. Of course, this raises the threshold and duties of care when balancing conflicting rights and objectives. Nevertheless, ensuring fundamental rights cannot be taken as just a hassle. In their own way, both the DMA and the DSA seem to acknowledge the role of companies as forums for realising others' rights and interests. Nonetheless, it is also important to recall that a 'fair balance' between several fundamental rights and interests cannot be fully achieved in abstract terms or through governing principles.[27] On the contrary, the enforcement and implementation of both Regulations will be key to ascertain their legitimacy and proportionality. In other words, digital regulations' adequacy depends not so much on their wording or frameworks but on their practical application. *How* they are effectively implemented and enforced matters[28] and that is why a holistic analysis that goes beyond companies' picture as powers acquires particular relevance.

To end the array of complexities, there is the open question of whether these Regulations are or will be 'future-proof'.[29] Their focus on current issues is a comprehensible choice in times of huge uncertainty. However, the metamorphosis typical of digital ecosystems may rapidly exhaust their utility. It is therefore important to explore the full potential of implementing regulations, delegated acts and guidelines. Finally, their periodical revision shall not be considered a foreign body nor an *ultima ratio* measure. It shall be acknowledged as a natural necessity from the beginning. The tension between the need for updates and legal certainty shall be solved through proper framing.

[26] This is a matter recognised by legal scholars, with regard to content moderation by intermediary service providers—see Ortolani (2023a), p. 2.

[27] Díez Estella (2023), p. 18.

[28] Inter alia, Becker and Penfrat (2023) van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.), p. 53; Jaursch (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), pp. 93–94.

[29] About keeping the DMA up-to-date, Monti (2021), p. 10 et seq.

It follows from the above that the DMA and the DSA share a genetic identity as well as an assortment of doubts and open questions. They differ, however, in several aspects. Their differences start with their focus and object. In simple terms, even if uncertainties remain as to its true nature, the DMA is closer to competition law. It is concerned with access to the market and effective freedom to conduct a business in the market. It is conscious that the freedom to compete implies the possibility to enter a particular market and compete (there) with other players. While assuming a regulatory dimension, it is not far from competition concerns since it aims to remedy similar problems caused by the growing power of large companies in markets with specific characteristics. The presence of large companies in digital markets enhances the adoption of unfair and abusive practices that promote the immunisation of incumbent firms from the competition of newcomers and weaken users' autonomy. The dilution of the latter's freedom of choice and decision is the result of strong dependence on digital infrastructures and core platform services, in terms that bring them closer to essential facilities or even services of public or general interest. The strong asymmetry of information between gatekeepers and users is also an issue considered by the DMA.

By contrast, the DSA is more focused on the protection of consumers and recipients of intermediary services while also providing a horizontal framework of conditional exemptions from liability for providers of intermediary services.[30] In particular, it seeks to protect online users' fundamental rights comprehensively. In order to do so, it establishes a set of harmonised rules on the accountability and non-liability of platforms for content stored or transmitted online. Reporting obligations and *due diligence* duties for the management and possible removal of content are at the DSA's heart.

While the DSA seems closer to fundamental rights guarantee and protection, it is possible to translate the DMA in similar terms. While the contestability and fairness that it elects as objectives seem to be in no law's land, that is probably caused by the difficulty of translating the bundle of fundamental rights, public interests and legal goods behind them. From competition to consumer rights and data protection, without forgetting the very freedom of enterprise of companies dealing with gatekeepers, it is fair to say that the DMA is not a Regulation alien to rights. In summary, there is a fundamental justification to interfere with the freedom to conduct business through a regulatory framework that constrains the freedom to decide *how* to exercise the business activity.

This text aims to demystify the apparent disconnect between the DMA and the fundamental rights discourse. Besides reaching the fundamental rights behind contestability and fairness, the objective is to show the importance of reading the DMA in accordance with the Charter of Fundamental Rights of the European Union and following constitutional guidelines. In addition to this introduction, the text is divided into six further sections. 'The Digital Services Act: a brief overview' gives a brief presentation of the Digital Services Act to bridge to the DMA. In 'The Digital

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[30] Moskal (2023), p. 1114.

Markets Act and its first implementing Regulation in a nutshell' we expose the main features of the DMA. After these two expository chapters, the jus-fundamental object of the DMA is reached in 'Fairness and contestability: a fundamental rights' translation'. After unveiling the hidden rights behind the objectives of fairness and contestability, we attempt to 'reframe' the freedom to conduct a business as a fundamental right, as the freedom most affected by the DMA. 'The freedom to conduct a business as a fundamental right' is about its nature as a true fundamental right. The purpose is to set aside the abstract lower value normally attached to corporate freedoms. Showing the importance of a DMA's reading in accordance with fundamental rights is the object of 'The DMA, in light of Article 52 of the EU Charter of Fundamental Rights', immediately preceding the conclusions.

Now that the sequence is introduced, it is important to state what this chapter is not about. Its purpose is not to exhaust each of the precepts of the DMA (or the DSA), nor each of the obligations set out therein. All these obligations and precepts are associated with particular balance exercises between the freedom of enterprise and conflicting or colliding rights, interests and objectives. Each would deserve a thorough analysis. In this sense, the objective is to put forward a legal framework which should guide the DMA's interpretation and enforcement. It can also guide its future improvement. This is a necessary framework (both for the European Commission—'EC'—and for National Competition Authorities—'NCAs' and competent authorities). According to Pires, 'In its enforcement role, the EC—as an administrative body—must seek to respect the fundamental rights of the undertakings in its administrative proceedings. Although the practical implementation of the fundamental rights should be better explained in a procedural regulation, sometimes, it is only clarified by the EC in its reviewing role'.[31] In particular as regards the DMA, it is a framework that can drive the Commission's discretion and the objectives of speed and efficiency in the most rights-friendly direction. Finally, it is a framework of interest to courts and the Court of Justice of the European Union ('CJEU') in particular, as the supervisory body of the both the European legislator and executive.

2 The Digital Services Act: A Brief Overview

Regulation (EU) 2022/2065 (the DSA) is the twin brother of the DMA. It builds on previous self-regulatory efforts, including the EU Code of conduct on countering illegal hate speech online and the 2022 Code of Practice on Disinformation.[32] The

[31] Pires (2023), p. 14.

[32] EU Code of conduct on countering illegal hate speech online (2016). https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en. 2022 Code of Practice on Disinformation (2022). https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation. As regards their connection with the DSA, see G'sell (2023), pp. 1–33.

DSA's main goal is to ensure the effectiveness of fundamental rights, consumer protection and to combat the dissemination of illegal content and the social risks of disinformation or other illegal or illicit content (of which gender-based violence is an example[33]). Without determining the unlawfulness of the content, it provides an approximation to what shall be considered as 'illegal content' referring to national and EU law.[34] According to its provisions, the concept should be broadly defined to cover information, which is either about illegal content, products, services and activities, such as illegal hate speech or terrorist content and unlawful discriminatory content, or which is illegal under the applicable rules because it relates to illegal activities. Examples include 'the sharing of images depicting child sexual abuse, the unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, the sale of products or the provision of services in infringement of consumer protection law, the non-authorised use of copyright protected material, the illegal offer of accommodation services or the illegal sale of live animals' (Recital 12 and Article 3(h).[35]

The DSA recognises that, more than powers, companies are also necessary pillars of the European governance of Internet services. For society, it represents more democratic control and supervision over platforms, helping to mitigate systemic risks, such as the manipulation associated with the amplification of disinformation.[36] Aware that today's platforms operate globally, are managed by algorithmic (and automated) systems, and can host harmful content,[37] the DSA represents a paradigm shift. From non-intervention and full liability exemption, it is now recognised that providers of intermediary services have a special role in guaranteeing the fundamental rights of users of their online services. A general duty to monitor the information or actively seek facts of circumstances indicating illegal activity is naturally denied (Article 8). However, these companies will have a pivotal role in controlling how the dissemination of illegal content takes place.[38] After all, the moderation of online content depends not only on the applicable law, but also on the terms and conditions designed by the platforms, in exercising their entrepreneurial freedom.[39] In summary, while the DSA updates the E-Commerce Directive without replacing it (Article 2),[40] it must also be brought in line with several EU

[33] On the issue, Allen (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 124 et seq.

[34] Leiser (2023), p. 4.

[35] In each section, the Recitals and Articles referred to are from the Regulation under analysis unless otherwise specified.

[36] Leiser (2023), p. 11.

[37] G'sell (2023), p. 2.

[38] Leiser (2023), p. 11.

[39] G'sell (2023), p. 9.

[40] Leiser (2023), p. 1. Even if 'the legal design of the liability exemptions from the e-Commerce Directive remains unchanged', 'there are a several noteworthy changes both in provisions'—Schwemer (2022), p. 7.

acts.[41] This is also one of its weaknesses and biggest dangers: the lack of clarity regarding complementarity with other acts, creating grey areas of underenforcement.[42]

The DSA entered into force on 16 November 2022. By 17 February 2023 (and then at least once every 6 months), online platform providers provided information on the average monthly active recipients of the service in the Union (Article 24(2)). The European Commission adopted the first designation decisions on 25 April 2023 (Article 33).[43] EU Member States had until 17 February 2024 to designate national Digital Service Coordinators. This date also marked the start of the DSA's application, except for providers of very large online platforms ('VLOPs') and very large online search engines ('VLOSEs'), that is those with an average monthly number of active recipients in the Union of 45 million or more (Article 92). Given that the first designation decisions were adopted in April 2023, they had, since then, 4 months to comply with the obligations.[44]

Turning to its scope, the DSA provides a horizontal framework for ensuring accountability, transparency and public oversight over the digital society. It sets out the responsibilities and accountability of providers of intermediary services and seeks to prevent arbitrary content removal.[45] To frame such a controversial issue

[41] In particular Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ 2019 L 130, and Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, OJ 2021 L 172.

[42] Goanta (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 142.

[43] Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines (2023). https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2413.

[44] For the sake of completeness, reference should be made to the Commission Implementing Regulation (EU) 2023/1201 of 21 June 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/2065 of the European Parliament and of the Council, C/2023/3946, OJ 2023 L 159. It lays down rules concerning the Commission's powers to conduct inspections under Article 69 and take the necessary follow-up measures in accordance with Article 72, in addition to rules on the exercise of the right to be heard and access to the file under Article 79.

[45] In fact, 'two scenarios need to be distinguished. In one, a legislative act would oblige platforms to remove content that is seen as violating a law defined by the mentioned act. In this case, the social media platform acts as a lengthened hand of the state administration, and all the safeguards for restriction of fundamental rights should be applicable. In the other scenario, the laws do not impose any obligation on the platform, but platforms are nonetheless allowed to remove content (or leave it online). Here, platforms are free to set and follow their own rules, without accountability for restricting freedom of expression'—see Bayer (2022), p. 758. In the second scenario, the platform is just exercising its freedom to conduct a business, which includes the right to determine its services' terms and conditions. This freedom might be restricted in order to prevent measures and decisions violating users' rights and interests. In this regard, regulating digital services and content removal in particular is welcomed. Also from the platforms' angle, legal certainty advises that this solution is provided for by law, since companies might not know what to do when faced with a conflict between several users.

as content moderation, is a difficult task.[46] There is a bundle of continuity and innovation in the DSA. While it maintains a horizontal framework of conditional exemptions from liability for providers of intermediary services, laid down in Directive 2000/31/EC, it now provides for due diligence obligations,[47] which are tailored and proportionate to specific categories of operators (according to their role, size and impact on the information ecosystem).[48] A 'tiered regulatory regime' or 'asymmetrical approach' is followed.[49] The fact that the obligations require specific implementation by the service providers under the close monitoring of the competent authorities allows us to speak of 'meta-regulation' or 'enforced self-regulation'.[50]

As to systematics, the DSA is organised into five chapters. Chapter I outlines general provisions, including its subject matter and scope (Articles 1 and 2). The DSA's subjective scope is clearly broader than the DMA, although they share the 'marketplace' approach.[51] The DSA applies to all intermediary services offered to recipients in the Union (although the liability of larger online platforms is higher) (Article 2). The substantial connection to the Union for service providers without an establishment therein is based on specific factual criteria (Article 3 (e)), such as the number of recipients of the service in relation to the Member State's population and the targeting of activities towards one or more Member States.

This first chapter also contains definitions of the main terms (Article 3). Chapter II includes provisions on conditional exemptions from liability for providers of intermediary services. More specifically, it contains the conditions under which the providers of mere conduit (Article 4), caching (Article 5) and hosting (Article 6) services are exempted from liability for the information they transmit and store. The exemptions in Chapter II merely determine when and in what circumstances intermediary service providers should not be liable for illegal content provided by service

[46] Leiser (2023), p. 1.

[47] According to some, the DSA is 'digital due process regulation bundled with risk-management tools. It creates universal due process guarantees, invites transparency to private decision-making and institutionalizes constant risk management by larger players. Europeans gain enforceable procedural rights owed to them by private parties operating the digital ecosystem. Regulators gain tools to hold such providers accountable for what science tells us goes wrong with their designs. Victims, NGOs, and industries gain tools to better enforce their rights at scale'—see Husovec (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 21.

[48] Leiser (2023), p. 1.

[49] Griffin and Vander Maelen (2023), p. 2. Leiser (2023), p. 4.

[50] On the issue, Zingales (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 215 et seq. and Cantero Gamito (2022), pp. 1–23.

[51] See Lutzi (2023), p. 2, considering that 'This approach clearly reflects the first of the two main goals of the 'Digital Services Act package', as they are stated on the website of the European Commission: 'to create a safer digital space in which the fundamental rights of all users of digital services are protected.' Indeed, holding European and non-European (especially American and Chinese) service providers who are active on the European digital market to the same standards of consumer protection and fundamental rights has always been one of the core concerns underlying the drafting and (uncharacteristically quick) adoption of the DSA/DMA'.

recipients. In other words, this is not a positive basis for determining when a provider can be held liable, since that derives from the applicable Union rules or national law.[52] Furthermore, the exemptions from liability are conditional and only apply under certain circumstances. They do not apply where, instead of merely providing the services neutrally by a merely technical and automatic processing of the information provided by the recipient of the service, the provider plays an active role enabling it to have knowledge of, or control over, that information (Recital 18). By way of illustration, providers must not initiate the transmission of illegal or harmful information; they must not have actual knowledge of illegal activity or content; they must act with diligence to remove or disable access to the illegal content from the moment of their knowledge (Recital 22 and Articles 4–6). The conditions for exemption vary according to the different nature of 'mere conduit', 'caching" and 'hosting' as well as the different positions and capacities of the service providers. The DSA innovates (according to some at least),[53] when it clarifies that these exemptions should not cease to apply when providers of intermediary services carry out voluntary own-initiative investigations or adopt measures in order to comply with the law (Article 7).[54] While this seems close to the so-called 'Good Samaritan Principle',[55] inspired by section 230 of the US Communications Act of 1934, its scope is more stringent, requiring that those voluntary measures are exercised in good faith and in a diligent manner.[56] Chapter II further prohibits the imposition of general surveillance or active fact-finding obligations on providers (section 8).[57] This is of particular relevance for the freedom to conduct a business of intermediary service providers.[58] Finally, the chapter contains the obligation for

[52] Recital 27 is clear in this regard: 'Whilst the rules on liability of providers of intermediary services set out in this Regulation concentrate on the exemption from liability of providers of intermediary services, it is important to recall that, despite the generally important role played by such providers, the problem of illegal content and activities online should not be dealt with by solely focusing on their liability and responsibilities'.

[53] Considering that this is not new, Wilman (2023), p. 43 et seq.

[54] In order to remove existing disincentives for voluntary investigations by intermediary service providers.

[55] G'sell (2023), p. 7 et seq.

[56] Herein would lie the real novelty, according to Wilman (2023), p. 45.

[57] In the sense of ensuring the protection of fundamental rights such as freedom of expression, privacy and data protection—Leiser (2023), p. 1.

[58] According to the ECJ case law, a general monitoring obligation would result in a serious infringement of the hosting service provider's freedom to conduct its business since it would require the service provider to install a complicated, costly, permanent computer system at its own expense. As the Advocate General Saugmandsgaard Øe recalls, 'not all service providers have the same capacities and resources as YouTube'—Opinion of Advocate General Saugmandsgaard Øe of 16 July 2020, *Frank Peterson v Google LLC and Others and Elsevier Inc.v Cyando AG*, Joined Cases C-682/18 and C-683/18, ECLI:EU:C:2020:586, footnote 226. Such obligation would not respect the requirement of a fair balance's being struck between the fundamental rights at stake. The case law also considers that the effects of such obligation would not be limited to the service provider. Besides its freedom to conduct a business, the fundamental rights of the users, namely their right to data protection and their freedom to receive or impart information, safeguarded by

providers to adopt measures against illegal content (Article 9) and to provide information (Article 10) when ordered by judicial or administrative national authorities.

Chapter III outlines a set of due diligence obligations for a transparent and safe online environment. Their specific content is distinct from the obligations imposed on gatekeepers in the DMA.[59] These due diligence obligations include notice and action procedures for illegal content and the possibility for recipients of services to challenge content moderation decisions.[60] Here lies the DSA's truly innovative rib, along with the one on enforcement.[61] Content moderation (Article 3(t)) is the essential 'core' of these obligations. The chapter is divided into five sections reflecting on the DSA's staggered, pyramidal or asymmetric approach.[62] In fact, the obligations of intermediary service providers stack up with their size and type. First, there are obligations applicable to all providers of intermediary services (section 1—Articles 11–15). These include the obligation to designate a single point of contact for direct communication with Member State authorities, the Commission and the European Board for Digital Services (Article 11) and transparency reporting obligations on content moderation activity (Article 15). It should be stressed that transparency obligations are particularly criticised by legal scholars, as they leave out algorithmic transparency, do not address information asymmetry,[63] and lack complementarity with additional incentives, being insufficient *per se*.[64]

Articles 8 and 11 of the CFR, would also be infringed. See ECJ Judgement of 24 November 2011, *Scarlet Extended*, C-283/11, C-70/10, EU:C:2011:771 and ECJ Judgment of 16 February 2012, *SABAM*, C-360/10, EU:C:2012:85.

[59] There is, however, complementarity between the DMA and the DSA in some cases. Examples include attempts to ensure users' ability to make autonomous and informed choices or decisions (in the case of the DSA, the focus on dark patterns is particularly relevant - Article 25)—Leiser (2023), p. 6.

[60] G'sell (2023), p. 9 et seq.

[61] G'sell (2023), p. 8 et seq.

[62] G'sell (2023), p. 4 et seq. According to the A., '[. . .] the DSA takes the form of a 'layer cake', designed to be applied asymmetrically with rules that vary depending on provider characteristics. In other words, the DSA's obligations are structured as a pyramid, 20 with layered requirements from the bottom to the top. At the base of the pyramid, the first layer encompasses all intermediary services that have very basic obligations, followed by hosting services, and then online platforms. Moving up the pyramid reveals increasingly stringent obligations that apply to fewer and fewer categories of providers. At the top of the pyramid, the most extensive and restrictive obligations are imposed on very large online platforms (VLOPs) or search engines (VLOSEs) that have at least 45 million average monthly active users in the EU. These additional obligations are justified by the systemic risks they pose due to their size. While large companies face heavier obligations, micro and small companies are exempt from certain obligations'.

[63] See Geese (2023), pp. 69–72.

[64] For a critical perspective, considering that the transparency obligations should be complemented with additional incentives for a more humanistic approach, less focused on profit—Leiser (2023), p. 5. The Author further considers that there is no evidence that users behave more rationally when they are provided with additional information—Leiser (2023), p. 11. See, also, with a more detailed analysis, Maroni (2023), pp. 1–28.

In addition to these cross-cutting obligations, specific and cumulative obligations apply to particular providers. Section 2 (Articles 16–18) sets out additional obligations for providers of hosting services, including online platforms (in addition to those in section 1). Section 3 sets out obligations (Articles 20–28) for providers of online platforms (in addition to those in sections 1 and 2), excluding only micro and small enterprises (which have not been designated as VLOPs - Article 19). This section includes, among others, the obligation to take appropriate and proportionate measures to ensure a high level of privacy, protection and safety of minors and prohibits advertising based on profiling (Articles 26(3) and 28(2) DSA). Section 4 includes additional provisions applicable to providers of online platforms that allow consumers to conclude distance contracts with traders (Articles 30–32). Again, except when designated as VLOPs, micro and small enterprises are exempted (Article 29). Section 5 contains obligations for providers of VLOPs and VLOSEs regarding managing systemic risks (Articles 34–43). Article 33 portrays very large online platforms and very large online search engines as undertakings which are subject to a designation decision by the Commission based on the data communicated by the provider or on the basis of the information in its possession. Articles 34 and 35 provide for the duty to identify, analyse, diligently assess and mitigate systemic risks arising from either the design or operation of services and related systems, including algorithmic systems, or the use of its services. The codes of conduct provided for in Articles 45–47 of the DSA will be highly relevant. Although they are a piece of 'soft law' in a hard law Regulation, they have been perceived as having a *de facto* quasi-binding nature. This is because an unreasoned refusal of the Commission's invitation to participate in the enforcement of a code of conduct may be considered when determining whether the online platform or search engine has breached the obligations set out in the DSA (Recital 104).[65]

Finally, section 6 (Articles 44–48) contains cross-cutting provisions on due diligence obligations. Chapter IV includes provisions on the application, cooperation and enforcement of the DSA. Unlike the DMA, national authorities are competent to supervise and enforce the DSA with regard to smaller service providers. The Commission has, in turn, almost exclusive competence with regard to very large online platforms and search engines (Articles 56, 65–78).[66] In other words, unlike the centralised enforcement model of the DMA, the supervision of the DSA is a shared task between the EC and the authorities designated by the Member States

[65] Griffin and Vander Maelen (2023), pp. 1–10. According to these Authors, codes of conduct are associated with important functions: concretion of vague precepts, strengthening oversight, correction of non-compliance through binding commitments, which may include 'a commitment to participate in a relevant code of conduct, as provided for in Article 45' (Article 75(2) of the DSA). These instruments also empower multi-stakeholder participation (suppliers and service providers), among others. While the risks of capture by large companies exist, they can be solved by ensuring the effective participation of various stakeholders and civil society.

[66] On the risks of conflict between the Commission's political function and its role in the implementation of the DSA, Buri (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), pp. 77–87. Also, on practical challenges, Wilman (2023), p. 17.

(one or several[67]). Where more than one national authority is designated, a 'Digital Services Coordinator' will be responsible for all matters relating to the supervision and enforcement of the DSA in that Member State. The latter must ensure that the roles of the competent authorities and the Digital Service Coordinator are clearly defined and that they cooperate closely and effectively in performing their tasks (Articles 49–51).[68] Due to the decentralised enforcement, rules on coordinated investigation and consistency control mechanisms stand out in this chapter. This does not rule out, at least according to some, that the ambitious scope of the DSA will make articulation between competent authorities a problem.[69] The maximum threshold for fines is lower than that of the DMA—6% of the total worlwide annual turnover of the provider in the previous financial year. Article 54 is a specific provision on the right of service recipients to claim compensation for any damage or loss suffered due to a breach of the DSA by intermediary service providers. Chapter V contains final provisions (Articles 89–93).

Obligations related to content moderation stand out in the array of requirements imposed on providers of intermediary services. In terms of content, and independent of the DSA's staggered applicability, its provisions can be segmented[70] into (i) obligations to fight illegal content online (for instance, through notice and action mechanisms, in Article 16)[71]; (ii) procedural safeguards, aiming to prevent arbitrariness of moderation decisions as well as 'overreaction' (for example, Articles 14, 17, 20 and 21),[72] in addition to (iii) transparency obligations and (iv) systemic risk management obligations. Other obligations focus more directly on user protection. By way of illustration, there are provisions seeking to ensure accurate and intelligible information (Article 27) and others which regulate targeted advertising (Articles 26 and 28)[73]. Dark patterns are specifically targeted as 'practices that materially

[67] According to Jaursch (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 94 'the DSA touches on issues as diverse as consumer protection, media regulation and data protection, for which countries often have separate authorities instead of one dedicated platform regulator'.

[68] On their role, Jaursch (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), pp. 95–102.

[69] G'sell (2023), p. 22 et seq.

[70] G'sell (2023), p. 9 et seq.

[71] Ortolani (2023a), p. 7 et seq.

[72] Kuczerawy (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), pp. 170–180. See, also, Ortolani (2023a), p. 10 et seq., distinguishing between dispute resolution mechanisms within the platform (Articles 16, 17 and 20 DSA) and outside the platform (Article 21 DSA).

[73] Criticising the restricted scope of application, see Becker and Penfrat (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 58. The authors refer to Article 26 and consider that 'Just as with deceptive interface designs, those restrictions only apply to online platforms as defined in the DSA, but not to websites, apps or other intermediary services that embed Google ads, for example. Worse, the DSA limits the prohibition to ads shown by platforms to their own users. Providers are therefore free to micro-target such ads to anywhere else on the web, if they offer this kind of service. This does not respond to the actual and current ad tech ecosystem.

distort or impair, either on purpose or in effect, the ability of recipients of the service to make autonomous and informed choices or decisions. Those practices can be used to persuade the recipients of the service to engage in unwanted behaviours or into undesired decisions which have negative consequences for them' (Recital 67 and Article 25). The DSA also includes concerns about consumer protection in distance contracts (Articles 30 and 31), in the context of which 'Know your customer' protocols are of particular importance.[74] Article 36 is also noteworthy as it provides for a crisis response mechanism according to which the Commission may require providers of VLOPs and VLOSEs to undertake additional obligations in the event of armed conflicts, acts of terrorism, natural disasters, pandemics and other serious cross-border threats to public health (Recital 91).

It follows from all the above that, although *born from the same mother*, the DMA and the DSA are distinct in character, scope and content. The DSA applies to all intermediary services[75] in the internal market, ensuring harmonised rules for a secure, predictable and reliable online environment. Although it refers to the purpose of facilitating innovation (which would bring it closer to the DMA), it is only a back-up objective and a guarantee of proportionality in the light of the obligations imposed on providers of intermediary services. In contrast with competition law and the DMA, the DSA is not directly focused on ensuring open markets to new and disruptive players nor at fighting market capture by large *players*. Its core is different: to ensure a safe, predictable and reliable online environment (Recital 9 and Article 1), through enhanced transparency, reporting obligations and *accountability* in content moderation and removal by providers of intermediary services.[76] In other words, although complementary to the DMA, the DSA focuses on consumers as recipients of services and parties affected by illegal content being shared, transmitted or stored online. This is what explains that fundamental rights are more closely related to the DSA, as evidenced by Article 34 and Recital 47 and the reference therein to the UN Guiding Principles on Business and Human Rights. It is without doubt that a fair balance or practical concordance between multiple fundamental rights and interests is part of the DSA's identity. Among the conflicting and colliding rights and interests, there are: copyright, freedom of expression and information, respect for private and family life, data protection, the right to non-discrimination, the right to an effective remedy, the achievement of a high degree of consumer protection, the freedom to conduct a business, including

In practice, the prohibition in the DSA will not cover things like cookies and tracking banners that appear as advertisements on most webpages thanks to Google ads services.'

[74] On Article 6(3) and the limitation of the liability exemption applicable to local accommodation services, see G'sell (2023), p. 18 et seq.

[75] Intermediary services are information society services of mere conduit, caching and hosting services (Article 3(g) DSA and Directive (EU) 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ 2015 L 241.

[76] Leiser (2023), p. 4.

the freedom of contract, the right to human dignity, the rights of the child, or even property, including intellectual property (Recitals 3 and 52).

This is in contrast to the DMA, where fundamental rights are only referred to in mediate terms. The DMA's main focus is on ensuring the conditions for open and fair markets. Despite this difference, fundamental rights are not absent from its spirit. In the same vein, while the DSA may be more evident in demonstrating the hybrid nature of digital players and economic operators that also assume a role in 'facilitating public debate, economic transactions and the dissemination to the public of information, opinions and ideas' (Recital 75), in the DMA, gatekeepers cannot be boiled down to threats as well. The fact that these are *sui generis* actors justifies their particular responsibility when complying with and implementing Regulations such as the DSA and DMA. In summary, although the goal of constitutionalising the power of intermediary service providers[77] is more manifest in the DSA,[78] the 'EU legislator's intention to combine the protection of fundamental rights and market interests'[79] is also present in the DMA. It is vital to understand how and to what extent the 'rights discourse' is qualifies the DMA.

3 The Digital Markets Act and Its First Implementing Regulation in a Nutshell

The DMA is an act of secondary EU law. It entered into force on 1 November 2022 and is applicable since 2 May 2023 (Article 54). It aims to ensure the contestability and fairness of markets in the digital sector (Article 1) and targets core platform services and certain companies providing them (the gatekeepers). Given the 'marketplace' approach, it only targets services provided or offered by gatekeepers to business and end users established (or located) in the Union.

Although the DMA qualifies itself as something different and complementary to the objectives of competition law (Recitals 10 and 11 and Article 1), it still departs from it, which generates doubts of articulation. In any case, it seems that it is not built on any abuse by gatekeepers or deceptive corporate reorganization.[80] According to Witt, 'the objectives of the DMA are defined as ensuring the contestability of and fairness in digital markets, whereas the current legal objective of EU competition law is to protect competition as a means of enhancing consumer welfare. Ensuring fairness in markets is not—at least no longer—an objective of EU competition law, and competition law does not aim to eradicate barriers to entry that are not

[77] Maroni (2023), p. 6.

[78] On the issue, Frosio (2022), pp. 1–20.

[79] Mantelero (2023) in van Hoboken J., Quintais J. P., Appelman N., Fahy R., Buri I., & Straub M. (Eds.) (2023), p. 110.

[80] Moreno Belloso and Petit (2023), p. 13.

the result of anticompetitive conduct.'[81] The problem(s) that the DMA seeks to address are inherent to digital markets and core platform services. Their specificities predispose the market in such a way as to enhance the position of a small number of large companies, leading to poor contestability and a special propensity to unfair practices. This is the result of the conjugation of strong economies of scale, considerable network effects, the multi-sidedness of the services and the ability to connect many business users with many end users, lock-in effects, lack of multi-homing, conglomerate corporate structures or vertical integration (Recital 13). In this light, it is believed that the existing barriers (to entry and expansion) in digital markets require the intervention of regulation through 'per se rules'.[82] In particular, the DMA aims to regulate 'winner-takes-all' (or 'winner-takes-most') markets and to eliminate or mitigate obstacles to the freedom of enterprise of newcomers. In short, it seeks to address one of the most striking problems of digital markets: companies with a potentially innovative product or service cannot even enter the market to present it, as barriers to entry seem impossible to overcome. Furthermore, even when companies reach the market, economies of scale and network effects prevent them from effectively compete with gatekeepers.[83] Despite its slightly different focus and nature, the boundaries or disconnection from competition law are still unclear. According to some, we are facing 'a sector specific competition law'[84] that could have been achieved by updating competition instruments and guidelines in order to tackle specific anticompetitive behaviours. The doubts and problems of articulation between them go beyond the object of this writing. One thing is clear, however. Even if the DMA is something different from competition, it is inherently related to competition.

We will focus here on another topic and deliver another message: although not as clear as in the DSA, the DMA is also about ensuring fundamental rights online. The 'insufficiency' of competition law may derive precisely from that. Competition law has its limits and cannot pretend to solve all the problems of the digital economy. Conversely, the DMA breaks free from the chains of speciality to cover other fundamental rights and interests, among which consumer rights.[85] The DMA is not just a panacea for the sluggishness of competition law.[86] It is a remedy for its limited object.

[81] Witt (2023), p. 25.

[82] Witt (2023), pp. 6, 16–17.

[83] Witt (2023), p. 3.

[84] Petit (2021), p. 2.

[85] Podszun (2023), p. 25.

[86] Witt (2023), p. 4 et seq.

3.1 A Roadmap for the DMA

In terms of systematics, the DMA is divided into six chapters: subject matter, scope and definitions (Articles 1 and 2); gatekeepers (Articles 3 and 4); practices of gatekeepers that limit contestability or are unfair (Articles 5 to 15); market investigation (Articles 16 to 19); investigative, enforcement and monitoring powers (Articles 20 to 43), and final provisions (Articles 44 to 46).

Starting with its subjective scope, the DMA is undoubtedly narrower in comparison with its twin brother: the DSA. The DMA targets only those markets in which gatekeepers are present, i.e., undertakings (i) having a significant impact on the internal market; (ii) providing one or more core platform services (that constitute an important gateway between business users and end users), and with (iii) an entrenched and durable position in its operations (or be expected to have such a position soon). Its narrower scope is further explained by the fact that it applies only to core platform services, i.e., those where weak contestability and unfair practices are more frequent and pronounced (Recital 13). These services are listed in Article 2(2). In the future, the Commission may conduct a market investigation to analyse whether one or more services in the digital sector should be added to the list of core platform services (Article 19). Following this investigation, the Commission may make a legislative proposal to amend the Regulation.

To speed up the identification of gatekeepers, the Regulation provides for an expedited procedure. It puts forward quantitative thresholds that guarantee a straightforward (but not automatic) designation procedure. This is the case for turnover, market capitalisation or fair market value, number of Member States in which the core platform service is provided, and number of active users. Undertakings meeting the quantitative thresholds set out in Article 3(2) are bound by a first obligation: they must notify the Commission thereof without delay and, in any event, within 2 months of reaching the quantitative thresholds. Failure to comply with this obligation (or the provision of inaccurate, incomplete or misleading information) may be sanctioned with a fine, under Article 30 of the DMA. In either case, the Commission is entitled to designate the undertaking under Article 3(4) on the basis of the information available to it (*ex officio*). The obligation to inform the Commission of the fulfilment of the thresholds does not stop at the first designation decision. As the obligations imposed on the company relate to the specific core platform services listed in the designation decision (Article 3(9), when the (already designated as) gatekeeper reaches the thresholds in relation to other core platform services, it must as well notify the Commission within 2 months of the thresholds being reached (Article 3(3). Upon receipt of the information provided by the company, the Commission must, without undue delay and at the latest within 45 working days after receiving the complete information, designate it as gatekeeper (Article 3(4).

Although justifications on economic grounds, or efficiency defences, are excluded (Recital 23),[87] the DMA allows an undertaking meeting the quantitative thresholds of Article 3(2) to add sufficiently substantiated arguments in its notification to the Commission showing that, although all the thresholds set out in paragraph 2 are met, it does not qualify as a gatekeeper. In other words, the company can rebut the presumption that it has a significant impact on the internal market while being burdened with the submission of evidence to that effect.[88]

Mindful that presumptions have limited value, the DMA provides for an alternative designation procedure, following a market investigation (Article 17). For this to occur, the elements of Article 3(8), among which network effects and data driven advantages, any scale and scope effects from which the undertaking benefits or other structural business or service characteristics, are taken into account. Through this alternative path, the DMA captures companies that do not meet the quantitative thresholds of Article 3(2). In either case—direct designation or designation following a market investigation—a designation decision is needed for the DMA to apply.

With the designation decision, the six-month period within which the gatekeeper has to comply with the set of prescriptive and proscriptive (de *facere* and *don't*) obligations,[89] listed in Articles 5, 6 and 7 of the Regulation, begins (Article 3(10). The designation decision is thus an element of legal certainty and a guarantee of judicial review of the Commission's prerogatives.[90] This is not to say that it is immutable. In fact, upon request or *ex officio*, Article 4 allows the Commission to reconsider, amend or revoke the designation decision at any time in the event of (i) a substantial change in any of the facts on which the designation decision was based or (ii) incomplete, incorrect or misleading information underlying the designation decision.

While the subjective scope of the DMA is important, the list of obligations it provides for are its '*raison d'être*'.[91] The obligations set out in Articles 5, 6 and 7 of the DMA are not organised according to higher regulatory principles or ideas, nor follow a systematic order.[92] There are several attempts to group them in the light of

[87] According to some, this seems consistent with the objective of the DMA, which is not to enhance consumer welfare directly but to abolish barriers to entry and create conditions for effective competition in the market, Witt (2023), p. 17.

[88] If the undertaking providing core platform services submits sufficiently substantiated arguments which manifestly call into question the presumptions, the Commission may conduct a market investigation. It shall ensure to conclude it within five months of the opening of the investigation (Article 3(5) and Article 17(3) DMA).

[89] Moreno Belloso and Petit (2023), p. 12.

[90] Bundeskartellamt, Digital Markets Act: Perspectives in (inter)national competition law. https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2021/Working_Group_on_Competition_Law_2021.pdf?__blob=publicationFile&v=2, pp. 4–5. The need for a designation act by the European Commission increases legal certainty and, insofar as it constitutes an act that may be challenged, it also contributes to the right to effective judicial protection.

[91] Witt (2023), p. 14.

[92] Moreno Belloso and Petit (2023), p. 2. Bostoen (2023), p. 22.

the objectives of contestability, fairness and independence of the decision, according to various theories of harm, or under exclusive legal competition concerns (exclusion and exploitation).[93] In the DMA, however, obligations are only distinguished according to two categories: obligations that apply without the possibility of specification (Article 5) and obligations that may, under Article 8, be further specified (Articles 6 and 7). In both cases, the list includes positive obligations (the gatekeeper allows, provides, enables, applies, ensures, publishes, collects, exchanges. . .) and negative obligations (the gatekeeper may not process, combine or cross-use personal data, shall not prevent, restrict, require, use, treat, have general conditions. . .). All obligations refer to the conduct or behaviour of the gatekeepers (vis-à-vis their users). Besides this core set of obligations, there are reporting and information obligations (for example, in Articles 11 and 15); anti-circumvention guarantees in Article 13, and the obligation to report concentrations in Article 14. Under the latter, the gatekeeper is required to inform about any intended concentration where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable data collection. The provision seeks to avoid concentration and the build-up of market power in only a few operators. As a result, it is independent of the fact that the operation is notifiable to either the Commission or competent national competition authorities. For some, this is a panacea for 'zombie acquisitions' through which small operators are 'silenced' by the incorporation into large platforms.[94] Indeed, data suggests that, 'Large digital platforms acquired 1149 firms in various economic sectors between 1987 and July 2022. The European Commission reviewed only 21 of these mergers as most did not meet the European Union merger control turnover threshold'.[95] In summary, although it may serve for a referral request under Article 22 of Regulation 139/2004[96] on the control of concentrations between undertakings, Article 14 of the DMA is a *different animal*.[97]

As in the DSA, the DMA provides for a heterogeneous group of obligations, applicable under a 'one-size-fits-all' model. While this enhances legal certainty, it may be inimical to justice. It must be acknowledged that the the EU legislator showed concern about the risks of petrification. Indeed, Article 12 provides for the updating of gatekeepers' obligations, allowing the Commission to adopt delegated acts following a market investigation under Article 19. In the interests of legal certainty, delegated acts cannot be used to introduce or abolish obligations. Their scope is limited to the possibilities mentioned in Article 12(2) of the DMA. By way of illustration, delegated acts may be enacted to extend an obligation applicable only

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[93] Moreno Belloso and Petit (2023), p. 12 et seq.

[94] Robertson (2023), p. 2.

[95] Carugati (2023), p. 1.

[96] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24.

[97] Witt (2023), p. 16. An update-reformulation of the 2021 Commission guidelines is necessary, according to objective and clear criteria—Carugati (2023), p. 5.

to certain core platform services to other core platform services or to specify the manner in which the obligations laid down in Articles 5 and 6 are to be performed by gatekeepers. In contrast, the modification of the obligations or core platform services listed in Article 2(2) requires a legislative proposal from the Commission under Article 53(3).

As previously referred, the chapter on obligations is followed by provisions on market investigations, for which the Commission is responsible. The European legislator recognises the necessity of up to date 'knowledge' of a highly changeable reality. Market investigations are multiple-purpose instruments that can be used in the (i) designation of gatekeepers (Article 17); (ii) determination of a systematic breach of obligations by the gatekeeper (Article 18), and (iii) ascertainment of new services and new practices (Article 19).

The subjective scope of the Regulation justifies Union intervention. The fact that large companies operating pan-European models are targeted, makes the EU the most appropriate level of governance. The centralisation of the DMA's enforcement in the European Commission may also be explained in this light and contrasts with the decentralised application of competition law.[98] Centralisation is not, however, without problems, as some voices properly recall.[99] Chapter V of the DMA is dedicated to the Commission's investigative and enforcement powers, and it features typical prerogatives of competition law. The fact that they are here reinforced makes the guarantees of due process, even if only as principles of the rule of law, particularly urgent. Examples of these powers are the requests for information in Article 21, the powers to carry out interviews and inspections in Articles 22 and 23, or the possibility to adopt interim measures and commitments in Articles 24 and 25. Commitments include behavioural or structural measures, among which the prohibition for the gatekeeper to enter into a concentration regarding core platform services or other services provided in the digital sector or allowing the collection of data affected by systematic non-compliance (Article 18(2). Non-compliance decisions, fines and periodic penalty payments are also dealt with under Articles 29 to 31. With regard to sanctions, gatekeepers are subject to higher fines than in the DSA. These can be up to 10% of their total worldwide turnover in the preceding financial year (Article 30), and the threshold rises to 20% in the event of a repeat offence within the last 8 years (Article 30(2). While relatively silent on the topic, civil liability and private enforcement are not ruled out, as evidenced by references to the role of national courts and in Article 42 itself.[100] The fact that the issue is not properly regulated in the DMA is criticised by legal scholars and opens space for

[98] Witt (2023), p. 33.

[99] Witt (2023), p. 33, referring to capacity constraints.

[100] Witt (2023), pp. 21 and 34.

future improvement.[101] In the meantime, and in the light of the limited scope of Directive 2014/104/EU, it would be on Member States to regulate the matter.[102]

It should be noted that, unlike the DSA, the role of national authorities is one of mere assistance and cooperation. In particular, NCAs will mostly act as relevant sources of information.[103] While this does not rule out, either the possibility of investigating a possible breach of Articles 5, 6 and 7 on their own initiative or the gathering of evidence, national authorities cannot decide the case[104] and must certainly inform the Commission in writing before the first formal investigative measure is taken (Article 38(7). Furthermore, the opening of proceedings by the Commission precludes the possibilities conferred on NCAs and implies the termination of ongoing investigations (Article 38(7) para 2). Finally, NCAs are prohibited from adopting decisions that run counter to a decision adopted by the Commission.[105] Coordination between the Commission and the NCAs is regulated by Articles 37 and 38. The DMA is more silent on due process and procedural guarantees. This may be worry, as they are the counterpoint to the discretion and concentration of power in a single enforcer—the Commission. Indeed, with the exception of a reference to the right to be heard and access to the file in Article 34 DMA and a note on limitation periods (Articles 32 and 33), due process and fundamental rights are only addressed in two Recitals (29 and 109). This is perhaps understandable since they are ‘prior’ to law. Nonetheless, it is important that this silence is not misunderstood and misused by the European Commission, in favour of speed and effectiveness.

3.2 *Shortcomings and Room for Improvement*

The DMA has been criticised on several grounds. The enforcement model is one example. To begin with, Member States are prohibited from imposing additional obligations on gatekeepers through laws, regulations or administrative measures, that aim to ensure the contestability and fairness of markets. This has been associated with risks of capture and blocking of national rules that rule in favour of a strict interpretation of Articles 1(5) and 1(7).[106] It is posited that national authorities might be better placed in cases with a national nexus, for example involving the rights of

[101] Hoffmann et al. (2022), pp. 30–31.

[102] Drexl et al. (2023), pp. 28–32. See also Witt (2023), p. 34. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349.

[103] de Streel et al. (2023), p. 26.

[104] Witt (2023), p. 18.

[105] Hoffmann et al. (2022), p. 5.

[106] Hoffmann et al. (2022), p. 29. See also Drexl et al. (2023), pp. 4–28.

advertisers and publishers,[107] or by virtue of past experience with gatekeeper behaviour.[108] In light of these shortcomings, some anticipate that, as happened with competition law, the centralised enforcement model will tend or may evolve towards decentralisation in the future.[109]

In addition to enforcement, the obligations of Articles 5 to 7 have also been the object of some criticism. In particular, the DMA is accused of merely crystallising past competition law cases and investigations,[110] without any overriding regulatory idea.[111] This poses a problem in relation to the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU')[112] and legitimises several questions: What is the DMA after all? Is it strengthened competition law? Is it something different? Despite reaffirming itself as something different (Recital 11), the *ne bis in idem* will certainly be a topic in the future.[113] Furthermore, there is the question of how to ensure the necessary articulation between *ex ante* obligations (in the DMA) and the *ex post* application of competition law, which continues to target *gatekeepers*' anticompetitive behaviour.[114] In particular, it will be for future consideration to establish a framework of principles to determine whether a behaviour that potentially restricts competition in the market and simultaneously threatens contestability and fairness in digital markets should be analysed and scrutinised under competition law or under the DMA.[115]

The technique of DO's and DON'Ts inherent to the list of obligations is also accused of being inadequate. According to some, 'Instead of such a closed casuistry, it would have been more appropriate to establish a legal regime based on broad principles, which could be further specified on a case-by-case basis'. In fact, these are obligations that apply to quite different economic operators, with varying, changeable and complex business models.[116] In addition to false positives,[117] the

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[107] Díez Estella (2023), p. 19.

[108] de Streel et al. (2022), p. 30 et seq.

[109] Witt (2023), p. 33.

[110] For a table of correspondences, de Streel et al. (2022), p. 13 et seq. The AA. consider it possible to extract advantages from the DMA's approval, with regard to its preferential application and the application of commitments close to its obligations.

[111] Caffarra and Morton (2021). The European Commission Digital Markets Act: A translation. https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation.

[112] Consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 C 326.

[113] In the light of the bpost and Nordzucker judgments—see Cappai and Colangelo (2023), pp. 1–20. Also, Ribera Martínez (2022), pp. 86–115.

[114] On the issue, Brook and Eben (2022), pp. 2–8.

[115] On this articulation, de Streel et al. (2022), p. 20 et seq.

[116] In this sense, the English approach seems more advised. For a simple explanation of the Digital Markets, Competition and Consumers Bill, see https://publications.parliament.uk/pa/bills/cbill/58-03/0294/en/220294en.pdf.

[117] Witt (2023), pp. 27–30. Despite mechanisms directed at correcting false negatives, there are fewer instances of correcting false positives. According to the A., p. 28, 'The DMA appears to be more tolerant of false positives than it is of false negatives'.

blind imposition of obligations risks preventing innovation due to highly restrictive technical requirements, causing a less smooth user experience, increasing prices and the risk of refusal to contract, not to mention specific dangers in terms of privacy and data protection, system integrity, security and media pluralism.[118] In the end, the DMA may risk damaging the same innovation and consumer choice that it intends to achieve.[119]

It must be acknowledged that false positives are inherent in any system of closed obligations. The problem is the absence of sufficient guarantees and escape valves. In other words, it is believed that the main shortcoming of the DMA lies in the absence of adequate defence mechanisms. First and foremost, the adversarial system is severely hampered. Note that, in order to oppose its designation as gatekeepers, the company may only put forward 'elements which directly relate to the quantitative criteria' (Recital 23), which contrasts with what the Commission may consider in its market investigations (Recital 25).[120] The equality of arms may indeed be a problem. As the undertaking cannot put forward objective efficiency arguments in order to justify a specific type of practice, we concur with those who argue that 'The DMA generally lowers the threshold for intervention compared to competition law. More specifically, many provisions in the DMA embody presumptions of monopoly power and anticompetitive effects. The result is that under the DMA, economic study of the facts underpinning market structure or business conduct is no longer a condition for the application of the law'.[121] Indeed, only some obligations (Articles 6(4) and 6(7) and 7(9) are sensitive to the need to ensure the integrity, security and privacy of services, equipment, systems and applications. In summary, it is believed that this might be the 'greatest flaw' of the DMA.[122]

A subsequent problem can be found in the fact that specification and regulatory dialogue do not cover the obligations of Article 5. Despite the allegation that the latter's obligations are clearer compared to the open rules of competition law and Article 6,[123] their implementation may not be straightforward and the technological advance associated with disruptive and heterogeneous business models can leave gatekeepers at a loss as to what is expected of them.[124] While it is possible for the Commission to adopt delegated acts in this regard (Article 12(2)(c), they must comply with the conditions of Article 49 of the DMA and may not ensure timely

[118] de Streel et al. (2021), p. 58.

[119] de Streel et al. (2023), p. 15.

[120] Witt (2023), p. 29.

[121] Moreno Belloso and Petit (2023), pp. 1–2.

[122] Dolmans et al. (2021), p. 24.

[123] Witt (2023), p. 15, referring to the prohibition for the gatekeeper to prevent business users from offering the same products or services to end users through third-party online intermediation services or through its own direct online sales channel at prices or under conditions different from those offered through the gatekeeper's online intermediation services (MFN clauses in Article 5(3) of the DMA) and data practices conferring leverage and risks associated with targeted advertising (Articles 5(2) and 5(3) of the DMA).

[124] Moreno Belloso and Petit (2023), p. 12.

specification in the absence of a 'stop the clock' mechanism.[125] Indeed, an extension is foreseen only for the deadlines set by the Commission (Article 10 of the DMA Implementing Regulation[126]) as well as for the specific obligations of Article 7(2) and (5). This means that no possibility of suspension or extension applies to the six-month deadline (Article 3(10) for ensuring compliance with the obligations of Articles 5, 6 and 7, even on a reasoned request by the company.[127]

While Articles 9 and 10 provide for the suspension and exemption for public health and security grounds, they are insufficient escape valves in this regard. First of all, the suspension of specific obligations is limited to exceptional circumstances not attributable to the gatekeeper ('beyond the gatekeeper's control'). The latter must show that compliance will jeopardise the economic viability of its operations (Article 9). Besides, the full or partial suspension is subject to an implementing act which the Commission has 3 months (!) to adopt after receiving a complete reasoned request. On top of this, the possibility of temporary withdrawal in urgent cases is at the Commission's discretion (Article 9(3)), a scenario which, depending on how discretion is exercised in practice, may convert the escape valve into a 'paper guarantee'. In the same vein, the (full or partial) exemption from a specific obligation also depends on an implementing act. The Commission has once again a three-month time limit to act and temporary withdrawal in urgent cases is also at the Commission's discretion (Article 10(4)). Finally, the exemption is limited to reasons of public health or public security,[128] which are subject to strict interpretation.

In contrast with a 'comply or explain' logic, the DMA embraces a 'comply or be sanctioned' approach. This forces to concur with the importance and primacy of cooperative compliance over a first-line policy of fines.[129] The goal of the DMA and the enforcer should be to change behaviours instead of promoting evasion or litigation.

The shortcomings of the DMA may be addressed either through amendments to the text or through cooperative and dialogical enforcement. The following suggestions do not exhaust the possible paths. To begin with, the possibilities for concretion-specification should also be provided for the obligations of Article 5 of the DMA. Although speed and effectiveness are important and legitimate goals, fairness is also required. Furthermore, the celerity of the results may become a false issue, considering that both the designation decision and the non-compliance decisions may be challenged by gatekeepers.[130]

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[125] Delegated acts are more time-consuming than implementing acts—see Witt (2023), p. 28.

[126] Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council, C/2023/2530, OJ 2023 L 102.

[127] de Streel et al. (2023), pp. 12–13.

[128] On the restrictive interpretation of these terms, Witt (2023), p. 17.

[129] de Streel et al. (2023), p. 25.

[130] As regards the DSA (where designation only applies to VLOPs and VLOSEs) as early as 27 June, 2023, Zalando filed a legal claim at the CJEU contesting its designation by the EC, under Article 33 of the Digital Services Act (DSA), as a 'Very Large Online Platform' obliged to

It is acknowledged that gatekeepers have freedom of means as to 'how' to comply with the obligations, and to ensure compliance with the DMA 'by design' (Recital 65).[131] However, despite this being proof of respect for a stronghold of business freedom, gatekeepers may find themselves in a state of uncertainty as to what is actually allowed, prohibited and considered effective in achieving the DMA's goals. In addition to this, the escape valves are limited and their role is dependent on how they are applied in concrete terms. Indeed, they are perceived as 'possibilities' open to the European Commission, which is a 'gold standard' in the DMA. There are many references in the DMA to the Commission's discretion: common formulations include 'the Commission may', 'shall', 'shall seek', 'is empowered'. While discretion may be the panacea to the DMA's rigidity, by allowing the Commission to act in the most fundamental rights friendly way, and to set priorities[132] by deciding not to act when faced with certain behaviours which it concludes are not harmful, it is dependent on the Commission and does not ensure the same protection as the law.

It is believed that the DMA is aware of the legal certainty and proportionality needed in order to be accepted as legitimate. It is believed that for such certainty to be achieved, the possibility for the Commission to adopt Guidelines under Article 47 will assume crucial relevance.[133] Until the necessary clarifications and interpretations are codified, an informed and participatory discussion between the Commission and gatekeepers should be the rule.[134] The Commission's discretion may be the ultimate way to secure inarguably concrete balancing exercises. The potential conflicts between contestability and fairness, on the one hand, and the rights of gatekeepers concerned, on the other, will dictate different solutions, depending on the case. However, as complete confidence is placed in the Commission, it is believed that its actions must be open to scrutiny in the light of fundamental rights. In summary, a fundamental rights reading of the DMA can ensure that its enforcement by the Commission is *an ally* rather than *an enemy*. Before such a reading, it is important to briefly address the DMA's first implementing Regulation 2023/814.

3.3 The DMA's First Implementing Regulation

On 14 April 2023, the European Commission adopted the Implementing Regulation (EU) 2023/814 on detailed arrangements for the conduct of certain proceedings by

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manage systemic risks. https://corporate.zalando.com/en/company/zalando-files-legal-action-against-european-commission-contest-its-designation-very-large. Later, several other companies have also lodged legal appeals against their qualification as gatekepers under the DMA.

[131] Considering the DMA is vague as to what effective compliance means - Moreno Belloso and Petit (2023), p. 22.

[132] Witt (2023), pp. 29–30.

[133] In this sense, Carugati (2022), p. 9.

[134] de Streel et al. (2023), p. 13.

the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council under Article 46 ('DMA's first implementing Regulation' or 'Implementing Regulation').[135] It contains detailed provisions, *inter alia,* on the form, content and other aspects of notifications and submissions under Article 3 (Article 1 of the Implementing Regulation). This includes rules on the format and maximum length of documents (Annex II of the Implementing Regulation), the languages and the procedure for transmitting and receiving documents. Furthermore, there are also rules on the information to be included by undertakings providing core platform services in the notifications they submit (Annex I to the Implementing Regulation). According to recitals 1 and 2 of the Implementing Regulation, it seeks to respond to the requirements of good administration and legal certainty, in order to ensure a procedure that is both fair and efficient. The binomial or balance of fairness (respect for the fundamental rights of gatekeepers) and efficiency marks its genetic identity.

Regarding the first element—the fundamental rights of undertakings—attention is drawn to protecting business secrets and other confidential information (Article 7 of the Implementing Regulation). The protection of business secrets is part of the typical content of the freedom to conduct a business as a fundamental right. It is a general principle of EU law as well. While it is not an absolute right and while 'certain information'[136] may be disclosed where there is an overriding interest in its disclosure (Article 7(6)), the Commission must grant the company concerned the right to adversarial proceedings and to present objections.

The overriding interest in disclosure requires that a fundamental right, interest or objective of Union law conflicts with the right to the protection of business secrets and other confidential information of the undertaking. The Commission's decision on disclosure must be based on a fair balance and comply with the principle of proportionality. As the Regulation itself makes clear, a principle of minimisation and restraint is imposed on the information to be disclosed. Furthermore, in order to avoid that the right to be heard is perceived as a paper right or a formality, the 'reasoned decision' adopted by the Commission following the company's objections to disclosure must justify the concrete prevalence of the rights and interests that militate for disclosure. A fair balance is particularly important in digital markets, where information is, not only a source of power and competitive advantage, but also a factor of differentiation and an incentive for innovation. After all, if competition law prohibits the exchange of sensitive information between competitors, it would be paradoxical for a similar result to be promoted by the law itself.

The Implementing Regulation is cause of special reservations with regard to the limits imposed on the length of documents submitted by companies (Article 4 of the Implementing Regulation and Annex II). It is one thing to regulate the exercise and

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[135] Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council, C/2023/2530, OJ 2023 L 102, 17.04.2023.

[136] The individualised reference reinforces the need for a principle of minimisation-necessity.

the way the notification of Article 3(3) of the DMA is fulfilled. Limiting the company's right under Article 3(5) is quite another. As stated above, the DMA allows an undertaking which meets the quantitative thresholds of Article 3(2) to put forward sufficiently substantiated arguments to rebut the presumption that it has a significant impact on the internal market. The gatekeeper has the burden of submitting evidence to that effect and the implementing Regulation limits the length of this and other documents. It is important to acknowledge that the Regulation provides for exceptions. First of all, it follows from Article 4(2) that the Commission may, following a reasoned request, authorise an undertaking or association of undertakings to exceed those page limits where and in so far as they prove that it is objectively impossible or challenging to deal with particularly complex questions of law or fact within those limits. Furthermore, Annex II clarifies that any annexes accompanying such documents do not count towards the applicable page limits provided that they (i) have a purely evidentiary and instrumental function and (ii) are proportionate in number and length. These are 'checks and balances' that seek to ensure the legitimacy of the limitation. However, it should not fall to the legislator to dictate that the gatekeepers' defence (even if objective or economic) is made in *x* number of pages. The concrete extension is a dimension of companies' rights of defence and it is dependent on the specific case.

While it can be accepted that procedural management justifies such restriction, it must be accompanied by 'escape valves', which are insufficient in the light of the discretion and indeterminacy they are dependent on. In the case of Article 4(2) of the Implementing Regulation, the Commission has the discretion to act on the indeterminate concepts of 'objective impossibility' or 'exceeding difficulty'. As with other points in the DMA, the Commission's concrete action will dictate whether respect of gatekeepers' fundamental rights is ensured, which is at odds with the fundamental principle that it is the Commission's discretion[137] which moves within the framework of fundamental rights (Article 51 CFR) and not the other way around.

This brief remark on selected aspects of the Implementing Regulation reinforces what has already been anticipated. The guarantee of gatekeepers' fundamental rights, due process and the rule of law are not obstacles to the enforcement of the DMA. Conversely, they are guiding principles and a condition of validity.[138] Besides, the Commission itself is protected as acceptability prevents their decisions from being attacked or challenged for procedural flaws.[139] We concur with the view

[137] Although smaller than in competition law—Petit (2021), p. 3.

[138] Díez Estella (2023), p. 19.

[139] de Streel et al. (2022), p. 11, according to whom, 'The DMA is relatively silent on the rights of parties, and in DMA enforcement there is not an established framework for procedures. The risk of violating party rights can be minimized if the Commission works on procedural safeguards from the start. The Commission is expected to publish procedural rules and best practices very soon. These can be inspired by the procedural rules for mergers and the Antitrust Manual of Procedures, modulated where appropriate considering the learning effects from recent cases. Setting out clear procedures and safeguards may minimize the risk of losing in court on procedure while enhancing the foreseeability of proceedings for all parties concerned, including third parties'.

that ‘Strong procedural safeguards would legitimize the DMA’s enforcement and ensure legally sound outcomes. When it comes to due process requirements, the EU should not be satisfied with minimum standards of protection’.[140] In the same sense, ‘The fact that the DMA has a regulatory ambition does not imply by nature a relaxation of due process requirements. The case law of the EU courts has established that due process rights also apply in economic regulation, on the ground of fundamental rights protection in matters involving quasi criminal penalties’.[141] In order to further enhance this importance, it is crucial to grasp the fundamental rights in the DMA’s heart.

4 Fairness and Contestability: A Fundamental Rights’ Translation

It follows from the above that the DMA aims to safeguard the contestability and fairness of core platform services provided by gatekeepers. These are not clearly defined objectives,[142] which introduces the question, ‘So, against what evils is the DMA directed?’.[143] The uncertainty or complexity surrounding these two pillars may be deliberate. These are composite references that go beyond their traditional economic meaning and introduce the discourse of rights in the language of the market. According to some, they go beyond purely economic dimensions to reach consumer protection and other fundamental rights and values[144]. Among the latter, the freedom to conduct a business plays a pivotal role. Indeed, only by ensuring contestable and fair digital markets will the freedom to compete of businesses (other than gatekeepers) be ensured.

Recitals 32 and 33 of the DMA define contestability and unfairness. Contestability means ‘the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services’. The DMA seeks to achieve this through the proscription of practices that may increase barriers to entry while also imposing obligations aimed at facilitating or enhancing entry into the markets where gatekeepers are present.[145] On the other hand, unfairness is described as ‘an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage’. The purpose here is to prevent gatekeepers from exploiting the factual dependency

[140] Lamadrid (2022). Procedural Fairness and the DMA: Some Comments on the Draft Implementing Regulation. https://chillingcompetition.com/2022/12/22/procedural-fairness-and-the-dma-some-comments-on-the-draftimplementing-regulation/.

[141] Petit (2021), p. 9.

[142] Hoffmann et al. (2022), p. 1.

[143] Moreno Belloso and Petit (2023), p. 13.

[144] Moskal (2023), p. 1116.

[145] Witt (2023), p. 11.

of end and business users through unfair and unbalanced conditions. The EU legislator bans 'certain practices by gatekeepers that are liable to increase barriers to entry or expansion, and impose certain obligations on gatekeepers that tend to lower those barriers' (Recital 32). The DMA also imposes obligations on gatekeepers addressing 'behaviour that does not allow others to capture fully the benefits of their own contributions, and unilaterally set unbalanced conditions for the use of their core platform services' (Recital 33). It is believed that, through these goals, the EU is acting positively to ensure the freedom to conduct a business, while at the same time 'limiting' the same freedom. By serving the freedom to compete, the DMA complements the insufficiencies of competition law in ensuring effective freedom in digital markets. The DMA is more than a complement to competition. As advanced, a set of fundamental rights is inherent to 'contestability' and 'fairness'. The EU seeks to make them effective, through the exercise of positive duties of action.

To begin with, although end users (or consumers) seem to be left out of the equation, with their predominant treatment as 'passive recipients',[146] the obligations of the DMA internalise their rights as well.[147] The focus on their freedom of contract, choice and self-determination is clear in the DMA. As a result, although consumers may not be the direct target of obligations, they clearly benefit from the more competitive and respectful environment that the DMA intends to achieve.[148]

The reference to proportionality in several recitals (27, 28, 29, 65–67, 75, 86 and 107) of the DMA is also an acknowledgement of the importance and presence of fundamental rights. In particular, it must be read as the implicit admission that fundamental rights are being restricted in order to ensure others' effectiveness. The freedom to conduct a business is perhaps the right suffering most from the obligations in the DMA. Nonetheless, it is also among those more favoured, depending on which companies we are speaking of (gatekeepers, users, SMEs...). Understanding what justifies interfering in the gatekeepers' freedom to conduct a business is crucial. The answer can be found in other fundamental rights and general interests, such as safeguarding public order, protecting privacy, or fighting fraudulent and deceptive commercial practices, as follows from Recital 35 and other provisions. By way of example, the risk of 'unfair business practices' is expressly mentioned in Recital 14 as likely to affect both end users and business users, whose economic interests may be put at risk. In turn, Recital 72 refers to end users' data protection and privacy interests as factors to consider when assessing the potential negative effects of practices of gatekeepers to collect and accumulate large volumes of data. The same recital views enhanced transparency as a way to allow potential new entrants and start-ups to have access to data to an extent and depth, and at a scale that enables them to compete with large companies providing core platform services. In other words, transparency is viewed as a mechanism to guarantee the freedom of

[146] Moskal (2023), p. 1117.

[147] For a realisation, Moskal (2023), p. 1117.

[148] Moskal (2023), p. 1118.

enterprise of these other companies (newcomers). A similar reference to transparency is made with regard to online advertising services (for example, in Recitals 45 and 58). The rights of advertisers, advertising agencies and publishers, on their part, unfold into a set of fundamental rights, from the freedom to conduct a business to the freedom of expression and the freedom of the press in connection with media pluralism. Finally, transparency also translates an important public interest underpinning the application and enforcement of the DMA as a legal act. By way of example, the obligation to inform the Commission of all planned acquisitions under Article 14 is relevant for the pursuit of the Commission's mission within the DMA. First, this obligation is essential for reviewing the *status* of individual gatekeepers. Second, it provides crucial information for monitoring broader contestability trends in the digital sector and may be useful in market investigations under the DMA. Finally, the information can be used 'for national merger control purposes and as, under certain circumstances, it is possible for the national competent authority to refer those acquisitions to the Commission for the purposes of merger control' (Recital 71).

More than respecting the fundamental rights in their negative dimension, as provided for in Recital 109, the DMA represents the intervention of the EU legislator in exercising positive duties of protection arising from several fundamental rights.[149] While competition is a strong driver, the fundamental rights realised by the DMA surpass the freedom to compete and include other important fundamental rights. They all have in common the fact that they are 'positive mandates' as well. The DMA seeks to ensure that these fundamental rights are effective as well in digital markets where gatekeepers are present. The doubts raised by the notions of fairness, contestability and, as we have seen, transparency hide, in fact, a set of rights and interests that allow speaking of a 'jus-fundamental side' of the DMA. Through these objectives, the DMA seeks to ensure a less economic read of digital markets, reconciling the language of market failures with duties of protection arising from fundamental rights in danger and calling for EU action. The EU is governed by values and fundamental rights and principles, which should not only be seen in negative terms. On the contrary, they are also 'imperatives' which require the legislator to act when faced with dangerous scenarios. In this case, the contestability and fairness of digital markets are vehicles of the realisation of rights and interests whose effectiveness is threatened by the particular characteristics of digital markets and the propensity for abuse by gatekeepers.

As the legal embodiment of these duties to act, the DMA seeks to conform the freedom to conduct a business of gatekeepers, converting its *prima facie* and broad content into a definitive right, stripped of some faculties it usually enjoys. It does not do so arbitrarily nor does it neglect the fundamental nature of the freedom to conduct

[149] While positive duties tend to be conceived as a matter for Member States, we believe that the EU has a role to play in this regard, when designing and implementing EU policies, competences and acts. On the positive duties arising from fundamental rights and the duties of protection in particular, Starck (2017).

a business. The DMA is not just a political choice of the EU to fight economic or market power of large companies. On the contrary, in order to be legitimate, it must be interpreted and enforced as a concretisation of duties to protect arising from fundamental rights hidden in the binomial contestability-fairness. Consumer protection is expressly enshrined in Article 38 of the CFR, imposing a high level of consumer protection in all EU policies. It is also a legitimate objective of general interest under Article 169 TFEU. Data protection is a right enshrined in Article 8 of the CFR. According to the explanations relating to the Charter[150] it is based on Article 8 of the ECHR. The freedom to conduct a business is a fundamental right enshrined in Article 16 of the CFR. It cannot be envisaged only as a right of gatekeepers' right prone to limitation, but also as a right being secured in favour of all the companies wanting to access and exercise their economic activity in digital markets. Finally, the fight against unfair commercial practices and the effective enforcement of Union law are both objectives of Union law.

Now that we have unveiled the rights behind the objectives of the DMA, that is, the rights being ensured or realised through the set of obligations imposed on gatekeepers, it is vital to focus on the restrained right. The freedom to conduct a business is the fundamental right that is both conformed to and enhanced by the DMA.

5 The Freedom to Conduct a Business as a Fundamental Right

Both the DMA and the DSA delimit undertakings' freedom. What they may do as a rule is proscribed and what they are generally free not to do is imposed on them. By way of illustration, under the DMA gatekeepers 'shall allow business users, free of charge, to communicate and promote offers, including under different conditions, to end users acquired via its core platform service or through other channels' (Article 5(4) DMA); 'shall allow and technically enable the installation and effective use of third-party software applications or software application stores using, or interoperating with, its operating system and allow those software applications or software application stores to be accessed by means other than the relevant core platform services of that gatekeeper' (Article 6(4) DMA); 'shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party' (Article 6(5) DMA); 'shall provide advertisers and publishers, as well as third parties authorised by advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the data necessary for advertisers and publishers to carry out their own independent verification of the advertisements inventory, including aggregated and non-aggregated data' (Article

[150] Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303.

6(8) DMA); 'shall provide to any third-party undertaking providing online search engines, at its request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on its online search engines' (Article 6(11) DMA).[151] The list continues.

The 'cutbacks' in the companies' freedom are not necessarily arbitrary, nor are they symptoms of weakening. First, one of the justifications inherent to the DMA's obligations is the effectiveness of the freedom to conduct a business itself. Second, like any fundamental right, the freedom to conduct a business is not an absolute prerogative and the social market economy model confirms the denial of absolute economic liberalism.

Companies and gatekeepers in particular are special entities, holders of special freedoms as well. As a right exercised in dialogue with others, the freedom to conduct a business must be read with keeping in mind that companies are not just holders of rights *per se*. They are also vehicles for realising others' rights, as a result of which they assume a particular responsibility of guarantee.

5.1 A 'True' Fundamental Right

To stress the jusfundamental nature of the freedom to conduct a business is important, as one could doubt its strength as such. This is because most of its typical faculties are curtailed or restrained by the obligations in the DMA. The freedom to conduct a business is a fundamental right in several constitutional texts (at least in the EU).[152] As to the European Convention on Human Rights ('ECHR'), while it does not contain any specific provision concerning the freedom to conduct a business or private economic initiative, the case law of the European Court of Human Rights on certain rights and freedoms enshrined in the ECHR proves its concern for businesses, entrepreneurial activity and the freedoms of the entrepreneur.[153] Their protection is achieved through a dynamic and teleological

[151] The gatekeeper also has to anonymise data that constitutes personal data.

[152] FRA—European Union Agency for Fundamental Rights (2015). Freedom to conduct a business: exploring the dimensions of a fundamental right. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf. See also the dedicated page on FRA's website. https://fra.europa.eu/en/eu-charter/article/16-freedom-conduct-business#national-constitutional-law.

[153] See Dissenting Opinion of Judge Wojtyczek in ECtHR Judgement of 5 October 2021, *Case Of Könyv-Tár Kft And Others v. Hungary*, 21,623/13: 'There is neither freedom nor democracy, nor the rule of law, without economic liberty. First and foremost, there is no prosperity without economic liberty. There cannot be meaningful social rights without economic liberty as a conditio sine qua non for creating wealth. The freedom to create and conduct one's own business is also an essential element of personal self-fulfilment and happiness. Effective legal protection of economic liberty is particularly important for physical persons conducting business activities individually, for micro-enterprises, for family enterprises and for small enterprises, that is, for the types of businesses which are crucial for economic development [. . .].'

interpretation of other rights and freedoms in attention to the values on which they are anchored.[154] Article 16 of the CFR provides that 'The freedom to conduct a business in accordance with Union law and national laws and practices is recognised'. It 'protects both natural and legal persons'.[155]

The recognition of the freedom to conduct a business as 'fundamental' in nature is not a novelty of the EU Charter of Fundamental Rights. On the contrary, it is part of the genetic identity of the European project. According to Advocate General Cruz Villalón, 'The freedom to conduct a business has a long history in European Union law'.[156] However, its importance gained new impetus with the express commitment of the Treaty of Lisbon to a 'social market economy as well as with its inclusion in the catalogue of the EU Charter of Fundamental Rights.

The naturalness, the relative recurrence or the agnostic way in which the freedom to conduct a business (a position typically held by non-human subjects—companies) was (early[157]) recognised as a non-subordinated[158] nor inferior 'fundamental right' (in comparison to others) is explained by its umbilical relationship with the construction of the internal market, the respective freedoms and the prohibition of discrimination. In this context, protecting the freedom to conduct a business not only 'makes sense',[159] but assumes particular importance.

In the EU, even before it was expressly enshrined as a fundamental right, the right to choose and exercise a commercial or economic activity—including the dimensions typically associated with it, namely the freedom of contract and the freedom of competition—was qualified, stated and respected or guaranteed as a 'general principle of Union law'. The work and case law of the CJEU was of paramount importance in leading cases such as *Nold*[160]; *Hauer*[161]; *Neu*[162]; *ABNA*[163]; *Scarlet*

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[154] See Emberland (2006) and Oliver (2022).

[155] Gill-Pedro (2022), pp. 189–190. See also, Bernsdorff (2003), §§ 1 and 16.

[156] Opinion of Advocate General Cruz Villalón of 19 February 2013, *Alemo-Herron and Others*, C-426/11, ECLI:EU:C:2013:82, para 48.

[157] The recognition of the freedom to conduct a business is no novelty. In Europe, even in the absence of the CFR, the right to freely choose and exercise a commercial or economic activity, including the freedom of contract and the freedom of competition, were considered as 'general principles of Union law', derived from the common constitutional traditions of the Member States. These traditions have not always corresponded to written precepts. On the contrary, derivation processes and praetorian constructions attempted to anchor the jusfundamental nature of freedom. In this sense, Everson and Gonçalves (2021), §§16.05, 16.19–16.21.

[158] It is a provision alongside civil and political rights all included in the same Charter - Usai (2013), p. 1869.

[159] Storr (2013), p. 219.

[160] ECJ Judgement of 14 May 1974, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission*, C-4-73, ECLI:EU:C:1974:51.

[161] ECJ Judgement of 13 December 1979, *Liselotte Hauer v Land Rheinland-Pfalz*, C-44/79, ECLI:EU:C:1979:290.

[162] ECJ Judgement of 10 July 1991, *Neu*, C-90/90, ECLI:EU:C:1991:303.

[163] ECJ Judgement of 6 December 2005, *ABNA and Others*, Joined cases C-453/03, C-11/04, C-12/04 and C-194/04, ECLI:EU:C:2005:741.

Extended[164]; *Netlog*[165]; *Sky Österreich*[166]; *McDonagh*[167] and *Alemo-Herron.*[168] Despite the use of varying terminology (freedom to conduct a business, freedom to exercise an economic or commercial activity or freedom of trade) its dual character or dual nature seems pacific.[169] On the one hand, it is a true fundamental right aimed at ensuring the existential *status* of its holders, protecting their legal sphere through a subjective public right. On the other hand, it can also (continue to) be seen as an organising principle of the (European) Economic Constitution and a pillar of the social market economy model that underlies it.[170] This is, at least according to some, the result of an evolution with the intention of continuity.[171]

However, the essence of the freedom to conduct a business is debated. In EU case law, this core is considered to be preserved when undertakings continue to be able to exercise their activity after the obligations have been imposed on them.[172] That is, the interference will be legitimate as long as companies can continue to market goods and provide services, in compliance with the requirements resulting from the European standards.[173] Although this may be an argument in favour of portraying the freedom to conduct a business as a right 'under the law', it only reflects the unfeasibility of an essential core defined in absolute terms. The fact that the freedom to conduct a business is endowed with high capillarity does not mean it is not a fundamental right. Once again, with Advocate General Cruz Villalón, 'the freedom

[164] ECJ Judgement of 24 November 2011, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10, ECLI:EU:C:2011:771.

[165] ECJ Judgement of 16 February 2012, *SABAM v Netlog NV*, C-360/10, ECLI:EU:C:2012:85.

[166] ECJ Judgement of 22 January 2013, *Sky Österreich GmbH v Österreichischer Rundfunk*, C-283/11, ECLI:EU:C:2013:28.

[167] ECJ Judgement of 31 January 2013, *Denise McDonagh v Ryanair Ltd*, C-12/11, ECLI:EU:C:2013:43.

[168] ECJ Judgement of 18 July 2013, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*, C-426/11, ECLI:EU:C:2013:521. See also Oliver (2013), p. 287 et seq.

[169] *Inter alia*, Everson and Gonçalves (2021), §16.24.

[170] See, in this sense, Everson and Gonçalves (2021), §16.04. Some, however, dispute the maintenance of a general principle of the Union, from the moment of its consecration as a right in the Charter. On this question, see, in particular, Oliver (2013), p. 281 et seq. and p. 295 et seq. On the umbilical relationship between the freedom of enterprise and the highly competitive social market economy model—Usai (2013), pp. 1870 and 1871.

[171] Everson and Gonçalves (2021), §§16.24–16.26.

[172] ECJ Judgement of 22 January 2013, *Sky Österreich GmbH v Österreichischer Rundfunk*, C-283/11, ECLI:EU:C:2013:28, para 49; ECJ Judgement of 20 December 2017, *Polkomtel*, C-277/16, ECLI:EU:C:2017:611, para 52; ECJ Judgement of 16 July 2020, *OC e.a. and Others v Banca d'Italia and Others*, C-686/18, ECLI:EU:C:2020:567, para 49. On advertising and labelling obligations, see ECJ Judgement of 6 September 2012, *Deutsches Weintor eG v Land Rheinland-Pfalz*, C-544/10, EU:C:2012:526, paras 57 and 58 and ECJ Judgement of 17 December 2015, *Neptune Distribution*, C-157/14, EU:C:2015:823, para 71.

[173] See Opinion of Advocate General Kokott of 23 December 2015, *Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for Health*, C-477/14, ECLI:EU:C:2015:854, para 192 and ECJ Judgement, *Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for Health*, C-477/14, ECLI:EU:C:2016:324, para 161.

to conduct a business, as stated in that article, acts to protect economic initiative and economic activity, obviously within limits but nevertheless ensuring that there are certain minimum conditions for economic activity in the internal market. Thus, the freedom to conduct a business acts as a limit on the actions of the Union in its legislative and executive role as well as on the actions of the Member States in their application of European Union law'.[174] The special circumstance that the freedom to conduct a business is exercised in the market implies that it cannot be realised without workers, customers, users and even competitors. Because it cannot realise itself without them, this necessarily implies more conflicts and collisions, bearing in mind that what interests the company may not equally interest these other holders. As a result, there are more scenarios where companies' freedom must be curtailed. Not because it is worth less. Conversely, and as illustrated by the regulatory mesh in which the freedom to conduct a business is typically exercised, the latter is particularly tightened as a way to avoid conflicts and collisions. The fact that the freedom to conduct a business is more open to delimitation does not rule out its essence. Any interferences must necessarily abide by judgements of proportionality and reasonableness. Its essential core requires the legislator to start from the '*prima facie*' right and its complex content, only being able to 'limit' it and strip it of certain faculties when there is a prevailing justification in concrete terms. It may not do so at random and may not do so disproportionately. While the freedom to conduct a business cannot see its essence defined in absolute terms, the fact that it is only determinable in concrete scenarios, does not mean it is relative, as both the legislator and the interpreter are bound by law ('*lato sensu*') and juridical principles.

We acknowledge that there are doubts about the classification of the freedom to conduct a business as a 'classic economic fundamental right'. Furthermore, we also recognise the many ideas of service, functionalisation, or even subordination to other fundamental rights, interests or blurred allegations of the common good orbitrating legal discourse. In particular, the idea of a 'diminished right' is common ground in the case law and decision-making practice. This reading ignores the freedom to conduct a business as a true fundamental right. In addition to its history and, nowadays, express enshrinment and classification as such, the jusfundamentality of the freedom to conduct a business results from the values it protects—freedom and autonomy. These are values clearly present in the faculties normally attached to the freedom to conduct a business as a complex right. Corporate freedoms are frequently organised in several classifications. In the EU, the freedom to conduct a business is considered an amalgam of three distinct or autonomous right-faculties: (i) the freedom to exercise a commercial or economic activity,[175] (ii) the freedom of contract and (iii) the freedom of competition.[176] Other

[174] Opinion of Advocate General Cruz Villalón of 19 February 2013, *Alemo-Herron and Others*, C-426/11, ECLI:EU:C:2013:82, para 50.

[175] According to some, the right to a properly functioning and competitive single market is also included—Usai (2013), p. 1887.

[176] Groussot et al. (2014), p. 3. As freedom of competition and competition protection as a limit to the freedom of enterprise—Usai (2013), p. 1876 et seq. Also on the issue, Storr (2013), pp. 220–221 and p. 224 et seq.

categorisations distinguish between (i) the freedom of establishment, (ii) the freedom of access to the market, (iii) the freedom of organisation and management (including the sub-freedoms of disposal, production, investment and development), (iv) the freedom to operate in the market (including the freedom as regards pricing, distribution, sales, competition, advertising and the contractual freedom) and the (v) guarantee of the company's existence.[177] Each of these sub-faculties can be divided into several specific freedoms. By way of example, the freedom to exercise an economic or commercial activity includes the freedom of conception and production. This means that, *prima facie,* the company is free to design the products and the terms and conditions of its services. The freedom to develop and improve the products and services is also relevant in the light of the DMA. Indeed, while establishing a 'result', the gatekeeper has, at least for some of the obligations, the freedom to choose how to align its activity with the new regulatory framework. The freedom to conduct a business also has an internal dimension linked with organisation, management and structuring, which includes the freedom to decide on the composition of corporate bodies as well as to adopt policies, missions, plans and strategies, and manage human resources. Other 'corporate freedoms' in this bundled right include the freedom to sell or commercialise products and to provide services in a given market, the freedom to cooperate with other economic agents and entities, the freedom of advertising or commercial communication (which suffers limitations with regard to targeted advertising), the right to protection of business and commercial secrets and the freedom of competition (for the market as well as in the market). In this last dimension, the freedom to conduct a business is not only negatively affected, but also promoted in the DMA, which is conscious of the fact that duties to protect small operators and new entrants flow as well from the positive dimension of the freedom to conduct a business.

Another typical dimension of the freedom to conduct a business is the freedom of contract, which includes the freedom as to whether, with whom, and how to contract, as well as the freedom to dispose of the resources necessary to pursue an economic activity. On top of these, there is the right to collect the personal data necessary for the performance of a certain contract or the conduct of an economic-business activity as well as related rights such as the rights to equal treatment, to an effective remedy and fair trial. In summary, the idea of a '*Bündelungsgrundrecht*' or a composite fundamental right is appropriate to grasp the freedom of enterprise as a true fundamental right.

5.2 Functions and Duties

Even though conceived initially in its defensive function, the freedom to conduct a business has an objective dimension from which positive duties arise. The EU has a

[177] See Ossenbühl (1991), pp. 9–44.

role in ensuring that fundamental rights are not just ‘paper’ positions or proclamations of intent. On the contrary, to be effective, the EU institutions and, in particular, the EU legislator must adopt frameworks that ensure the effectiveness of fundamental rights and a fair balance when they conflict or collide with each other. The DMA and the DSA are examples of the importance of this positive dimension and illustrate why the freedom to conduct a business cannot be seen only as the ‘affected’ right. Focusing on the DMA in particular, it is important to stress that the business users that the it seeks to protect are indeed companies, whose freedom must be safeguarded against the power and idiosyncrasies of digital markets. In contrast with a negative vision towards corporate freedoms or economic liberties, portrayed as threats to other rights, public policies, and democracy, it is important to perceive the freedom to conduct a business as afreedom of different players.

Any conflict or collision with other rights and interests must be solved under a balancing test. This does not imply the blockage of EU activities, priorities, policies and duties, nor does it deny that other rights and interests may prevail in concrete cases, limiting the scope of the freedom to conduct a business. While subject to more limitations, the freedom to conduct a business must be taken seriously and its highly limited nature must be understood in the light of fundamental rights’ inherent limitation. A ‘*carte blanche*’ to the legislator or the enforcer must be rejected since such a vision would undermine fundamental rights’ primacy over the law. Above all, it would affect the very idea of the rule of law.

In accordance with Article 52(1) of the Charter, limitations may be imposed on the exercise of the rights and freedoms recognised by the Charter, such as the freedom to conduct a business and the right to property, as long as those limitations (i) are provided for by law, (ii) respect the essence of those rights and freedoms and, (iii) subject to the principle of proportionality, are necessary and genuinely (iv) meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. As a result, we adhere to the opinion of Advocate General Szpunar, stressing that: ‘[. . .] the reference in Article 16 of the Charter only serves to emphasise that a greater degree of State interference is permissible in relation to the right guaranteed in that article than in relation to other rights. The reference does not imply either a reduction in the level of protection guaranteed by that right or that it has the status of a principle or of a ‘second-class’ right. [. . .] The above does not change the fact that in practice it will be rare for decisions to be based solely on Article 16 of the Charter. In comparison with other fundamental rights, the freedom to conduct business, and therefore also the freedom of contract, will often have to give way to other values protected by EU law. The need for far-reaching encroachments on the freedom of contract is particularly evident with regard to regulated markets and transactions conducted with consumers’.[178]

[178] Opinion of Advocate General Szpunar of 15 July 2021, *Thelen Technopark Berlin GmbH v MN*, C-261/20, ECLI:EU:C:2021:620, paras 89–90.

In summary, the greater limitation of the freedom to conduct a business does not obviate the need to preserve its essential core. While it is a matter of disagreement and despite its more fluid outlines,[179] such an essential core exists and cannot be ignored only because it 'generates discord'. It is believed that it can be properly determined in the light of a fair balance that obeys fundamental principles derived from the rule of law, thus removing any relativism in this regard.[180]

The 'social function' frequently attached to the freedom to conduct a business tends to be read as a functionalization or downgrading. In our view, however, it can only be grasped and properly understood as a recognition of the importance of companies in society, which is also an additional argument in favour of their recognition, protection and respect as subject-holders of true fundamental rights. The fact that the company is not just a 'subject-holder' of their own fundamental rights but a simultaneous forum or structure where other rights are realised calls for different and more demanding harmonisation and balancing exercises, which can no longer be solved in the light of a bipolar scheme 'company - public authorities' or 'company - holders of conflicting rights' or even 'companies - conflicting interests'. On the contrary, the '*specialis*' of businesses and their freedoms requires that other rights and interests are called into the equation.

As with other rights and freedoms, the freedom to conduct a business is not an absolute prerogative. However, it is a true fundamental right. Its holders may vary in dimension, specificities and role in society. They have in common the fact that they are holders of the same fundamental right. The particularities of the freedom to conduct a business derive from the fact that it is not feasible or effective without the others. This feature explains its special 'function in society' or 'social mission', and it may also explain why the freedom to conduct a business is more frequently subject to interventions by public authorities acting in the general interest. In either case, the freedom to conduct a business is not a diminished right. Conversely, the fact that it is certainly highly restrictable is the product of being a freedom in necessary dialogue with others.

In summary, despite being limitable, the freedom to conduct a business is endowed with a 'fundamental value', imposing to any restriction a set of limits or guarantees which cannot be neglected as parameters of validity when analysing the most recent EU regulations regarding the digital environment. While there is a clear justification for limiting companies' freedom, compliance with proportionality must be carefully analysed during their implementation and enforcement. Even when a wider margin of action and discretion is to be recognised to the EU legislator and enforcer, European case law and fundamental principles condemn restrictions not justified by the prevalence (*in concreto*) of conflicting and colliding rights and interests. This is all the more important as regards gatekeepers and intermediary services platforms. They are not merely 'subject-holders' of conflicting and/or

[179] Gill-Pedro (2017), p. 133.

[180] The rule of law calls for proportionality, justice and legal certainty. These are to be applied in favour of all subjects of a specific legal community. They are not exclusive of the human being.

colliding fundamental rights with other(s). Digital players' rights cannot be seen in isolation from the rights of their users and stakeholders. In order to achieve a fair balance, those rights must be considered in fundamental rights' adjudication. In short, a bipolar scheme gives way to a complex one where polygonal relationships raise the standards for those responsible for balancing conflicting rights and interests: the EU legislator, the enforcers and the Courts as their keepers.

6 The DMA, in Light of Article 52 of the EU Charter of Fundamental Rights

In exercising the powers conferred by the Union Treaties, the EU, its institutions, bodies, offices and agencies must respect fundamental rights. As a *sui generis political reality* in respect of which many questions arise, there can be no doubt that the Union is a Union of law and a Union of fundamental rights. Its institutions are subject to review of the conformity of their acts, particularly with the Treaties, with general principles of law and fundamental rights.[181] According to Article 6(1) of the Treaty on European Union ('TEU'),[182] the CFR has the same legal value as the Treaties and it is thus Union's primary law, to which secondary law is subordinated. Both the DMA and the DSA may be questioned in that light.

Naturally, the rights enshrined in the Charter are not absolute prerogatives. They must be considered in relation to their function in society. Their 'social dimension' reminds us that their *prima facie* scope is always subject to cutbacks. Freedoms are mutually limited and the Charter admits restrictions on the exercise of fundamental rights, provided that these restrictions meet the conditions provided for in Article 52 CFR. According to this Article, the definitive scope and interpretation of the rights and principles of the Charter depends on a set of rules or conditions: (i) a legal basis; (ii) a justification, (iii) respect for the principle of proportionality and (iv) preservation of the rights' essence. This is what we call 'conflicts dogmatic'. These conditions prevent arbitrary judgments and guarantee a minimum degree of certainty as to the results. As legal requirements, they must also be observed regarding limitations of the freedom to conduct a business. This means that the law on which the freedom of enterprise moves must be justified and proportionate. Otherwise, it does not stand up to the provisions of Article 52 CFR. The DMA and its obligations do not deny the freedom to conduct a business as a fundamental right. On the contrary, they convert its *prima facie* content into a definite freedom, stripping it of some of its identity faculties. Indeed, while the freedom to conduct a business has a vast, rich and complex content, it would be illusory to perceive it in such broad terms when in dialogue with other rights and interests.

[181] ECJ Judgement of 6 October 2015, *Maximillian Schrems v Data Protection Commissioner*, C-362/14, ECLI:EU:C:2015:650, para 60.

[182] Consolidated version of the Treaty on European Union, OJ 2012 C 326.

The DMA's legitimacy and validity depend on the fulfilment of all the conditions mentioned above. Both the DMA and the DSA fulfil the requirement that any restriction on the exercise of fundamental rights must be provided for by law. While there are several areas of discretion and open rules, this first condition does not preclude the restriction from being formulated in sufficiently open terms so that it can be adapted to different situations and changing circumstances (for example, through updating and reform mechanisms). Furthermore, the Court may, where appropriate, specify, by way of interpretation, the precise scope of the restriction.[183] At least as far as the DMA's obligations are concerned, their restrictive nature *per se* removes the uncertainty. In turn, the spaces of discretion are spaces of bounded discretion. Any action contrary to fundamental rights subjects the Commission and its acts to judicial scrutiny.

It is believed that any further references to the justification can be dispensed with. The DMA justifies itself through the concepts of contestability and fairness. These are bundled objectives concealing true fundamental rights. Consumers' and users' rights, as well as general interests, provide the DMA with a justification to interfere with gatekeepers' freedoms.

In addition to the legal basis, it is necessary to ensure respect for the principle of proportionality. It silences the dangers of relativism. Although it needs to be implemented in practice, it is a legal principle requiring a legal analysis. Limitations imposed by acts of Union law on the rights and freedoms enshrined in the Charter may not exceed the limits of what is appropriate and necessary in order to achieve the legitimate aims and rights pursued or protected. Besides adequacy, proportionality as necessity requires that the least restrictive is used when there is a choice between several appropriate measures.[184] The speciality of gatekeepers as vehicles of alien rights and interests implies that these are duly considered when weighing the advantages and disadvantages and measuring the proportionality of the interference. In this context, references such as that found in Articles 9(4) and 53(2) of the DMA are welcomed. They embody an impact that goes beyond the gatekeeper as a subject and extends to third parties. The legislator recognises that the company is not only an economic agent. It is also a forum for the realisation of the rights and interests of others.

As to the essential core of the freedom to conduct a business, it is believed that it cannot be determined in absolute terms. On the contrary, this is a freedom that can be absolutely denied (even if only temporarily).[185] As a result, it seems unrealistic to define the essential core of a freedom which, precisely because of the fact that it presupposes the other(s), is at the origin of multiple and recurrent situations of

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[183] ECJ Judgement of 21 June 2022, *Ligue des droits humains*, C-817/19, EU:C:2022:491, para 114 and the case-law cited therein.

[184] ECJ Judgement of 22 November 2022, *Luxembourg Business Registers and Sovim*, joined cases C-37/20 and C-601/20, EU:C:2022:912, para 64.

[185] GC Judgement of 27 July 2022, *RT France v Council of the European Union*, T-125/22, ECLI: EU:T:2022:483, para 225.

conflict and collision. Indeed, it seems difficult to make a closed list of faculties that, considered in isolation, are 'untouchable'. By contrast, conflicting rights and interests may always argue for some limitation. What matters is that the freedom to conduct a business is taken seriously in the fair balance being conducted.

While the DMA's text states that it 'respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union' and is proportionate since it 'does not go beyond what is necessary in order to achieve that objective' (Recitals 108 and 109), it is not within the purview of the legislature or the executive to self-legitimise itself. The DMA can and must be reviewed under the lens of fundamental rights. Despite its *prima facie* legitimacy, its concrete implementation will be crucial to its effective validity and acceptance. What is said concerning the wording of the DMA also applies to its application and enforcement. For this very reason, it is sustained that, when the Commission implements the DMA's provisions in exercising the discretion it enjoys, its options and margin of action, choice and decision must be read in the framework of bounded discretion and obey the same 'conflicts dogmatic' presented above. It will be for the courts to exercise control and ensure the DMA's legitimacy, both as a text and as law in action.

7 Conclusion

Through the DMA and the DSA, the EU seeks to adapt the European legal framework to new challenges and risks associated with the digitalisation of society, economy and markets. These EU Regulations share a common concern, at least regarding fundamental rights. They are both concrete expressions of the positive obligations arising from the fundamental rights enshrined in the Charter of Fundamental Rights. They include the rights (and, in some cases, general interests as well) of consumers, end users and business users, among which privacy and data protection, autonomy and freedom of choice, freedom of expression and information, intellectual property, and non-discrimination. The freedom to conduct a business takes a prominent position, however. Either as a right restricted or shaped by the obligations imposed on the companies in question or as a right whose effectiveness is ensured, the freedom to conduct a business is a pillar of both Regulations.

The DMA and the DSA are, however, distinct instruments. Whereas the DMA focuses on (digital) markets, the DSA's mission revolves around the (digital) society. As a result, the fundamental rights discourse is more present in the DSA. However, it is not absent in the DMA. Conversely, the objectives of contestability and fairness translate a composite set of fundamental rights and interests that the European legislator intends to accomplish through openness and fairness in the markets. Through those two composite terms, the DMA seeks to introduce obligations on gatekeepers justified by different conflicting and colliding rights and interests.

The DMA is an act of secondary Union law which must comply with the Charter of Fundamental Rights of the European Union, bearing in mind that the EU is a

Union of law and fundamental rights. The acts, measures and options of the European Commission, NCAs and national and European courts which interfere with fundamental rights must respect a 'conflicts dogmatic'. Fundamental rights do not exist in isolation. On the contrary, they limit each other. The potential scope of a right and the *prima facie* content assigned to it appear limited in practice. Conflicting and colliding rights and interests, as well as the public interest, must be safeguarded.

No presumption of legitimacy can be applied to the DMA merely because it targets economic freedoms. The fact that the companies targeted by the DMA are gatekeepers, that is, companies with considerable economic power, should not ignore the fact that they also function as *forums* for the realisation of the fundamental rights of many business users and end users. As a result, balancing exercises cannot ignore the impact of the company's obligations on these other rights and interests.

Even so, the fact that we are dealing with companies with this particularity or dual status means that their position is not that of 'mere holders' of the freedom to conduct a business. Without denying their rights or diminishing their power, as many would have it, these companies have a particular responsibility. This dual role makes their freedoms naturally prone to 'limitation'. This limitation must always be carried out under the 'conflicts dogmatic'. A hierarchy of values in the EU's system of fundamental rights is to be rejected when used either to perceive non-economic fundamental rights as 'exceptions' to economic liberties, or to sustain that businesses' freedoms are automatically and always superseded by other fundamental rights.[186]

Although not exclusive to the freedom to conduct a business as a fundamental right, the social function that is usually attached to it acquires a particular meaning in the digital environment since digital companies provide goods and services that are truly decisive for the fulfilment of the individual and the guarantee of democracy. Their particular responsibility and social function cannot be read as a social mortgage or a symptom of lesser value or axiological weight. Indeed, any interference with the freedoms of the company may negatively impact the rights of the people whose rights are realised through it. Be it the freedom of expression of users, the right of access to more innovative products, or the freedom of enterprise of other companies.

The obligations under the DMA—proscriptive and negative—are justified in the light of conflicting fundamental rights, aims and objectives of general interest. These obligations deprive the freedom to conduct a business of liberties that usually fall within its potential scope: the freedom to contract, the freedom to conceive and design services and infrastructures, and the very freedom to compete. In addition to a justification, interference with the freedom to conduct a business requires the application of the principle of proportionality.

Proportionality is a dimension of the rule of law that prevents arbitrariness and ensures that balancing is not made in terms that are detrimental to the primacy of rights over the legislature and the will of the executive. Although the essential core

[186] See Van Cleynenbreugel and Miny (2022), pp. 292–294.

of entrepreneurial freedom cannot be defined in absolute terms, it can be delimited in the light of the concrete circumstances.

DMA's proportionality and compliance with the CFR cannot be asserted in the abstract. While the text has some shortcomings, the DMA's jus-fundamental conformity will mostly depend on how it is concretely applied and enforced. As the Commission's wide margin of discretion is present in many aspects of the DMA, it is believed that it will be of paramount importance to ensure the proportionality of the DMA. In any case, how this discretion will be acted upon in practice must be subject to judicial review. And here is how an apparently foreign text on the subject of fundamental rights is actually a translation of their intricacies.

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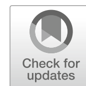
Enhancing Autonomy of Online Users in the Digital Markets Act



Beata Mäihäniemi

Abstract An increased movement towards developing digital fundamental rights can be observed. This includes a call for amplified autonomy of online users. This chapter defines the right to autonomy in the digital environment and assesses different dimensions of autonomy as a concept. This is done by identifying these dimensions in the Digital Markets Act (hereinafter DMA) the sectoral regulation of large online platforms that has recently entered the EU scene. The chapter identifies two dimensions of autonomy in the DMA: self-empowering as to data gathering and autonomy as being free from manipulation. The chapter also offers some recommendations as to how to tackle autonomy in a digital environment.

1 Introduction

Policy towards gatekeepers should be rooted not only on business justifications or on increasing the flow of data and making Europe another data behemoth. Instead, EU policy should increasingly and gradually focus on protecting fundamental rights. It should especially aim at increased measures to protect users' autonomy. This autonomy derives directly from the ultimate human right, which is human dignity. In the DMA, fundamental rights are only mentioned in the preamble but not explicitly in the articles. One has to somehow fish them out of the articles. I claim that fundamental rights of users should be implemented more clearly into dealing with gatekeepers.

In this chapter, I discuss autonomy of users and how it is reflected in the DMA that has started applying in the EU. The DMA is aimed at gatekeepers, large dominant platforms offering core platform services such as online search engines

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like Google or online intermediation services like Amazon. So far, by 8th of August 2024, seven gatekeepers were designated by the European Commission. These are Alphabet Inc., Amazon.com, Apple inc., ByteDance Ltd., Meta Platforms, Inc., Microsoft Corporation and Booking.com. There were 24 different core platform services identified in total within all of these gatekeepers.[1]

The chapter aims at analysing different dimensions in which autonomy is reflected in the DMA. This includes: an attempt to self-empower users to consent or not to data gathering and measures to prevent manipulation by gatekeepers by means of dark patterns. It also offers some recommendations on what matters as regards increasing the autonomy of users require increased attention.

The chapter proceeds as follows. It first defines autonomy as a right of a user, and then proceeds into introducing the DMA. As the DMA promises to protect fundamental rights in its text, is this in fact happening? Which of DMA obligations are autonomy-enhancing?

2 The Digital Markets Act

The DMA has as its main goal ensuring fair and contestable digital markets in the EU.[2] It has been shaped to remedy for the situations where market processes are incapable of ensuring fair economic outcomes and it complements the enforcement of competition law at EU and national level. It is a sector-specific regulation that has started applying from 2 May 2023, however the Commission has to firstly designate gatekeepers so that the obligations from the DMA can start binding these large dominant online platforms and search engines. Potential gatekeepers were obliged by 3 July 2023 to notify to the Commission in which core platform services they operate in and if they meet the quantitative thresholds established in the DMA for gatekeepers. Until 6 September 2023, the Commission designated gatekeepers; after their designation they had six months to comply with the DMA, however at the latest by 6 March 2024. On 6 September 2023 the European Commission designated six gatekeepers - Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft. On 29 April 2024, the Commission designated Apple with respect to its iPadOS, its operating system for tables. On 13 May 2024, the Commission also designated Booking as a gatekeeper for its online intermediation service Booking.com.[3]

[1] European Commission (n/d), 'Gatekeepers' https://digital-markets-act.ec.europa.eu/gatekeepers_en.

[2] Article 1 of the 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) (Text with EEA relevance), PE/17/2022/REV/1 OJ L 265, 12.10.2022.

[3] 'See European Commission, 'Remarks by Commissioner Breton: Here are the first 7 potential "Gatekeepers" under the EU Digital Markets Act' (Statement of 4 July 2023, Brussels) https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_23_3674, European Commission,

The aim of the DMA is to contribute to the proper functioning of the internal market by laying down harmonized rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users.[4] It applies to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union.[5] It provides unified rules to avoid fragmentation on the national level.

The DMA covers ten core platform services: online intermediation services, e.g. Amazon, online search engines; e.g. Google Search, Baidu, online social networking services; e.g. Facebook, video-sharing platform services; e.g. YouTube, number-independent interpersonal communication services; e.g. WhatsApp, operating systems; e.g. Microsoft Windows or Android, cloud computing services; e.g. Google Docs, Microsoft 365, advertising services; e.g. AdWords, DoubleClick, Baidu, web browsers; e.g. Chrome, virtual assistants e.g. Siri or Alexa.[6] New core platform services can be added to the list later on by the Commission.

The DMA regulates large online platforms that will pose the biggest threat to users' autonomy. Online platforms will be designated as gatekeepers if they: (a) have a significant impact on the internal market; (b) provide a core platform service which is an important gateway for business users to reach end users; and (c) enjoy an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.[7]

After their designation, gatekeepers will have half a year to fulfil the obligations arising from the DMA. These include Article 5 which is directly applicable to gatekeepers and Articles 6 and 7 that are subject to specification: the Commission can further specify measures to be adopted by a gatekeeper to comply with these Articles. The Commission can impose fines of up to 10% of the company's total worldwide annual turnover or 20% in the event of repeated infringements if the gatekeeper commits a second violation of the DMA, about the same CPS and in less than eight years following the first violation.

The DMA is primarily addressed as a counter power for large online platforms. In this chapter I aim at analysing how the DMA enhances autonomy (of users)? In the following part I explain the concept of autonomy and advocate for adding autonomy to the list of (digital) fundamental rights.

'Digital Markets Act: Commission designates six gatekeepers' (Press release of 6 September 2023) https://ec.europa.eu/commission/presscorner/detail/en/IP_23_4328, European Commission, 'Commission designates Apple's iPadOS under the Digital Markets Act' (Press release of 29th April 2024) https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2363, European Commission, 'Commission designates Booking as a gatekeeper and opens a market investigation into X*' (Press release of 13 May 2024) https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2561.').

[4] Ibid.

[5] Ibid.

[6] Article 2 DMA (n 2).

[7] Article 3 DMA (n 2).

3 What Is Autonomy?

As pointed out by Hildebrandt:

> The most prominent threat, (. . .) that connects with concerns over autonomy, identity and digital sorting, occurs if we cannot defend ourselves. If we cannot contest the way we are being 'read' and steered and thus if we cannot resist the manipulation of our unconscious emotional states, we may lose the sense of self that is pre-conditional for human autonomy. Not having a chance to develop feelings, we may actually become the machines that smart technologies take us to be.[8]

This threat is a threat to human dignity which is an absolute fundamental right (Article 1 of the EU Charter of Fundamental Rights).[9] Dignity is endangered when an individual's privacy or the right to private life, to be able to take control of one's own information, is endangered.[10]

Autonomy and privacy are elements of human dignity and are therefore interconnected. We can however distinguish the right to privacy from the right to data protection, which are two separate rights. The first one deriving from Article 7 of the EU Charter of Fundamental Rights (respect for private and family life) giving each individual the right to respect of their private and family life, home and communications. The latter, Article 8 EU Charter on Fundamental Rights, gives the protection of personal data to everyone when data concerns them, and ensures data is processed fairly and for designated purposes and that a user has access to data collected that concerns them. Privacy is recognised as a universal human right while data protection is not—at least not yet. [11] However, the right to privacy and to data protection does not accommodate fully the lack of choice, the lack of influence, or simply the lack of information on what happens with one's data. Therefore, a separate, seemingly broader, digital right to autonomy could be proposed as it is wider than the right to data protection as enshrined in the General Data Protection Regulation.

The narrative of (contractual) autonomy can be tracked back to ancient Roman philosophy and later to the German understanding of informational self-determination. The latter does not correspond to the concept of autonomy in the full sense, but only focuses on one specific aspect of it. Informational self-determination denotes a situation where, with sufficient information, each user could decide for themselves how they wish to share their personal data with others.[12] This idea was then transplanted to data protection law in the EU, which, together with EU competition law, propose some limited working tools to tackle online users' autonomy. However, the newest additions to the framework for data governance such as the DMA, the Digital Services Act (hereafter DSA),[13] or the Data Act,[14]

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[8] Hildebrandt (2015), pp. 71–72.

[9] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

[10] Data Protection Supervisor (n.d.).

[11] Ibid.

[12] Westin (1967), pp. 410–411.

offer an entirely new understanding of autonomy. They recognize that boosting the EU economy, we need an abundance of data and to move away from treating it as a scarce resource. There is therefore a clash between old and new regulations (e.g. Käll 2020).

When there is an abundance of data, it may be more easily available for collection to the online platform. This may lessen the incentives of especially dominant platforms to offer tools for fully enhancing the autonomy of online users. However, it is unclear whether abundance is in fact diminishing or expanding the personal autonomy and individual privacy of users or interests (Madison et al. 2022). The DMA aims at preventing gatekeepers from gathering data in an unfair way, from preventing users from making informed choices, from manipulating users into certain behaviours.

The DMA, along with the DSA, promises increasing users' autonomy when they are present online and active, along with protecting users' fundamental rights.[15] Recital 109 states that the DMA will 'respect the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union'.[16] It is however unclear what is the role of this sentence. Does it have a clear meaning and the strength of a form of an influential soft law or is it there since it simply should be there? It seems that where users' autonomy has to be strengthened, this could be done by reference to the EU Charter of Fundamental Rights. However, where the application of these rights is ambiguous and unclear, there may be a need to look at the case law that explains what autonomy or self-determination is. The importance of autonomy in the face of dealing with large online platforms cannot be understated. This is because of their almost public-like role in the current society. Although they are private, they affect society in the way that public enterprises or governments do.[17]

Autonomy is supposed to be enhanced by a legal mechanism of 'consent', which originates from the General Data Protection Regulation. Moreover, consent has been strengthened and confirmed in a number of other legislations, such as the DMA. Processing of data has been primarily based on consent in contracts with gatekeepers. Consent can be found in Article 7 of the GDPR and has to be requested by means which is evidently distinct from other matters, in a comprehensible and straightforward form, using clear and simple language.[18] Moreover, the data subject shall have the right to withdraw his or her consent at any time. It shall not affect the

[13] Article 25 of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) PE/30/2022/REV/1, OJ L 277.

[14] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on harmonised rules on fair access to and use of data (Data Act) (Text with EEA relevance) COM/2022/68 final.

[15] European Commission (n.d.).

[16] Recital 109 DMA (n 2).

[17] See e.g., Guo (2020).

lawfulness of processing based on consent before it has been withdrawn. It shall be as easy to withdraw as to give consent.[19]

The DMA largely confirms the importance of consent as understood in GDPR. For example, data gathering practices are largely allowed if consent from the user is obtained, the same goes to dark patterns and profiling. The DMA stresses the need for the user to be able to withdraw consent, which should be as easy as giving it. Users should not be nudged into or prompted into giving consent more than once a year for the same purpose in respect of which they initially did not give their consent or withdrew it from.[20] The DMA largely connects the need for consent to avoiding manipulation, which can be understood as the use of dark patterns etc.

As the DMA points out, the manipulation of users by online platforms can be problematic. In fact, it can lead to a loss of autonomy. It seems that in the digital world one is autonomous when one can make their independent choices on services to choose from but also decide whether data on one's activities are released to specific business actors (which most of the time take the shape of an online platform). Vulnerability can be presented as a theory of harm for digital manipulation. Calo compares market manipulation in digital markets to the massive surveillance by the government. He stresses that being monopolistic does not give a green light for coercion. The fact that the motive of monopolies is profit-driven seems less dangerous and more acceptable than the outcomes of tyranny.[21] However, as digital manipulation in fact influences individuals or diminishes the already limited resources of willpower, the harm here could be classified as individual or collective autonomy.[22] Similarly, Susser talks about "online manipulation" that is 'the use of information technology to covertly influence another person's decision-making, by targeting and exploiting decision-making vulnerabilities manipulation of users by online platforms'.[23] It is facilitated by information technology.[24] Nevertheless, this approach has been challenged as some technologies are more manipulative than others. Therefore, perhaps coercion would be a more adequate reason for the loss of autonomy than manipulation? Moreover, this loss of autonomy could be proven in an empirical way.[25] Finally, as pointed out by Lindroos-Hovinheimo (2021),[26] autonomy is as a narrative that is often taken for granted and misleading, and not an optimal goal of legal regulation. Complete autonomy, where an individual is

[18] Article 7 of the European Parliament and of the Council. Regulation 679/2016 of 4 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data. 2016. OJ L119/1.

[19] Ibid.

[20] Ibid, recital 37.

[21] Calo (2014), p. 1031.

[22] Ibid.

[23] Susser et al. (2019), p. 6.

[24] Ibid.

[25] Klenk and Hancock (2019), p. 2.

[26] Lindroos-Hovinheimo (2021).

completely free and autonomous and controls all of their actions, should not be aimed at.[27]

Autonomy-enhancing rights from the EU Charter of Fundamental Rights, such as e.g. right to human dignity (Article 1), right to privacy (Article 8), right to freedom of expression and right to data protection (Article 16) do not achieve full autonomy and a separate right to autonomy should be introduced. This has several implications for example for the re-use of data to make inferences on users' behaviour, etc. Taking fundamental rights into account while designing legal instruments is difficult as they do not have clear boundaries or criteria. In particular, where we talk about digital environment, which is in itself very complicated, looking at fundamental rights will most probably be having to be taken into account ex-post, in case of an infringement of the fundamental right. Moreover, some fundamental rights, such as right to privacy or data privacy, are more developed than others in jurisprudence so it would be easier to define them in a particular setting. Autonomy is very ambiguous, as it goes beyond the right to self-determination as to ones' data and is more about making conscious, unbiased choices instead. Finally, different dimensions of autonomy can be found in the DMA, as will be analysed in the following parts of the chapter.

4 Self-Empowering Users in the DMA: The Example of Unfair Data Gathering

One good way to explain the problem with large platforms and how they affect our autonomy and privacy is the so-called 'privacy paradox'. Privacy paradox means that despite the fact that people seem to be concerned about their personal information, which would mean they are willing to control where they wish to disclose it, their behaviour in the marketplace shows exactly the opposite. Namely, people are not selective enough and may tend to be careless as to how and where they disclose their information.[28] There is therefore inconsistency with when we are ready to reveal more about ourselves and when less. However, the privacy paradox does not denote users' indifference in protecting their privacy. It reflects users' responses to online platforms that are designed in such a way so that to benefit from users' limited awareness.[29]

Additionally, although users are sometimes offered options to share less data or pay with money instead of their personal information, they rarely decide to do so as they do not seem to be eager to bargain over their data. They also seem not to be concerned about potential privacy or public harm, which excessive data collection brings along.[30] Users also face incomplete information as the data subject's control

[27] Ibid, 70.

[28] Norberg et al. (2007), p. 101.

[29] Waldman (2020), p. 105.

on their data is either limited or not easy to determine. In particular, when another entity gains access to or uses their personal information, the user may have difficulties understanding the consequences of this access.[31]

The privacy paradox sees a connection between the collection of personal data by enterprises with the harm caused to people whose information is collected. This harm is also connected to the information that these enterprises learn and collect about users; sometimes this collected information may benefit users, sometimes it harms them. However, proving this harm is difficult as it is not easy to grasp, consisting of 'emotional health, personal dignity, autonomy, and reputation'.[32]

There have been several field experiments conducted measuring users' willingness to pay for privacy[33] and such that show users having difficulties in valuing their data privacy.[34] According to Huberman et al.,[35] people will disclose information when they either believe that they are typical or positively atypical in comparison to the targeted group.[36] There is therefore a connection between an individual's belief about a characteristic and the value he or she associates with it. Individuals would then be willing to release information on a less desirable trait, only if paid a higher price for it.[37]

Autonomy could be enhanced by allowing users to express their expectations, e.g. as regards the use of social media and their personal data. Expectations are shaped by factors such as trust and what people are told about the use of their data. This would make the data gathering fairer, as it would be within the reasonable expectations of the people concerned. It is possible that algorithmic decisions may be unfair if they use data that people would not reasonably expect to form part of a decision. For example, would people expect that their post on social media is used to assess their insurance risk?[38]

Article 19(a) and (b) of the European Declaration on Digital Rights and Principles for the Digital Decade promises to guarantee everyone real control of their personal and non-personal data as well as the option for persons to easily move their personal and non-personal data between different digital services.[39] Is this promise fulfilled in the DMA? Here, different dimensions of autonomy can be found, one of which is that a loss of autonomy can derive from the lack of users' self-empowerment as to

[30] Ben-Shahar (2019), p. 121.

[31] Acquisti and Grossklags (2007), p. 2.

[32] Ben-Shahar (2019), p. 111.

[33] See e.g. Beresford et al. (2012); Benndorf et al. (2015).

[34] See Winegar and Sunstein (2019).

[35] Huberman et al. (2005).

[36] Ibid, 22.

[37] Ibid.

[38] UK Parliament (n.d.), p. 4.

[39] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Establishing a European Declaration on Digital rights and principles for the Digital Decade{SWD(2022) 14 } Brussels, 26.1.2022 COM(2022) 27 final.

how their data is used. The European Declaration on Digital Rights and Principles for the Digital Decade stresses the need to 'empower (. . .) individuals to make freely given, specific choices and limiting the exploitation of vulnerabilities and biases, namely through targeted advertising'.[40] However, where the only model available to deal with platforms is contractual, users are merely left with binary opt-in and opt-out options, limiting their autonomy as a consequence. Moreover, as pointed out above, most platforms rely on consent, which also has its roots in the idea of autonomy. Therefore, where data is gathered secretly, consent does not seem to work.[41] Even where consumers receive a consent notice or privacy policy which informs them about data collection, storage, and processing, they only have a choice to agree directly or indirectly.[42]

As noted in the DMA, gatekeepers also gather personal data of end users on 3rd party websites and software applications so that they can offer online advertising. This data allows gatekeepers to customise their audience.[43] Therefore, users are faced with already pre-determined choices, without freely choosing to opt into these services. Choosing a less personalized option or refusing to consent to predetermined terms and conditions would result in less or no functionality of the core platform service.[44]

Therefore, Article 5(2) on banning processing and use of end-users' personal data could also be seen as protecting the autonomy of users. Three different practices are forbidden by Article 5(2). Firstly, the processing of end users' personal data that has been collected from third-party services for the purpose of providing online advertising services without prior consent (Art. 5(2)(a)). This obligation is largely based on Facebook investigations in Germany where firstly Bundeskartellamt (the German Competition Authority) has classified such a behaviour as an abuse of a dominant position, in particular as 'exploitative business terms'.[45] The execution of this decision has then been stopped by the 2nd instance in interim proceedings by the Düsseldorf Court of Appeals, which have seen no loss of control on the side of users over their data; as they base decisions on own values and circumstances.[46] The case went then to the 1st Cartel Senate of the Federal Court of Justice which has classified the abuse of dominance as one based on the lack of choice for Facebook users since it lessens their personal autonomy and impairs their right to self-determination. It pointed out that the terms of use are abusive and if there were options on how much

[40] Ibid, Article 15(g).

[41] Waldman (2020), p. 106.

[42] See e.g. Nouwens et al. (2020).

[43] DMA (n 2), recital 36.

[44] DMA (n 2), recital 36.

[45] See Case B6-22/16. *Judgement of the Bundeskartellamt of 6 February 2019: Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing.* Bundeskartellamt. https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=.

[46] Case VI-Kart 1/19 (V). Judgement of Oberlandesgericht Düsseldorf of 26 August 2019 https://perma.cc/WFJ2-JWEM.

information to disclose, users would be willing to disclose less of it.[47] The case went then back to the Düsseldorf Court of Appeals and this time its analysis was rooted, similarly to the Bundeskartellamt, in exploitative abuse that consists of violation of data protection rules. It ruled that a violation of the GDPR could not happen without Facebook being dominant, since it could not apply abusive conditions without having sufficient market power.[48] A request for a preliminary ruling was made to the ECJ, asking several important questions, among others two that seem very relevant when discussing self-empowerment: namely whether sensitive data can be gathered by Facebook through 3rd party websites and then linked to the profile of the user and whether the consent is given freely when the recipient company is a dominant undertaking?[49] These have been, among other questions, recently rejected by the ECJ.[50] Namely, when a user visits websites or apps that can disclose sensitive information, this does not equal the user manifestly making their data public, within the connotation to the GDPR.[51] Moreover, personalised content does not seem to be necessary in order to offer that user the services of the online social network.[52] Finally, according to the ECJ, Facebook's, and overall, any dominant position on the social network market may influence users' freedom of choice and lead to power asymmetry between users and Facebook as a data controller. A dominant position of a social media is therefore a significant aspect in defining whether the consent was freely given and valid.[53]

The obligation in Article 5(2) DMA is preventing the collection of data and combining it, especially for the purpose of advertising, without users consent. This is addressing the loss of autonomy deriving from the use of profiling in online advertising. Online advertising services are at the heart of how e.g., Google and publishers monetise their online services. Google collects data to be used for targeted advertising purposes, it sells advertising space and also acts as an online advertising intermediary. Information intermediaries such as Google advertise products if they are paid enough and gather data in connection with what they can monetise later on. Advertisement is also aimed at users in a personalized way, based on their

[47] Federal Court of Justice of Germany. (2020, June 23). Federal Court of Justice provisionally confirms allegation of Facebook abusing dominant position. Press release no. 080/2020 www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/23_06_2020_BGH_Facebook.pdf?__blob=publicationFile&v=3.

[48] Case VI-Kart 2/19 (V). Judgement of Oberlandesgericht Düsseldorf of 24 March 2021: www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2021/Kart_2_19_V_Beschluss_20210324.html.

[49] Case C-252/21: Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 — Facebook Inc. and Others v Bundeskartellamt.

[50] Judgment of the Court (Grand Chamber) of 4 July 2023. in Case C-252/21 | Meta Platforms and Others (General terms of use of a social network), 4 July 2023, Request for a preliminary ruling from the Oberlandesgericht Düsseldorf.

[51] Ibid, para 78.

[52] Ibid, para 102.

[53] Ibid, para 154 See also European Court of Justice (2023), p. 2.

preferences, previous searches etc. Perhaps there is no better place to advertise than Google as it reaches most of online users.

Secondly, also reusing personal data collected during a service for the purposes of another service without prior consent (Art. 5 (2)(b)-(c)) is forbidden by the DMA. This is the case if they are reused for core platforms service or other services offered by a gatekeeper for the purposes of combing data and cross-using it. Thirdly, signing up end users to other services of the gatekeeper in order to combine personal data (Article 5(2)(d)) is on the blacklist as well.

In addition to the competition law investigations into Meta's data collection and combining of users' data, the Commission has now send its preliminary findings to Meta on 1st July 2024 as regards its 'Pay or Consent' advertising model, and qualifies it as a breach of the DMA, in particular, Art. 5 (2) DMA. According to the Commission, this 'binary choice forces users to consent to the combination of their personal data and fails to provide them a less personalised but equivalent version of Meta's social networks.'[54]

The Commission sees the violation of the DMA as the lack of choice that consists of two problems. Firstly, Meta's model, according to the Commission, 'does not allow users to opt for a service that uses less of their personal data but is otherwise equivalent to the "personalised ads" based service' (ibid.). Secondly, it 'does not allow users to exercise their right to freely consent to the combination of their personal data.' (ibid.). The Commission claims that compliance with DMA would be assured if users who do not consent would still get access to an equivalent service which uses less of their personal data, in this case for the personalisation of advertising (ibid.). The autonomy of users cannot be exercised here, as they cannot use Facebook and enjoy its full version without consenting to data gathering. but if they choose to refuse consent for gathering their data they do not have access to equivalent service. This conclusion is in the way a big failure to Meta, who, anticipating the DMA changes in the Autumn 2023, introduced this very 'pay and consent' advertising model to provide users with a paid, ad-free version to make up for the free version that uses personal advertising. It remains to be seen what a service equivalent to the 'personalised ads' one would be. One option would be the service that is transparent about main criteria used for personalised ads and that would give a possibility to give feedback to the relevance of each ad, or possibility to turn certain kinds of ads completely off. Otherwise, with the 'pay or consent' model we are still at the take-it-or-leave-it situation, which favors people who are able to

[54] European Commission, 'Commission sends preliminary findings to Meta over its "Pay or Consent" model for breach of the Digital Markets Act' (Press release of 1st of July 2024) https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3582., see also D'Amico et al, 'META'S PAY-OR-OKAY MODEL: AN ANALYSIS UNDER EU DATA PROTECTION, CONSUMER AND COMPETITION LAW', Utrecht Center for Regulation and Enforcement in Europe, Working Paper 1-2024 08-04-2024 https://ssrn.com/abstract=4787609). The Commission stresses the strong power asymmetry between Meta and its competitors who do not have access to such a vast amount of data, which raises barriers to entry to online advertising services and social media services (ibid. European Commission).

pay for their privacy, therefore, not providing the possibility to exercise full autonomy to all the users. Meta faces the possibility of being fined for the breach of DMA oscilating at 10% of its yearly worldwide turnover. This will happen if the Commission adapts the non-compliance decision by 24 March 2025, that is 12 months from starting its investigations into Meta's advertising model.

5 Autonomy and Manipulation: The Case of Dark Patterns and Profiling

Firms can nudge or even sludge users into certain behaviours. A nudge is 'any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives'.[55] Nudges need to be 'easy and cheap to avoid'.[56] Nudging occurs for example, when the shop puts sweets directly next to the cashier so as to affect customers into buying these.

However, in the digital environment users can be nudged to involuntary behaviours, such as e.g., giving away their data thanks to an increasing personalisation of products, which makes it much more dangerous than the regular nudging and is also much harder to opt out from. We could therefore see it as manipulative or even deceptive where it derives from a persons' weaknesses in decision-making and designs choices based on this personalisation.[57] As Yeung points out, users' choice architecture is constantly updated. Firstly, users' choice environment is refined as to the changes that occur in users' behaviour that has been marked as relevant by the designer of the algorithmic system. Secondly, data are fed back to the system designer and can be repacked and reused for other algorithmic applications. Thirdly, users' choice environment is monitored and refined taking into account e.g., trends in the population.[58] Hypernudging would occur if a large food chain sends a newsletter with personalized offers for food to a particular customer, based on information of their previous purchases if they own and benefit from a loyalty card as well as customers' data obtained from other sources.

The intention behind some nudges may be questionable and can be classified as manipulative. Such a behaviour has been classified as "sludging" and can have two different forms such as 'discouraging behaviour which is in the person's best interest or encouraging self-defeating behavior'.[59]

Where consent is still based on the responsibility of users, and data treated as one's responsibility to protect, legal design could perhaps help users make more

[55] Thaler and Sunstein (2008), p. 6.

[56] Behaviouraleconomics.com (n.d.).

[57] Yeung (2017), p. 263.

[58] Ibid. On nudging see also Morozovaite (2023).

[59] Thaler (2018), p. 431.

informed decisions. Choice architecture, which gains importance in the digital world, could address sludging and ignoring behavioural factors. Where platforms operate as intermediaries between sellers and buyers, often selling products and services by themselves, they can also affect this process by designing interfaces, which is a matter of technical design. Choice design has been defined as 'organising the context in which people make decisions'.[60]

The manipulation of users is clearly visible in the practice of dark patterns, which can be defined as 'interface design choices that benefit an online service by coercing, steering, or deceiving users into making decisions that, if fully informed and capable of selecting alternatives, they might not make."[61] They are used to 'hide, deceive, and goad users into disclosure.'[62]

The definitions of what constitutes dark patterns vary between different regulations. Dark patterns are a manipulation that meaningfully restricts users' autonomy which derives from the connection between consent and dark patterns. Examples of dark patterns include 'privacy Zuckering' which makes users disclose more information about themselves than they would initially wish, 'roach motel', which enables easy sign up but makes leaving complicated as users have to go to another part of the website for that; or 'confirm shaming' which manipulates users towards a particular option as it presents alternatives in an ethically questionable or risky manner.[63]

Therefore, there are many different kinds of dark patterns so far designed. One study of shopping websites discovered 1,818 different dark pattern instances (Mathur et al. 2019). Dark patterns are primarily regulated by Article 25 of the DSA that focuses on online interface design and organization. This Article states that

> Providers of online platforms shall not design, organise or operate their online interfaces in a way that deceives or manipulates the recipients of their service or in a way that otherwise materially distorts or impairs the ability of the recipients of their service to make free and informed decisions.[64]

Moreover, under the DSA, the European Commission is also authorized to implement delegated acts to explain additional practices that may be under the scope of dark patterns.

Dark patterns are not directly regulated in the DMA, however, are mentioned in its preamble, which states that

> Gatekeepers should not design, organise or operate their online interfaces in a way that deceives, manipulates or otherwise materially distorts or impairs the ability of end users to freely give consent. In particular, gatekeepers should not be allowed to prompt end users

[60] Thaler et al. (2013), p. 428.

[61] Mathur et al. (2019), p. 81:2.

[62] Waldman (2020), p. 107.

[63] Leiser and Caruana (2021), p. 240.

[64] Ibid.

> more than once a year to give consent for the same processing purpose in respect of which they initially did not give consent or withdrew their consent.[65]

The definitions in the DSA and the DMA are therefore almost identical as they both define dark patterns very broadly. As pointed out by Catalina Goanta: ‘if everything is a dark pattern, then nothing is a dark pattern’.[66] There is therefore a lack of conceptual limitations for what constitutes a dark pattern, how we measure and detect it etc.[67] Moreover, while the DMA’s goals are fairness and contestability, it also mentions ‘transparency’ in many of its provisions. Similar to unfair data gathering, dark patterns are a manipulation that is both unfair and intransparent (especially with regard to terms and conditions offered by a gatekeeper). Dark patterns take advantage of behavioural biases and heuristics and similar to unfair data gathering could be labeled as an abuse based on ’exploitative business terms’ and violation of the GDPR. Moreover, if dark patterns are used without consent they can also be seen as a violation of the GDPR.

Dark patterns have been analysed in the context of data gathering through cookies as a violation of data protection law in France under Article 82 of the French Data Protection Act.[68] Google was found to violate the article in question as it was gathering data through cookies without obtaining users’ prior consent, which led to the situation where users made decisions without sufficient information.[69] Similarly, the Italian competition authority found Facebook violating Italian consumer protection regulations[70] where it was obtaining user acceptance of new terms and conditions by using an in-app procedure and disproportionately accenting the need to accept those new terms and conditions. In addition to that it was providing insufficient information about the possibility to deny consent to sharing personal data from users’ WhatsApp accounts with Facebook.[71]

What is more, also profiling, which means

> any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements;[72]

if done in an inappropriate way could be seen as manipulative. Article 22 of the GDPR prohibits profiling if done solely by automated means, without a human involvement. However, the DMA introduces separate measures for addressing profiling.

[65] DMA (n 2), recital 37.

[66] Goanta and Santo (2023).

[67] Ibid.

[68] Data Protection Act n° 78-17 of 6 January 1978.

[69] CNIL (2022).

[70] “Codice del Consumo” (Consumer Code), Legislative Decree no. 206 of 6 September 2005.

[71] Case No. CV154: WhatsApp - Unfair Terms; <https://www.agcm.it/dotcmsDOC/allegati-news/CV154_vessestratto_omi.pdf> on 18 April 2020.

[72] Article 4, point (4), of Regulation (EU) 2016/679 (n 17).

In particular, the DMA mentions that transparency, as an important goal when it comes to dark patterns, must also be ensured in profiling practices that are employed by gatekeepers. Such a transparency will, according to the DMA, pressure gatekeepers against the use of deep consumer profiling, which is reserved for larger online platforms as smaller companies that are entering the market do not have access to data to the same extent and depth, and at a similar scale.[73] The minimum information gatekeepers should provide is e.g. which kind of profiling is performed, for which purpose, for how long, and how it affects the gatekeeper's services.[74] The DMA also vaguely mentions that some measures should be taken to make users more aware of the applicable use of such profiling, the ways their consent can be asked and how they could deny or withdraw consent.[75]

Article 15 of the DMA regulates audit of profiling and sets out an obligation where a designated gatekeeper has half a year to submit to the Commission 'an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services'.[76] This audited description will then be transmitted to the European Data Protection Board. However, the Commission may develop the procedure and methodology of audit in a separate implementing act.[77] An overview of an audited description should be made available by the gatekeeper in such a way that allows the company to protect its business secrets. This description and overview should be updated at least once a year.[78]

One problem that is connected to lessened autonomy is not the profiling per se or how it is done, but also the fact that users cannot affect how profiling is done, even with all the information available to them, due to e.g., information asymmetries etc. Therefore, firstly, what do users do with this information on profiling, will they understand it and use it in their decision-making? Secondly, users do not have any possibility to affect the outcomes of profiling, or to give any feedback on what is shown to them. For example, if cat videos are shown to me, can I give feedback on whether I am into cats or not? In a way profiling is already predetermined by our previous choices and preferences and we cannot affect the process anymore. The choice on what is shown as our preferences is however not entirely ours and is therefore biased. This is so as some design choices have been made already at the level of the dominant intermediary, e.g., that some kinds of content, some advertisements will be shown more than others etc. Moreover, some contents/advertisements are more popular than others and considered 'safe for everyone' with the result that users interested in niche products will not be accommodated. Therefore,

[73] Recital 72 DMA (n 2).

[74] Ibid.

[75] Ibid.

[76] Article 15, point 1 DMA (n 2).

[77] Article 15 DMA (n 2) points 1 and 2.

[78] Article 15 DMA (n 2) point 3.

we can identify multiple layers of how profiling is done, adding to this the nature of machine learning on how data learns in itself etc.

One important question that arises here is how should digital communication practitioners deal with targeted advertising campaigns, which might be intrinsically discriminatory (i.e. client asks for a product launch aimed at only wealthy, middle-age, western men)? Should digital agencies promote adopting and/or adhering to self-assessment guidelines and ethical codes of conduct on inclusion? It seems that data protection as enshrined in the GDPR is focusing only on a narrow aspect of autonomy, the right to privacy. However, autonomy as to one's presence in a digital world, e.g. what happens with my data after I consent to it to be gathered by a gatekeeper, goes well beyond data collection.

6 Recommendations

6.1 Increased Focus on Behavioural Factors

A large part of the loss of autonomy is due to behavioural factors, which are not addressed in the DMA to a sufficient extent. For example, it is estimated that in the US, 91% of users (out of 2000 that took part in the survey) consent to terms and conditions on how their data is collected without reading them.[79] This percentage was significantly higher (97%) for people aged 18–34.[80] Where the only model available to deal with platforms is contractual, users are left only with opt-in and opt-out options and consequently, their autonomy is limited. Behavioural aspects of consumers' behaviour are of crucial importance and could shape the boundaries of autonomy as a concept. However, acknowledging the biases and heuristics that users face in data collection cannot directly bestow more autonomy on users. Legislators need to limit how platforms prey on users' biases and heuristics.

Users face several biases and use mental shortcuts (known as "heuristics" in behavioural economics) as well as power and information asymmetries that significantly affect their autonomy as to data collection.[81] These biases and heuristics affect their rationality in decision-making online to a great extent and are taken advantage of by online platforms. Behavioural economics suggests reasons for limited user autonomy, which tends to be self-inflicted and derives from the irrationality of human behaviour. Empirical observations demonstrate that users do not always make optimal decisions, even if they are provided with information on how to make such a decision,[82] people are not perfectly rational.[83]

[79] Cakebread (2017).

[80] Ibid.

[81] See e.g. Mäihäniemi (2022).

[82] Witynski (2022).

[83] See e.g. Tversky and Kahnemann (1974).

These solutions are not, however, implemented in the DMA to a sufficient extent. Behavioural economics acknowledge that companies are smart and are willing to exploit the fact that consumers are not 'neoclassically rational' and in fact predictably deviate from this kind of rationality. What is very important is the fact that data gathering techniques, enormous computing power, and the amount of big data, has made it even more possible for online platforms to exploit users' behavior.[84]

6.2 Consent

Gatekeepers also have a large influence on legislation, which they are able to affect to a certain extent by lobbying, therefore, we could conclude that they have also been heavily involved in the creation of the mechanism of consent which gives power to online users to decide on their data. The consumer of the future is a meditated consumer, approaching the marketplace through technology designed by someone else. As a consequence, companies create a thorough track record of their transaction with the consumer and, importantly, personalize every feature of this interaction. This allows companies to identify how an individual consumer diverges from rational decision making and use it to benefit their business.[85]

In fact, the freedom to conduct a business[86] has a huge impact on legitimizing data collection by gatekeepers at EU and national level. As pointed out by Hiltunen, 'the freedom to conduct a business in Article 16 has helped in legitimizing, often if not always together with Articles 15 and 17, platform firms' rent-seeking business as the exercise of a fundamental right'.[87] This effectively sanctions and protects the firms' exclusionary control over platform design and governance processes.[88] The DMA goes one step further by requiring that gatekeepers should not be allowed to circumvent their designation by artificially segmenting, dividing, subdividing, fragmenting or splitting their core platform services to circumvent the quantitative thresholds laid down in this Regulation. Therefore, the anti-circumvention obligation that requires undertakings providing CPS (including gatekeepers) not to circumvent quantitative thresholds, engage in any behaviour undermining compliance, or alter CPS quality and conditions, could also support users' autonomy.[89]

In particular, the contractual 'notice and choice mechanism', where users can only 'opt in' or 'opt out', has a significantly negative impact on the level of autonomy of users. Even where consumers receive a consent notice or privacy policy which informs them about data collection, storage, and processing, they

[84] Currie (2015).

[85] Ben-Shahar (2019), pp. 1002–1003.

[86] Article 16 of the Charter of Fundamental Rights of the European Union (n 7).

[87] Hiltunen (2022), p. 1235.

[88] Ibid.

[89] Article 13(1), (4) and (6) DMA (n 2).

only have a choice to agree either directly or indirectly. In its request for a preliminary ruling the Dusseldorf Court of Appeals asks, among other questions, whether the consent given to an undertaking is given freely when the company it is given to is a dominant undertaking?[90] As pointed out earlier, the ECJ points out that

> the fact that the operator of an online social network holds a dominant position on the market for online social networks does not, as such, preclude the users of such a network from being able validly to consent, within the meaning of Article 4(11) of that regulation, to the processing of their personal data by that operator. This is nevertheless an important factor in determining whether the consent was in fact validly and, in particular, freely given, which it is for that operator to prove.[91]

Here, I agree with the ECJ and claim that consent can be seen as a root of manipulation, thanks to the power asymmetry users face as to dominant platforms and the binary choice of opt in and opt out only. However, it is unclear what an alternative to consent would be at the moment.

6.3 Is Legal Design an Answer?

Even if users were capable of making rational disclosure decisions, privacy policies' inability to adequately convey information means users are unable to do so in practice. Even where internet users care about their privacy, technology companies may pre-design their websites and services which in result will make it difficult for online users to ensure their preferences are taken into account. Therefore, large online platforms may pre-design their online environments so that they manipulate users into increased disclosure, taking advantage of a number of cognitive biases that lead to ceded control over our privacy. Users are manipulated to keep the data flowing, rational disclosure of data is only a myth, and our choices do not always reflect our personal preferences. Much of the manipulation is due to the use of the so-called 'dark patterns' in platform design.[92]

However, where gatekeepers design their interfaces by themselves, they could still manipulate users into certain behaviours. Where sludging end users is only forbidden with consent, obtaining such, by means of manipulation and coercion, gives gatekeepers a green light for further data gathering. Consent may therefore be weak and questionable and does not give full autonomy to a user. Is GDPR actually working the opposite way here - instead of giving autonomy to the user, is it taking it away?

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[90] Case C-252/21: Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 — Facebook Inc. and Others v Bundeskartellamt, question 6.

[91] Judgment (n 49), para 154.

[92] See Waldman (2020).

6.4 A Right to Autonomy as a Communication Right

A right to autonomy could also be qualified as a communication right in a broader sense and help to address the power asymmetry of gatekeepers, e.g. in the context of their role in dissemination of information, in preserving democracy and fundamental rights in the society. Communication rights such as the right to privacy, the right to global commons of knowledge, the right to the freedom of expression (including the right to receive and impart information), and the right to access information, are endangered due to the operation of a number of communication media (i.e. information intermediaries) such as Google, Facebook, Netflix.

These communication media base their business model on the operation of algorithms. These algorithms co-govern and co-determine what can be found on the Internet.[93] Algorithmic selection used by such media affects culture, knowledge, and norms and shapes the values that are to be promoted in the society.[94] Having a business model based on algorithms and the increased use of algorithmic selection by information intermediaries affects the possible breach of communication rights understood in a broader sense. Therefore, algorithmic selection could be the justification for limitations to communication rights by information intermediaries, whether or not the breach of these communication rights is the sole responsibility of the media itself.

A business model of an intermediary which is largely based on the need to gather data that feed into the algorithm and provide the much-needed context for the use of the algorithm as well as the novelty of an information intermediary should not in any way justify overrunning legal rights such as communication rights and social acceptability. Such rights should not be voluntarily traded for in return for free services offered by the communication media. As a society, there is a need to protect the fundamental rights of each human being and communication rights are slowly becoming fundamental on the Internet and not be bargained for.

7 Conclusions

There is a movement towards increased protection of Fundamental Rights in the digital environment in the EU. The recently published European Declaration on Digital Rights and Principles for the Digital Decade states that it 'is rooted in EU law, from the Treaties to the Charter of Fundamental Rights but also the case law of the Court of Justice.'[95] What is the impact of this policy document with a quasi-

[93] Just and Latzer (2017), p. 247.

[94] Ibid, 246.

[95] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Establishing a European Declaration on Digital rights and principles for the Digital Decade, Brussels, 26.1.2022 COM (2022) 27 final.

constitutional twist? How will it affect the already published legal regulations such as the DMA, the DSA and others? Do we need somehow more expressively stress fundamental rights in the digital world, explicitly state them in the regulation, or is the reference to them at the beginning of the text enough? Are the so-called old fundamental rights enough or do we need new digital rights? Moreover, at the moment some fundamental rights seem to have a larger influence in the EU than others. The freedom to conduct a business may need to be weighed against the right to human dignity. Similarly, the freedom of expression has to weighed against the right to privacy and the right to data protection.

In this chapter it has been argued that users' autonomy should be added to the list of digital fundamental rights. In particular, dominant intermediaries affect market forces in the way that is not easy to grasp by law, while they play an important role in our society, e.g. as to communication rights such as autonomy. The DMA attempts to capture that challenge to users' autonomy by imposing obligations that seemingly protect users' autonomy, such as acting against unfair data gathering, dark patterns and by auditing profiling. As has been shown in this chapter, these practices were firstly tackled by competition, consumer and data protection law, before they found their way into the DMA in the form of obligations or mentions in the preamble.

These measures are very welcome, however, where these obligations still rest on the legal concept of consent and users are given the option to decide for themselves, it seems like a dead end. Therefore, it is still unclear how, in practice, the DMA will address design interfaces and choices of algorithmic system designers.

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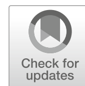
The Digital Markets Act and the Principle of *Ne Bis in Idem*: A Revolution in the Enforcement of EU Competition Law?



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Abstract This chapter will be discussing the development of the *ne bis in idem* principle and assessing whether its judicial interpretation and application in the last years can be said to constitute a revolution for the enforcement of EU competition law. The analysis will be divided into pre- and post-DMA litigation, starting from the creation of the principle of *ne bis in idem* in the interaction between the CJEU and ECtHR case law until after the adoption of the DMA with particular focus on two recent Grand Chamber cases of the CJEU: *bpos*t and *Nordzucker*. Our main argument is that the post-DMA case law constitutes a major shift in the application of the principle of *ne bis in idem* and will thus significantly contribute to the enforcement practices under the DMA in particular and EU competition law in general.

1 Introduction

The rise of digital technologies has changed our way of thinking and, perhaps even more significantly, what we used to think was possible.[1] In 2019, Crémer, de Montjoye and Schweitzer published their report 'Competition policy for the digital era', which was prompted by an assignment from Commissioner Vestager[2] to explore competition policy with regard to the digital age.[3] The conclusions were

[1] European Commission (2020).

[2] Commissioner Margrethe Vestager is Executive Vice-President for A Europe Fit for the Digital Age and Competition.

[3] Crémer et al. (2019), p. 2.

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ambivalent and drew attention to several benefits mixed with some apprehensions.[4] The European Union (EU) aims to make the digital technologies work for businesses and people by ensuring a 'Europe fit for the digital age'.[5] Adapting to the digital age is one of the European Commission's (Commission) priorities for 2019–2024.[6] As part of the EU's wider digital agenda[7] and together with its twin regulation the Digital Services Act (DSA),[8] the Digital Markets Act (DMA) is aimed at ending the negative connotations of a notoriously under-regulated and economically motivated internet, while at the same time paving the way for European regulatory leadership in the digital sphere with a particular focus on establishing a level-playing field in the Digital Single Market.[9] In a nutshell, it serves as a tool to ensure fair and open digital markets.[10] The DMA was adopted in the autumn of 2022 and has applied since 2 May 2023.[11] Originally, the DMA was part of the DSA package presented in 2019,[12] before being split into two and introduced as separate legal instruments. Indeed, from a competition law perspective, the provisions under the DMA cannot be viewed in isolation but must be considered in conjunction with its twin regulation, the DSA.

Following the entry into force of the DMA, as well as during the process of its adoption, concerns have risen regarding the new regulation's similarities with the competition rules and the interaction between the two set of instruments when it comes to enforcement. According to Regulation 1/2003,[13] it is possible to have

[4] Ibid, p 12. such as the fear that a few platforms will dominate the economy and that the digital sector will favour the growth of such platforms.

[5] European Commission, *A Europe fit for the digital age*, <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en>.

[6] Von der Leyen (2019).

[7] European Commission (2020) 'A European Strategy for Data', COM(2020) 66 final. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions '2030 Digital Compass: the European Way for the Digital Decade', COM/2021/118 final.

[8] Regulation (EU) 2022/2065, of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[9] 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).

[10] European Commission (2019).

[11] See Article 54 DMA. The DMA applies to gatekeepers that provide core platform services. See also Article 1(2) DMA and Article 3(1) DMA. Gatekeepers are defined as undertakings that have a significant impact on the internal market, provide a core platform service and have an entrenched and durable position. The Commission may impose fines on the non-compliant gatekeeper according to Article 26 or other periodic penalty payments according to Article 27 of the DMA.

[12] Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ 2019 L 186, p. 57.

[13] 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.

parallel proceedings in competition law.[14] It is also possible to have parallel proceedings with Article 101 and Article 102 TFEU according to the DMA.[15] The relationship between the competition rules and the DMA is, however, not thoroughly explained in the DMA. Moreover, an important difference is that contrary to the enforcement of Article 101 and Article 102 TFEU,[16] the DMA follows an *ex-ante* approach.[17] Yet, when enforcement occurs under the provisions of competition law as well as the DMA, the enforcers must respect EU fundamental rights.[18] The DMA has the potential to transform the application of EU fundamental rights in the digital sphere.[19] One of the fundamental rights in the EU is the right not to be prosecuted twice for the same offence, which is enshrined in Article 50 of the EU Charter of Fundamental Rights (EUCFR). This right is known as the principle of *ne bis in idem* which translates literally from Latin to 'not twice about the same'.[20] The principle of *ne bis in idem* has a long history,[21] as it constitutes a 'fundamental principle of the European legal culture'[22] and can be found in several international law instruments as well as in almost every domestic legal order.[23]

A point of contention, however, remains the application of the principle of *ne bis in idem* in the enforcement of the DMA and the competition rules.[24] It has been discussed whether the two set of instruments are of such a resemblance that it will make the principle of *ne bis in idem* applicable.[25] Due to these existing concerns and new case law from the CJEU, it is of interest to examine how the *ne bis in idem* principle is enforced in EU competition law and if the principle would be applicable on the relationship between the competition rules and the DMA. The *ne bis in idem*

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[14] See Recital 22 of Regulation 1/2003; Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72, paras 81 and 82.

[15] See Recitals 9 and 10 of the DMA.

[16] Ibid as to the relationship between the DMA and Articles 101 and 102 TFEU. See for the application of competition law principles to DMA; Gerbrandy (2020), pp. 309–310; Crémer et al. (2019), p. 3. See also Case T-612/17, *Google Alphabet v Commission (Google Shopping)*, EU:T:2021:763. The existence of dominant positions in the digital market have also resulted in new forms of abuse.

[17] See Recitals 8, 73 and 76 of the DMA.

[18] See Article 51 of the Charter.

[19] Engel and Groussot (2022), p. 2.

[20] Geiß and Bäumler (2022) para 2.

[21] Ibid. Demosthenes reasoned in circa 355 BC that 'the laws forbid the same man to be tried twice on the same issue'.

[22] See dissenting Opinion of Judge Pinto de Albuquerque in *A and B* v *Norge* (Applications nos. 24130/11 and 29758/11), p. 91.

[23] See e.g. Article 14(7) of the 1966 International Covenant on Civil and Political Rights and Article 20 of the Statute of the International Criminal Court; Van Bockel (2010), pp. 2 and 10; Geiß and Bäumler (2022) para 2.

[24] See Recital 86 of DMA.

[25] See e.g. Andreangeli (2022); Harrison et al. (2022); Cappai and Colangelo (2023).

principle was initially aimed at sanctions that are 'purely criminal'.[26] However, the CJEU has developed the application of the principle in the field of competition law in its case law[27] and the CJEU now finds the *ne bis in idem* principle fully applicable in competition law cases.[28] Nevertheless, the case law regarding the *idem* criteria in competition law has been considered by the doctrine in a less clear and precise manner compared to case law in other areas of law.[29] It can be noted that during many decades the CJEU has resisted the application of the ECtHR case law on *ne bis in idem principle* in competition law cases since it has not found the criteria for the application of the principle to be fulfilled.[30] This approach was often criticized by Advocate Generals and legal scholars. On 22 March 2022, the CJEU delivered two judgments that fundamentally altered the principle's application in competition law.[31] From the new case law, it follows that the objectives of competition rules and the DMA will be of great importance when determining if there has been a violation of the *ne bis in idem* principle. If competition rules and the DMA pursue different objectives, a limitation of the *ne bis in idem* principle may be justified in accordance with Article 52(1) of the Charter. However, if they pursue the same objective, a limitation can be difficult to justified.

This chapter will be divided into two sections, each of which will be divided into two sub-sections. First, we will study the development of the *ne bis in idem* principle before the adoption of the DMA in the case law of the European Courts by looking in particular to the creation of the principle in the interaction between the CJEU and ECtHR case law (Sect. 2.1) and then by focusing on the impact of the EUCFR in moulding the principle (Sect. 2.2). Second, we will analyse the development of the principle after the adoption of the DMA, where we will specifically be looking at its implication for the enforcement of EU law and EU antitrust law. In this section, we will look at two recent Grand Chamber cases of the CJEU: *bpos*t and *Nordzucker* (Sect. 3.1) and we will discuss the potential impact of the *ne bis in idem* principle on the enforcement of the DMA and competition law (Sect. 3.2). The main thread of the chapter is to assess whether the development of the *ne bis in idem* principle in the last years can be said to constitute a revolution for the enforcement of EU law and EU competition law.

[26] Devroe (2013), p. 404.

[27] See e.g. Case 14/68, *Walt Wilhelm and others v Bundeskartellamt*, EU:C:1969:4, Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV and Others v Commission (LVM),* EU:C:2002:582, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6 and Case C-17/10, *Toshiba Corporation and Others*.

[28] Devroe (2013), p. 404.

[29] Van Bockel (2010), pp. 41 and 233.

[30] See e.g. Case C-17/10, *Toshiba Corporation and Others*; Devroe (2013), p. 404.

[31] Case C-117/20, *bpost*, EU:C:2022:202 and Case C-151/20, *Nordzucker and Others*, EU:C:2022:203.

2 The Ne Bis in Idem Principle Before the Digital Markets Act

In the preliminary steps of this inquiry, it is important to look on how the *ne bis in idem* principle has been interpreted in the CJEU case law before the entry into force of the DMA. This stage of the process is marked by a complex relationship with ECHR case law. This is so in particular for the application of the principle in the field of competition law. We will then look at the effect of the EUCFR and Article 50 which codifies the *ne bis in idem* principle. This codification has tremendously impacted on the application of the principle in both EU and ECHR law.

2.1 The Genesis of Ne Bis in Idem

Ne bis in idem has a long and complex history in the CJEU case law. Already in *Gutman* (1965), a staff case, the Court of Justice recognised the existence of *ne bis in idem*.[32] In this ruling, the applicant complained that two decisions, which ordered a fresh disciplinary inquiry to be held concerning him, violated the principle *ne bis in idem.* The Court found a violation by stating that neither in the terms of the contested decision nor in the items in the file submitted to it has the Court been able to find any assurance that the principle of *ne bis in idem* had been respected. The application of the principle of *ne bis in idem* spilled-over in the context of competition law with the judgment in *Walt Wilhelm* (1969) which concerns the parallel application of Community (now EU) competition rules and those of the national authorities.[33] The Court stated that the acceptability of a dual procedure which can result in concurrent sanctions follows from the special system of the sharing of jurisdiction between the Community and the Member States with regard to cartels.[34] However, in the case of consecutive sanctions (and the Court saw no means of avoiding such a possibility in the general principles of Community law) it is required that any previous punitive decision must be taken into account in determining any sanction which was to be imposed.[35] In support of this, the Court did not refer explicitly to the *ne bis in idem*

[32] Joined Cases C-18 and 35/65 *Gutman* ECLI:EU:C:1966:24.

[33] Case C-14/68 *Walt Wilhelm and others v. Bundeskartellamt* ECLI:EU:C:1969:4.

[34] Wils (2003), pp. 136 and 143. When considering this case, it is important to keep in mind that at that time the Commission had a monopoly on enforcing the EC Competition rules in cases that affected trade between Member States. This was during the time of the old situation under Regulation No. 17/62. Back then, the Member States only rarely prosecuted infringements under EU law, but rather applied only their national Competition law. Thus, the reasoning of the CJEU in this case is built on the fact that EC Competition law and national competition laws pursued different ends and in that sense protected different legal interests. See *contra* case *Toshiba* (n 14).

[35] Íbid., para. 11.

principle, but instead relied on a more general concept of "natural justice".[36] These two cases are significant in order to understand the position of the Court of Justice towards *ne bis in idem*.[37] The principle can be summarized as protecting individuals and undertakings against the duplication of proceedings and sanctions.[38] The *ne bis in idem* principle is intended to guarantee the proper administration of justice and to protect the individual's private sphere[39] and it is considered to contribute to efficient law enforcement in that it prevents over-punishment, prevents vexatious multiple prosecutions and creates incentives for proficient coordination between prosecutors.[40] Thus, *ne bis in idem* can also be seen as reducing costs, both for society and the individual.[41] In addition, it is conceptually linked with strength to the meta-principles of legality[42] and legal certainty[43] as well as to *res judicata*.[44] When establishing if there has been a violation of the *ne bis in idem* principle, two elements are of importance: (i) 'whether there is a *second trial or second punishment*' (*bis*) and (ii) 'whether the facts are *the same*?' (*idem*). Van Bockel has rightly stated that

[36] The Court's reference to a "general requirement of natural justice" in para. 11 may be seen to correspond with the argument of AG Cruz Villalón in Case C-617/10, *Åkerberg Fransson* ECLI:EU:C:2013:105, para. 95, where he states that the principle of proportionality, and the principle of the prohibition of arbitrariness, preclude a criminal court from exercising jurisdiction in a way which completely disregards the fact that the facts before it have already been the subject of an administrative penalty.

[37] In that respect, the CJEU made an implicit reference in one case and referred to the principle of *ne bis in idem* in the other. However, there is no explicit reliance to a 'general principle' of Community law that might have reflected a consensus between the laws of the Member States. This is in fact not surprising since the first (laconic) reference to the 'general principles of Community law' was made the same year as *Walt Wilhelm* in *Stauder* (1969). At this stage, there was no methodology associated to the recognition and elaboration of the general principles.

[38] Van Bockel (2010), p. 2. The principle of *ne bis in idem* protects the defendant against being prosecuted more than once for the same act, facts, or offence.

[39] Di Federico (2011), p. 243.

[40] Wils (2003), p. 136.

[41] Van Bockel (2010), p. 27 et seq.; see also Van Bockel (2016), p. 13. The authorities have only one chance for the proceeding, resulting in a sanction against any occurring negligence from the authorities. The risk of being wrongfully convicted increases with multiple proceedings. Furthermore, multiple proceedings can be expensive.

[42] Ibid Van Bockel (2010), p. 25 and 27; Van Bockel (2016), p. 13. *Ne bis in idem* plays an important part in the upholding of the principle of *legality*, meaning prosecution must be based on pre-existing legislation. The principle of legality would be just an illusion if a defendant could continually be troubled for various aspects of the same act, facts or offence.

[43] Ibid Van Bockel (2010), p. 25 et seq.; Van Bockel (2016), p. 13 et seq. According to Van Bockel, assuring legal certainty is an important and self-evident *rationale*.

[44] Ibid Van Bockel (2010), p. 27; Van Bockel (2016), p. 13. In order for the state's legitimacy not to be undermined, *res judicata*, the finality of judgments, must be respected and upheld. See also Turmo (2022) 41 et seq. *Res judicata* prevents final judgments from being called into question and a new judgment with a different outcome compared to the first one being decided. With its prohibition on double punishment, the *ne bis in idem* principle goes further than *res judicata.*

determining the *idem* criteria has been more difficult than determining the *bis* criteria.[45] The determination of the 'idem' is particularly complex in a multi-level constitutional system such as the EU where encroachment on the principle can occur not only in internal situations (where parallel proceedings can be started) but also in cross-border situations (where proceedings can be started by national authorities between Member States) and with a possible involvement of the European Commission (which can e.g. impose fines on undertakings).

To add to this inherent complexity, the *ne bis in idem* principle is protected under ECHR law through specifically Article 4 of Protocol 7 of the ECHR and, more broadly, by the right to a fair hearing under Article 6 and 13 ECHR.[46] As explained elsewhere, the interpretation of the Protocol has always been uneasy due to the absence of a full ratification of this text (whole text or specifically Article 4)[47] by all the States of the Council of Europe.[48] In order for Article 4 of Protocol 7, the proceedings or sanctions must be of a 'criminal nature'. A three-pronged test has been specifically designed by the ECtHR in *Engel and Others v The Netherlands.*[49] Firstly, as a starting point, the legal definition of the offence under national law is considered. Secondly, the very nature of the offence is examined. This factor is of greater importance than the national legal definition of the offence (i.e. whether it belongs to criminal law or disciplinary law). Thirdly, the degree of severity of the penalty that the person risks incurring is taken into consideration. The last two criteria have led the ECtHR to consider that administrative proceedings and administrative sanctions at national level can be of a 'criminal nature'.

In *Engel and Others* v. *the Netherlands*,[50] the ECtHR stated that in determining the real nature of a conduct one should look not only at the legal qualification of the offence under the internal law of a given State, but also at the nature of the act, together with the repressive and deterring character of the penalty, and the type and the degree of affliction (severity) of the penalty for which a given individual is liable.[51] In the application of these criteria, the ECtHR has thus attributed a greater importance to the second and third criterion which eventually outweighed the first criterion, i.e. the formal classification of the act under national law.[52] Yet, this interpretation was complexified by the fact that it was not applied in a systematic manner by the ECtHR. However, it is important to underline that the *Zolothukin* v. *Russia* case delivered by the Grand Chamber of the ECtHR in 2009 has eventually

[45] Ibid, p. 41.

[46] Van Bockel (2010), p. 27. Van Bockel has stated that it could be argued that a court cannot be impartial unless its decisions are binding also on other courts as well as other organs of the state.

[47] See AG Cruz-Villalón in *Åkerberg Fransson* (n 36). See Groussot and Ericsson (2016), p. 53.

[48] Ibid.

[49] *Engel and Others v The Netherlands*, App 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, judgment of 8 June 1976 (cit. *Engel and Others v The Netherlands*).

[50] ECtHR: App. 5100/71, *Engel and Others* v. *the Netherlands*. Judgment delivered on 8 June 1976.

[51] Ibid., para. 82.

[52] Rosiak (2012), p. 116. Available at http://www.yars.wz.uw.edu.pl.

united the definition of the *'idem' in the ECtHR case law*.[53] Interestingly, the reasoning of this case as to the definition of the *'idem'* element, that is based on the identity of the material acts or factual situation irrespective of the legal classification under national law, is clearly inspired by Article 54 of the Convention Implementing Schengen Agreement (CISA)[54] and the related interpretative case law of the CJEU, e.g. *Van Esbroeck* and *Van Straaten*.[55] Article 54 CISA in contrast to Article 4 of Protocol 7 of the ECHR, only concerns a prohibition of double prosecution and has a cross-border application.

Two other cases of the ECtHR are also crucial to mention for the purpose of this chapter: *Menarini* v. *Italy*,[56] and *A and B* v. *Norway.*[57] *In Menarini Diagnostics S.R.L. v Italy*, the ECtHR found that a fine imposed under competition law was a criminal penalty resulting in the applicability of Article 6(1) of the ECHR.[58] This explicit finding sharply contrasts with the CJEU law in competition law proceedings as we will study in detail in the next section. The CJEU avoided mentioning the *Engel* criteria in major judgments that followed *Menarini*.[59] In *A and B* v. *Norway,* the ECtHR provided and extensive reasoning[60] as to both the interpretation of the *bis* element and to the proportionality of the interference by the public authorities (by looking at whether the duplication of proceedings is limited to what is strictly necessary).[61] It appears that a sufficiently close connection in substance and in time between the two sets of proceedings is required to render the duplication of proceedings strictly necessary.[62] In case it is found strictly necessary, the ECtHR will consider the absence of completion of the *bis* criterion and thus will conclude to the

[53] See Application no. 14939/03 *Zolotukin,* 10 April 2009, paras 78–84.

[54] See Article 54 CISA, "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party". The CISA was elaborated between the 12 Member States of the EC. 9 Sates ratified the Convention. [not ratified by Greece, Luxembourg and the UK, and reservation by Netherlands]. This Convention deals with the *ne bis in idem* principle in a transnational setting in the EC. The Convention has been poorly ratified. See Vervaele (2013), p. 212.

[55] See Case C-436/04 *Van Esbroeck* EU:C:2006:165 and C-150/05 *Van Straaten* EU:C:2006:614.

[56] *A. Menarini Diagonstics S.R.L. v Italy*, Judgment of 27 September 2011, Application no 43509/08.

[57] See *A and B* v *Norway* (n 22).

[58] Ibid.

[59] Case C-386/10 P, *Chalkor v Commission*, EU:C:2011:815; Case C-272/09 P, *KME v Commission*, EU:C:2011:810 and Case C-389/10 P, *KME v Commission*, EU:C:2011:816; See H Andersson, *Dawn Raids under Challenge: A Study of the European Commission's Dawn Raid Practices in Competition Cases from a Fundamental Rights Perspective* (2017), p. 175 et seq.

[60] See *A and B* v *Norway* (n 22), paras 120–132.

[61] Ibid.

[62] Ibid para 130.

non-violation of Article 4 of Protocol 7. This case has led to a considerable number of criticisms that we will discuss later in more detail.[63] Furthermore, A *and B* v. *Norway* is a noticeable case since the ECtHR mentioned the *Åkerberg* case law of the CJEU on *ne bis in idem*. This Grand Chamber case of the CJEU that concerned a duplication of tax and criminal penalties (implicitly), relied on the three-pronged test established by the ECtHR in *Engel* and considered that the proportionality evaluation of the duplication of penalties should be realised by the national court.[64] As we shall see in the next section, the reasoning of this case differs from the CJEU case law on *ne bis in idem* in the field of competition law and has influenced the reasoning of the ECtHR. The EU Charter of Fundamental Rights appears to be central to the understanding of both the CJEU logic in *Åkerberg* and the complicated relationship between the CJEU and ECtHR case law.

2.2 *The Effect of Article 50 of the EU Charter: Fiat Carta Et Facta Est Carta*

In this section, we consider that the adoption and entry into force of the EU Charter has changed the previous momentum described in Sect. 2.1 regarding the application of *ne bis in idem* in the ECHR and EU legal orders, and notably the non-application of the ECtHR case law in the context of EU competition law. As we shall see, the EUCFR has paved the way to a radical shift in the CJEU case law by affecting the ECtHR case law in the first place. Arguably, this shift is dictated not so much by the substantive provisions of the EUCFR (Article 50 EUCFR in particular) but mostly by its horizontal provisions, notably Article 52(1) and 52(3) EUCFR. We will now examine Article 50 EUCFR before turning to the impact of the horizontal provisions.

The principle of *ne bis in idem* is enshrined in Article 50 of the binding EUCFR—an instrument mirroring the highest level of consensus between the Member States of the Union. According to Article 50 EUCFR, “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law”. Similarly, to Article 4 of Protocol 7 to the ECHR, this provision protects

[63] See e.g. Turmo (2020).

[64] See *Åkerberg* (n 36) paras 35 and 36. The CJEU made reference in para 35 to C-489/10, *Bonda*, EU:C:2012:319, para 37. In para 36, it relied on its case on proportionality of penalties, see e.g. Case C-326/88 *Hansen* EU:C:1990:291 para 17; Case C-167/01 *Inspire Art* ECLI:EU:C:2003:512 para 62 and C-403/02 *Berlusconi and Others* EU:C:2005:270 para 65.

the individual against both double prosecution and double punishment.[65] Nevertheless, in contrast to the Protocol 7, its scope is wider since it covers not only internal situations but also cross-border situations as envisaged under Article 54 CISA.[66] Two years after the adoption of the EU Charter, the CJEU made clear in *LVM* that 'the principle of *ne bis in idem* [. . .] is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR'.[67]

After the entry into force of the EUCFR, the CJEU delivered two Grand Chamber cases, namely *Toshiba* (2012) and *Åkerberg* (2013)[68] as to the application of *ne bis in idem* in EU law in respectively EU competition law and EU tax law. The first, *Toshiba*, a competition case concerned the application of Regulation 1/2003, which under its recital 37 clearly links its application and interpretation to the EUCFR. In sharp contrast to its previous case law, where it methodically referred to Article 4 of Protocol No 7 to the ECHR and contrary to Opinion of Advocate General Kokott which insisted on the need for uniform interpretation of EU and ECHR law, the CJEU dropped the reference to the ECHR. As rightly put by Devroe, "the explanation for the deletion of the reference to the ECHR cannot possibly be a desire to 'update' fundamental rights protection from the ECHR to the Charter as indeed any

[65] See *Explanations of the Charter*, ABl 2007 C 303/31; Council of the EU, *Charter of Fundamental Rights of the European Union – Explanations relating to the complete text of the Charter* (December 2000), available at http://ue.eu.int/df/docs/en/EN_2001_1023.pdf. This memorandum is expressed to 'have no legal value' and is 'simply intended to clarify the provisions of the Charter'.

[66] This interpretation is confirmed by the non-binding legal explanations. Explanations to Article 50 CFR in *Explanations Relating to the Charter of Fundamental Rights* (OJ C 303, 14.12.2007, pp. 17–35). that states that, "the "non bis in idem" principle applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the acquis in Union law; see Articles 54 to 58 of the Schengen Convention, Article 7 of the Convention on the Protection of the European Communities' Financial Interests and Article 10 of the Convention on the fight against corruption. The very limited exceptions in those Conventions permitting the Member States to derogate from the "non bis in idem" principle are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations". Going further, the legal explanations emphasizes that concerning the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR. This means that Article 50 EUCFR when it applies in the so-called 'internal situation' (application within the same Member State) should respect the ECHR case-law in the light of Article 52(3) EUCFR which regulates the relationship between the EU and ECHR legal orders or what we can call the '*the Law between the legal orders'*.

[67] See C-238,244,245,247,250-252,254/99 *P Limburges Vinyl Maatschappij (LVM) v Commission* EU:C:2002:582 para 59, the CJEU has confirmed that 'the principle of *non bis in idem* [. . .] is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR'. See also C-289/04 *P Showa Denko* EU:C:2006:431, para. 50, "it should be noted that . . . the principle of ne bis in idem constitutes a fundamental principle of Union law".

[68] See *Åkerberg* (n 36).

mention of Article 50 EUCFR is equally lacking in the *Toshiba* judgment. The Charter is mentioned in relation to the *lex mitius* principle,[69] which makes its absence in relation to *ne bis in idem* even more striking".[70] The *Toshiba* case also confirmed the application of the test of the *idem factum* relied in previous competition law cases.[71]

In *Åkerberg*, a tax case concerning an 'internal application' of *ne bis in idem* and the practise of double-track enforcement system, the CJEU did again not refer to the ECHR and its case law.[72] The Opinion of Advocate General Cruz Villalón is instructive here and thus necessitates scrutiny. As to the scope of application of Article 50 EUCFR *en préliminaire*, the AG believed the Court of Justice did not have jurisdiction to give a ruling on the substance of the case since it should be considered to fall outside of the scope of EU law. However, he decided to propose an answer to the preliminary questions made, for the court to refer to if it did decide to rule on the issue. He first investigated Article 4 of Protocol No 7 to the ECHR and the relevant case law of the ECtHR and pointed out that there had been considerable lack of agreement between the Member States of the EU regarding the problems resulting from the imposition of both administrative and criminal penalties in respect of the same offence. He finds this lack of agreement to be clearly revealed in the fact that not all Member States have been willing to ratify Protocol No 7 to the ECHR, while some have done so with reservations to the application and interpretation of Article 4 of the Protocol.[73] The Advocate General traced the lack of agreement back to the importance of measures imposing administrative penalties in a large number of Member States, in addition to the special significance also afforded to criminal prosecution and penalties. According to him, the twofold interest in maintaining a dual—administrative and criminal—power to punish explained why many Member States are holding on to this dual system even though the case-law of the ECtHR has developed in a direction which practically excludes that duality.[74]

When looking into the ECtHR case law, the Advocate General shows that, at the moment, Article 4 of Protocol No 7 to the ECHR precludes measures for the imposition of both administrative and criminal penalties in respect of the same acts, thereby preventing the commencement of a second set of proceedings, whether administrative or criminal, when the first penalty has become final.[75] After having established the meaning of the *ne bis in idem* principle in the context of Article 4 of Protocol No 7 to the ECHR, the Advocate General proceeded to look at the *ne bis in idem* principle in Union law, that is Article 50 EUCFR, and its interpretation in the light of Article 4 of Protocol No 7 to the ECHR. The AG maintained that notice must

[69] See *Toshiba* (n 14) para 64.

[70] See Devroe (2013), pp. 105–107.

[71] See Cappai and Colangelo (2023), p. 455.

[72] See *Åkerberg (*n 36).

[73] Ibid., para. 68.

[74] Ibid., para. 74.

[75] Ibid., para. 79.

be taken to the fact that the *ne bis in idem* principle is not guaranteed in the same way as other core principles of the ECHR are guaranteed and bind all Member States.[76] He then pointed out that in *Åkerberg* a lack of agreement concerning an ECHR right clashes with the widespread existence and established nature of the principle in the Member States, in which both an administrative and a criminal penalty may be imposed in respect of the same offence. This could even be described as a common constitutional tradition of the Member States. The view of the Advocate General is thus that Article 50 EUCFR calls for a partially autonomous interpretation. In addition, regard must be had to the current state of the case law of the ECHR, but the CJEU must independently interpret Article 50 of the Charter, basing its interpretation exclusively on the wording and scope of the provision itself.[77]

In the judgment in *Åkerberg,* and similarly to *Toshiba,* the CJEU dropped again the reference to the ECHR case law. It is contended that this reflects a deliberate choice of the Luxembourg judges. According to Devroe,

> [s]ome may have believed that the deletion of a reference to the ECHR was a one-time '*accident de parcours*'. However, the recent *Fransson* [Åkerberg] judgment of the ECJ proves otherwise. It confirms - unfortunately again only implicitly - that the deletion of a reference to the ECHR very much translates as a deliberate choice of the ECJ. The ECJ is no longer willing to interpret the EU *ne bis in idem* requirement in Article 50 of the Charter in conformity with the ECHR's *ne bis in idem* requirement as interpreted in *Zolotukhin*. From now on, it seems that the EU and ECHR *ne bis in idem* principles will diverge in large areas of the law.[78]

If this is true, it means that there is no obligation to interpret Article 50 of the Charter in conformity with Article 4 Protocol No 7 ECHR and its related case law. In the end, it appears that, after the entry into force of the EUCFR and its incorporation in its Article 50, the principle of *ne bis in idem* can certainly be viewed as a fundamental principle of the EU legal order. Yet, this incorporation does not lead to a uniform interpretation in EU laws but instead reinforces its autonomous character towards the ECHR legal order. This autonomous interpretation of *ne bis in idem* clashes in our view with the so-called 'homogeneity clause' enshrined in Article 52(3) EUCFR which imposes an obligation to respect the ECtHR case law when the rights are corresponding between the Charter and the ECHR, which is the case in relation to Article 50 EUCFR and Article 4 of Protocol No 7.

However, the *Åkerberg* ruling, though silent as to the application of the ECtHR case law, added another crucial piece to the *ne bis in idem* jigsaw when it referred to the *Bonda* case and to the need to make sure that the duplication of penalties is 'effective, proportionate and dissuasive'. Concerning *Bonda,* the CJEU explicitly

[76] Ibid., para. 84.

[77] Ibid., paras. 86–87. The AG then goes on to discuss Article 50 of the Charter and the imposition of both an administrative and a criminal penalty for the same offence. With support of the established case-law of the Court of Justice on the *ne bis in idem* principle, the AG finds that the tax surcharge of the case indeed represents a substantive criminal penalty and that the acts being penalized in the case were indeed 'same acts' within the meaning of *ne bis in idem.*

[78] See Devroe (2013).

referred to the *Engel* criteria[79] and has, as we shall see in Sect. 3, later referred to the *Bonda* case instead of the *Engel* case.[80] This shows that the CJEU respects Article 52(3) EUCFR, though this logic does not extend to competition law and the *Toshiba* ruling. Concerning the duplication of penalties, it appears here that the CJEU introduces a proportionality assessment in evaluating the potential breach of Article 50 EUCFR as required by Article 52(1) EUCFR. Though the CJEU does not explicitly rely on Article 52(1) EUCFR in *Åkerberg*, the case law post-*Åkerberg* such as *Menci*, *Garlsson* and *Di Puma*[81] has integrated such an analysis within the framework of Article 52(1) EUCFR.[82] Such an integration of proportionality is logical if one considers the place of Article 52(1) EUCFR which acts as a general derogation clause to the non-absolute rights enshrined in the EUCFR. The situation is obviously different in the ECHR context, where the derogations clauses are specific to the provisions of the ECHR, and where Article 4 of Protocol 7 has no specific derogation clause directly associated to its enforcement.

In that sense, the *A and B* v *Norway* case delivered after *Åkerberg* confirms the systemic distinction between the EU and ECHR systems by partially rejecting the 'principled approach' of the CJEU (based on justification and proportionality) in considering that a system of double-track enforcement is contrary to ECHR law when two sets of proceedings are 'sufficiently closely connected in substance and time'. In doing so, the ECtHR recognised the importance of proportionality but 'administers' the existence of the breach within the '*bis'* criteria.[83] In other words, it must be shown that the two sets of proceedings

> have been combined in an integrated manner so as to form a coherent whole. This implies not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected.[84]

It is undeniable that this approach differs from the *Åkerberg* approach since the ECtHR does not rely on proportionality to justify the interference to the principle of double jeopardy.[85] However, it is also plausible to argue that the case law of both courts is converging due to the importance given to the principle of proportionality

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[79] See Case C-489/10, *Bonda*, EU:C:2012:319, para 37.

[80] See e.g. *Åkerberg* (n 36), para. 35 and *bpost* (n 31) para. 25.

[81] See Case C-524/15 *Menci* EU:C:2018:197; Case C-537/16 *Garlsson Real Estate* EU:C:2018:193 and Joined Cases C-596/16 and C-597/16 *Di Puma* EU:C:2018:192.

[82] See Lasagni and Mirandola (2019), p. 126.

[83] See *A and B* v *Norway* (n 22) para 130, "Article 4 of Protocol No. 7 does not exclude the conduct of dual sets of proceedings, even to their term, provided that certain conditions are fulfilled. In particular, for the Court to be satisfied that there is no duplication ("*bis*") of trial or punishment as proscribed by Article 4 of Protocol No. 7, the respondent State must demonstrate convincingly that the dual sets of proceedings in question have been sufficiently closely connected in substance and in time".

[84] Ibid.

[85] See Turmo (2020), p. 1356. This case shows the limits of f constitutional pluralism in Europe.

in their reasonings. To us, the ECtHR tried to accommodate the CJEU approach as to *ne bis in idem* and thus also recognized the prominence of the EU Charter in its adjudication. Subsequent case law of the ECtHR has confirmed this new interpretation of *ne bis in idem*.[86] More recently, in March 2022, the CJEU incorporated the test of 'sufficiently closely connected in substance and time' *('SCCST test')* within its *ne bis in idem* case law and, notably, within its EU competition law jurisprudence. This is a revolution in terms of convergence and cross-fertilization of the EU and ECHR systems.

3 Ne Bis in Idem After the Digital Markets Act

Following the adoption of the DMA, two seminal cases of the CJEU have seriously impacted the application of the *ne bis in idem* principle in EU competition law. In this section, we study in detail these two cases (Sect. 3.1) before assessing whether these cases can radically change the way in which EU law and EU competition law is enforced (Sect. 3.2).

3.1 An Analysis of the Jurisprudential Revolution

On 22 March 2022 the CJEU delivered two Grand Chamber judgments regarding the *ne bis in idem* principle in EU competition law, *bpost*[87] and *Nordzucker*.[88] In a nutshell, the CJEU overruled its previous case law[89] and unified the application of Article 50 EUCFR by relying on ECHR case law and on the reasoning used in *Menci*.[90] The latter case concerned criminal proceedings brought for non-payment of VAT for which an administrative penalty was imposed to the defendant.[91] In order to assess whether the proceedings and penalties are of criminal nature, the CJEU will now look at the *Engel* criteria described in the previous section and this even in the field of EU competition law.[92] We shall have a more in-depth look at *bpost* and *Nordsucke*r, since these two cases deal with the application of competition law and *ne bis in idem* in the duplication of proceedings. *In bpost*, a Belgian case, an abuse of dominant position under Article 102 TFEU led to a conflict of interpretation between

[86] See *A and B* v *Norway* (n 22).

[87] See *bpos*t (n 31) para. 25; and *Nordzucker* (n 31), para 30.

[88] Ibid *Nordzucker.*

[89] See Turmo (2022), p. 43.

[90] See *Menci* (n 81).

[91] Ibid. See also Case C-489/10*, Bonda* EU:C:2012:319 paras 33 and 37. *Bonda* is mentioned in *Åkerberg* (n 36) para 35.

[92] See Brammer (2009), p. 347; Andersson (2017), p. 174.

the National Competition Authority (NCA) and the Court of Appeal of Brussels. In *Norducker*, the case involved the application of *ne bis in idem* in relation to leniency programs adopted in *Austria* and *Germany* and the interpretation of Article 101 TFEU.

In 2010, bpost, a postal services provider in Belgium, adopted a new tariff system which was found to be discriminatory in relation to the rules on tariffs by the Postal Regulator. The decision was annulled by the Court of Appeal of Brussels and the judgment became final. During this time, the Belgian NCA adopted a decision stating that bpost had abused its dominant position by adopting the new tariff system. When calculating the fine, the NCA considered the fine previously imposed by the Postal Regulator. The Court of Appeal of Brussels annulled the NCA's decision because the court found it to be an infringement of the *ne bis in idem* principle.[93] The Court of Cassation in Belgium referred the case back to the Court of Appeal of Brussels who requested a preliminary ruling from the CJEU.[94]

The CJEU started by acknowledging that the *ne bis in idem* principle is a fundamental principle of EU law that can it be found in Article 50 of the Charter. Thereafter, the CJEU stated that Article 50 of the Charter contains a right corresponding with the right provided in Article 4 of Protocol No 7 to the ECHR. According to Article 52(3) of the Charter, the meaning and scope of rights in the Charter shall be the same as the rights in the ECHR provided that these rights are corresponding. The CJEU further considered that it is therefore necessary to take account of the ECHR when interpreting the Charter.[95] When determining the meaning of 'criminal', the CJEU stated - following the *Åkerberg* case, a case delivered outside the field of competition law - that it is the referring national court that must determine if the sanction is considered criminal by using the criteria established in *Bonda*.[96]

The CJEU found the *bis* criteria, a prior final decision, to be fulfilled since the judgment on annulment of the Postal Regulator's decision had acquired *res judicata*.[97] Regarding the *idem* criteria, the same facts, the court first stated that the two different proceedings were directed at the same legal person, bpost.[98] According to the CJEU, the legal classification under national law and the legal interest protected are not relevant for establishing the existence of the same offence. Otherwise, the protection provided by Article 50 of the Charter would vary from one Member State to another. The CJEU further asserted that this is also true regarding the application of the *ne bis in idem* principle in competition law since the scope of

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[93] See *bpost* (n 31) paras. 8–13.

[94] Ibid, paras. 14, 16 and 20.

[95] Ibid, paras. 22–23.

[96] Ibid, para. 25.

[97] Ibid, paras. 28 and 30.

[98] Ibid, paras. 28 and 32.

protection in Article 50 EUCFR cannot vary from one field of EU law to another (unless otherwise provided by EU law).[99] Then, the CJEU stated that the *idem* condition requires the material facts to be identical and if the facts are not identical but merely similar, the *ne bis in idem* principle is not intended to be applied.[100] The CJEU referred here to *Sergey Zolotukhin v Russia* when stating that 'identity of the material facts must be understood to mean a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space'.[101] It is for the referring court to determine if the facts are identical and if it finds that the facts are identical, it would constitute a limitation of the *ne bis in idem* principle.[102]

According to Article 52(1) of the Charter, a limitation may be justified if the limitation is provided by law and respects the essence of the rights and freedoms as well as the principle of proportionality.[103] The possibility of multiple proceedings and sanctions respects the essence of the *ne bis in idem* principle in Article 50 of the Charter if the possibility for duplication is provided under different legislations. The CJEU noted that competition law and the sectoral rules at hand pursue distinct legitimate objectives: ensuring that competition is not distorted in the internal market on the one hand and the liberalisation of the internal market for postal services on the other.[104] The CJEU used the objective established in Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service, without further discussing the objective.[105] It stated that due to the different objectives, it is legitimate for a Member State to punish infringements of both competition law and sectoral rules concerning the liberalisation of the relevant market.[106]

The limitation must further be in compliance with the principle of proportionality. The different proceedings cannot exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by the different legislations. The CJEU considered that if the accumulated legal responses do not represent an excessive burden for the individual public authorities can legitimately choose complementary legal responses to certain conduct that is harmful to society through different procedures that address different aspects of the social problem are involved.[107] An

[99] Ibid, para. 34–35; this was also noted in the Opinion of Advocate General Bobek delivered on 2 September 2021 in *bpost* (n 31), EU:C:2021:680, paras. 95 and 122.

[100] See *bpost* (n 31), para. 36.

[101] Ibid, para. 37.

[102] Ibid, para. 38–39.

[103] Article 52(1) of the Charter; *bpost*, ibid, paras. 40 and 41.

[104] See *bpost*, ibid, paras. 43–46.

[105] See Recitals 8 and 41 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service without further discussing the objective; See also *bpost* (ibid) paras. 3–4 and 45.

[106] Ibid, *bpost*, para. 47.

[107] Ibid, para. 48–49.

assessment of the necessity of multiple proceedings must be done by the referring court and this assessment can only be done *ex post*. When conducting such an assessment the court has listed different factors to take into consideration. The first factor is whether there are clear and precise rules resulting in the possibility to predict when multiple proceedings may occur and if there will be coordination between different authorities. It is further important to determine if such coordination actually took place. The second factor is whether the two proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe. In the case at hand, the first decision was adopted on 20 July 2011 and the second decision was adopted on 10 December 2012. Given the complexity of competition investigations, the CJEU found that the two decisions were sufficiently closely connected in time. The third and last factor is whether the second proceeding has taken into account any sanction imposed in the first proceeding, which is important in order for the penalties to not go beyond what is strictly necessary. The CJEU pointed out that the fact that the second fine is larger than the first fine is not in itself an indication of the penalties being disproportionate.[108] It then concluded that, provided that the factors mentioned above are fulfilled:

> Article 50 of the Charter, read in conjunction with Article 52(1) thereof, must be interpreted as not precluding a legal person from being fined for an infringement of EU competition law where, on the same facts, that person has already been the subject of a final decision following proceedings relating to an infringement of sectoral rules concerning the liberalisation of the relevant market [. . .].[109]

In *Nordzucker*, the Nordzucker company submitted leniency[110] applications to the German and Austrian NCAs who then initiated investigation procedures against three major sugar producers, including Nordzucker and Südzucker.[111] In 2010, the Austrian NCA, seeking declaration that Nordzucker and Südzucker had infringed Article 101 TFEU and national Austrian law, brought an action before an Austrian court. The evidence used included a telephone conversation where Südzucker's sales director called the sales director of Nordzucker to inform about deliveries to Austria and their consequences for the German sugar market.[112] The German NCA adopted a decision, which became final in 2014, where it found that the three major sugar producers, including Nordzucker and Südzucker, had infringed Article 101 TFEU

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[108] Ibid, paras. 51–57.

[109] Ibid, para. 58.

[110] Under the Commission's leniency programme, undertakings may receive immunity from fines if they provide sufficient information about cartels they have participated in. Such immunity may be full or partial. See European Commission, *Leniency*, <https://competition-policy.ec.europa.eu/cartels/leniency_en>.

[111] See *Nordzucker* (n 31), paras. 9 and 15.

[112] Ibid, paras. 14 and 16.

and German national law. Of the facts used by the German NCA, the telephone conversation was the only fact that concerned the Austrian market. Otherwise, the decision only penalised anticompetitive effects in Germany.[113]

Since the telephone conversation used as evidence by the Austrian NCA had already been subject to a different penalty, the Austrian court dismissed the action brought by the Austrian NCA in 2019 on the ground that an imposition of a penalty would violate the *ne bis in idem* principle. The Austrian NCA appealed the judgment to the Supreme Court of Austria, which requested a preliminary ruling from the CJEU.[114] The referring court sought clarification for assessing if two different NCAs have ruled on the same facts.[115] The preliminary observations from the CJEU were similar to the ones presented in *bpost*.[116] The CJEU stated that the *ne bis in idem* principle is a fundamental principle of EU law, that the *Bonda* criteria are relevant in order to determine whether a sanction is criminal and that the application of the *ne bis in idem* principle is subject to a twofold condition, *bis* and *idem*.[117]

The CJEU considered that the *bis* criteria was fulfilled since the German decision constituted a prior and a final decision. With regard to the *idem* criteria, it first stated that the different proceedings were directed against the same legal persons, Nordzucker and Südzucker.[118] The CJEU referred to its judgment in *bpost* regarding the relevant criteria to assess *idem*, being the identity of the material facts.[119] It is for the referring court to determine if there is identity of the facts but the CJEU can provide help with the interpretation of EU law. When determining the identity of the facts, the territory, the product market and the time period during which and when the conduct had anticompetitive objects or effects must be examined.[120] The proceedings in Austria are based on facts that have already been used in the German proceedings, i.e. the telephone conversation. The CJEU stated that in order for identity of facts to be found it is insufficient that the particular fact has given rise to the proceedings or was found to be one of the elements that was constituent of the infringement. It must further be ascertained whether the NCA regarded the facts as encompassing the territory of the Member State in question. According to the CJEU, it is thus of importance for the assessment whether the German NCA only considered the German sugar market or if the NCA also considered the Austrian sugar market. If the turnover used by the German NCA to calculate the fines only considered the turnover in Germany or included the turnover in Austria as well is also of importance for this assessment.[121]

[113] Ibid, paras. 17 and 23.

[114] Ibid, paras. 18–19.

[115] Ibid, para. 27.

[116] ibid, paras. 28–33.

[117] Ibid, paras. 28, 30 and 33.

[118] Ibid, paras. 35–37.

[119] Ibid, paras. 38 and 40.

[120] Ibid, paras. 41–42.

[121] Ibid, paras. 43–46.

If the referring court is to find that the German decision included a penalisation of the cartel's anticompetitive object or effect in the Austrian territory, a second proceeding and penalisation in Austria would violate the *ne bis in idem* principle. However, a limitation of the principle may be justified.[122] Article 101 TFEU has the objective of ensuring that competition is not distorted in the internal market. A duplication of criminal proceedings and penalties may be justified when the proceedings and penalties pursue complementary aims relating to different aspects of the same unlawful conduct at issue. The CJEU noted that national competition law and EU competition law are closely linked together. Article 3(1) of Regulation 1/2003 requires Member States to apply Article 101 TFEU in parallel with national competition law when the latter contains provisions corresponding to Article 101 TFEU.[123] In that respect, the CJEU stated that the application of national competition law and the application of Article 101(1) TFEU cannot result in different outcomes. For the CJEU, a duplication of proceedings and penalties that do not pursue complementary aims relating to different aspects of the same conduct can never be justified under Article 52(1) of the Charter.[124] It concluded that:

> Article 50 of the Charter must be interpreted as not precluding an undertaking from having proceedings brought against it by the competition authority of a Member State and, as the case may be, fined for an infringement of Article 101 TFEU and the corresponding provisions of the national competition law, on the basis of conduct which has had an anticompetitive object or effect in the territory of that Member State, even though that conduct has already been referred to by a competition authority of another Member State, in a final decision adopted by that authority in respect of that undertaking following infringement proceedings under Article 101 TFEU and the corresponding provisions of the competition law of that other Member State, provided that that decision is not based on a finding of an anticompetitive object or effect in the territory of the first Member State.[125]

In other words, the CJEU has now established an outer limit for when a limitation of the *ne bis in idem* principle can never be justified.[126] Andersson has described *bpost* and *Nordzucker* as being of fundamental importance and considers that the judgments have provided clarity on the legal situation.[127] In a similar vein, Andreangeli has concluded that an interpretation in line with the judgment in *bpost* will likely respect the integrity of the *ne bis in idem* principle while simultaneously maintaining the effectiveness of regulations that govern certain markets for public interest reasons.[128] Others have argued that even though the judgments provided clarity, the cases were highly fact-specific and the CJEU left several important questions unanswered. For example, the CJEU did not set out any principles or guidance on how to differentiate legal interests and objectives. The distinction between the

[122] Ibid, paras. 48–49.

[123] Ibid, paras. 51–53.

[124] Ibid, paras. 55 and 57.

[125] Ibid, para. 58.

[126] Andersson (2022), p. 379.

[127] Ibid, 369 and 380.

[128] Andreangeli (2022), p. 504; for a similar conclusion see Cappai and Colangelo (2023), p. 455.

objectives established in *bpost* is not self-evident since the postal sector rules were introduced to promote competition in postal services. These concerns will likely result in more litigation in this area.[129] In any case, it seems clear now that the CJEU has finally adopted a unified test for the *ne bis in idem* principle and the CJEU's reasoning deserves full support. It can, however, not be assumed that *bpost* and *Nordzucker* solve all issues.[130]

Furthermore, Cappai and Colangelo argued that the CJEU probably attached too much importance to the objectives of the different legislations, but concluding that the CJEU has simply moved the criteria of legal interest protected from one stage to another seems too harsh.[131] There are additional criteria to consider when determining if the limitation is justified; and if these are not fulfilled the criteria of different objectives will not matter since the limitation will not be justified. The duplication of proceedings must also be closely connected in both substance and time and the second sanction must take into account the first one. The CJEU did, however, not provide satisfying guidance in relation to the different criteria. It merely noted that the time period in *bpost*, which was approximately seventeen months, fulfilled the criteria of closely connected in time.[132] The criteria for a justified limitation must be further specified in EU competition law—if they are too broad the exception might instead become the rule.[133]

3.2 An Analysis of the Future of Enforcement: A Revolution?

The *bpost* and *Nordzucker* rulings are seminal cases that will strongly influence not only the enforcement of competition policy but also arguably the enforcement of the DMA. Following these two decisions, the DMA has already been amended to deal expressly with the application of the *ne bis in idem principle* as defined by Article 50 EUCFR in order to be in line with *bpost and Nordzucker*. According to the new Recital 86 of the DMA,

> the Commission and the relevant national authorities should coordinate their enforcement efforts in order to ensure that [the ne bis in idem principle is] respected. In particular, the Commission should take into account any fines and penalties imposed on the same legal person for the same facts through a final decision in proceedings relating to an infringement of other Union or national rules, so as to ensure that the overall fines and penalties imposed correspond to the seriousness of the infringements committed.

[129] Harrison et al. (2022).

[130] See Cappai and Colangelo (2022), pp. 489 and 510.

[131] Ibid, 512.

[132] Ibid.

[133] Cappai and Colangelo (2023), p. 451.

The new recital underlines in particular the necessity of coordination between the EU and national authorities - a 'principle of coordination' that forms an integral part of the '*SCCST test'* developed in the ECHR and CJEU case law.

In addition to this new change and as discussed previously, it is beyond doubt that parallel proceedings are allowed by both the DMA and Regulation 1/2003.[134] This is so even if the DMA provides a centralized system of enforcement that sharply contrasts with the enforcement of competition policy based on Regulation 1/2003 and its spirit of decentralization. As made clear by its recital 10 and Article 1(6), the DMA is without prejudice to the competition rules under Articles 101 and 102 TFEU. However, the enforcement of the competition rules should affect the obligations imposed on gatekeepers under the DMA[135] and their uniform and effective application in the internal market.[136] Ten years ago, Nazzini wrote that risk of multiple proceedings and convictions in EU Competition enforcement was inadequately addressed by the CJEU interpretation of Article 50 EUCFR in competition matters.[137] As seen in the previous section, *bpost* and *Nordzucker* have provided a necessary shift of interpretation and have brought back the interpretation of *ne bis in idem* in competition law in line with the substantive and horizontal provisions of the EU Charter.

Yet new problems of interpretation have (unsurprisingly) occurred due to this revolutionary jurisprudential development. The major interpretative challenge being in our view the interpretation of the *'SCCST test'*. If we add to this the need to interpret for the CJEU in the near future the list of obligations imposed on gatekeepers by the DMA as well as to understand the relationship between the DMA and the many reforms at national level concerning the enforcement of competition rules in the digital economy,[138] we could end up in a perfect jurisprudential storm. According to us, one of the most important criteria in the future is to determine whether there is a violation *of ne bis in idem* and whether the violation can be justified or not on the basis of Article 52(1) EUCFR—the so-called derogation or limitation clause.[139] The establishment of a (non-justified) violation of *ne bis in idem* will have to be based on the need to show a symbiotic relationship between the DMA and antitrust objectives. In other words, if antirust rules and the DMA pursue different objectives, a limitation of the *ne bis in idem* principle may be justified in accordance with Article 52(1) EUCFR. However, if it is shown that they pursue the

[134] See recitals 9 and 10 DMA.

[135] See Komninos (2022). DMA is inspired by Article 102 TFEU case law and decisions.

[136] See Recital 10 and Article 1(6) DMA.

[137] Nazzini (2016), pp. 160 and 164.

[138] See e.g. reforms in Germany with the new article 39(A) of the competition law.

[139] See also Fratini (2013); and Van Cleynenbreugel (2022). According to Van Cleynenbreugel (at p. 374), "The judgments' constitutional importance lies above all in allowing the identification of what constitutes the 'essence' of the ne bis in idem right in the EU legal order. It follows from the judgments that ne bis in idem is above all meant to avoid over-punishment. Although the Court pays limited explicit attention to the essence notion, it takes an inductive, objective and negative approach towards defining ne bis in idem's essence".

same objectives, a limitation can be difficult to be justified on the basis of Article 52(1) EUCFR. It raises the crucial question whether the duplication of proceedings and sanctions is in fact legitimate at the general level since the objectives of the DMA are not identical to competition rules.

In that respect, the core distinction between the enforcement of the DMA and of the enforcement of competition policy is that the DMA provides an *ex-ante* enforcement mechanism in contrast to the *ex-post* enforcement in antitrust matters. This central difference is carved out into the constitutional foundation of the text of the DMA that grounds the very existence of the DMA Regulation on Article 114 TFEU and not on Article 103 TFEU. Elsewhere in this book, Engel shows the problematic to rely solely on Article 114 TFEU instead of relying also on Article 103 TFEU.[140] Accordingly, the EU's competence in competition law was deemed unsuitable for the *ex-ante* enforcement mechanism provided for in the DMA. We consider here that this argument is unconvincing due to the arbitrary distinction between *ex-ante* and *ex-post* in this context. Instead, a dual legal basis comprising of both provisions would have been justifiable in this case and in line with previous legislation in this area.

As mentioned before in this book, both DMA and DSA measures were adopted under the internal market competence.[141] This is particularly surprising for the DMA, which constitutes a generational shift in the EU's enforcement strategy in competition law, and yet, is firmly placed within the ambit of Article 114 TFEU, rather than Article 103 TFEU, as the sole legal basis. According to Article 1(1) of the DMA, its purpose is "to contribute to the proper functioning of the internal market (. . .) ensuring for all businesses, constable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users." Despite this clear internal-market objective, the DMA cannot disguise the fact that it is simultaneously aimed "to complement the enforcement of competition law" in the Digital Single Market.[142] The competition law competence in the form of Article 103 TFEU, however, is entirely missing from the legal base. This raises a range of questions, such as why Article 103 TFEU was omitted by the

[140] See in this volume A Engel, 'Licence to Regulate: Article 114 TFEU as Choice of Legal Basis in the Digital Single Market'.

[141] For a more detailed discussion on this legislative package, see Engel and Groussot (2023, forthcoming).

[142] Recital 10 of the DMA Preamble.

legislator, whether it should have been added to Article 114 TFEU in a dual legal base, and whether this practice constitutes a more profound shift in the digital era.[143]

As underlined by Engel, it is also worth looking at Impact Assessment Report (IAR) on the DMA, which analyses existing market failures as well as fragmentation between national enforcement regimes aimed at tackling the digital challenges in competition law. The analysis of the document shows that the distinction between the DMA and antitrust policies is paradoxical since it not only highlights their difference but also acknowledges the strong competition law objective inherent in the DMA in "promoting effective competition in digital markets, in particular a fair and contestable online platform environment."[144] In addition, Article 114 TFEU cannot derogate from a more specific legal base—which Article 103 TFEU constitutes. According to the court's established *lex specialis derogat legi generali* principle, if two potential legal bases are available the more specific one should be chosen. This is particularly the case if the 'centre of gravity' theory[145] does not lead to a definite result due to a significant overlap in the scope of the respective legal bases and the aims they pursue, such as with the competition law and the internal market. Thus, in adopting the DMA on Article 114 TFEU as the single legal base, the legislator has—what Trüe called—effectively reversed the *lex specialis derogat legi generali* principle into *lex generalis derogat legibus specialibus*.[146]

At the end of the day, it will be for the CJEU to determine whether the possible duplication of proceedings and sanctions in the DMA/antitrust field is in fact legitimate due to the non-identical nature of the DMA and competition rules. Many elements point towards a possible justification of the breach of Article 50 EUCFR by the CJEU in case of duplication. Yet, the many paradoxes surrounding the use of Article 114 TFEU as the sole legal basis and the close connection of the DMA with antitrust rules may tip the balance in the other way depending of course on the circumstances of the case at issue in future adjudication. In any case, even if the CJEU ultimately finds a commonality in the objectives, thus leading to a

[143] See Recital 5 of the DMA of preamble, which provides a first indication for the omission of Article 103 TFEU in the legal base, restricting traditional competition law and its competence to an *ex-post* enforcement of rules, with specific requirements for either dominance (Article 102 TFEU) or anti-competitive behaviour (Article 101 TFEU) and resulting in extensive investigations on a case-by-case basis. The DMA, however, establishes an *ex-ante* mechanism under which a number of *per-se* practices are deemed to be illegitimate if conducted by so-called gatekeepers. Gatekeepers are defined in Article 3(1) of the DMA as undertakings which (i) have significant impact on the internal market; (ii) provide a core platform service which is an important gateway for business users to reach end users; and (iii) enjoy an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.

[144] Commission Staff Working Document, Impact Assessment Report, Accompanying the document, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD(2020) 363 final, paras 100, 101 and 108.

[145] As was first established in Case C-70/88 *European Parliament v Council of the European Communities*, EU:C:1991:373.

[146] Trüe (2002).

potential breach of the *ne bis in dem* principles the offence at issue will still have to pass the whole *'SCCST test'* in order to make it clear and certain that it is in line with the principles of enforcement established by *bpost* and *Nordzucker* for ensuring its compliance with EU law.[147] As said previously, the interpretation of this test by the CJEU will constitute the 'real deal' for the CJEU due to its novelty and complexity. In this Chapter, we do not intend to propose a complete study of this test or to provide specific answers to the problematic of duplication in the DMA/antitrust vortex. Instead, we intend to supply some *idées directrices* as to its interpretation and we try to underline the key challenges for the future.

As it resorts from the recent the case law, two challenges—one more general challenge and one more specific challenge—are particularly daunting for the CJEU. These two challenges will probably be present in the context of litigations on duplication of proceedings involving the DMA and competition polices. The first (more general) challenge relates to the interpretation of the *'SCCST test'* within the European multilevel constitutional system as exemplified by the *bpost* ruling.[148] Can the CJEU accommodate this test with the EctHR jurisprudence (and *vice versa*)? The second (more specific) challenge relates to the application of the test of 'sufficiently closely connected in substance and time' as a ground of justification on the basis of Article 52(1) EUCFR. One specific issue here to focus our attention on concerns the interpretation of the 'principle of coordination' in enforcing EU law and the DMA (in light particularly of the newly amended recital 86 of the DMA). Another point that will be of interest in the DMA context but that is not discussed thoroughly in this chapter is the application of the ''time-limb' in the '*SCCST test'* since the dual enforcement system proposed by the DMA and antitrust policy (i.e. a system of enforcement based on *ex-ante* (DMA) and *ex-post* (antitrust) enforcement) will irremediably lead to litigations where the 'time-limb' will become central.

The *bpost* case, though silent on this last point on the 'time-limb' of the test, is of profound interest as to answering not only the first general point but also showing the importance of the second specific point (that touches upon the use of the 'principle of coordination' in future litigations). Indeed, in *bpost* and in contrast to *Nordzucker*, the CJEU made an explicit mention to the *'SCCST test'* and referred abundantly to the *A and B v Norway* ruling of the EctHR in conjunction with the *Menci* case[149] of the CJEU.[150] The *'SCCST test'* is relied on within the framework of proportionality and Article 52(1) EUCFR[151] in order to justify a possible derogation (limitation) to the *ne bis in idem* principle. *In casu*, the CJEU found that the EUCFR does not preclude

> a legal person from being fined for an infringement of EU competition law where, on the same facts, that person has already been the subject of a final decision following proceedings

[147] See *bpost* and *Norducker* (n 31).

[148] Ibid.

[149] See *Menci* (n 89).

[150] See *bpost* (ibid) paras 51–56. In particular paras 51 and 53.

[151] Ibid paras 58.

> relating to an infringement of sectoral rules concerning the liberalisation of the relevant market, provided that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities.[152]

It results from the reasoning of the CJEU in *bpost* that it integrates the *'SCCST test'* within the proportionality valuation required by Article 52(1) EUCFR and the consequential valuation of the 'strict necessity' (also required by Article 52(1) EUCFR) of the duplication of proceedings'.[153] As already explained in Sect. 2.2., this logic based on the proportionality of the justification, though differing from the ECtHR case law, is viable and can be rationally explained.[154]

More intricate to us is the relationship between the '*SCCST* test' and the test relied in *Åkerber*g based on the necessity to check that the penalty/sanction must be 'sufficiently effective, proportionate and dissuasive' (hereafter, *'the test of effectiveness'*).[155] This *'test of effectiveness'* originates from the traditional case law of the CJEU as to proportionality of sanctions. In *Åkerberg,* the CJEU relied on the 'test of effectiveness' for the first time in relation to the duplication of sanctions whereas this test is normally used by the CJEU to assess the legality with EU law of a single system of sanctions.[156] Bringing the two tests together leads in our view to the difficult and thorny issue of constitutional interpretation of the *ne bis in idem* clause enshrined in Article 50 EUCFR with Article 49 EUCFR that concerns specifically the proportionality of criminal sanction. Notably, Article 49 EUCFR was recently mentioned by the CJEU in the *NE II case*,[157] a Grand Chamber case of 8 March 2022 delivered 14 days before the *bpost* ruling and where the CJEU noticeably adopted a very broad interpretation of what constitutes a criminal sanction under Article 49 EUCFR.[158] This raises the question of what will be the relationship between Articles 49 and 50 EUCFR in future CJEU litigation and whether these two lines of case law are viable and symbiotic in such a way that they can appropriately converge without difficulties? Can, in addition, the effectiveness of a sanction according to EU (case) law be interpreted in harmony with the ECHR case law?

Finally, the *bpost* case leads to discussing in a more specific way the different criteria established by the *A and B* v *Norway* ruling[159] and the 'principle of

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[152] Ibid.

[153] See in particular paras 51 and 53.

[154] See Sect. 2.2.

[155] See *Åkerberg* (n 36) para 36. The *ne bis in idem* principle must therefore be applied in a manner consistent with the principle laid down by the CJEU, according to which the penalties imposed by Member States for breaches of Union law must be "effective, proportionate and dissuasive" (see C-68/88 *Commission v Greece*, para 24). This requirement is, arguably, in line with that of the ECtHR, according to which "effective" criminal sanctions must be imposed on private individuals for behaviour contrary to the ECHR (see *C.N. and V. v France*, para 105).

[156] Ibid.

[157] See Case C-205/20 *NE* v *Bezirkshauptmannschaft Hartberg-Fürstenfeld II* EU:C:2022:168.

[158] See for development, Groussot and Loxa (2022).

[159] See *A and B* v *Norway* (n 22) paras 130–132.

coordination' which is central to review the legitimacy of the level of enforcement chosen by the competent authorities. This last issue will probably be thoroughly discussed by the CJEU in the (at the time of writing still pending) Case C-27/22 *Volkswagen,* where the CJEU has to interpret a breach of Article 50 EUCFR due to the imposition of an administrative pecuniary penalty in Italy following proceedings originally started in Germany in the 'dieselgate' saga.[160] Here AG Campos Sánchez-Bordona considers that, in light of the test of 'sufficiently closely connected in substance and time' and the CJEU case law such as *bpos*t, the duplication of proceedings can be putatively justified on the basis of Article 52(1) EUCFR. He relies on the three-step approach used by the CJEU and described in the previous section.[161] In doing so, he opines first that the penalty due to its severity and repressive purpose is of a criminal nature. Secondly, he underlines that the imposition of such a penalty is in breach of Article 50 EUCFR as it is based on identical facts and the legal person has already been the subject of a prior criminal conviction in another Member State which has become final. Thirdly, he considers that no limitation may be placed on the right not to be tried or punished twice for the same criminal offence where the concurrent duplication of proceedings conducted and penalties imposed by national authorities of two or more Member States, with competence in different fields, has taken place without sufficient coordination.[162] Since, according to him, the condition under Article 52(1) EUCFR is not met, there is therefore no valid justification for the imposition of the administrative pecuniary penalty by the Italian authorities. And, as a consequence, Volkswagen cannot be punished a second time in Italy. Following the AG, Article 52(1) EUCFR does not cover the duplication of proceedings conducted and penalties imposed by national authorities in different fields in respect of the same person for identical facts, where sufficient coordination between those authorities' actions does not exist.[163] The *Volkswagen* case shows the difficulty in applying the *bpost* case law of the CJEU allowing limitations to be placed on Article 50 EUCFR through the use of Article

[160] Case C-27/22 *Volkswagen (nyg),* Opinion delivered on 30 March 2023, EU:C:2023:265. Judgment delivered on 14 September 2023, EU:C:2023:663. Annegret Engel and Xavier Groussot have discussed this in an Op-Ed "The Court's Ruling in Volkswagen Italia: Revisiting the Principle of Ne Bis in Idem with a Pinch of Res Judicata" EU Law Live (Op-Ed), 27 September 2023, https://eulawlive.com/op-ed-the-courts-ruling-in-volkswagen-italia-revisiting-the-principle-ofne-bis-in-idem-with-a-pinch-of-res-judicata-by-annegret-engel-and-xavier-groussot/.

[161] Ibid para 116.

[162] Ibid.

[163] Ibid para 115.

52 EUCFR, in the cases such as the one at hand where there is coordination between the national authorities.[164] The AG specifically underlines that certain areas of EU law, such as EU competition law,[165] have special mechanisms established to facilitate the application of the principle *ne bis in idem* by preventing the duplication of proceedings in which a penalty is imposed for the same facts in cross-border disputes involving several Member States.[166] But this is not the situation according to him in the *Volkswagen* case.[167] The message sent by Campos Sánchez-Bordona's Opinion to the judges of the CJEU is clear and blunt and can be summarized with two French words: '*débrouillez-vous*' ('figure it out')! In that sense, the Opinion is not particularly useful for the CJEU. Its bluntness is due to an apparent disagreement between the AG and the judges of the CJEU as to the application of Article 52(1) EUCFR in the case law regarding the duplication of proceedings and penalties.[168] It is also worth noting that AG Campos Sánchez-Bordona does not discuss the *'test of effectiveness'* in his Opinion. So, what will happen next?

The CJEU will probably confirm its *bpost* case law and frame its reasoning within the scope of Article 52(1) EUCFR in order to assess the justification for the breach of Article 50 EUCFR. Indeed, in our view, it is not to be expected that the CJEU will overrule so rapidly its brand-new case law based on a structured constitutional interpretation of the EUCFR as discussed in Sect. 2.2. Another result of the Opinion, that could lead in fact to justify the breach of Article 50 EUCFR and thus to legitimize the second sanction imposed by Italy, can be achieved in our view by relying instead on the '*test of effectiveness'* used by the CJEU in *Åkerberg* in the field of duplication of proceedings and sanctions and, more recently, in relation to Article 49 EUCFR in the wake of *NE II*.[169] It is, however, doubtful that the CJEU would open another constitutional pandora's box with regard to the interpretation of the EUCFR. This might even lead to view *bpost* as an overruling of *Åkerberg* by

[164] Ibid para 109. See also AG Bobek in his Opinion in *bpost* (n 31, paras 115) who highlighted that '... once the combination of the relevant proceedings involves a number of parallel administrative regimes, and more importantly, more than one Member State or the authorities of the Member States and of the European Union, then suggestions about the desirability of single-track systems might quickly leave the realm of wishful thinking and cross over into science fiction'. After mentioning the existence of networks of national and EU administrative authorities and the coordination difficulties which nevertheless exist, he considered (in para 116 of AG Bobek's opinion) that 'if that is the current state of affairs within dedicated and expressly regulated networks across the European Union, it is not immediately obvious how the necessary level of coordination could reasonably be expected and achieved in various areas of law, within various bodies, and across various Member States'.

[165] Ibid paras 104–105.

[166] Ibid para 105.

[167] Ibid paras 106–108.

[168] Ibid para 113, "I, for one, do not hold out much hope of the Court reversing its case-law on this matter. Since the Court did not endorse the position I defended in my Opinion in *Menci* or heed Advocate General Bobek's subsequent criticism of the criterion laid down in the judgment in *Menci* (subsequently repeated in the judgments in *bpost* and in *Nordzucker*), it is unlikely to do so now".

[169] See *Åkerberg* (n 36) para 36.

completely replacing the *'test of effectiveness'* with the *'SCCST test'* in the case of duplications of proceedings and sanctions. In light of the analysis provided in this chapter, this would be rather striking given the strong and undeniable conceptual connection between *Åkerberg*, *A and B v Norway* and *bpost*. But since the *'SCCT test'* has been specifically designed by the ECtHR and the CJEU to provide an interpretative support in the context of duplication, it may be argued that it should be used as *lex specialis* and that the *'test of effectiveness'* should only apply in relation to a system of single sanctions. Of course, this reading is contrary to the *Åkerberg* ruling that applied the *'test of effectiveness'* in the context of duplication, *ne bis in idem* and Article 50 EUCFR. There is therefore no doubt that the CJEU will have to clarify the relationship between the *'SCCST test'* and the *'test of effectiveness'* in future cases concerning EU enforcement law. The CJEU will tell us whether it will already happen in the *Volkswagen* case.

4 Conclusion: A (R)evolution in the Enforcement of EU (Competition) Law?

This chapter has provided an in-depth analysis of the evolution of the *ne bis in idem* principle in competition law cases before the European courts and the resulting consequences for enforcement of the DMA as well as other competition laws. As has been shown, the roots of this jurisprudential (r)evolution in competition law cases, such as *bpost* and *Nordzucker,* can be found a decade ago with the *Åkerberg* case. The main points to be taken away from this development can be summarised as follows:

First, the CJEU now explicitly refers to the ECHR jurisprudence again (thus coming to a pre-*Toshiba* situation) as well as to its obligation under Article 52(2) EUCFR in situations of double jeopardy. Second, in assessing the criminal nature of a proceeding or sanction in competition law, the CJEU relies on the test *of idem factum* and not the *idem crimen* as it used to do in the wake of its *Aalborg* case law.[170] The condition that two offences are the same only if they protect the same legal interest (*idem crimen*) is not valid anymore. In practise, this means that the decisive criterion is that two infringements constitute the same offence in light of Article 50 EUCFR when they are based on the same or inseparably linked facts *(idem factum)*. The application of Article 50 EUCFR is thus not limited to proceedings and penalties which are classified as 'criminal' by national law but extends regardless of such a classification to proceedings and penalties which must be considered to have a criminal nature.[171] The criminal nature of the proceedings or the fine must be assessed by the national courts.

[170] See Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others* v. *European Commission*, (n 27), para 338.

[171] See e.g. *Nordzucker* (n 31) para 31 and *bpost* (n 31) para 26.

Third, the CJEU has built a comprehensive and structured test for evaluating a breach of Article 50 EUCFR based on a three-steps approach (a) assessing the bis (b) assessing the idem (c) assessing the proportionality of the justification. This test is different from the ECtHR assessment of Article 4 of Protocol No 7 that also includes a sort of proportionality valuation but that focuses on the existence of the *bis* rather than the justification. Fourth, the principle of proportionality is key to assessing the breach of *ne bis in idem* and Article 52(1) EUCFR is now totally integrated in this evaluation in the competition law field following *Menc*i, Garlsson, and *Di Puma*,[172] which are tax and market abuse cases. Fifth, looking at the recent interaction post-*Åkerberg* between the ECHR and CJEU, it is difficult to deny that there is no cross-fertilization between the two legal orders in the field of *ne bis in idem*.[173] The CJEU in *Åkerberg* has triggered a powerful response in *A and B* v *Norway*,[174] which in turn has triggered the rulings in *bpost* and *Nordzucker*.[175] This is also good news for a successful restart of the process of accession to the ECHR.

Finally, the new *ne bis in idem* case law is also very much orientated towards the policy of effective enforcement as it shows from the extensive and growing examination *of res judicata* (as seen in *Di Puma*, *bpost* and *Nordzucker*) and of the level cooperation between national authorities (as seen in *Garlsson* and *Volkswagen*), which is now integrated in the test of 'sufficiently closely connected in substance and time'. The *'SCCST test'* which originates from the ECtHR case law is now fully integrated in the assessment of the breach of Article 50 EUCFR after *bpost* and *Nordzucker* within the frame of Article 52(1) EUCFR.

As has been shown in our discussion, this development in general and the two cases of *bpost* and *Nordzucker* in particular, will significantly influence not only the enforcement of competition law in the EU but arguably also the enforcement of the DMA. The two cases have provided a necessary shift of interpretation and have brought back the application of *ne bis in idem* in competition law in line with the substantive and horizontal provisions of the EU Charter. Nevertheless, future litigation will depend on the CJEU to determine whether the possible duplication of proceedings and sanctions in the DMA/antitrust field is in fact legitimate due to their respective different objectives. We have identified two challenges of importance here. The first challenge relates to the interpretation of the *'SCCST test'* within the European multilevel constitutional system as exemplified by the *bpost* ruling. The second challenge relates to the application of the test of 'sufficiently closely connected in substance and time' as a ground of justification on the basis of Article 52(1) EUCFR.

A currently pending case before the CJEU, *Volkswagen*, may already provide some answers and indications of future directions in this area of litigation. Most importantly, the CJEU will have to clarify the relationship between the *'SCCST test'*

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[172] See *Menci* (n 81), *Garlsson Real Estate* (n 81) *Di Puma* EU:C:2018:192 (n 81).

[173] See *Åkerber*g (n 36).

[174] See *A and B* v *Norway* (n 22).

[175] See *bpost* and *Nordzucker* (n 31).

and the *'test of effectiveness'*. We have argued in this chapter that the 'SCCST test' should be used as *lex specialis* and that the *'test of effectiveness'* should only apply in relation to a system of single sanctions. Of course, this reading would be contrary to the *Åkerberg* ruling that applied the *'test of effectiveness'* in the context of duplication, *ne bis in idem* and Article 50 EUCFR. Nevertheless, this would in fact provide an avenue to justify the breach of Article 50 EUCFR and thus to legitimize the second sanction imposed by Italy in the *Volkswagen* case. Despite the imminent risk of opening pandora's box with a new controversial ruling, the CJEU will also have the opportunity to clarify some previously controversial issues derived from its rulings and in the light of competition law enforcement and the DMA.

Nevertheless, when it comes to the application of the *ne bis in idem* principle in duplication scenarios involving the DMA and competition rules, our analysis shows that it is very unlikely that the CJEU will find the *ne bis in idem* and Article 50 EUCFR to be applicable in potential cases, and this for two main reasons. The first reason is that the CJEU will have to make a finding that the objectives of the DMA and competition law are the same. This is not an easy finding to make considering that the DMA is based only on the 'internal market' clause of Article 114 TFEU and its overall logic is not merely based on 'market fairness' but also on 'market contestability'. The second reason is that even if the CJEU concludes to a similarity of objectives between the DMA and competition rules, the situation involving a potential breach of *ne bis in dem* will have to satisfy the *'SCCST'* test in any case. Due to the 'substance and 'time' criteria of the test, discussed in detail before, it is uncertain that a situation of duplication between the DMA and competition rules will satisfy the criteria because of the *ex-ante* nature of DMA enforcement.

Therefore, it is probable that the entry into force of the DMA will not bring a major impact regarding the enforcement of competition law and the application of the *ne bis in idem* principle. To put it differently, a revolution in this specific area of EU law enforcement is not to be expected in our view. This conclusion, however, does not preclude the rise of problems related to the enforcement of DMA and competition law at national level. This is particularly so when a Member State adopts hybrid national regulations that create an overlapping between digital markets and antitrust laws and thus 'enter into competition' and conflict with the main purpose of the DMA which is to bring uniformity of enforcement between the Member States of the EU based on the DMA regulation.[176]

[176] See New Section Article 19a) of GWB (German Competition Act, 19 January 2021) and Article 1(5) and Article 1(6) DMA.

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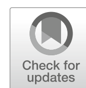
Between Online and Offline Due Process: The Digital Services Act



Giulia Gentile

Abstract The EU approach to governing the digital space increasingly features public law tools that seek to address the imbalances of powers of the online environment. Among those public law tools, EU fundamental rights have a prominent role. Hence, the questions emerge of how EU fundamental rights migrate and adapt to the legal issues of the world of bits, and how the coherence of EU law on- and off-line could be preserved. These issues become especially complex for the Digital Services Act adopted to repeal the E-commerce directive. This novel framework introduces procedural guarantees of 'digital due process' in the context of the take down procedure. Whether these procedural rights should be conceptualised as part of the EU standards of due process is a complex matter due to several controversial implications for the EU governance. While strengthening the EU due process pedigree of online take down procedures could enhance fairness on online platforms, it could also lead to a disintegration of the judicial authorities' power and a potential balkanisation of fundamental rights' protection.

1 Introduction

In recent years, technological progress and its impact on society have prompted EU institutions to regulate the internet and the data generated in the EU territory. The EU has become one of the most active regulators of the digital space and an exporter of legislation on digital matters.[1] The E-commerce directive[2] partially repealed by the

[1] Bradford (2020).

[2] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-commerce directive') OJ L 178, 17.7.2000, pp. 1–16.

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Digital Services Act (DSA),[3] the data protection directive[4] reformed with the General Data Protection Regulation (GDPR),[5] and the recently adopted Digital Markets Act (DMA),[6] among others, have shaped digital governance in the EU and beyond. While these measures were all grounded on market-oriented objectives, the latest iterations of EU digital regulation are also increasingly concerned with the protection of common public goods and fundamental rights, such as online free speech.[7] As remarked by several authors, the position that online platforms and big tech companies have in society has led the EU legislator to impose on these actors quasi-public duties, including the protection of fundamental rights.[8]

The transplant of public law tools and fundamental rights protection from the physical world to the digital field was enhanced by a threefold externality. First, EU fundamental rights application has been strengthened through the entry into force of the EU Charter of Fundamental Rights (or 'EU Charter'), which also contains a digital fundamental right *par excellence*, the right to data protection.[9] Second, the EU digital regulatory frameworks recently adopted all require the achievement of polycentric objectives that include fundamental rights compliance. The application of fundamental rights may be carried out by public authorities vis-à-vis digital bodies or delegated to private digital entities under the supervision of public bodies. We can trace this trend in the GDPR,[10] which entered into force in 2018, but also the proposal of the EU AI Act.[11] Third, litigation concerning balancing between policy objectives and fundamental rights has unsurprisingly arisen with reference to EU

[3] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) PE/30/2022/REV/ OJ L 277, 27.10.2022, pp. 1–102.

[4] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23/11/1995 P. 0031 – 0050.

[5] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L 119, 4.5.2016, pp. 1–88.

[6] 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) (Text with EEA relevance) PE/17/2022/REV/1 OJ L 265, 12.10.2022, pp. 1–66.

[7] See infra.

[8] De Gregorio (2019); Pollicino (2021).

[9] See article 8 of the EU Charter of Fundamental Rights.

[10] See recitals 1 to 4 of the GDPR.

[11] Proposal for a Regulation of The European Parliament and of The Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts COM/2021/206 final, see para 3.5.

digital regulation. Cases such as *Google Spain*[12] and the *Schrems* saga[13] are representative of the balancing jurisprudence of the cyberspace.[14]

The progressive regulation of private digital platforms and the expanding role of public law governance tools to deal with the challenges of digitisation were captured under the concept of 'digital constitutionalism'. While there is a plurality of understandings of 'digital constitutionalism',[15] they tend to converge on two tenets. First, the proliferation and strengthening of private digital actors has created power imbalances in the digital word.[16] Second, due to their implications in the real world, these 'digital-power-imbalances' should be subject to regulatory tools, the law appearing as a central element to restrain power and tackle abuses of powers perpetrated by private actors in the digital field.[17] Both these dynamics speak to the introduction of public law guarantees in the online space. The prominent role of fundamental rights' protection in the EU digital regulation articulates one of the aspects of 'EU digital constitutionalism'.

In the context of this literature, a question that remains underexplored is whether and, if so, how, constitutional governance tools are transformed through their adaptation to the digital field. The question of the migration of constitutional ideas and tools, such as fundamental rights, towards the digital space is of importance for at least three reasons. First, as a result of adapting constitutional law from the physical to the digital world, legal entitlements, and especially fundamental rights, are subject to a first evident transformation: they affect and bind private actors. In this sense, the horizontality of constitutional protections is strengthened in and through the digital environment. This transformation is worthy of scholarly attention and its study contributes towards the growing literature on the horizontal application of EU fundamental rights.[18] Second, the bifurcation of constitutional law between

[12] Case C-131/12 *Google Spain and Google* EU:C:2014:317.

[13] See infra.

[14] The application of fundamental rights in digital horizontal settings should not be confused with the 'mimicking' of a constitutional narrative by private actors who wish to resemble public bodies but are effectively free from public control. Costello (2023).

[15] We can trace different definitions of digital constitutionalism. For instance, Gill, Redeker and Gasser define 'digital constitutionalism' as a common term to connect a constellation of initiatives that have sought to articulate a set of political rights, governance norms, and limitations on the exercise of power on the Internet. See Gill et al. (2018). Suzor instead talks about digital constitutionalism as a paradigm that seeks to articulate and realize appropriate standards of legitimacy for governance in the digital. Suzor (2018). Celeste defines digital constitutionalism as an 'ideology that aims to establish and guarantee the existence of a normative framework for the protection of fundamental rights and the balancing of powers in the digital environment'. Celeste (2019). Moreover, while Pollicino argues that digital constitutionalism is about the imposition of constraints and checks on private parties operating in the digital environment that have the ability to exercise a quasi-public power (Pollicino 2023), De Gregorio describes digital constitutionalism as aiming to articulating the limits to the exercise of power in a networked society. See De Gregorio (2021).

[16] See De Gregorio (2022), p. 29.

[17] Ibid; Celeste (2019), p. 78.

[18] Leczykiewicz (2013), Frantziou (2019), Prechal (2020).

the online and offline world raises questions of coherence and consistency of the law, and thus potential challenges for the rule of law. The rule of law requires predictability and equality before the law.[19] Yet a potential fragmentation of the law, and particularly essential legal entitlements, such as fundamental rights between the off- and on-line world could challenge those very principles. In the EU, the question of coherence of the law becomes even more complex in light of the EU multi-level governance.[20] Third, on a more general level, the application of EU constitutional law online and offline raises questions of the relationship between the digital and physical world, and the role of the law to connect and regulate the two. Again, in the EU this question is complicated by the presence of multiple sources (national and international) of law that interplay with EU law.

The 'adaptation' of constitutional law tools to the challenges of the digital environment becomes particularly evident under a recently adopted framework, the DSA. The DSA has been singled out for its strong procedural rights component, coined by some as 'digital due process'.[21] Such procedural rights have been hailed as a form of strengthened protection on the internet for users,[22] in so far as they will allow individuals to obtain procedural guarantees in the context of complaints for content moderation. The DSA due process rights are thus a prominent example of digital constitutionalism in the EU and constitute an 'adaptation' of crucial EU fundamental rights, the rights to a fair trial and to effective remedies being an emanation of the EU general principle of effective judicial protection.[23]

In this context, several questions arise concerning the adaptation of due process guarantees from the EU 'physical world' to the online environment under the DSA. What is the relationship between online procedural rights under the DSA and the EU traditional due process rights? Should we conceptualise these guarantees as an emanation of traditional due process standards or should they be kept separate, and why? Is it helpful to fragment due process standards between the physical and the digital world? Or should we instead ensure a certain degree of coherence in this field?

This chapter does not seek to address once and for all the question of the transplant and adaptation of public law governance tools in the digital field. More modestly, it contributes to the literature reflecting on the interplay between constitutional law tools and the digital sphere by studying the relationship between the online procedural rights introduced by the DSA and the EU standards of due process for the physical world. To do so, the chapter proceeds in three stages. It firstly outlines the content of the EU standards of due process developed 'in the physical world' through the EU jurisprudence on the principle of effective judicial protection and Article 47 of the EU Charter. Secondly, the chapter reflects on applications of

[19] Reed and Murray (2018), p. xx.

[20] Bache (2012).

[21] Husovec (2022), Kuczerawy (2022), Kadri (2022).

[22] Ibid.

[23] Giulia Gentile (2023a), p. 128.

EU due process standards in the digital world by looking at the interplay between the GDPR and the E-commerce directive with effective remedies. These frameworks are chosen as they apply to online platforms and have shaped the initial phases of digital constitutionalism in the EU.[24] Thirdly, the chapter explores the due process protection embedded in the text of the DSA and critically reflects on the interplay between the novel DSA online procedural rights and EU due process standards.

2 Due Process Under EU Law: Article 47 of the EU Charter and the Principle of Effective Judicial Protection in the Physical World

The EU constitutional architecture is premised upon a dominant narrative revolving around due process and especially effective judicial protection. Courts—particularly in the Member States—have been conceptualised as the ultimate guarantor of rights and freedoms stemming from the EU legal order,[25] the Court of Justice having a significant role in developing and defining this narrative. The ability of individuals to access courts and claim their EU-derived rights has been crucial in shaping the EU governance and articulating the demands of effectiveness of EU law.[26] Such understanding of the role of courts is chiefly enshrined in the principle of effective judicial protection[27] (or 'effective judicial protection'), later constitutionalised through Article 47 of the EU Charter (or 'Article 47'). The general principle of effective judicial protection stems from the constitutional traditions common to the Member States and the corresponding Convention rights, Articles 6 and 13 thereof. Similarly, Article 47 protects macro-rights to an effective remedy and to a fair trial, which respectively mirror Articles 13 and 6 of the Convention. The rights to an effective remedy and to a fair trial are bundle rights that offer several guarantees, such as, among others, equality of arms,[28] judicial independence,[29] the right to be heard[30] and the duty to state reasons.[31] These sub-rights all contribute towards access to justice within the scope of application of EU law. In so doing, they shape the achievement of procedural and substantive justice, and bind both EU and national institutions.[32] While the content of Article 47 is defined in more detail, the principle is not, and thus the Court of Justice can use the channel of the principle of effective

[24] De Gregorio (2022).

[25] Gentile (2023a).

[26] Gentile (2022).

[27] Case C-222/84 *Johnston* EU:C:1986:206.

[28] Case C-199/11 *Otis and Others* EU:C:2012:684.

[29] Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117.

[30] Case T-748/16 *QH v Parliament* EU:T:2019:274.

[31] Case C-335/09 *Poland v Commission* EU:C:2012:385.

[32] Gentile (2023b).

judicial protection to expand due process guarantees in the EU.[33] Both the principle of effective judicial protection and Article 47 of the EU Charter set the EU standards of due process.

Scholars have widely acknowledged the omnipresence of effective judicial protection and Article 47 in the EU as well as national case law.[34] Effective judicial protection has been defined as the factotum[35] of the EU legal order due to its wide-ranging application both at EU and national level. Through the prism of these fundamental rights, the Court of Justice asked national courts to contribute towards the effective enforcement of EU law. But these provisions have also provided the foundations for the EU rule of law understanding.[36] Namely, the presence of effective judicial review and independent courts in the Member States, both requirements of the EU general principle of effective judicial protection, are deemed to be the essence for the EU rule of law.[37] Article 47 and effective judicial protection are therefore fundamental pillars of the EU legal order.

What is peculiar about effective judicial protection and Article 47 is that, by their very nature, they were 'born' to apply in vertical situations, that is, between an individual and a state entity. This is because they both impose on Member States the duty to provide effective access to courts for individuals demanding the effective enforcement of EU law claims. Hence, the principle assumes an active, positive role for national authorities, be they courts or administrations, to redress potential violations of EU law rights. This duty corresponds to the right of individuals to access courts and obtain judicial protection in the scope of application of EU law. This right applies to disputes involving private parties, but the obligation to offer procedures and remedial avenues remains on the Member States.[38] This requirement does not necessarily mean that Member States have to adopt ad hoc procedural rules to process EU claims.[39] The Court of Justice has been more modest in this respect, and interpreted the principle of effective judicial protection as requiring national courts to interpret procedural rules in ways that allow EU law claims to be processed effectively (see Fig. 1).[40]

Since the establishment of the general principle of effective judicial protection, new questions on the effective enforcement of EU law have emerged in parallel with the expansion of EU legislation. The principle of effective judicial protection and later Article 47 have played a crucial role in setting the standards for access to justice and remedies in the EU. National courts have applied the principle in cases pending

[33] Prechal (2016).

[34] Frantziou (2019), p. 79, Gentile (2023b), p. 142.

[35] Gentile (2023a), p. 128.

[36] Krajewski and Ziółkowski (2020); Bonelli and Claes (2018).

[37] *Associação* cit

[38] Case C-414/16 Egenberger EU:C:2018:257 para 49 and 78.

[39] Case C-432/05 Unibet EU:C:2007:163 para 40.

[40] Ibid.

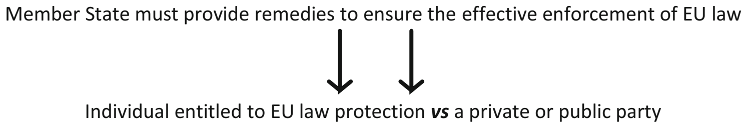

Fig. 1 Interpretation of the principle of effective judicial protection

before them and have posed novel preliminary ruling questions to the Court of Justice.[41] As a result, effective judicial protection has been used to influence various areas of EU law in the 'physical world', such as environmental, migration, and consumer law.[42] But Article 47 and effective judicial protection have also been applied in and adapted to the 'world of bits', long before the introduction of online procedural rights under the DSA, as the following section will illustrate.

3 EU Due Process in the World of Bits

As provisions that are broad in their terms, fundamental rights lend themselves to interpretative evolutions.[43] Whether a fundamental right adapts to the digital field depends on different factors. There may be legal/normative factors connected to the demands of legislation requiring actors operating in the digital environment to comply with fundamental rights; or there may be litigation raising novel interpretative questions concerning fundamental rights. Due to their wide-ranging applications, the EU standards of due process have also been employed in the digital world based on EU legislation, such as the GDPR and the E-commerce directive, as will be explored below.

3.1 EU Due Process Standards and the Data Protection Framework

The EU data protection framework is touted as the first comprehensive set of rules protecting personal data.[44] The repealed Data Protection directive referred to remedies at different points in its text.[45] With the GDPR and the entry into force of the

[41] Bonelli et al. (2023).

[42] Ibid.

[43] Spaventa (2016).

[44] Lynskey (2014).

[45] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23/11/1995 P. 0031 – 0050, see among others articles 22 and following.

Charter, the links between data protection (currently a fundamental right under Article 8 of the EU Charter) and Article 47 became even stronger. Several GDPR provisions are intrinsically connected to effective judicial protection. The GDPR includes a chapter entitled 'Remedies' that details the various avenues for redress of violations of data protection rules,[46] thus implementing Article 47 and effective judicial protection. An additional example is Article 45(2)(a) GDPR which requires the Commission to take account in its assessment of the adequacy of the level of protection in a third country, in particular, of 'effective administrative and judicial redress for the data subjects whose personal data are being transferred'. Recital 104 of the GDPR further states that a third country 'should ensure effective independent data protection supervision and should provide for cooperation mechanisms with the Member States' data protection authorities'; it further adds that 'the data subjects should be provided with effective and enforceable rights and effective administrative and judicial redress'. Hence, the GDPR text is permeated with the objective of ensuring effective remedies, even in a cross-border dimension.

The connections between the GDPR and the EU standards of due process emerged powerfully in the EU case law. Two dynamics can be traced. On the one hand, EU due process standards may be shaped by the principles of data protection. This means that effective remedies should serve the objectives of data protection, including lawful data processing and control over personal data.[47] On the other hand, EU due process standards may influence the enforcement of data protection law, which entails that data protection rules should be enforced with the objective to grant effective judicial protection.

Starting from the former dynamic, EU case law seems more sparse. One of the few cases illustrating this dynamic is the *Norra Stockholm* case. In this judgment, the Court of Justice held that national courts are required to determine whether the disclosure of personal data is adequate and relevant for the purpose of attaining the objective pursued by the applicable provisions of national law. In addition, national courts are obliged to ensure that this objective cannot be achieved by recourse to less intrusive means of proof in respect of the protection of the personal data of a large number of third parties such as, for example, the hearing of selected witnesses.[48] In other words, the disclosure of evidence during judicial proceedings—an aspect of due process—should be guided by the principles of the GDPR. In this sense, the scope of the right to an effective remedy answers the demands of personal data protection.

But, as mentioned, we can also trace a different, more common dynamic, whereby EU due process influences the enforcement of data protection rules.[49] As an example, the Court of Justice established that the remedies under the GDPR should be interpreted in light of Article 47. This provision does not preclude that

[46] See Chapter 8 GDPR.

[47] Galetta and De Hert (2015), Lynskey (2014).

[48] Case C-268/21 Norra Stockholm Bugg AB v Per Nycander AB EU:C:2023:145 para 55.

[49] Para 88.

administrative and judicial remedies in the field of the GDPR be exercised concurrently with and independently of each other. It is for the Member States to lay down the procedural rules to avoid conflicting decisions resulting from parallel proceedings.[50]

Moreover, in the seminal *Schrems* judgments, Article 47 played a fundamental role in the GDPR extra-territorial application. In *Schrems I*,[51] the Court of Justice found a breach of the essence of Article 47 because the Safe Harbour decision did not provide for any avenues to pursue legal remedies to access personal data, or to obtain the rectification or erasure of that data in the United States.[52] The violation of Article 47 was one of the reasons leading the Court of Justice to find that the Safe Harbour decision was incompatible with EU law. In the subsequent *Schrems II* judgment,[53] the Court of Justice found some lacunae in the enforcement of the right to an effective remedy under the GDPR. It stated that the 'lack of any redress mechanisms'[54] against selected instances of unlawful electronic surveillance for national security purposes ran against Article 47. Additionally, the Court remarked, inter alia, that the Privacy Shield Ombudsperson mechanism did not lay down causes of action essentially equivalent to those required by Article 47.[55]

3.2 Due Process and the E-Commerce Directive

Moving on to the E-commerce directive, this framework deals with the liability of online intermediaries of services with reference to content that is illegal.[56] Hosting platforms are exempted from liability for any illegal content they store in selected cases: in case they do not have actual knowledge of illegal activity or information and, as regards claims for damages, are not aware of facts or circumstances from which the illegal activity or information is apparent; or upon obtaining such knowledge or awareness, in case they act expeditiously to remove or to disable access to the information.[57] Similarly to the data protection rules, also this framework is imbued with references to procedures and judicial enforcement. Court actions and out-of-court disputes are listed as one of the measures to implement the framework.[58] Especially courts appear crucial to achieve the directive's objectives because

[50] Case C-132/21 BE v Nemzeti Adatvédelmi és Információszabadság Hatóság EU:C:2023:2.

[51] Case C-362/14 Schrems I EU:C:2015:650.

[52] Para 95.

[53] Case C-311/18 *Data Protection Commissioner v Facebook Ireland Ltd, Maximilian Schrems* EU:C:2020:559.

[54] Para 191.

[55] Para 193 and ff.

[56] See Husovec (2017).

[57] See Article 14 of the E-commerce Directive.

[58] See Articles 1 and 17 of the E-commerce Directive.

they have the power to declare content illegal, issue injunctions and interim measures, therefore triggering the duties of online intermediaries to remove content. On this issue, Article 18 of the Directive states that 'Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.'

The interplay between the EU due process standards and the E-commerce directive has revealed a similar dynamic to that explored with reference to the data protection case law. Notably, the *Promusicae*[59] case offers an interesting instance of the influence of Article 47 in shaping the interpretation of EU digital measures, including the E-commerce directive. In a preliminary ruling, the referring court enquired whether an interpretation of several directives, including the E-commerce directive, to the effect that the Member States are not obliged to lay down, in order to ensure the effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings, leads to an infringement of the fundamental right to property and the fundamental right to effective judicial protection. The Court held that the E-commerce directive, jointly with the other directive at stake, as read in light of Article 47 of the EU Charter, does not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, EU law requires that, when transposing those directives, Member States rely on an interpretation of those instruments which allows a fair balance to be struck between the various fundamental rights protected in the EU legal order.[60] Further, when implementing the measures transposing the directives at stake, national authorities and courts must not only interpret their national law in light of those directives but also EU fundamental rights.[61] In this context it is evident that EU fundamental rights, including Article 47, shaped the enforcement of the E-commerce directive.

Providing some interim conclusions, we can raise three sets of observations on the EU case law of the cyberspace and the relevant due process standards. The first set of observations concerns the impact of that fundamental right in the EU digital regulatory space. The analysed jurisprudence indicates that the application of EU due process standards in the cyberspace can generate a double dynamic. First, it can shape the enforcement of the substantive digital regulation; second, it can be shaped by the objectives of the EU digital regulation. Therefore, there may be a synergy between Article 47, effective judicial protection and EU secondary digital regulation. These dynamics do not differ from the interplay between EU primary and secondary law that can be traced in other fields of law.[62]

[59] Case C-275/06 *Promusicae* EU:C:2008:54.

[60] Para 70.

[61] Ibid.

[62] Syrpis (2015).

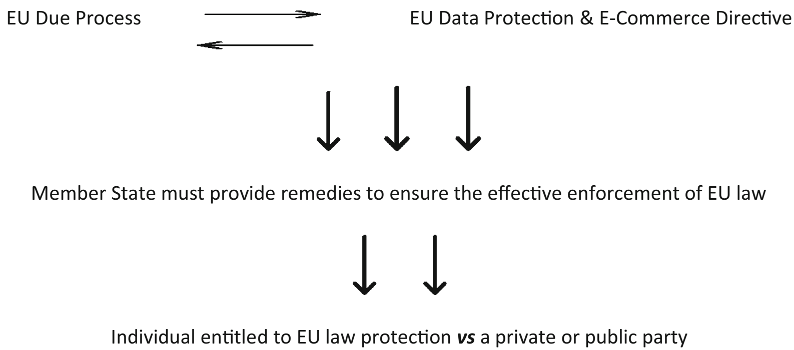

Fig. 2 Due process and the E-commerce directive

The second set of observations regards the way in which EU due process standards have been applied. Namely, those guarantees have not been adapted or transformed due to their 'migration' to the digital field, at least from the perspective of their vertical dimension. For instance, Article 47 of the EU Charter has consistently been applied against state entities, i.e. the authorities able to determine and grant remedies for violations of EU rights. At the same time, the *Promusicae* case has highlighted how the cyberspace may entail conflicts of multiple fundamental rights that require balancing.[63] The balancing exercise could in principle involve the protection of individual interests in horizontal settings. The polycentric balancing of EU fundamental rights may foster the application of those rights in horizontal situations in the digital environment.

Thirdly and finally, we can observe that the remedies for online violations of EU law governing the digital environment are to be sought 'offline' before national authorities in the physical world. There is no creation of 'digital remedies' or bifurcation of remedies between the online and the offline world, the latter still prevailing in the area of remedies and redress for data protection and online platform liability. Due to the absence of online remedies, the question of the bifurcation of standards of due process protection between the offline and the online world has not materialised thus far (see Fig. 2).

The E-commerce directive has been repealed by the DSA, which presents an even stronger remedial and due process narrative. How have the EU process standards been adapted to the challenges of a platform's liability online under the DSA?

[63] De Vries et al. (2012).

4 Effective Remedies and Due Process Guarantees Under the DSA

Building on the E-commerce directive, the DSA imposes on online platforms the exercise of activities that are typically executed by public bodies, such as courts. First, online platforms need to balance freedom of expression with other interests and rights coming into conflict following a request for delisting.[64] This balancing exercise is intrinsic to the take-down procedure. Second, as anticipated, the DSA introduced new procedural requirements for online platforms; accordingly, the latter must grant several due process protections to their users in the context of take-down procedure. Overall, the DSA has an enhanced focus on remedies and effectiveness. The question emerges as to what the relationship between the novel procedural guarantees imposed on online platforms under the DSA and the EU guarantees of due process is. To answer this question, this section explores the most prominent remedial rules under the DSA with a specific focus on the procedural duties imposed on platforms.

The first evident finding when reading the DSA text is that the influence of Article 47 and the principle of effective judicial protection is further increased compared to the E-commerce directive. The world "fundamental right/s" appears 39 times, while "remedy" appears 21 times in the text of the Regulation.[65] A powerful narrative of online effective remedies emerges from several provisions. To begin with, several recitals make clear that the procedural duties imposed on platforms should not undermine the ability to access judicial remedies. On this point, recital 59 provides that 'The possibilities to contest decisions of providers of online platforms thus created should leave unaffected in all respects the possibility to seek judicial redress in accordance with the laws of the Member State concerned, and therefore should not affect the exercise of the right to an effective judicial remedy under Article 47 of the Charter. [. . .].' Other recitals and DSA provisions[66] also clarify that Member States' authorities involved in the enforcement of the DSA should comply with Article 47. Hence, Article 47 clearly shapes the duties of public authorities in the enforcement of the DSA, but the procedural duties of online platforms are apparently separate from the EU due process standards.

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[64] O'Leary (2018), p. 59.

[65] See e.g. recital 39: Informational duties on redress mechanisms, including internal-complaints, for platforms, recitals 52 and 55: rules on notice and action should comply with the right to an effective remedy, recital 59: out-of-court dispute provisions; recital 79: platforms' duty to assess risks and devise strategies to address them via redress plans to be notifies to the Commission; recital 114: interim measures from national competent authorities (not necessarily courts); recital 116: right to a fair trial and effective remedy to national authorities applied to national authorities (not only courts!); recital 145: Commission enforcement powers to verify the redress plans; Article 14: transparency obligations for platforms regarding remedies; Article 17: statement of reasons from platforms; Article 20: Internal complaints procedure; Article 21: out-of-court dispute settlement. Engel observed that the influence of the EU Charter is particularly in the DSA, Engel (2023), p. 97.

[66] Article 51(6) DSA.

This impression is confirmed when reading the provisions concerning platforms. The text of the DSA is careful in not mentioning Article 47 with reference to platforms. At the same time, the guarantees envisaged under the DSA resemble those stemming from EU due process standards. Hence, the question arises as to the coherence and unity of the EU due process standards online and offline. First, under Article 16 DSA, online platforms must notify users whose content they are restricting. The notification must provide information on the content being restricted, its location, the name and email address of the individual or entity submitting the notice, except in the case of information considered to involve one of the offences referred to in Articles 3 to 7 of Directive 2011/93/EU, a statement confirming the bona fide belief of the individual or entity submitting the notice that the information and allegations contained therein are accurate and complete. The notification to users mirrors a typical due process requirement: there cannot be any trial or sanction without the parties being duly informed.[67]

An even more remarkable due-process-like requirement is laid down in Article 17 DSA. According to this provision, online platforms are subject to a duty to provide a reasoned statement of justification for taking down the material published online. The statement should indicate, for instance, the facts and circumstances relied on in taking the decision, including, where relevant, information on whether the decision was taken pursuant to a notice submitted in accordance with Article 16 or based on voluntary own-initiative investigations and, where strictly necessary, the identity of the notifier. The information provided by the providers of hosting services in accordance with Article 17 DSA should be clear and easily comprehensible and as precise and specific as reasonably possible under the given circumstances. The provision further specifies that '[t]he information shall, in particular, be such as to reasonably allow the recipient of the service concerned to effectively exercise the possibilities for redress'. There is extensive case law from the EU courts linking the statement of reasons to the ability to exercise the fundamental right to access to court. Without the indication of the reasons underlying a measure impacting individual interests, the affected parties do not have sufficient material to bring a challenge.[68] The duty to state reasons is also imposed on EU institutions under Article 296 TFEU and has been deemed to be the essence for the right to a fair trial.[69]

Another due process requirement is laid down under Article 20 DSA. The provision requires online platforms to provide recipients of the services with access to an effective internal complaint-handling system that enables them to lodge complaints and to electronically and free of charge deal with complaints in a timely, diligent and objective manner. This requirement recalls the duty stemming from Article 47, second sentence, according to which courts should decide their cases in a

[67] Case C-688/18 TX, UW EU:C:2020:94 para 35.

[68] See case law on EU sanctions, e.g. Case T-215/15 *Mykola Yanovych Azarov v Council of the European Union* EU:T:2017:479 para 136 and ff.

[69] Ibid.

reasonable time. Users must have a possibility for an effective appeals process, and a right to file their appeal within six months of the restriction being imposed.[70] Therefore users cannot be heard before the taking down procedure but can challenge the take-down decision after its implementation. Another remarkable feature of the DSA from the perspective of procedural rights is the role of trusted flaggers in the enforcement of that framework. Trusted flaggers are entities having specific expertise on content moderation that will support the role of platforms in patrolling freedom of expression online.[71] Trusted flaggers may lose their status in case they submit an excessive number of spurious claims.

5 Between Online and Offline: Due Process Under the DSA and EU Law

The DSA procedural rules go further than the Data Protection framework and the E-commerce directive in shaping due process *online*. Under the GDPR and the E-commerce directive, there is a presumption that remedies can be provided by public authorities such as courts *offline*. By contrast, the DSA introduces procedural guarantees that enhance procedural fairness in the take-down procedures that occur entirely online. Moreover, the procedural guarantees protect users in their interactions with private digital entities and are entirely electronic. These procedural rights will be therefore exercised online, through smartphones or computers. This is a novelty that reflects the advancement of the law in the online space and the important role that platforms have in online decision-making concerning online speech.

These rules have clear models from pre-existing procedures adopted by some online platforms. On the one hand, the adjudication role of platforms seems to take inspiration from the Meta Oversight Board, whose mandate is to adopt content moderation decisions on the social media platforms of Facebook and Instagram.[72] On the other hand, the rules on trusted flaggers, and especially those on spurious claims, recall those applicable for Youtube's strikes procedure.[73] However, while the models for these rules may have partially come from private companies' rules, the connection between the DSA procedural rights and existing due process guarantees in the EU is evident. As a result, several authors have spoken about the introduction of digital due process rights under the DSA.[74] But what should be the relationship between these online procedural rights and the EU standards of due

[70] Article 20 DSA.

[71] Article 22 DSA.

[72] Klonick (2020).

[73] See https://www.youtube.com/intl/ALL_uk/howyoutubeworks/policies/community-guidelines/#:~:text=Channels%20that%20receive%20three%20strikes,strikes%20system%20and%20be%20terminated.

[74] Douek (2022), Husovec (2022).

process? Whether these procedural duties are construed as part of the EU due process standards has several normative and governance implications that affect the coherence of those fundamental rights guarantees.

Starting with the normative implications, in case these procedural duties were deemed as an emanation of Article 47 and effective judicial protection, it would logically follow that the scope of those provisions could be triggered. Therefore, Article 47 could be invoked against online platforms. If so, then EU due process standards would have horizontal application and platforms would become fora for remedial protection for individuals. Consequently, coherence between online and offline due process would be better ensured, as there would be a more limited risk of fragmentation.

Yet in case EU due process standards applied to platforms, the question remains as to whether all guarantees of that provision would be applicable. This is a pernicious matter because of the practical difficulties in applying due process to online platforms. The difficulties stem from the structural features of the online environment, which is dominated by gatekeepers (i.e. online platforms) that act in a nodal network and allow access to their services for the users.[75] Let us consider two sub-rights of the EU due process, judicial independence or the right to be heard, and the challenges surrounding their application to online platforms and complaints.

Judicial independence seems to be hardly achievable in the context of complaints before online platforms considering that the latter will both execute the take-down content and decide on the merits of complaints. The same challenges from the perspective of judicial independence, and especially judicial impartiality, hold true in case algorithms are used to support the monitoring activities of platforms. As remarked by several authors, one of the most complex issues for content moderation policies is the policing of thousands of users engaging with online platforms.[76] Hence, algorithms may offer a quick fix to automate content moderation. But then algorithms, fed by previous patterns and data, may reinforce biases in their assessment (for example if they are more likely to delete content in a racially prejudiced way).[77] Therefore, these tools seem intrinsically at odds with judicial impartiality and EU due process standards.

Another problematic aspect from the angle of Article 47 guarantees is the absence of a right to be heard before a take-down decision is implemented. Only after content has been removed, users have the possibility to rebut that decision. This could have significant consequences for online freedom of speech, and in addition, the appeal procedure may not be effective in restoring the violation of free speech online. The right to be heard could be crucial in avoiding scenarios that could seriously hinder online freedom of speech. Yet, the DSA does currently not envisage this right. Similar challenges could also emerge with reference to other due process

[75] Murray (2011).

[76] Castets-Renard (2020), p. 283; Singhal (2023).

[77] Obermeyer et al. (2019).

guarantees.[78] All in all, the enforcement of Article 47 and effective judicial protection to further due process guarantees online would have certainly the effect of enhancing the protection of users vis-à-vis platforms. However, it is evident that there are several controversial aspects linked to a potential application of Article 47 to online platforms.

Moving on to the governance issues, the application of EU due process standards to online platforms would inevitably blur the lines between courts and private actors in providing remedies. While this development could extend the reach of and the ability to receive remedies, a watering down of judicial protection could also occur, with the importance of courts as a source of authoritative interpretation and application of the law being undermined. True, online platforms are gatekeepers and therefore shape the online space and enjoy a more privileged, powerful position. Yet the attribution of public duties corresponds to the increase of public authority, the offline authorities thus renouncing a part of their powers and role in society. How to ensure coherence between the online and offline governance structures will be a pivotal challenge for the years to come. In any event, the application of EU due process standards to platforms would not completely solve the potential risk of fragmentation in fundamental rights' interpretation. Even by ensuring that due process guarantees fully apply to companies, the fact remains that not all decisions on take-down procedures would be challenged in courts. Therefore, a degree of divergence in the interpretation of fundamental rights online could materialise for cases that are only decided by online platforms only, rather than courts.

By contrast, in case procedural rights under the DSA were considered as distinct from EU due process standards, the interpretative questions arising from the horizontal application of effective judicial protection explored above would be avoided. Additionally, the exclusive competence of public authorities to provide remedies would be protected, too. There are interpretative reasons to prefer this approach: the text of the DSA does not mention Article 47 or effective judicial protection with reference to online platforms. Nonetheless, also in this case there is a controversial implication. The DSA de facto creates a form of *jurisdictio* for platforms which can decide on issues of freedom of expression, privacy and other interconnected fundamental rights online. As a result, the interpretation of those fundamental entitlements may be shaped to a certain extent by platforms' decisions. The interpretative role of platforms in shaping the contours of those rights would be strengthened since not all take-down decisions would be challenged before public authorities. Therefore, the decisions adopted by platforms would often become final and ultimately influence the content of the affected fundamental rights. As a result, also under this scenario a certain degree of fragmentation in the application of fundamental rights would arise. The enhancement of EU due process guarantees online would ensure a better

[78] Additionally, since algorithms behind these decisions are opaque and their explainability may be limited, there is a risk that users will not be granted with a sufficient explanation, with compliance with the requirement of statement of reasons becoming challenging. Such a scenario would lead to a potential violation not only of the DSA but also of Article 47 of the EU Charter.

participatory governance for users in shaping 'justice' online, thus mitigating the risk of users not effectively participating in the interpretation and application of fundamental rights online.

Another argument to keep the due process rights under the DSA as separate from EU due process is grounded in a comparative analysis of fields that present similar characteristics to that of online platforms, where private entities may have some remedial competences. In the banking[79] and the consumer law[80] fields, private companies are not subject to the requirements of EU due process. By analogy, the same should apply also to online platforms. But this argument does not solve the risk for fragmentation that could follow from the enforcement powers of platforms.

Whether Article 47 and effective judicial protection will be invoked and applied against platforms remains to be seen. Litigation will mainly shape the answers to these questions. But beyond this matter, it is evident that the combination of EU digital environment's regulation and the increased role that platforms have in favouring the exercise of fundamental rights are raising the demands of fundamental rights' guarantees in the digital field, which is dominated by private parties. The future of fundamental rights in the online world should adapt to and mirror the protections that users require vis-à-vis abuses of power. The challenge will lie in ensuring coherence and connections between the online and offline world, while protecting a human-centric approach to digital regulation.

6 Conclusion

The relationship between the online and the offline world is becoming increasingly complex due to two connected developments. First, users can engage into more activities online; second, and consequently, increased demands for justice in the digital environment are accordingly emerging. In this context, the question of the adaptation of fundamental rights guarantees, traditionally conceived for the offline world, to the world of bits is becoming growingly pressing, especially in the EU where several EU digital frameworks require application of fundamental rights in the digital environment. This matter is particularly acute under the DSA which introduces procedural rights in relation to content moderation and take-down procedures that users enjoy against online platforms.

This chapter has sought to contextualise the emergence of digital due process rules under the DSA in this debate, and to analyse the implications of an understanding of these rules as part of EU due process standards or as distinct from the

[79] See for instance European Banking Authority's Guidelines on complaints-handling for the securities and banking sector https://www.eba.europa.eu/sites/default/documents/files/documents/10180/2381463/cd6e3328-7442-4582-8b68-819346d200ec/Joint%20Committee%20Guidelines%20on%20complaints-handling%20%28JC%202018%2035%29_EN.pdf?retry=1.

[80] See Your Europe 'Informal dispute resolution for consumers' https://europa.eu/youreurope/citizens/consumers/consumers-dispute-resolution/informal-dispute-resolution/index_en.htm.

latter. Through its analysis, the chapter aimed to highlight the practical and theoretical challenges in adapting the law to the world of bits and ensuring coherence between the online and offline world. Focusing on the DSA and the procedural rights it introduces, while a unitary view of online and EU due process standards would ensure coherence and better participation and protection for users, several controversial implications would materialise. These range from the practical challenges in ensuring compliance with crucial aspects of EU due process, such as judicial independence, to the inevitable fragmentation of fundamental rights' interpretation. By contrast, a separation between EU due process and the DSA procedural rights would avoid these issues. Yet, it would also exacerbate the balkanisation of fundamental rights' application between the online and offline world.

It remains to be seen whether society would be better off by engaging with online and offline authorities, in the hope of obtaining better justice in either online or offline environment.

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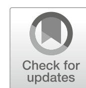
A New Framework for Limitation of Fundamental Rights in EU Law?



Gunnar Thor Petursson

Abstract Soon the EU Charter will have been a binding part of EU law for 15 years. Different tasks and challenges are facing the EU legislator and the EU Member States now as compared to in 2009, when it entered into force. Therefore, a focused stock-taking is both timely and relevant. In this chapter, the attention will be on the *methodological* implications the EU Charter has had, when and once it is the *starting point and reference legislation* in adjudication of Charter rights, in particular in the context of their *limitations*. Here Article 52(1) of the EU Charter is the focal point, since steering limitation of its rights, and therefore, appropriately considered to be a pivotal provision in the EU Charter. In this article, the evolution of this provision will be analysed, not least in the light of the more recent case-law of the CJEU, with a specific focus on privacy rights, personal data protection and digital rights in general.

1 Introduction

Fundamental rights are taking an ever-larger space in EU law, both in the case law of the Court of Justice of the European Union (CJEU),[1] and now increasingly in EU secondary norms—which often are referencing the EU Charter of Fundamental Rights, either separate provisions, or even more frequently, the Charter as a whole.[2] Indeed, this is not odd, since as of 1 December 2009 the EU Charter became

[1] Tinière (2020), pp. 16–17, see also Groussot and Petursson (2022), p. 239.

[2] For example, the 2016 GDPR Regulation (Regulation (EU) 2016/679) is referencing the EU Charter already in its first preamble and thereafter 6 times in the preambles, and in one of the provisions. The Digital Services Act (Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC) is citing the EU Charter 37 times in total, but, the Digital Markets Act (Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on

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a legally binding norm of EU law, and, as of the same date, Article 6 of the Treaty of the European Union (TEU) provided that the Charter shall have the 'the same legal value as the [EU] Treaties'.

The entrance of an EU bill of rights, with Treaty equivalent force, has increased both the visibility and the legitimacy of fundamental rights under EU law. Therefore, it is not surprising that is has been maintained that—within the scope of EU law—the EU Charter is to be the *starting point and reference legislation* for any legal analysis involving fundamental rights.[3]

Soon we have moved 15 years beyond the date of the entry into force of the EU Charter and different tasks and challenges are facing the EU legislator and the EU Member States now as compared to in 2009. Therefore, a focused stock-taking is both timely and relevant. In this chapter, the attention will be on the *methodological* implications the EU Charter has had, when and once it is the *starting point and reference legislation* in legal analysis involving Charter rights, in particular as concerning their *limitations*.

Having first set the scene (scope and types of cases), the focal point will be on the methodological tools and steps that are provided for in one of the horizontal provisions of the EU Charter, i.e., Article 52(1) of the EU Charter. What does it mean to involve the EU Charter in the legal analysis and how does it impact or alter the methods of legal analysis applied in each case? This will be reviewed in the light of the more recent case-law of the CJEU, with a specific focus (given the context of this publication) on privacy rights, personal data protection and digital rights in general.

2 Scope and Case-Type Context of the EU Charter of Fundamental Rights

While it is undisputed in the EU law context that the legally binding EU Charter of Fundamental rights has brought fundamental rights to the fore and its Treaty force equivalence repositioned fundamental rights in EU law, the more exact effect of fundamental rights, (including methodological implications) remains an issue less discussed.

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contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828) is only citing the EU Charter once in its last preamble.

[3] In their Joint Declaration of January 2011, the presidents of the Strasbourg and Luxembourg courts stated that the: '[T]he Charter has become the reference text and the starting point for the CJEU's assessment of the fundamental rights which that legal instrument recognises.' Opinion of Advocate General Bot delivered on 5 April 2011 in *Scattolon*, C-108/10, ECLI:EU:C:2011:211 para 108: 'Since the Charter now occupies a central place in the system of protection of fundamental rights in the Union, it must, [. . .] constitute the reference legislation each time the Court is called upon to rule on the compliance with an EU measure or a national provision with the fundamental rights protected by the Charter'.

First, the EU Charter has a specific scope or 'field of application', as determined by Article 51 of the EU Charter, which stipulates that the Charter is "addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law".

For the EU institutions, including all its bodies, offices, and agencies of the EU, the EU Charter does not explicitly enlist the type of actions which are to be (judicially) reviewed or interpreted in light of the EU Charter. Thus, questions as concerning the scope of the EU Charter have been dealt with in the case law of the CJEU, post 1 December 2009, in different context. In general, the scope of the EU Charter has been interpreted broadly for the EU institutions. For example, the CJEU has made clear that the scope of the EU Charter results in the duty to respect fundamental rights even under private contractual obligations involving the EU Commission,[4] when concluding international agreements,[5] to actions in the field of the Common Foreign and Security Policy[6] and even when the institutions act "outside the EU legal framework".[7]

For the EU institutions, the interpretation of the scope by the CJEU reveals that the EU Charter of Fundamental rights applies in a wide sense to all their actions, which may in turn be reviewed and interpreted in light of the EU Charter. This type of an 'institutional review' forms a case-type category of its own. Including in this type of cases would be the important

(i) review of legality of the secondary norms of the EU institutions under Article 263 TEU (or even Article 267 TEU as the case may be).

The number of cases where EU norms have been reviewed, and in many cases annulled, on the basis of fundamental rights is clearly growing *post* the entry into force of the EU Charter. Here, we find cases such as *Test Achat*,[8] *Digital Rights Ireland*[9] and *Facebook Ireland (Schrems I and II)*,[10] where Articles 7 and 8 of the

[4] Judgment of 16 July 2020, *ADR Center / Commission* (C-584/17 P) ECLI:EU:C:2020:576, para 139.

[5] See for example, Opinion 1/17 (*EU-Canada CET Agreement*), of 30 April 2019 (Digital Reports) ECLI:EU:C:2019:341, 2019, para 190.

[6] Judgment of 3 September 2008, *Kadi* (C-402/05 P and C-415/05 P, ECR 2008 p. I-6351) ECLI:EU:C:2008:461.

[7] See judgment of 20 September 2016, *Ledra Advertising/Commission and ECB*, C-8/15 P to C-10/15 P, ECLI:EU:C:2016:701, para 67, see also judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756.

[8] Judgment of 1 March 2011, *Test-Achats and others* (C-236/09, ECR 2011 p. I-773) ECLI:EU:C:2011:100.

[9] Judgment of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238.

[10] Judgment of 6 October 2015, *Schrems (I)*, C-362/14, ECLI:EU:C:2015:650 and Judgment of 16 July 2020, *Schrems II*, C-311/18, ECLI:EU:C:2020:559.

Charter played an important role in gauging the validity of EU secondary norms, and more.[11]

For *the Member States*, and the review of their actions in the light of the EU Charter, the exact scope of the EU Charter was even less clear from the outset. Article 51 of the EU Charter says that the EU Charter applies to the Member States "only when they are implementing EU law". For a long period, prior to the entry into force of the EU Charter, the CJEU case law had developed two case categories, in addition to the 'review of legality' type of cases explained above, namely

(ii) cases that deal with the implementation of EU law at the national level, that is the situation when Member States are implementing and applying EU secondary law at the national level;[12] and

(iii) review of Member State actions in light of fundamental Treaty provisions/principles, such as the free movement provisions or other fundamental provisions of EU law.[13]

In the third category of cases, we have the application of Treaty provisions in review of Member States' measures in the context of fundamental Treaty provisions. In this category, we find the typical free movement situations such as in *ERT* or *Carpenter*[14] and cases that are based on the fundamental provisions found in the Treaty, for example Article 20 and/or Article 21 TFEU on EU citizenship and the rights of EU citizens to move and reside freely in the territory of Member States.[15]

In *Åkerberg Fransson*, the CJEU concluded on this point and clarified that *there* were no situations where national law falls within the scope of EU law and that fundamental rights are not applicable, since 'applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter', while noting at the

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[11] See also for example, Judgment of 9 November 2010, *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, ECR 2010 p. I-11063) ECLI:EU:C:2010:662. For more recent examples see, *Luxembourg Business Registers,* C-37/20 and C-601/20, EU:C:2022:912 *Orde van Vlaamse Balies and* others, C-694/20, EU:C:2022:963.

[12] Judgment of 13 July 1989, *Wachauf*, case 5/88, ECLI:EU:C:1989:321 is symbolic for this case type category. See more recently judgment of 21 June 2022, *Ligue des droits humains*, C-817/19, ECLI:EU:C:2022:491, summarising this type of an approach in paras 86–87.

[13] Judgment of 18 June 1991, *ERT*, C-260/89, ECLI:EU:C:1991:254, is symbolic for this type of cases, the *ERT* type of cases where fundamental rights may serve both as an 'additional hurdle' (ERT) and as a 'per se' derogation ground (*Familiapress* (Judgment of 26 June 1997, *Familiapress* (C-368/95, ECR 1997 p. I-3689) ECLI:EU:C:1997:325)/*Schmidberger*/*Carpenter*) when it comes to the review of national measures restricting the fundamental freedoms, or in fact any fundamental right under the EU Treaties subject to limitation (principle of non-discrimination or Article 19 TEU).

[14] Judgment of 11 July 2002, *Carpenter*, C-60/00, ECLI:EU:C:2002:434.

[15] Judgment of 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:12—is an ideal example, apart from the fact that, surprisingly the EU Charter is not applied in the case. In more recent cases, the CJEU is using the EU Charter also in the citizenship realm. Similar reasoning is also applied in relation to Article 19 TEU in the context of rule of law case law like Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117 and Judgment of 24 June 2019, *Commission/Poland* (Independence of the Supreme Court), C-619/18, ECLI:EU:C:2019:531.

same time that the Court had no competence to examine the compatibility of national law with the Charter, if it was 'lying outside the scope of European Union law'.[16] Conversely in, *TSN*, the CJEU stated that, 'Where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on the Member States with regard thereto, the national rule enacted by a Member State as regards that aspect falls outside the scope of the Charter and the situation concerned cannot be assessed in the light of the provisions of the Charter'.[17]

3 Has the EU Charter Brought About a Methodological Change?

3.1 Article 52(1) EU Charter

Even if all the horizontal provisions of the EU Charter, found in its last Chapter (VII), have the potential to materially and substantially impact the application of the Charter, Article 52(1) is central, since serving as the core 'analytical framework' in terms of limitation of Fundamental Rights of the Charter,—within 'the scope of EU law' (Article 51(1) Charter). As a specific limitation clause, Article 52(1) of the EU Charter is to be applied 'horizontally' throughout the EU Charter, to all Charter Rights which are subject to limitation (non-absolute rights).

Article 52(1) EU Charter stipulates the following:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

According to the explanations to the EU Charter, the purpose of Article 52(1) of the EU Charter is to set the scope of the rights and principles of the Charter, and to lay down rules for their interpretation.[18] Also, the explanations seem to indicate that there is nothing new here—since stipulating that 'the wording is based on the case-law of the Court of Justice'. In that respect, a reference is made to paragraph 45 of the *Karlson* case[19]—which, however, references paragraph *Wachauf*,[20] which states:

[16] Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, paras 20 and 21.

[17] Cases C-609/17 and C-610/17 *TSN* ECLI:EU:C:2019:981, para 53.

[18] Hereinafter referred to as the '*explanations'*. Explanations Relating to the Charter of Fundamental Rights', [2007] *Official Journal* C 303/17.

[19] Judgment of 13 April 2000, *Karlsson and others* (C-292/97) ECLI:EU:C:2000:202.

[20] Judgment of 13 July 1989, *Wachauf*, case 5/88, ECLI:EU:C:1989:321.

> The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.

This type of wording emphasises the non-absolute nature of fundamental rights and their social function that may impact their scope in a given case. Similar wording is interestingly found already in the first cases from the CJEU, recognizing fundamental rights as part of the Community legal order, which similarly emapsises the non-absolute nature of fundamental rights and their limitability.[21]

3.2 A Methodological Honing of Article 52(1) EU Charter

While it is clear that a method of limitation of fundamental rights has certainly been a part of EU law from the outset, the Article 52(1) wording, in particular its first sentence, begs to ask the question—will reliance on Article 52(1) EU Charter lead to a methodological change in the context of questions on *validity*, *interpretation* or *derogation* from fundamental principles of EU law?

In the first cases dealing with fundamental rights after the entry into force of the EU Charter, Article 52(1) EU Charter was not consistently referenced, or relied on in a structural way.[22] However, this has changed, and Article 52(1) EU Charter is now frequently referenced when the EU Charter is otherwise applicable in the case.[23] In the more recent case law, as will be discussed, it is clear that the first sentence of Article 52(1) EU Charter is playing a prominent role in the legal assessment. This involves both the *provided for by law* requirement, and the *essence test*. Both these conditions, found in the first sentence, are of a cumulative nature, among the other conditions of Article 52(1) EU Charter, and thus, if one condition is not fulfilled, that means that the limitation of the fundamental right at issue is not acceptable.

Even if well known in the case law of the Court of Human Rights in Strasbourg, the provided for by law requirement has not, until the entry into force of the EU Charter, been part of the CJEU's standard approach when adjudicating fundamental rights in EU law, although a reference has been made to this condition in the context

[21] Judgment of 14 May 1974, *Nold*, case 4/73, ECLI:EU:C:1974:51, para 15 and also later in the Case C-44/79, Hauer, v. Land Rheinland-Pfalz, ECLI:EU:1979:290, para 23, and Judgment of 12 June 2003, Case C-112/00, *Schmidberger*, ECLI:EU:C:2003:333, para 80.

[22] See and compare for example the *validity* cases *Volker* and *Test A*chats (op. cit. *supra* note 11&12) and the case on interpretation, *Deutche Weintor* (Case C-544/10, *Deutsches Weintor*, ECLI: EU:C:2012:526, Judgment of 6 Sept. 2012) that deals with among other issues Article 15 of the EU Charter, repeats similar wording as found in the explanations on Article 52, but does not cite Article 52(1) EU Charter.

[23] Scarcello (2021), p. 5. His analysis also confirms that Article 52(1) EU Charter has been appearing in many high level (Grand Chamber) cases in recent years.

of direct reference to the ECHR regime or provisions.[24] In general, also in the initial case law of the CJEU, applying Article 52(1) EU Charter or otherwise limiting fundamental rights, without a direct reference to Article 52(1) EU Charter, the condition 'provided for by law' was inconsistently, and even sometimes only in a thin manner, applied by CJEU.[25] This has changed in more recent cases, where the CJEU has given this condition a higher status—also (at least initially) referencing the Strasbourg case law. In *WebMindLicences*,[26] a case that concerned mainly application of harmonised VAT rules and Articles 7 and 47 of the EU Charter, the Court emphasised the importance of the provided for law requirement, in relation to Article 52(1) and held that:

> [..]any limitation on the exercise of that right must be provided for by law implies that the legal basis which permits the tax authorities to use the evidence referred to in the preceding paragraph *must be sufficiently clear and precise* and that, by defining itself the scope of the limitation on the exercise of the right guaranteed by Article 7 of the Charter, it affords a measure of legal protection against any arbitrary interferences by those authorities.[27]

The Court here referred solely to the case law of the eCtHR, the cases of *Malone* and *Gillian*.[28] In two 2020 Grand Chamber cases, *Recorded Artists*[29] and *État luxembourgeois*,[30] the Court affirmed the importance of this condition. Both cases concerned the application at the national level of EU secondary norms, and how they should be applied and implemented in compliance with the EU Charter. In *Recorded Artists,* the requirement was not fulfilled by a national notification, in accordance with the Council Decision 2000/278/EC ('WPPT'): "because such a reservation does not enable nationals of the third State in question to ascertain in precisely what way their right to a single equitable remuneration would, consequently, be limited in the European Union. For that purpose, a clear rule of EU law itself is necessary."[31] In *État luxembourgeois,* the CJEU assessed *national legislation*, the wording of which the CJEU deemed to apparently meet the requirement and which it had emphasised should "clearly and precisely define the scope of [the] limitation".[32] In two fairly recent Grand Chamber cases (2022) concerning the validity of EU secondary

[24] Peers and Prechal (2013), p. 1470.

[25] Groussot and Petursson (2015), p. 139.

[26] Case C-419/14 *WebMindLicenses*, EU:C:2015:832.

[27] Ibid., para 81, emphasis added.

[28] *Malone v. the United Kingdom*, 2 August 1984, § 67, Series A no. 82, and *Gillan and Quinton v. the United Kingdom*, 12 January 2010, no. 4158/05, § 77, ECHR 2010.

[29] Case C-265/19, *Recorded Artists Actors Performers*, EU:C:2020:677.

[30] Cases C-245&6/19 *État luxembourgeois,* EU:C:2020:795.

[31] *Recorded Artists,* op. cit. *supra* note 29, para 86. Emphasis added.

[32] *État luxembourgeois*, op. cit. *supra* note 30, paras. 76-77. See also Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraph 139; and judgment of 16 July 2020, *Facebook Ireland and Schrems* (*II*), C-311/18, EU:C:2020:559, paragraphs 175 and 176.

norms, this requirement was tested for the *EU norms* at hand, and in both cases the CJEU concluded that the condition had been fulfilled. [33]

It is clear that the condition *provided for by law* is very well present in the current case law of the CJEU, when applying Article 52(1) EU Charter. While it may be less likely to be fulfilled when analysing Member State norms, rather than EU norms, the level of scrutiny, in particular looking at the founding case *WebMind Licenses*, which cited the Strasbourg Court, has the potential to be rather strict, given that the norm at issue *must be sufficiently clear and precise*.

The second aspect of the first sentence of Article 52(1) concerns *the essence test*. While the wording in this first sentence, when it comes to the essence test, certainly has a basis in cases decided before the entry into force of the EU Charter, as mentioned, the test had not been previously directly applied as a *per se* test outside the proportionality analysis.[34]

Further for *the essence test*, the CJEU did not go into a separate essence analysis in the first cases relying on the EU Charter,[35] but the *Alemo-Herron* case[36] heralded a difference in approach. In this case, the CJEU addresses the core of the right to conduct a business (Article 16 EU Charter) in the light of the Directive 2001/23/EC, concerning safeguards of employees' rights in the case of a transfer of undertakings. The Court emphasised that the interpretation of the Directive had to be in compliance with Article 16 of the EU Charter, laying down the freedom to conduct a business. In this context, the CJEU held that Article 3 of the Directive could not be interpreted in such a way that it entitled the Member States 'to take measures which, while being more favourable to employees, are liable to adversely affect *the very essence* of the transferee´s freedom to conduct a business'.[37] In the view of the Court, the Directive could not be interpreted in such a way that it would reduce a transferee´s contractual freedom to the point that the limitation would be liable to *adversely affect* 'the very essence of its freedom to conduct business'.[38] Therefore, the UK's 'more favourable' national measures were deemed by the Court to be in conflict with EU law. However, there was no separate reference to Article 52(1) EU Charter in the

[33] *Luxembourg Business Registers,* C-37/20 and C-601/20, EU:C:2022:912 *Orde van Vlaamse Balies and* others, C-694/20, EU:C:2022:963, indeed such a consideration is also in judgment of 21 June 2022, *Ligue des droits humains*, C-817/19, EU:C:2022:491, paragraph 114.

[34] Lenaerts (2019), p. 781.

[35] See for example Cases C-92/09 and 93/09, *Volker und Markus Schecke and Eifert* [2010] ECR I-11063.

[36] Case C-426/11 *Mark Alemo-Herron* [2013] judgment of 18 July 2013. It is interesting to compare this to Case C-201/15, *AGET Iraklis*, ECLI:EU:C:2016:972, Judgment of 21 Dec. 2016, which concerned also questions on the restrictions on free movement of capital, and cited the Mark Alemo-Herron case in that context. In that situation (*ERT*-type of (iii) case type situation), the focus is on conventional proportionality analysis – in which discussion on the essence test and Article 52(1) is subsumed entirely. In fact, *AGET* Iraklis, is seemingly the current main reference case of the CJEU, when dealing with free movement provisions and fundamental rights (EU Charter rights).

[37] *Ibid Mark Alemo-Herron*, para 36.

[38] *Ibid Mark Alemo-Herron*, para 35.

case, and indeed, the UK referring Court had not made any reference to Article 16 EU Charter. Irrespective, it is clear in this case, that even though the case revolves around interpretation and application of a Directive in the national context, the impact of the ruling is that the national norm and approach cannot prevail in the light of the Charter provision, without engaging in any balancing discussion or analysis on the basis of Article 52(1) or otherwise.[39]

The first time the essence test was (solely) relied upon in the context of validity questions of EU secondary norms in the light of the EU Charter, was the Grand Chamber case of *Schrems I*,[40] which was decided upon in the last half of the year 2015. While not referencing Article 52(1) EU Charter in this case, the annulment of Commission Decision 2000/520[41] is based on an essence test only. Firstly, the CJEU concluded that 'legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter'.[42] In the same way, the Court concluded that a legislation that does not provide for 'any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter.'[43] Importantly, and interestingly, the CJEU also emphasised here that the 'very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of *the rule of law*', which adds an important value element in this context.[44]

Schrems I is different from the *Digital Rights Ireland* case,[45] which the Grand Chamber of the CJEU had concluded the year before. In the latter case, the CJEU concluded on the essence element, even with a rather thin reasoning, that the disputed provisions of the Data protection Directive[46] did not adversely affect the essence of the fundamental rights at stake (Article 7 and 8 of the EU Charter). However, this was a rather case-specific exercise, and did not seemingly exclude or impact the following comprehensive analysis, which included a detailed proportionality analysis in the case, on the basis of which the CJEU concluded that the Directive was invalid.

[39] See further on the critique of this case, Groussot and Petursson (2015), pp. 143–144.

[40] Judgment of 6 October 2015, *Schrems (I)*, C-362/14, ECLI:EU:C:2015:650.

[41] US adequacy decision based on Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[42] *Schrems (I)*, C-362/14, para 94.

[43] Ibid. para 95.

[44] Ibid. para 95, emphasis added.

[45] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* EU:C:2014:238.

[46] Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

A somewhat similar approach to the *Digital Rights* case is found in the 2016 case, *Tele2 Sverige*,[47] which concerned the question whether national legislation which, for the purpose of fighting crime, provided for a general and indiscriminate retention of all traffic and location data of subscribers and registered users through means of electronic communication, was contrary to Article 15(1) of Directive 2002/58 (on privacy and electronic communications), read in the light of Articles 7, 8 and 11 of the EU Charter. In this case, the focus is, as the first step, on proportionality of the national implementing measure, rather than the detailed or *per se* essence test as the first threshold.[48]

Finally, to recall in this methodological context, is the *Ligue des droits humains* case,[49] which was decided by the Grand Chamber in 2022 on the basis of a preliminary reference from the Belgian Constitutional Court. The case mainly concerned questions of interpretation of the General Data Protection Regulation (Regulation (EU) 2016/679) and questions of both validity and interpretation of the PNR Directive,[50] in light of Articles 7 and 8 of the EU Charter, and the API Directive[51] in light of Article 45 of the EU Charter. In the case, the CJEU highlighted, firstly, that Article 52(1) is indeed consisting of two sentences.[52] Thereafter comes a rather detailed essence test analysis of the PNR Directive, seen in the light of the EU Charter, which however, ultimately concludes that the interferences flowing from the PNR Directive do not adversely affect the essence of the fundamental rights protection laid down in Articles 7 and 8 of the EU Charter.[53] A detailed proportionality analysis also followed, and the CJEU finally concluded that nothing had been revealed that was capable of affecting the validity of the PNR Directive. It is submitted here, that the methodological approach of this case will remain a *model* for an approach which involves both interpretation and questions of validity of EU secondary norms, in the light of the EU Charter of

[47] Joined Cases 203 & 698/15, *Tele2 Sverige AB v. Post- och telestyrelsen and Others*, ECLI:EU:C:2016/970, Judgment of 21 Dec. 2016.

[48] See also *Schrems II*, Judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, ECLI:EU:C:2020:559, which is partly also relying on *Schrems I*, para 95, when it comes to the issue of the essence test, but otherwise is firstly focusing of proportionality, when declaring Decision 2016/1250 on the EU/US Privacy Shield invalid (see paras 175–185 on the one hand and para 187 on the other (essence test of *Schrems I*). Indeed that emphasis on proportionality rather than the essence test is also the main approach in the significant *La Quadrature du Net* case, Judgment of 6 October 202, joined Cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791) which concerned interpretation of Article 15(1) of Directive 2002/58 (Directive on privacy and electronic communication) in the light of Articles 3, 4, 6 and 7 of the EU Charter.

[49] *Ligue des droits humains case*, op. cit. *supra* note 12.

[50] Directive (EU) 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

[51] Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data.

[52] *Ligue des droits humains case,* para 113, op. cit. *supra* note 12.

[53] Ibid. para 120.

Fundamental Rights. This finds support in writings of the President of the CJEU, in his extra judicial capacity, even if written prior to this case, where he held that:

> From a methodological perspective, the case law of the CJEU reflects the fact that that court will first examine whether the measure in question respects the essence of the fundamental rights at stake and will only carry out a proportionality assessment if the answer to that first question is in the affirmative. [footnote omitted] The application of that method of analysis is not simply empty formalism, but rather seeks to emphasize the point that the essence of a fundamental right is absolute and not subject to balancing. Otherwise, if the CJEU were to examine first whether the measure in question complies with the principle of proportionality, the concept of the essence of fundamental rights would lose both its importance and its autonomous nature.[54]

3.3 Criticism and Considerations

In the above case analysis, it is clear that there has been an evolution in the CJEU´s approach to Article 52(1) EU Charter, in particular its first sentence, from the initial inconsistence referencing to a more structural and methodologically driven approach, highlighting *the essence test* as a *per se* test, free from the proportionality analysis mentioned in its second sentence. In addition, the CJEU also developed a real test of the *provided for by law* condition, inspired by the Strasbourg case law. This *new* approach finds support in the above quote from the President of the CJEU, even if speaking in his personal capacity, from which it is clear that the test of the essence of the fundamental right is to come *first*, and *independently* of proportionality—thus emphasizing the point that "the essence of a fundamental right is absolute".

Even if the firm application of the *provided for by law* condition is as such new in this context, its arrival has not been met with any real surprise, nor hard criticism in the legal literature. However, both the idea of absoluteness of all fundamental rights and a free-standing essence test analysis has been criticized, despite it also having been welcomed by distinguished scholars at the same time.[55]

This author, together with Xavier Groussot, argued in 2015 that the essence test should not be separated from the proportionality analysis—but should, however, appropriately impact the depth and intensity of that review.[56] Furthermore, in 2022,[57] the same authors again argued along the same lines, and criticised the lack of a transparent and coherent methodology when the CJEU is defining the essence of a fundamental right, and also that this may lead to "false" and even inappropriate hierarchy of norms, where detailed balancing and limitation analysis, respecting the social context of the rights at issue, should have occurred instead (such as in the case

[54] Lenaerts (2019), pp. 787–788.

[55] See for example, Ojanen (2016), p. 318.

[56] Groussot and Petursson (2015), pp. 141–144.

[57] Groussot and Petursson (2022), p. 239.

of *Alemo-Herron*). At the same time, we warned that this might have an additional impact on those fundamental rights that would have otherwise been considered absolute, which is the case for a limited number of fundamental rights only. I would like to maintain that this criticism is still valid, despite the recent development in the case-law.

Other scholars have also put forward both detailed theoretical and case law based critical analysis, such as to be found in the writings of Orlando Scarcello. His conclusions are clear and well-reasoned. Scarcello emphasises that Article 52(1) of the EU Charter "is crucial to our understanding of EU law", even if arguing that the absoluteness of fundamental rights is done for commendable reasons, such as those related to the rule of law, it is reasonable to doubt that the furthering of the absolute theory for fundamental rights is "theoretically or empirically sound".[58] For theoretical discussion on the absolute and non-absolute nature of fundamental rights limitations, despite 'protection of the essence' requirements, Robert Alexy also provides a very useful input. In his book, 'Theory of Constitutional Rights', he relates this to the essence requirements in Article 19(2) of the German Basic law. In his view, requirements of guaranteeing 'the essential core' laid down in Article 19(2) of the Basic law do not lay down any additional requirements on the limitability of constitutional rights, beyond what is already contained in the principle of proportionality. The core of the right is found through balancing but not intuitively.[59] Takis Tridimas has in recent writings highlighted the elusiveness of the essence concept and held that while a distinction between the essence and the periphery of rights is logical, in practice it is extremely difficult to draw. In his view, this limits the functionality of the essence test 'as a judicial tool'.[60] Also, Sebastien Platon has provided for an excellent interpretation and critique of the essence test in his writings on Article 52(1) EU Charter.[61]

Irrespective of this criticism, the methodological approach of the Court of Justice is clearly steering in the direction of a *per se* essence test—and deliberately seeking to do that independently, and before any proportionality analysis (indeed excluding it, if the essence of a fundamental right is adversely affected). In the words of President Lenaerts, as mentioned above, this is done in order to "emphasize the point that the essence of a fundamental right is absolute and not subject to balancing".

Notwithstanding, it is not argued by this author that the essence and absoluteness of fundamental rights are not to be respected—in particular for those traditionally considered absolute fundamental rights (such as for example human dignity, found in Article 1 of the EU Charter and the prohibition of torture (Article 4 EU Charter)), but adjudicative limitation of Charter rights should be more appropriately done via open and transparent proportionality analysis—which respects, and, is impacted by,

[58] Scarcello (2021), p. 21.

[59] Alexy (2002), pp. 195–196.

[60] Tridimas (2023), pp. 199–200.

[61] Platon (2020), p. 317.

the essence of fundamental rights in the balancing exercise. This would also be more appropriate in a situation of EU law, for example where two hierarchically equal fundamental rights need to be weighed against each other—such a situation may ultimately only yield one prevailing essence of fundamental right.

4 Conclusions

The EU Charter has impacted EU law and the case law of the CJEU in a concrete and significant way since December 2009. However, even if it was appearing not to bring about a fundamental change in a methodological sense, the outcome is very different. First, the scope of the EU Charter had to be defined. Since linked to the scope of EU law, it may be maintained in a way that it is a work in progress; but neither the actions of the EU institutions, nor the actions of the EU Member States, within the scope of EU law, are outside the reach of the EU Charter.

In this contribution, the focus has been on one of the central provisions of the EU Charter, Article 52(1). Despite a somewhat unclear and inconsistent start, the provision is now appearing frequently in the case-law of the CJEU when the application of the EU Charter is necessary for the legal analysis at stake. It is clearly a pivotal provision in the whole EU Charter. Here, as well, it was not evident from the text, nor from the *explanations* to the EU Charter, that a change in the methodology applied for limitation of fundamental rights was under way. However, as demonstrated above, that has clearly happened, in particular with the *provided for by law* condition, and *the essence* test, both found in the first sentence of Article 52(1) EU Charter. While the change is both clear and impactful, it is submitted here that the new methodology is still under construction, and coherency in the approach is still not sufficient. For example, the essence test remains somewhat of a black box in the hands of the CJEU. In this respect, in my view, academic constructive criticism is still necessary and helpful, since even those responsible for limitations, need limits.

It is also clear from the CJEU case law dealt with in this text, that privacy rights, personal data protection, and digital rights, are appearing in many of the most noticeable cases of the CJEU. This is certainly going to be the case for some time to come, while legislation, such as the GDPR Regulation and the new acts in the digital field (DSA and DMA), are still in its infancy and crucial terms and provisions need further clarification and interpretation. It is important to understand the scope of the EU Charter, the different case type categories within which fundamental rights operate in EU law, and the most appropriate tools and methods in order to gauge the validity and limitation of fundamental rights, which are operating in the challenging mix of international norms, constitutional norms and identity, and important EU values such as the rule of law. In this context, balancing of rights needs to be open, structured and reliable.

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Part III
Future Directions in Digitalisation

Digital Constitutionalism, EU Digital Sovereignty Ambitions and the Role of the European Declaration on Digital Rights

Edoardo Celeste

Abstract The *European declaration on digital rights and principles* represents the latest EU contribution to the complex process of constitutionalisation of the digital society. The Declaration, similar to many other Internet bills of rights emerged in the past few decades, shares the objectives of digital constitutionalism. It aims to update the constitutional normative framework to face the challenges of the digital revolution. To this end, the Declaration aspires to make rights and principles that should guide EU actors in the context of the digital transformation more visible. Its mission is twofold: programmatic and educative. On the one hand, it is a political document, aiming to set the objectives and commitments that the Union and its Member States should pursue to implement EU values in the digital society where we live. On the other hand, it is an educational tool: it aims to disseminate the EU visions for the digital transformation both internally, to raise societal awareness on digital rights, and externally, to promote the EU digital model in the world. The chapter reconstructs the legislative history of the Declaration, positions this initiative within the EU regulatory and policy framework in the digital field, assesses the overall degree of innovation of its content, re-contextualises this initiative within EU digital sovereignty strategies and evaluates its potential contribution to the agenda of digital constitutionalism.

1 Introduction

Over the past few years, scholars from various disciplines have observed the emergence of a plurality of declarations of digital rights, documents very often lacking any binding legal value, which aim to articulate rights and principles for the digital society and which are usually referred to with the expression ‘Internet bills

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of rights'.[1] This phenomenon has attained a considerable size, if one considers that, depending on the variables used, some scholars collected almost two hundreds of these documents spanning slightly more than two decades.[2] The proliferation of these declarations has been linked to the concept of 'digital constitutionalism', a notion variably defined, which in my view denotes the ideology underpinning this trend.[3] Digital constitutionalism would not be a revolutionary theory subverting the tenets of contemporary constitutionalism, but would rather denote the idea that our rights and principles should evolve to face the challenges of the digital revolution. Digital constitutionalism would be the driver of a gradual process that is discussing, elaborating, and implementing rights that speak to the problems of the digital society: what I called a process of constitutionalisation.[4]

This chapter will analyse the *European declaration on digital rights and principles for the digital decade* (hereinafter, simply called the 'Declaration'), which represents one of the latest additions to the above-mentioned set of declarations as well as a very relevant one, given the fact that was solemnly adopted by the EU Commission, Parliament and Council.[5] The chapter reconstructs the legislative history of the Declaration (2), positions this initiative within the EU regulatory and policy framework in the digital field (3), assesses the overall degree of innovation of its content (4), re-contextualises this initiative within the EU digital sovereignty strategies (5) and evaluates its potential contribution to the agenda of digital constitutionalism (6).

2 From Stakeholders' Engagement to the Solemn Declaration

The EU Commission first announced its plan to adopt a declaration on digital rights and principles in its Digital Compass Communication in March 2021.[6] In May 2021 the Commission launched a public consultation on a set of digital rights and principles, followed by a special Eurobarometer survey in October of the same

[1] See Musiani et al. (2009), p. 359; Weber (2015); Oates (2015); Redeker (2018), p. 302; Celeste (2022a).

[2] See Celeste (2022b); for an updated list of these documents please consult the dataset at www.digitalconstitutionalism.org.

[3] For a mapping of the various approaches to this concept, see Celeste (2019b), p. 76.

[4] Ibid; Celeste (2022b) ch 6.

[5] European Declaration on Digital Rights and Principles for the Digital Decade 2023 [2023/C 23/01].

[6] European Commission, 2030 Digital Compass: The European Way For The Digital Decade, COM (2021) 118 Final. Available online: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0118.

year.[7] In addition to these two consultation tools, a series of targeted workshops were organised to hear the view of consumer organisations, trade unions and small and medium-sized companies (SMEs), local and regional authorities as well as specific categories of individuals who might have had difficulties in accessing the public consultation and the Eurobarometer survey, such as children, individuals with disabilities, and elderly people.[8] The research service of the Commission also engaged in an analysis of thirty digital rights declarations published between 2014 and 2021 by an array of actors, ranging from international organisations to local communities.[9]

A Commission Staff Working Document published in January 2022 includes a detailed report of the outcome of these various consultations, from which it emerged that the consulted stakeholders generally agreed on the importance of digital rights and principles.[10] Strong of this result, in the same month the Commission published a communication including a draft of the *European Declaration on Digital rights and principles for the Digital Decade*.[11] This opened the trialogue involving the EU Council and the Parliament. In particular, the Council made various amendments reflecting a series of criticism moved by consulted stakeholders after the publication of the first draft of the Declaration.[12] Its key changes aimed to broaden the scope of application of the stated rights and principles. First of all, by enlarging the perimeter of the addressees of the Declaration from EU citizens to 'all people living in the EU'.[13] Second, by explicitly referring to the aim of achieving gender balance and of benefitting also individuals from rural areas when the Declaration states the solidary and inclusive objectives of the digital transformation.[14] Third, by adding more specific references to fundamental rights and ethical standards in relation to the use of AI.[15] And, finally, by emphasising the importance of paying attention to the sustainability aspects of digital technologies at all stages, from their design and

[7] European Commission, Commission Staff Working Document Report on the Stakeholder Consultation and Engagement Activities Accompanying the Document Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, SWD(2022) 14 Final. Available online: https://digital-strategy.ec.europa.eu/en/library/declaration-european-digital-rights-and-principles#Document; EU Commission (2021).

[8] Ibid.

[9] Ibid 33 ff.

[10] Ibid.

[11] EU Commission, Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 27 Final.

[12] See a summary in Car (2022).

[13] Declaration, Article 1.

[14] Declaration, Chapter II.

[15] Declaration, Chapter III.

development to their use and disposal, highlighting the importance of repairing and reusing.[16]

The final document was adopted as a 'solemn' joint declaration by the EU Commission, Parliament and Council on 15 December 2022.[17] It explicitly recognised to be devoid of binding legal force, representing only a document with declaratory nature.[18] It is composed of one preamble, twenty-four articles organised in six chapters and including fifty-one commitments. The next section will examine in more detail the content of the Declaration within the context of the EU regulatory framework in the digital field.

3 The Declaration Within the EU Digital Regulatory and Policy Framework

The Declaration represents an instrument in line with the EU tradition as a regulator of digital technologies and as a protector of digital rights. Digital technologies were the subject matter of EU law and policy since the 1990s. The Data Protection Directive, for example, represented the cornerstone of data privacy in relation to the use of automated means of processing from 1995 to 2018, when the GDPR was adopted.[19] The E-Commerce Directive, adopted in 2000 and still in force, harmonises rules related to the provision of online services, online commercial communication, electronic contracts and the liability of online intermediaries.[20] From a policy perspective, the first consolidated and comprehensive policy document focusing on digital issues was the 2010 Commission's Digital Agenda.[21] Part of the broader EU 2020 strategy, it aimed to react after the 2008 recession. Reinforced by the adoption of the 2015 Digital Single Market strategy, this third decade of EU digital regulation culminated in the adoption of the GDPR in 2018.[22] In this decade also the CJEU emerged as a decisive actor in shaping EU digital law. Judgments such as *Digital Rights Ireland*, *Google Spain* and *Schrems* represented seminal decisions that further strengthened digital rights in the EU.[23] The last few years have been characterised by

[16] Declaration, Chapter VI.

[17] European Commission (2022).

[18] Recital 10, Preamble.

[19] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; Regulation (EU) 2016/679 (General Data Protection Regulation); see Lynskey (2015).

[20] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') 2000.

[21] 'A Digital Agenda for Europe' (European Commission 2010) COM(2010)245.

[22] 'A Digital Single Market Strategy for Europe' (European Commission 2015) COM(2015) 192.

[23] See Pollicino (2021); Fabbrini et al. (2021).

what Papakonstatinou and De Hert have defined as a phenomenon of ‘actification’, the proliferation of EU regulations bearing an ‘eponimous’ denomination including the ‘nickname’ of the piece of legislation, followed by the expression ‘act’, which is typical of the common law tradition.[24] In the digital field, this is the result of the adoption of a further policy strategy focusing on the digital, called the Digital Decade Policy Programme for 2030, which has led to the proposal and adoption of seminal pieces of legislation such as the Digital Services Act, the Digital Markets Act, and the AI Act.[25]

In the digital field, a high level of attention to the dimension of individual rights has emerged since the beginning. For example, in the history of data protection, one of the areas on which the EU legislator paid attention since the 1980s, the EU approach differentiated itself from those of the other international organisations that were working in this area, such as the Organisation for Economic Cooperation and Development (OECD), for a distinct attention to the dimension of individual rights.[26] In 2000, the Charter of Fundamental Rights of the EU was one of the first international instruments to enshrine a fully-fledged right to data protection independent from the right to personal, family life and correspondence, what across the Atlantic is more known as the right to privacy.[27] From a policy perspective too, the attention to the individual dimension is apparent: a user/human-centric approach is not only evident in the Commission’s policy documents mentioned above but also in the political commitments enshrined in a series of declarations of the European Council on e-government and e-democracy[28] and in multiple resolutions of the EU Parliament.[29]

The Declaration fits in this groove.[30] Recital 1 of its Preamble made a univocal reference to the Charter of Fundamental Rights of the EU and the international

[24] Papakonstantinou and De Hert (2022).

[25] European Commission (2021a); Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030 2022; Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts 2021 2021; 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 L 265); Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) 2022 (OJ L).

[26] See Bygrave (2014).

[27] See Lynskey (2015).

[28] European Council (2017, 2020, 2021).

[29] See, e.g., European Parliament resolution of 20 May 2021 on shaping the digital future of Europe: removing barriers to the functioning of the digital single market and improving the use of AI for European consumers (2020/2216(INI)) 2021.

[30] Cf Hoepman (2022). Hoepman states that the Declaration is fundamentally liberal in nature by providing individual agency to people instead of protecting them, an element that Hoepman sees as very much in line with the economic focus of early European integration.

obligations of EU Member States, reiterating that the EU is a 'union of values'. And not only values abstractedly, but values that put individuals at their centre. Article 1 of the Declaration affirms that 'People are at the centre of the digital transformation in the European Union'; technology is seen as an instrument at the service of the society. An inclusive society: the Declaration not only refers to EU citizens but to 'all people living in the EU', an aspect that was intentionally amended by the Council to enhance the inclusivity of the proposal.[31]

In Recitals 7–12 of the Preamble, we can find relevant guidelines related to the positioning of the Declaration within the sources of EU law and a series of interpretative rules. From a policy perspective, Recital 5 tells us that the Declaration builds on previous declarations adopted by the EU Council in the field of digital transformation and complements the European Pillar of Social Rights, a set of twenty principles to make Europe fairer and more inclusive that was proclaimed by the EU Parliament, Commission and Council in 2017.[32] From a legal perspective, the Declaration traces back its foundations in primary and secondary EU law as well as in the case-law of the CJEU.[33] In terms of its interpretation, the Declaration 'should form a holistic reference framework and should not be read in isolation'.[34] It is 'declaratory' in nature[35] and is without prejudice to existing rights and their limits as established by EU law and case-law.[36]

In the Commission's Communication accompanying the first draft of the Declaration, we find other useful information that allow us to better understand the nature of this document. From a legal point of view, the Declaration does not have any legally binding force. However, it possesses a clear 'political' value, as it emerges from the objectives laid down in the Preamble and mentioned above. The Commission writes:

> Given the political nature of the Declaration, not all principles correspond to rights that are directly enforceable: some are already laid down in legislation, others may require further action, at the appropriate level.[37]

In this statement, the programmatic nature of the Declaration is apparent. It is neither a legally enforceable document nor a directly implementable one: it sets objectives for the EU and its Member States that will have to be further articulated in legislative proposals. Recitals 7–12 in the Preamble include interesting information about the aims of the Declaration. This initiative aims to spell out 'shared political intentions and commitments, and recalls the most relevant rights in the context of the digital

[31] Declaration, Article 1.

[32] See supra (n 28); European Union (2017); see also European Commission (2021a).

[33] Recital 10, Preamble.

[34] Recital 7, Preamble.

[35] Recital 10, Preamble.

[36] Recital 9, Preamble.

[37] EU Commission, Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 27 Final (n 11) 6.

transformation'.[38] It should represent a reference point for policy-makers when developing their approach to the digital environment[39] as well as guide business actors in all phases related to use of digital technologies, from their design to their disposal.[40] Interestingly, the Declaration is presented as a programmatic document of the EU strategy in the digital field both internally and externally. It is a 'shared political commitment and responsibility' of the Union and its Member States to implement it.[41] Moreover, the Preamble states that this document should be promoted and used in the context of EU trade relationships and within international organisations, an element that will be analysed below in the context of the EU digital sovereignty aspirations.[42]

Despite not being legally binding, the EU Commission will prepare annual reports on "The State of the Digital Decade" and yearly Eurobarometer surveys to assess societal perceptions.[43] Reporting therefore represents the soft tool to ensure that the Declaration is being implemented and to measure the status of the programme outlined in the Declaration both from a legal and political point of view. Such reports will be shared with the Parliament and the Council,[44] and, according to the Commission's Communication, Member States will receive a series of recommendations and will be involved in ad hoc bilateral meetings with the Commission.[45] Annual reports will also be used by the Commission to assess the health of the Declaration and suggest amendments to the Parliament and Council, if deemed necessary.[46]

4 Codification or Innovation?

Recital 3 of the Declaration's Preamble states:

> With the acceleration of the digital transformation, the time has come for the EU to spell out how its values and fundamental rights applicable offline should be applied in the digital environment. The digital transformation should not entail the regression of rights.

[38] Recital 7, Preamble. It is worth noting the repeated use of the expression 'spelling out', as seen in Recital 3.

[39] Recital 7, Preamble.

[40] Recital 8, Preamble.

[41] Recital 12, Preamble.

[42] Recital 11, Preamble.

[43] Recital 12, Preamble. EU Commission, Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 27 Final (n 11) 6.

[44] Recital 12, Preamble.

[45] EU Commission, Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 27 Final (n 11) 6.

[46] Ibid 7.

The declaration does not fully present itself as an innovative instrument, but in the use of the expression ‘spelling out’ is implicit a logical exercise of rearticulation of rights in the digital context. Despite what is affirmed in Article 1(b), stating that rights and values of the EU that are valid offline should also be respected in the online dimension, the Declaration is not a simple recollection of already established principles, a superficial codification. The Declaration often makes a general reference to ‘fundamental rights’, without however reinstating them.[47] Contrary to other Internet bills of rights, as will be further explained in the last section, the Declaration does not aim to provide a catalogue of digital rights. Its objective is rather to provide a programme for the EU digital transformation by extracting its guiding principles from the puzzle of regulatory and policy tools adopted by the EU in this area.

The content of the Declaration can be classified into three groups: rights, which are explicitly flagged as such by the use of the expression ‘everyone has the right to’; two types of principles, one that is expressed in a peremptory way using a performative present tense and another whose normative character is softened by the use of conditional tense ‘should’; and, finally, commitments, which represent statements of political nature that are clearly introduced by the expression ‘we commit’. Given the legal focus of this chapter, the first two categories shall be analysed.

Only five principles are formulated as rights among the twenty-four articles included in the Declaration. These five rights do not reserve surprises in terms of content; they all represent rights enshrined in the Charter of Fundamental Rights of the EU that are reiterated in the context of the digital environment. Article 18 is the only one to include a right that represents a development in comparison with the content of the Charter. It is formulated as the right ‘not to be subjected to unlawful online surveillance, unlawful pervasive tracking or interception measures’. Building on a series of significant decisions of the CJEU, this principle is not explicit in the Charter, which limits itself to list a right to the protection of personal communications in Article 7.[48]

Among the principles that are presented using a performative present tense, it is worth to mention what can be considered the imprinting of the EU: the human-centric approach to the digital transformation. Article 1 of the Declaration reads: ‘People are at the centre of the digital transformation’. This is not a new principle per se. The centrality of the individual in the digital field characterised early legislative interventions such as the Data Protection Directive.[49] Recital 2 of the Data Protection Directive stated that ‘data-processing systems are designed to serve man’. Similarly, Recital 4 of the GDPR states that ‘The processing of personal data should be designed to serve mankind.’ Although it is absent from the current text of the AI Act, a similar principle is explicitly mentioned in its accompanying explanatory memorandum and implicit in some of the key provisions of the act.[50]

[47] See e.g. Article 9; 11(a); Chapter IV (a).

[48] See Celeste (2019a), p. 134. See also Celeste and Formici (2023, forthcoming).

[49] See Celeste and De Gregorio (2022), p. 4.

[50] Explanatory Memorandum, Section 1.1; Article 14 of the Proposal of AI Act (n 25).

The group of principles that are presented using the conditional form 'should' include more courageous statements that go beyond the EU *acquis*. Article 3 affirms that everyone *should* have a fast and affordable Internet connection, while the EU has so far limited itself to ensure the deployment of fast connectivity and to reduce the costs of installation of the necessary infrastructure.[51] Article 7 states that everyone *should* have online access to key public services, building on the aspiration of the EU to introduce more efficient rules related to an EU system of digital identity to access public services online more easily.[52] Article 8 respecifies the principle of digital humanism of Article 1 of the Declaration in the context of AI, making explicit one of the core assumptions of the proposed AI Act.[53] Article 9 complements this principle specifying that everyone *should* be able to make informed choices when interacting with AI systems, so echoing the transparency obligations enshrined in Article 52 of the proposed regulation. Article 10 enshrines the user's freedom of choice of online services, affirming a principle that was implicit in the right to data portability introduced by the GDPR.[54] Article 19 seems to complement this provision by enshrining an innovative right to the individual self-determination of one's own digital legacy.[55]

Similarly innovative, Article 14 establishes a right to know media's owners or controllers, in line with the objectives of the European Democracy Action Plan 2020 and one if its core projects, the Euromedia Ownership Monitor.[56] Article 15 instead highlights the role that online platforms should play in contrasting online disinformation and misinformation and promoting a 'free democratic debate', directly evoking the framework introduced by the Digital Services Act.[57] Articles 23 and 24 focus on the intersection between digital and green, building on recent EU strategies that try to harness the benefits of technology to tackle climate change.[58] Article 23 states that one should try to mitigate negative consequences from an environmental perspective during the whole life of a digital product or service, from its design to its disposal, while Article 24 requires more information about the

[51] In 2014 the EU adopted to this end the Broadband Cost Reduction Directive, which is due to be repealed by the Gigabit Infrastructure Act that has been proposed by the Commission in February 2023.

[52] In 2014 the EU adopted the Electronic Identification, Authentication and Trust Services (eIDAS) Regulation and an update of this framework is currently being discussed by the EU co-legislators.

[53] See explanatory memorandum accompanying the current proposal.

[54] Article 20 GDPR.

[55] See Maciel and Carvalho Pereira (2013); Harbinja (2017), p. 26.

[56] Euromedia Research Group (2022).

[57] According to Article 25(1) DSA, Very Large Online Platforms (VLOPs) are 'online platforms which provide their services to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million'.

[58] See European Commission (2023). See also Celeste and Dominioni (2024, forthcoming).

sustainability, energy consumption, reparability of a product to be provided to users to facilitate their choices.[59]

From this rapid analysis, it is possible to argue that the answer to the question of whether the Declaration carries out an action of codification or innovation in the digital field is in reality more nuanced. The Declaration seems to make explicit a series of principles that implicitly orient the EU regulatory strategy in the digital environment. The Declaration connects the dots between the general principles and values enshrined in EU primary law, and in particular the Charter of Fundamental Rights, and in the jurisprudence of the CJEU, on the one hand, and the concrete provisions of the EU regulatory framework and the Commission's policy strategies in the digital field on the other hand. The Declaration interprets the former to provide a more explicit rationale to the latter.

5 The Declaration's Contribution to the EU Digital Sovereignty Strategy

The Declaration opens with the first-person plural 'We', a typical language of constitutional instruments. One might wonder to whom this 'we' refers: the European people? The Commission, Parliament and Council? An answer to this question is difficult to provide. What is certain is that it refers to the EU dimension, a 'we' that embodies actors or promoters of the 'European way to the digital transformation'.[60] The previous section was concluded by arguing that the Declaration would represent a complementary instrument to the many 'acts' and proposals of acts that have been emerging in the past few years in the digital field. A 'quasi-constitutional' instrument, we could argue. A tool that is devoid of constitutional character strictly speaking, as the Declaration is merely of a declaratory and political nature, but that performs a de facto constitutional function. Not only because, as we have seen earlier, it aims to guide national and EU policymakers, public and private actors. But also because it 'spells out' a 'vision', the EU vision for the digital transformation.[61] The recent process of 'actification' represents a phase of further ripening of the EU approach to digital rights. The Declaration confirms the acquisition of a high level of self-awareness of the EU as an actor with a distinct ideological identity and regulatory programme in the field of digital rights.

The EU 'vision' or 'model' for the digital transformation has two distinctive characteristics.[62] Firstly, it is 'human-centric': individuals represent the top priority

[59] See Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828 2023.

[60] Declaration, opening statement.

[61] Recital 6, Preamble.

[62] Expressions found respectively in Recitals 6 and 5 of the Preamble.

of the EU regardless of their citizenship, social or economic status, as is evident in Article 1 of the Declaration and the provisions on solidarity and inclusion (Article 2), which have been previously commented on.[63] Secondly, the EU model is 'value-based'.[64] As previously said, the Declaration, and its rights and principles, builds on EU primary law, and in particular on the values enshrined in the TEU and in the Charter of Fundamental Rights. Recital 6 of the Declaration's Preamble includes the foundational principles of the 'EU way for the digital transformation', echoing the values included in Article 2 TEU, with some interesting addition, such as 'digital sovereignty' and 'sustainability'.[65]

The Declaration does not explain what it means when stating the EU model for the digital transformation 'encompasses in particular digital sovereignty in an open manner'.[66] Apart from the Preamble, there are no other explicit references to the concept of EU digital sovereignty or its strategies in the Declaration. Digital sovereignty is in itself a relatively nebulous concept in the sense that both in the existing literature as well as in EU policy documents it has not received a univocal definition.[67] This is certainly partially due to the fact that the notion of sovereignty itself has evolved throughout the history and has never been definitively set in stone.[68] Digital sovereignty appears as the last offspring of the family of concepts applying the notion of sovereignty to the technological world, such as 'technological sovereignty' and 'data sovereignty'. This trend is not surprising, as our vocabulary changes following the evolution of technology and reflects the relative importance that these innovations play within society.[69]

In the documents presenting the project Gaia-X, the so-called 'cloud made in the EU', one of the most apparent examples of digital sovereignty claims within Europe, digital sovereignty is depicted as 'an aspect of general sovereignty',[70] and is defined as the 'possibility of independent self-determination by the state and by organisations' with regard to the 'use and structuring of digital systems themselves, the data

[63] The expression 'human-centric' can be found in EU Commission, 'Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 27 Final' (n 11) 7.

[64] Ibid.

[65] Recital 6 of the Declaration's Preamble reads: 'The EU way for the digital transformation of our societies and economy encompasses in particular digital sovereignty in an open manner, respect for fundamental *rights*, *rule of law* and *democracy*, inclusion, accessibility, *equality*, sustainability, resilience, security, improving quality of life, the availability of services and respect of everyone's rights and aspirations. It should contribute to a dynamic, resource efficient, and fair economy and society in the EU.' Article 2 TEU reads: 'The Union is founded on the values of respect for human dignity, freedom, democracy, *equality*, the *rule of law* and respect for human *rights*, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' In both quotes, common values are put in italics.

[66] Recital 6, Preamble.

[67] See Celeste (2021).

[68] See Kalmo and Skinner (2010).

[69] See, e.g., in relation to the concept of digital constitutionalism, Celeste (2017).

[70] Federal Ministry for Economic Affairs and Energy (BMWi) (2019a).

produced and stored in them, and the processes depicted as a result.'[71] Compared with the traditional notion of sovereignty, digital sovereignty is still a form of control and independence at the same time; it implies the possibility for an actor to determine the destiny of their digital assets. However, compared with the Westphalian notion of sovereignty, digital sovereignty is no longer exclusively linked to the idea of a territory; digital boundaries overtake national frontiers and new elements of connection between digital assets and sovereign entities emerge.

EU digital sovereignty claims emerged in anti-US and China perspectives.[72] The EU perceived to have lost part of its control in the digital realm due to the fact that most of the digital products and services are commercialised by American or Chinese companies. US and China do not share the same human-centric and value-based 'vision' of the digital transformation advanced by the EU. In this context, claiming control means ensuring that EU fundamental rights are respected in the digital context, too. The Declaration thus emerges as a consolidating element of the theoretical justifications of EU digital sovereignty ambitions, which cannot be merely backed by economic aspirations—which would amount to protectionist policies and represent a form of what I have called 'digital sovereignism'—but should be informed by the duty to protect fundamental rights.[73] The Declaration represents the 'manifesto' of EU digital sovereignty aspirations, not so much in the sense of providing programmatic provisions to implement specific digital sovereignty strategies, but rather as a document encompassing the rights and principles that should be used as a litmus test to assess the legitimacy—and thus the limits—of EU digital sovereignty strategies.

As digital sovereignty has an internal and an external dimension, the former intended as a control on digital assets and the latter as a form of independence from the influence of foreign actors, so the Declaration is set to be used as a guiding instrument in a twofold manner. Internally, to the benefits of the EU and its Member States, and, externally, as a policy document to promote the EU model among third countries, trade partners, and even in the context of EU activities within other international organisations and multistakeholder summits, such as the Internet Governance Forum.[74] However, in this explicit willingness stated in the Declaration of acting as an international model, the EU goes even beyond its digital sovereignty ambitions, a reality that could even be criticised as an expression of digital sovereignism. Indeed, digital sovereignty relates to digital assets with a link—not necessarily territorial—to the EU, while this globalising objective also encompasses portions of the digital environment that are devoid of any connection with the EU. And this is not expressed in a subtle or nuanced way: in the Commission's Communication including the first draft of the Declaration, the EU is presented as a '*global* leader of a human-centred and value-based approach model in the digital

[71] Federal Ministry for Economic Affairs and Energy (BMWi) (2019b).

[72] See Celeste (2021, 2023a).

[73] Ibid.

[74] Recital 11, Preamble.

age'.[75] The Declaration, in this sense, is not only an instrument for the EU, but being part of the EU 'brand' in international relations it is also conceived to the benefit of third countries desiring to embrace a similar approach to the digital transformation.[76]

6 The Declaration as an Expression of Digital Constitutionalism

All the more so in light of the just described global ambitions of the Declaration, one can analyse this EU document within the context of other similar initiatives connected to the idea of digital constitutionalism.[77] The necessity to translate the DNA of contemporary constitutionalism to face the challenges of the digital revolution, which represents the essence of digital constitutionalism as an ideology, informs a variety of processes at multiple levels.[78] One of the most peculiar ways in which this constitutionalisation of the digital society is taking place is through the emergence of 'Internet bills of rights', declarations articulating rights and principles for the digital age, adopted by a range of actors, and in most of the cases devoid of any binding legal force.[79] Yet, it is possible to argue that these documents play a constitutional role, nurturing the global conversation on which rights and principles should guide the digital transformation. They do not aim to set a final word, to establish a global constitution. They rather possess an experimentalist character; they aim to gradually innovate, to advocate and persuade, to enhance the level of awareness on digital rights and principles.[80]

The European declaration well fits this trend. It does not aspire to be part of EU primary law, but assumes a softer nature, halfway between a legal, quasi-constitutional document and a policy programme. The EU itself contributes in this way to the global conversation on digital rights and principles, making its baggage of values more explicit in the context of the digital transformation, both internally—within the Union, at the level of its Member States—and externally—in its international relations. In terms of process of elaboration of the Declaration, the public consultation launched by the Commission in May 2021 is similar to the procedure adopted to draft other Internet bills of rights, such as the Brazilian Marco Civil or Italian Declaration of Internet Rights.[81] Compared with other Internet bills of rights,

[75] EU Commission, 'Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 27 Final' (n 11) 7. My emphasis.

[76] See Article 1(d).

[77] For an analysis of Internet bills of rights initiatives in the context of digital constitutionalism see Celeste (2022a).

[78] See Celeste (2022a) (n 4).

[79] See Celeste (2022b).

[80] For a more detailed analysis of these arguments see Celeste (2023b).

[81] Marco Civil Da Internet (2014); Camera dei Deputati.

the Declaration adopts a spurious linguistic style. Expressions and elements that are typical of the constitutional jargon, such as the employment of the first-person plural or the more neutral 'everyone' are present besides sentences that seem more extracted from a policy document. Statements using the conditional tense and 'we commit to'-type of sentences are more difficult to read as individual rights, exactly because they embody the programmatic nature of the Declaration. Another difference lies in the non-comprehensive nature of the Declaration that does not aim to reinstate all the EU rights and values that would be applicable in the digital context, but focuses its attention on the most emblematic areas that are connected to fields of EU digital regulation currently in need of guiding rights and principles, for the rest making a general reference to 'fundamental rights'.

Despite these differences, the core similarity between the Declaration and other Internet bills of rights lies in its objectives. The Declaration aims to make EU rights and values more 'visible', by spelling out values and principles that are either expressed in analogue terms or are implicit in the EU regulatory framework in the context of the digital society. The Declaration, in this way, also embodies one of the ambitions of the Charter of Fundamental Rights, which is to enhance the 'visibility' of rights in light of societal changes, and in particular of technological developments.[82] The last Eurobarometer survey confirms that from this point of view the EU is on the good track.[83] The report indicates that the majority of the respondents has a scarce knowledge of digital rights. Most do not even know that basic 'analogue' rights are valid online too. Now the ball is however in the hands of a plurality of actors: the dissemination and implementation of the values of the Declaration will tell us in the future about the success—hopefully—of this educational objective.

7 Conclusion

The Declaration on digital rights and principles represents the latest EU contribution to the complex process of constitutionalisation of the digital society. The Declaration too, similarly to many other Internet bills of rights emerged in the past few decades, shares the objectives of digital constitutionalism. It aims to update the constitutional normative framework to face the challenges of the digital revolution. To this end, the Declaration aspires to make rights and principles that should guide EU actors in the context of the digital transformation more visible. Its mission is twofold: programmatic and educative. The Declaration, indeed, does not have any binding legal value. On the one hand, it is a political document, aiming to set the objectives and commitments that the Union and its Member States should pursue to implement

[82] The preamble of the CFR reads: 'to this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.'

[83] European Commission (2021b), p. 21.

EU values in the digital society where we live. And on the other hand, it is an educational tool; it aims to disseminate the EU vision for the digital transformation both internally, to raise societal awareness on digital rights, and externally, to promote the EU digital model in the world.

Political and educational ambitions are connected. The Declaration positions individuals at the centre of the digital transformation. Protecting individuals and their fundamental rights is one of the core objectives of the Declaration. But the Declaration itself derives its legitimacy from the people. The Declaration was adopted following encouraging results of a public consultation; it was solemnly proclaimed by the three EU institutions that embody the legislative power at EU level. The Declaration maps the principles and rights that should guide the development of the EU regulatory framework in the digital field. It is not purely an ex-ante exercise; the EU is already working on a significant series of legislative proposals in this area, so what the Declaration is doing is enhancing the awareness of the pillars, the guiding principles of this regulatory activity. The EU is working on its digital rights awareness. Both at institutional level—making sure that our policy makers know where the EU is going—and at societal level—to ensure that the norms adopted in the digital field will effectively be implemented and fully understood by all individuals. Only in this way, the EU can reinforce its identity as a player that puts values and individuals at the centre. Only in this way, the EU can be proud to export a model beyond its boundaries, without being accused of regulatory auto-referentialism, not to say normative colonialism.

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Making the Rule of Law Great Again: The Building of the Digital Rule of Law in the European Union

Annegret Engel and Xavier Groussot

Abstract This chapter examines the legislative and judicial dimensions of the digital rule of law in the EU and its current and future building. We argue that adjudication in EU law related to the digital rule of law is destined to grow as it is fostered by the new legislation in digitalisation and a proactive Court of Justice eager to interpret the rights enshrined under the Charter. The building of the digital rule of law takes the form of an increased reliance on the Charter in horizontal situations and an increasing application of the principle of proportionality before the courts, including a balancing of fundamental rights. In this chapter, we will examine the reasons for this growth in EU litigation within the digital field and whether this constitutes a positive development for the protection of the rule of law in the EU, thus making the rule of law great again in a time of 'rule-of-law anxiety'.

1 Introduction

The study of the digital society and its evolution is marked by a potent anxiety when it comes to ensuring that it will not irremediably undermine the fundaments of democracy and the rule of law as understood in the Western world.[1] In the US, this anxiety is reflected by abundant publications on this topic written by influential legal and political thinkers arguing for an increased regulation of the digital sector to limit the erosion of democracy and the rule of law.[2] In Europe, the regulation of the digital field has started many years ago and the European Union is now finalizing new extensive legislations that will regulate this sector in the years to come. Both the present and future legislations are founded on the development of an 'ecosystem of

[1] For an overview of the 'rule of law anxiety' in EU law, see Groussot et al. (2020), p. 425.

[2] See e.g. Fukuyama (2021); Kissinger et al. (2021); and Lessig (2006).

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trust' that protect and promote a digital rule of law strongly founded on EU Fundamental Rights and the EU Charter of Fundamental Rights (EUCFR).

Yet, as it is well- known in Sophocles' philosophy, 'trust dies but mistrust blossoms'. In legal practice, indeed, the mistrust in the digital society between individuals, undertakings and governmental bodies is often transformed and crystallized in litigations before courts. We consider that adjudication in EU law related to the digital rule of law is destined to grow in the future fostered by the new legislation on its way and a proactive Court of Justice of the European Union (CJEU) eager to interpret the EUCFR. It is therefore of relevance to take a look at how the CJEU currently constructs the digital rule of law in its jurisprudence. Our argument is that in EU law, the building of the digital rule of law takes the form of increased reliance on the EUCFR in horizontal situations (i.e. situation involving private parties); and an increasing use by the CJEU judges of the principle of proportionality and the balancing of rights as enshrined in the EUCFR.

This increasing adjudication based on the EUCFR promotes in turn the protection of the rule of law—a substantive rule of law hence understood as incorporating EUCFR in its core meaning and content. Two main questions will guide our inquiry of the building of the digital rule of law in this Chapter: First of all, what are the reasons of the growth in EU law litigation within the digital field? And, secondly, does this growth constitute a positive development for the protection of the rule of law in the EU—thus making the rule of law great again in a time of 'rule-of-law anxiety'? In short, this chapter examines the legislative and judicial dimensions of the digital EU rule of law and its current and future building.

In Europe, the 'age of digitalization' is also the 'age of regulation'. Never before has the EU regulated so much in the internal market[3] and the legislation related to the digital rule of law is only an exemplification—though an excellent one—of this general regulatory move. Also, as a starting point of our inquiry, it is important to clarify and explain the use of the term 'digital rule of law' (or what can be also called *i-rule of law*).[4] In this chapter, we take the perspective that the function of the rule of law is dual: it is not only a tool that allows the limitation of power; but it is also a tool of power.[5] This is the reason why the terminology of the 'digital rule of law' is used here in this text and also why we intend not to propel the fashionable terminology of 'digital constitutionalism' since we consider it to be too much of a neutral terminology with normative and constitutional implications. In our view, the rule of law is a better terminology since—historically—it is a contested concept.[6] Hence, it reveals

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[3] See Sadl et al. (n.d.).

[4] For the use of the concept of 'i-rule of law', see Groussot et al. (2020); and Groussot and Zemskova (2020).

[5] See Tamanaha (2004).

[6] Waldron (2002), p. 137; and Waldron (2021). See also Orford (2011), p. 9. According to Orford, law is inherently genealogical: it also transmits inherited obligations and not only create new obligations.

in our opinion the double function of the rule of law (limiting and creating powers) in a better way.[7]

This first section will discuss both functions of the rule of law in EU legislation and also touch upon the issue of EU competences and values. The next sections will then focus mostly on the 'limitation of power' dimension of the digital rule of law through the use of the EUCFR. This is done through looking at two crucial aspects of the EUCFR: On the one hand, at the horizontal direct effect of the provisions of the EUCFR relied on in the digital field ('the horizontal direct effect Doctrine'). And, on the other hand, this is done by examining and discussing the balancing of rights and the application of the principle of proportionality in the 'digital rule of law' case law of the CJEU ('the balancing and proportionality Doctrine').

2 The Legislative Dimension of the Digital Rule of Law

To understanding the making of the 'digital rule of law,' it is first of all important to look from a bird's eye view at the new EU legislation that impacts the 'digital rule of law'; and thus also to understand its 'spirit' or 'essence'.[8] Here in this section, in our analysis, we put our attention to only four legislative instruments: The GDPR regulation (which has entered into force since 2016)[9] and three other regulations at the proposal stage or recently adopted: the Artificial Intelligence Act (AIA)[10] the Digital Market Act (DMA)[11] and the Digital Service Acts (DSA).[12] This is what Luciano Floridi calls the 'legislative square'.[13] This new legislation[14] exudes in our

[7] See Tamanaha (2004).

[8] See for an overview, Renda (2020). Renda argues that the current legislative framework at EU level is still "too sparse and uncoordinated" to achieve the Union's objectives.

[9] Regulation (EU) 2016/679 of the European Parliament and of the Council of 17 April 2016 on the protection of natural persons with regard to the processing personal data and the free movement of such data. For case law on the process of personal data and EU fundamental rights, see e.g. case C-101/01, Lindqvist, EU:C:2003:596; case C-131/12, Google Spain and Google, EU:C:2014:317. With regards to the consent by a user of a particular website to the storage or access of personal data, see e.g. case C-673/17, Planet49, EU:C:2019:801.

[10] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM/2021/206 final.

[11] 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).

[12] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[13] Floridi (2021).

[14] But also many more instruments: DGA, Health space regulation, e-privacy regulation. The logic of the e- privacy directive is similar to GDPR. The data retention directive was declared *ultra vires* *i*n the Digital Rights case.

view two other (interconnected and non-exclusive) constitutional principles which form an integral part of our understanding of 'the digital rule of law': 'digital sovereignty'[15] and 'digital transparency'.[16] In essence, digital sovereignty (security) is about power; and digital transparency (accountability) is about limitation of power.[17] But both ensure the protection and promotion of the European liberal and democratic values. These two principles, and hence the digital rule of law, are not about digital innovation but concern the governance of the digital: the *'new morphology of power'*.[18]

Digital sovereignty on the one hand creates red lines for illiberal states (within and outside Europe) and Tech Giants. It is about protecting the 'ecosystem of trust'. Two pieces of legislation of the legislative square are particularly marked by 'digital sovereignty': the AIA and the DMA. The main aim of 'digital sovereignty' is to protect the digital rule of law. In that sense, it may be viewed as a 'defensive principle' that ensures the 'security' of the EU digital rule of law. Digital transparency on the other hand establishes and promotes (fundamental) rights for individuals/consumers. It is about enhancing the 'ecosystem of trust'. Two pieces of legislation are particularly marked by digital transparency: the GDPR and the DSA. The main aim of 'digital transparency' is to enhance the digital rule of law. In that sense, it may be viewed as an 'offensive principle' that ensures the 'accountability' in the EU digital rule of law

One of the invariants of the EU digital legislation is trustworthiness in data processing that is enhanced, among others, by a high level of transparency.[19] It is no coincidence that the Commission identifies the creation of an 'ecosystem of trust' as its essential policy objective in constructing the regulatory framework of Artificial Intelligence.[20] The EU users of digital tools need to be reassured that processing of their personal data is carried out in accordance with the safeguards prescribed by the data protection instruments and that the protection of their privacy is not compromised in any way. Transparency, being the principle that is closely

[15] See Floridi (2020), and Floridi et al. (2021), p. 220. For Floridi, the AI regulation is a-territorial, a concept that assumes a post-Westphalian world in which the territoriality of the law no longer applies automatically and may be irrelevant. See also Celeste (2021); and Roberts et al. (2021).

[16] Floridi (2016), p. 330. As Floridi underlined, '"My" in my data is not the same as "my" in my car, but it is the same as "my" in my hand'. The fight for Digital Sovereignty is an epochal struggle, Floridi (2020), p. 371. The EU is regulating as never before in the digital field. However, the concept of transparency and access to documents has become less and less protected with extensive and far-reaching exceptions being introduced in disrespect of the spirit of the EU law in place. As put by Hoffmann HCH (2017), "although the EU is not in danger of moving into the spectrum of the totalitarian ideal, much effort needs to be undertaken, *to live up to the necessities of an open system under the rule of law"*. It appears therefore important to strengthen the protection of 'transparency rights'.

[17] See Atik and Groussot (2020).

[18] Floridi (2016).

[19] Hofmann (2017).

[20] White Paper 'On Artificial Intelligence - A European Approach to Excellence and Trust', the European Commission, Brussels, COM (2020) 65.

connected to one of the EU's foundational values, rule of law, is one of the key requirements for establishing an 'ecosystem of trust'.[21] Strengthening transparency in processing personal data is crucial especially due to the fact that its absence seems to be a norm in the area of digitalization.[22] In this respect, the GDPR, the provisions of which pay special attention to transparency while processing personal data,[23] contributes to creating a safe 'digital playing field' for EU users and a favorable milieu for the promotion of democratic values and protection of EU fundamental rights; and thus provides a powerful tool for the enhancement of the rule of law and the liberal values in the European Union.[24]

Another commonality of the 'legislative square' is that their legislative basis is grounded (exclusively or non-exclusively) on the internal market, i.e. the clause enshrined in Article 114 TFEU, the so-called 'internal market clause'. This is of interest since it shows that this legislation that promotes the protection of fundamental rights is also 'economically' based.

Therefore, an argument that would contend that the new legislation promotes exclusively 'digital humanism' is flawed. Two acts are based exclusively on Article 114 TFEU, the DMA and the DSA, whereas the GDPR and the AIA have a dual legal basis: Article 114 TFEU and Article 16 TFEU. The AIA proposal consider that it contains certain specific rules on the protection of individuals with regard to the processing of personal data, notably restrictions of the use of AI systems for 'real-time' remote biometric identification in publicly accessible spaces for the purpose of law enforcement. According to the AIA proposal, it is therefore appropriate to base this legislation, in as far as those specific rules are concerned, on Article 16 of the TFEU. The same applies to the GDPR that is often described in the literature as having a 'dual normative value' (economic and human)[25]—probably a consequence of its dual legal basis.

The choice of the legal basis also constitutes a normative marker that should be taken into consideration when considering the values enshrined and promoted in a legislative instrument. While the exclusive choice of Article 114 TFEU for the DSA is unquestionable, the same conclusion cannot so easily be drawn for the DMA. The latter was originally envisaged to be adopted on a dual legal basis together with Article 103 TFEU,[26] thus taking into account the clear competition law angle of the proposed regulation. Indeed, the DMA aims to provide "harmonized rules ensuring

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[21] Belder (2020).

[22] Ibid.

[23] See e.g. Recitals 39, 58, Articles 5, 12 of the GDPR.

[24] See Groussot and Zemskova (2020) for development. See also e.g. De Gregorio (2022), p. 268. By promoting transparency and accountability in automated decision-making processes through procedural safeguards, the GDPR fosters human dignity.

[25] See discussion in Lynskey (2015).

[26] European Commission Inception Impact Assessment, Ref. Ares (2020)2877634 – 04/06/2020, p 2. See e.g. Basedow (2021); see also Georgieva (2021). The artificial distinction between ex-ante and ex- post enforcement and the consequential separation of the proposed DMA from the area of competition law has to be criticised as both unnecessary and impractical.

contestable and fair markets in the digital sector across the Union where gatekeepers are present."[27] To this end and in contrast to the traditional *ex-post* competition law framework at EU and national level, the DMA establishes an *ex-ante* enforcement mechanism in order to ensure the free movement of digital services before competition laws apply. It states that "the intrinsic cross-border nature of the core platform services provided by gatekeepers, regulatory fragmentation will seriously undermine the functioning of the Single Market for digital services as well as the functioning of digital markets at large."[28] As a result, it refers to Article 114 TFEU as the single legal basis.[29]

The artificial distinction between *ex-ante* and *ex-post* enforcement and the consequential separation of the proposed DMA from the area of competition law has previously been criticised as both unnecessary and impractical.[30] In fact, the omission of Article 103 TFEU as a legal base does not alter the scope of competences, choice of legal instrument, or legislative procedure from the Union's point of view. As can be observed, Article 114 TFEU allows for increased parliamentary involvement and shared competences with Member States, so the removal of the internal market legal base would have a much greater impact than the removal of Article 103 TFEU. Nevertheless, the use of Article 114 TFEU allows for greater flexibility in the drafting of a measure without it being limited to merely competition law objectives, as well as—ultimately—occupying the entire policy area of the Digital Single Market at supranational level. In the long term, this bears the risk of Article 103 TFEU being side-tracked in the quest for the correct legal basis for similar measures. The question is thus whether the Commission's choice of Article 114 TFEU as a single legal base can be justified with the need for a more regulatory approach in digitalisation.[31]

If challenged, the courts' interpretation of the Union's competence under Article 114 TFEU has usually been rather generous and favourable towards EU supranational interests.[32] Particularly with its infamous ruling in *Tobacco Advertising*,[33] the CJEU has provided a "drafting guide" as argued by Weatherill,[34] essentially allowing the EU's legislative organs to design measures according to their desired legal base. As can be argued, the establishment and functioning of the (digital) single

[27] Article 1(1) of the proposed DMA.

[28] DMA Proposal, p. 4.

[29] Chapter "Licence to Regulate: Article 114 TFEU as Choice of Legal Basis in the Digital Single Market".

[30] Basedow (2021); see also Georgieva (2021).

[31] There is indeed evidence of a much wider shift towards a more regulatory approach at EU legislative level, particularly in the internal market, as opposed to a previous de-regulatory approach which relied on the removal of obstacles to trade at national level. See to this effect Sadl et al. (nyp).

[32] An extensive discussion on the general criteria for legal basis litigation as well as Article 114 TFEU as a legal basis can be found in Engel (2018).

[33] Case C-376/98, *Federal Republic of Germany* v *European Parliament and Council of the European Union* (Tobacco Advertising), EU:C:2000:544.

[34] Weatherill (2012).

market in order to remedy what has been described as a "wild West" internet[35] could indeed be considered within the scope of Article 114 TFEU. In addition, the field of digitalisation particularly benefits from a more regulatory approach, due to rapid technological developments inherent to the online world in addition to lengthy litigation processes at national and European level which would most certainly fail to deliver timely justice in the new digital era. Indeed, as mentioned above, the interplay between the principles of sovereignty and transparency establish a new set of digital rights by means of regulatory force in an environment so far largely driven by mere economic values.

As such, the EU can play a leading role in promoting European values for the digital sphere, as it pursues an "open, but proactive international approach", as expressed as part of its digital agenda.[36] As was already established in the 2020 Commission Communication on "A European strategy for data" that the "Commission's vision stems from European values and fundamental rights and the conviction that the human being is and should remain at the centre."[37] More recently, in its Declaration on European Digital Rights and Principles[38] as well as the Declaration for the Future of the Internet,[39] the EU's goal is the creation of a level playing field which envisages the same rules and principles to govern the digital sphere as they also do in the offline world.[40] It appears difficult to deny that the EUCFR is central to the achievement of this strategy.

3 Horizontal Effect of Fundamental Rights in the Digital Rule of Law

When the EU Charter of Fundamental entered into force, it was argued in the literature that it will constitute a key factor in fostering the doctrine of horizontal direct effect by stimulating litigations between private parties before European

[35] E.g. Berg (2000); and Shipchandler (2000).

[36] European Commission "A European Strategy for Data", COM(2020) 66 final, available at https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf. See also Kuner (2019).

[37] European Commission (2020).

[38] European Declaration on Digital Rights and Principles for the Digital Decade, proposed by the European Commission, published on 26 January 2022.

[39] Signed by the EU, the U.S. and more than 60 other international partners, published on 28 April 2022.

[40] See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2030 Digital Compass: the European Way for the Digital Decade, COM/2021/118 final.

courts.[41] Advocate General Bot opined in *Kücükdeveci,* that "given the ever increasing intervention of Community law in relations between private persons, the Court will . . . be inevitably confronted with other situations which raise the question of the right to rely, in proceedings between private persons". This assertion is in our view correct. Undeniably, the material scope of application of the EUCFR is broader than the doctrine of general principles of EU law used by the CJEU pre-Lisbon. When one adds this to the more highly visible nature of the Charter, one cannot exclude that claimants and their counsels may seek on a more regular basis to test the applicability of the Charter's rights before national courts in the context of "horizontal" litigations provided that the matter falls within the scope of EU law. However, many scholars have argued in favour of using a textual interpretation of Article 51 EUCFR that the Charter does not apply in relation to private parties.[42] In the five years following the entry into force of the EUCFR, the CJEU and its Advocates General were rather reluctant in extending the scope of application of the EUCFR to horizontal situations.[43]

At this stage of development in EU case law, the doctrine was very much contested as reflected for instance by the position of Advocates General in *Dominguez*[44] or in *Google Spain*[45] or the position of the CJEU in *Association Médiation Sociale*.[46] This limited interpretation was guided by a restrictive interpretation of the general provisions of the EUCFR; and more specifically in the digital sector by a fear of the difficulties of the private actors facing EU law obligations involving a constellation of fundamental rights.[47] So during the first years of adjudication of the EUCFR, the doctrine of horizontal direct effect remained

[41] See for a discussion on horizontal direct effect, Groussot and Petursson (2015). See also on the impact of EUCFR in its use by judge as innovative and powerful tool in the digital field, Fabbrini (2015).

[42] Cf Frantziou (2015). Article 51 of the Charter, which regulates its scope of application, has limited interpretative value in respect of horizontality. Overall, the Charter is phrased in a cryptic way, giving rise to arguments both denying and supporting its horizontal effect. A dynamic interpretation is therefore required in order to analyse it meaningfully. Indeed, such an interpretation is needed not only in order to make sense of the textual difficulties identified above, but also in order to reconcile the Charter analysis with the EU horizontality doctrine which had been developed prior to the Charter's entry into force.

[43] Yet, 'the need to protect the rights and freedoms of others' is explicitly mentioned in Article 52(1) EUCFR, which concerns limitations on Charter's rights. This provision reflects, in our view, the position that the Charter may be applied in horizontal situations and can be used as the fundamental cause of civil proceedings brought by a private party against another one. This logic is in our view also applicable to litigation in the digital sector.

[44] Case C-282/10 *Dominguez*, judgment of 24 January 2012, AG 's Opinion at [83].

[45] Opinion of AG Jääskinen in *Google Spain*, C-131/12, EU:C:2013:424, paras 133–34, such as private search engines, to conduct the balancing exercise between different rights, such as one person's right to private data over another's freedom of expression and information, respectively protected in Articles 8 and 11 of the Charter.

[46] Case C-176/12, *Association* de *Médiation Sociale* ECLI:EU:C:2014:2.

[47] E.g. internet search engine service providers having to implement a decision of withdrawal.

basically a 'work in progress' with the imposition in certain cases of an indirect horizontal effect via the national courts.[48] Orla Lynskey discusses in *The Foundations of EU Data Protection Law,* the issue of horizontal effect of data protection rights. According to her, although the right to data protection protected by Article 8 EUCFR can be considered to be directly effective between private parties, she also notes that the issue of horizontality of data protection rights must be viewed with caution due to the lack of direct effect of Article 16 TFEU and apparent lack of enthusiasms in the CJEU case law for developing the doctrine of horizontal effect of general principles/rights.[49]

Yet, in the last five years the CJEU has now solidly anchored in its case law[50] the doctrine of horizontal effect of fundamental rights.[51] In *Bauer,* the CJEU made clear that a mandatory provision of the EUCFR may have legal effect between private parties.[52] It is worth noting that the text of some provisions of the EUCFR strongly related to data protection law e.g. Article 7 and 8 EUCFR does not exclude the application of these provisions to private parties.[53] There is in our view no strong argument in rejecting the application of these provisions in horizontal situations and this particularly in light of the recent development of the case law.

In his book on *Digital Constitutionalism*, Giovanni De Gregorio shows the potential use of the doctrine of horizontal direct effect in the digital sector in EU law. For him, the tools are present to develop such a doctrine in this sector and notably by recognizing a horizontal directed effect to the freedom of expression clause enshrined in Article 11 EUCFR.[54] However, he also warns us as to the

[48] See Tridimas (2013), p. 171.

[49] Lynskey (2015), pp. 120–122.

[50] See e.g. C-414/16 *Egenberger* ECLI:EU:C:2018:257; C-569/16 *Baue*r ECLI:EU:C:2018:871; and C-193/17 *Cresco investigations* ECLI:EU:C:2019:43.

[51] Frantziou (2020).

[52] C-569/16 *Bauer*, paras 85–87, in relation to Article 31(2) EUCFR.

[53] Frantziou (2015), p. 44. Additionally, there are several Charter provisions which either directly or implicitly extend to private conduct. Many of the protections enshrined in Titles I-IV of the Charter are phrased in a manner that guarantees minimum individual rights without specifying that they apply to public authorities only. For example, the rights to human dignity (Article 19) and non-discrimination (Article 20) are phrased in a manner that suggests a wide-ranging application. Further, unlike Article 8 of the European Convention, which is limited to the actions of public authorities, the rights to privacy and the protection of private data enshrined respectively in Articles 7 and 8 of the Charter are not restricted to such action and, in conjunction with secondary legislation, do indeed create obligations for private parties. See also C-131/12, *Google*. Cf Article 11 EUCFR.

[54] De Gregorio (2022), see discussion at pp 192–201. According to him, 'In the future, we may probably see a jurisprudential development of the protection of the right to access to information under Article 11 CFR in the same line as the ECtHR case law on Article 10 of the European Convention of Human Rights, i.e. as a right to receive and impart information of ideas'. See e.g. ECtHR, *Cengiz and Others* v. *Turkey* (1 December 2015) and *Jankovskis* v. *Lithunania* (17 January 2017); and Case C-516/17 *Spiegel Online* ECLI:EU:C:2019:625.

expansion of obligations to respect constitutional rights to online platforms.[55] This would lead, in general, to legal uncertainty and, more specifically, to the fragmentation about content moderation obligations, hence weakening the separation of powers.[56]

The codification of fundamental rights in the Digital Single Market legislation discussed in the previous section is another element that will in our view foster the development of the doctrine of horizontal effect of rights in the digital sector. It seems difficult avoiding its spill- over due to the very existence of the phenomenon of digitalization of a society where digital services are often provided by private parties and the codes are habitually owned by private companies, which are most of the time Tech Giants. These Tech Giants boast powers akin to a State and inevitably put individuals facing them in a situation of 'societal submission' that undermines the need of social inclusion and the principle of equality. A situation thus reflecting the 'inherent vulnerability' of these individual. We believe that this asymmetric situation provides also the (moral/social) justification for increasing horizontal direct effect of fundamental rights in order to judicially protect the weaker party in an enhanced way and attempt recalibrating the balance of power in the digital sector.[57]

Lawrence Lessig considered that the developments in internet 2.0 made him recognize that the regulation of cyberspace was not only in the hands of governmental institutions, but that private parties in the market are now also important actors in this field, as they are in control of the codes that are used to make their applications work.[58] Moreover, as lucidly emphasized by Dorota Leczykiewicz, parties that provide digital and e-commerce services are in the vast majority private parties. That means that their relationship with service-recipients is to a significant degree regulated by the 'market' and its regulatory expression—private law.[59] As put by her, "there is a clear danger of asymmetric relationship between the private parties in the digital society. We are witnessing new forms of inequality, not just of the bargaining power between a user and a digital market operator.[60] The wealth of the information collected by such an organization, the technical complexity and the

[55] Ibid, p 198.

[56] Ibid, p 199.

[57] The issue of justification of reliance on horizontal direct effect is also discussed by Frantziou (2015) broadly and not in the digital market, p 20. The horizontal effect of fundamental rights can be conceptualised as a tool to respond to broader new phenomena in which the EU and its Member States are inevitably involved: contemporary developments such as globalisation, the privatisation of public functions, and legal fragmentation, clearly point towards an extension of some obligations to private actors. Some private parties, such as large multinational corporations, paramilitary groups and religious institutions, are increasingly accumulating power equivalent to that of states.

[58] See Lessig (2006).

[59] See Leczykiewicz (2020), p. 66. As put by Leczykiewicz, 'Despite many political and ideological transformations, the principle of freedom of contract continues to be central to modern private law regimes, and still consists of three elements: freedom to choose one's contractual partner, freedom to pursue one's own goals through contracting, and freedom to set the terms on the basis of which contracting takes place'.

[60] Ibid.

interconnectedness of the different media makes the users of its products inherently vulnerable and incapable of exerting any influence over their relationship".[61]

The danger of this asymmetric relationship is illustrated in our view by the factual situation in the *Fashion ID* case (the so-called 'Facebook 'Like' button' case).[62] In this case concerning the interpretation of the scope of the concept of 'controller', it appears that the Operator of a website (a private company providing online shopping services) had embedded on that website a social plugin that allows personal data of a visitor to that website to be transferred to the provider of that plugin. With regard, in particular, to the Facebook 'Like' button, it seems to be apparent from the order of reference that, when a visitor consults the website of Fashion ID, that visitor's personal data are transmitted to Facebook Ireland as a result of that website including that button. It seems that that transmission occurs without that visitor being aware of it regardless of whether or not he or she is a member of the social network Facebook or has clicked on the Facebook 'Like' button.[63] The user of the *Fashion ID* website is in asymmetric situation with the Tech-giant; it is a situation of 'inherent vulnerability'. Seen in this light of "asymmetric relationship", the doctrine of horizontal effect of fundamental rights in combination with the multiple rights enshrined in the EUCFR may be useful in practice to improve the legal protection of individuals facing a Tech Giant in a specific dispute.

Therefore, the EUCFR and its horizontal application may be considered as the only solution to some of the problems related to the weak application of the rule of law in the digital field by a judicial empowerment of individuals facing Tech Giants.[64] Horizontality of fundamental rights is destined to grow in the digital society of the EU Member States.[65] This growth is caused by two factors: on the one hand a factual factor and on the other a normative one. Concerning the 'factual factor', it is impossible to deny that litigation in the digital sector has increased in recent years. Many areas of the digital legal sector are concerned and the last years have seen a plethora of litigation related to security and mass surveillance. Yet new areas of litigations are appearing that are particularly reactive to the horizontal

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[61] Ibid.

[62] Case C-40/17 *Fashion ID* ECLI:EU:C:2019:629.

[63] Ibid, para 27.

[64] See also Leczykiewicz (2013). In that respect, one should also note that an apparent problem with the EUCFR is that its values are not homogenous. While it guarantees freedom from discrimination, freedom of expression, fair working conditions and consumer protection, it also protects freedom to conduct business or the right to property. This 'conundrum of values' (between human-centric values and market-centric values) is also enshrined in the right of protection of personal data that is central in the digital society.

In a similar vein, this marketization of the digital society is also epitomized by the dual goals of the GDPR. One of the goals is to facilitate the achievement of the internal market. The other goal is to protect fundamental rights when personal data is processed. See Lynskey (2015), p. 46 et seq. The protection offered by data protection rules is nowadays wider in many respects than that offered by privacy rules. Indeed, 'data' has a high value in the market and 'personal data' has a potential to become a 'personal property'.

[65] See de Vries (2020).

application of fundamental rights. As put by Judge Siofra O'Leary, 'the future promises a considerable amount of litigation on questions relating to social media use and related forms of digital "surveillance" by non-State bodies'.[66] Concerning the 'normative factor', the development of horizontal effect of EU fundament rights constitutes a justification for counterbalancing the powers of the Tech Giants in the digital society and creating a less 'asymmetric society' by (giving the possibility of) limiting those immense powers. The existence of a justification, in other words, creates an incentive for the development of the doctrine of horizontal effect of rights.

4 Balancing of Rights and Proportionality in the Digital Rule of Law

Whereas Article 51 EUCFR is key to understanding the scope of application of the Charter, Article 52(1) EUCFR is an essential provision to grasp the application of the principle of proportionality and the balancing of rights in the digital sector. Even if the general provisions of the EU Charter all have the potential to materially and substantially impact on the application of the Charter, Article 52(1), is fundamental in serving as the 'analytical framework' in terms of limitation of Fundamental Rights of the Charter, within 'the scope of EU law' as defined by Article 51(1) EUCFR. The case law of the CJEU on Article 52(1) EUCFR is often related to, but obviously not exclusively geared towards, the digital sector. The important number of cases or 'weight' of this digital litigation in a variety of fields of EU law[67] also reveals the prominence of the principle of proportionality in this area where balancing of fundamental rights occur on a regular basis and in different domains.[68] EU digital

[66] O'Leary (2018), p. 90. According to O'Leary, 'both European courts have recently been preoccupied with questions of mass surveillance by State authorities or the use to which the latter put communications and content data transferred by private companies'.

[67] Such e.g. Copyrights law and (outside fundamental rights) competition law. See Andersson (2020). Andersson has examined the resilience of the general principles and shows the Court's application of the principle of proportionality in its interpretation of Article 101(1) TFEU, and more precisely in its assessment of online sales restrictions in selective distribution agreements. According to her, it can be concluded that the Court applied the principle of proportionality already in the seminal *Metro* ruling delivered in 1976, and that it still does. Even more interesting is perhaps the fact that the Court still relies on the *Metro* criteria, this being more than forty years after they were first established. Thus, while we may have moved into the digital age, the Court's view on selective distribution systems remains unaltered. It retains the view that price competition does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded, and that for certain products, selective distribution is considered necessary to maintain the desired quality or to ensure the proper use.

[68] See Bakardjieva-Engelbrekt (2020). The author discusses case law related to Articles 11, 16, 17 EUCFR.

copyright law constitutes for instance such a 'field of occurrence' where balancing of rights is common practise in the CJEU case law.[69]

In *Scarlet Extended*,[70] the CJEU had to decide the scope of application of Article 52(1) Charter,[71,72] particularly whether an injunction could fall under the first condition defined in Article 52(1) of the Charter, that of being 'provided for by law'.[73] This condition is necessary to accept a limitation on the exercise of a right defined by the Charter.[74] In the present circumstances, the injunction restricted the right to conduct business (Article 16 Charter) of the ISP by requiring the installation of the contested filtering system involves monitoring all the electronic communications made through the network of the ISP concerned in the interests of those right holders. In the case *Scarlet Extended*, Advocate General Cruz Villalón, discussed this condition in detail, linking it to 'rule of law' requirements. In his opinion, the national legal provisions at issue, did not meet 'these requirements'.[75] The Court,

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[69] Ibid. In the context of digital copyrights: the enforcement of digital copyright has in many respects been extensively shaped by the jurisprudence of the EU Court of Justice and by the balancing of rights approach embraced by the Court.

[70] Case C-70/10 *Scarlet Extended SA* EU:C:2011:771.

[71] Article 52(1) of the Charter was relied on, for the first time, by the Court in the *Volker* case Cases C-92/09 *Volker und Markus Schecke and Eifert* EU:C:2010:662. Article 52(1) of the Charter was relied on, for the first time, by the Court in the *Volker* case. This ruling concerned the *validity* of EU secondary law, reviewed in the light of the EU Charter, and where the Court went through the 'analytical stages', much as the Advocate General Sharpston had suggested. In fact, 'provided for by law' was the first analytical stage, which the Court went through when it verified that the measures at stake were in fact laid down by the EU secondary norm (EU Regulation) at issue. This was similarly done in the case *Schwartz,* whereas in the otherwise detailed analysis under Article 52(1) in the *Digital Rights Ireland* case, there was no specific application of this criterion.

[72] Cases C-92/09 *Volker und Markus Schecke and Eifert* EU:C:2010:662. The term 'analytical stages' comes from the AG's opinion. Joined Cases C-293/12 and C- 594/12 *Digital Rights Ireland and Seitlinger and Others* EU:C:2014:238. Again, Advocate General Cruz Villalón had suggested an approach similar 'to that adopted by the European Court of Human Rights', para 109, and who would therefore analyse 'the quality of the law' involved – much as the Advocate General had done in the *Scarlet* opinion. In her opinion in the *Dominguez* case, Advocate General Trstenjak, relied on the condition in order to argue for a limitation of horizontal application of fundamental rights. In her opinion, individuals failed at fulfilling the 'legislative proviso contained in Article 52(1) of the Charter', since this 'rule of law' could 'naturally be directed only at the European Union and its Member States as agencies of the State' Case C- 282/10, *Dominguez*, judgment of 24 January 2012, para. 83 of AG's opinion. The Court did not rely on the Charter in the case. Case C-291/12 *Schwartz,* EU:C:2013:670, para 35.

[73] It is worth noting that Article 52(1) Charter is identically worded as Articles 8(2) and 10(2) of the ECHR.

[74] The Charter states, in well-known terms, the conditions to which any limitation on the exercise of the rights and freedoms which it recognises are subject to, just as the ECHR defines the circumstances in which, inter alia, any interference in the right to a private life or any restriction on freedom of expression may be considered lawful.

[75] Ibid., para 67 of the Advocate General's Opinion. The Court, however, did not make any reference to Article 52(1) of the EU Charter in its decision.

however, made no reference to this condition, even though it applied Article 17(2) of the Charter in the case and balanced it with Article 16 EUCFR.[76]

It is therefore not surprising to see the most recent case law of the CJEU in digital copyrights still emphasising the importance of the principle of proportionality and the balancing of rights. For instance, In *Poland* v *European Parliament and Council*, the CJEU had to balance the right to freedom of expression (Article 17 EU Charter) with intellectual property rights (Article 11 EU Charter) in the context of Directive 2019/70 on copyrights and the obligations imposed on online content-sharing service providers.[77] The CJEU recalling its *Promusicae* jurisprudence[78] considered that a fair balance to be struck between the various fundamental rights protected by the Charter and that, in addition, 'when implementing the measures transposing that same provision, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that provision but also make sure that they do not act on the basis of an interpretation of the provision which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality'.[79] Importantly, the balancing at national and EU level must be realized within the 'proportionality framework' of Article 52(1) of the EU Charter that allows for derogations for the Member States.

Similarly in *Youtube and Cyando* that concerns inter alia the e-commerce Directive (Directive 2000/31) and the Copyright Directive, the CJEU stated that the courts and authorities must strike a balance between the Charter provisions at issue in this harmonized field.[80] The case law of the CJEU will see an increase of this type of litigations based on the balancing of rights (and scope of derogations) in the harmonized field of the Digital Single Market.[81] As recently stated by Kacper Szkalej in his PhD dissertation that discusses the increasing significance of

[76] In other cases, that concern the *validity* of EU measures, the Court has, however, verified whether or not the requirement is fulfilled, but in a 'thin' manner, not testing the quality of the law as such. See also Case C-291/12, *Schwarz*.

[77] Case C-401/19, *Republic of Poland* v *European Parliament and Council of the European Union,* EU:C:2022:297, para 67.

[78] C-275/06, *Promusicae*, EU:C:2008:54, para 68. See Groussot (2008).

[79] Ibid para 99.

[80] See Cases C-682/18 and C-683/18, *Youtube and Cyando* EU:C:2021:503, paras 63, 64 and 138. Article 52 of the EU Charter is not referred to explicitly in these cases but in Case C-265/19, *Recorded Artists Actors Performers*, EU:C:2020:677, and Cases C-245&6/19 *État luxembourgeois,* EU:C:2020:795, the Court affirmed the importance of the conditions of Article 52(1) EUCFR. The cases concerned application at the national level of EU secondary norms, and how they should be applied and implemented, in compliance with the EU Charter. See also *WebMindLicenses*.

[81] See for development Engel and Groussot (2023, forthcoming). The regulatory shift in the digital space is pulled by two major regulatory instruments: the DMA and the DSA. In this regard, Engel and Groussot argue that "it is clear that greater focus is on regulatory alignment in order to accommodate for an improved balancing of rights and principles with the inclusion of new values, such as the principle of solidarity".

fundamental rights both in copyright law discourse and the practical dimension of adjudication set in the context of, horizontal, civil law disputes: "Despite justified critique by scholars towards the CJEU's varying approaches during its balancing act, the ever growing amount of case law from the Court confirms the increased sensitivity towards fundamental rights in the copyright context and the existence of mechanisms that can reconcile competing interests, in particular in the digital environment".[82]

In the area of collection of personal data, AG Pitruzella in *Ligue des Droits Humains* introduces the case by highlighting that 'balancing' is at the heart of the relationship between the individual and the society in the age of digitalization.[83] He considers that balancing fundamental rights in digital technologies that assemble, process and analyse personal data constitutes the 'principal dilemmas of contemporary liberal democratic constitutionalism'.[84] In other words, balancing of fundamental rights is viewed as the core of the digital rule of law understood as a substantive rule of law since it includes EU fundamental rights. The balancing of rights in EU (digital) law is often associated with the application of the principle of proportionality particularly since the ruling in *Promusicae*.[85] The close relationship between proportionality and the rule of law as well as the understanding of proportionality as 'a pillar of democratic constitutionalism'[86] sometimes lead authors to consider this principle a value of EU law (such as dignity).

For Giovanni De Gregorio, the principle of proportionality is structural to European data protection and central to the reconciliation of fundamental rights necessary in a democratic society.[87] For him, 'It is not by chance that the ECJ has relied on the principle of proportionality since the first cases on data protection and this balancing logic is at the core of the GDPR's structure'.[88] Whereas this 'romantic view' of 'proportionality as value' can be understood if one places oneself in the theoretical frame of the school of democratic constitutionalism and its belief in the constitutional faith of the 'Holy Trinity' (Rule of Law- Democracy-Human Rights); others have been more sceptical as to the application of the principle of proportionality in digital EU Law.[89] For instance, Mylly shows the risks of an increased use of proportionality in human rights dispute in the context of digitalization. For him,

[82] Szkalej (2021), p. 192.

[83] Opinion of AG Pitruzzella in Case C-817/19, *Ligue des droits humains* v *Conseil des ministres*, delivered on 27 January 2022, EU:C:2022:65, para 2. According to the AG, 'That relationship, on the one hand, calls for delicate balancing acts between the interests of society and the rights of individuals, premised on the paramount importance of the individual in the European constitutional tradition, and, on the other, makes it necessary to establish safeguards against abuse'.

[84] Ibid, para 2.

[85] See Groussot (2008). Case C-275/06, *Productores de Música de España (Promusicae)* v *Telefónica de España SAU*, EU:C:2008:54, para 68.

[86] De Gregorio (2022), p. 262.

[87] Ibid.

[88] Ibid, p. 263.

[89] See e.g. Mylly (2020).

flexibility and responsiveness of rights proportionality towards societal and techno-economic change comes with the price of *gouvernement des juges:* the CJEU structures and reorients important societal and techno-economic trajectories through recourse to rights proportionality.[90] Whether or not one is to agree with him, it is impossible to deny that the CJEU judges and their 'digital jurisprudence' have been crucial in the development of the principle of proportionality and the building of a substantive rule of law in EU law.

In that respect, two cases can be underlined in the 'Digital jurisprudence' on Article 52(1) EUCFR and the principle of proportionality: *Digital Rights* and *Schrems I* that are important to understand the 'essence test' (and its relationship with proportionality) which show the vigour of judicial scrutiny at the CJEU by invalidating EU measures contrary to EU fundamental rights. In *Digital Rights Ireland*, an 'essence test' of a kind is made, separately from the proportionality analysis undertaken in the case. The Court verified that the interference at issue did not adversely affect the essence of the fundamental rights at stake (Article 7 and 8 of the EU Charter). However, this was a rather case-specific exercise, seemingly neither excluding nor impacting on the following comprehensive analysis, which included a detailed proportionality analysis.[91] In *Schrems I, the* CJEU ruled for the first time a breach of both the essence of the fundamental right to privacy and of the fundamental right to effective judicial protection.[92] In particular, the case law of the CJEU had to face challenges, related to ambiguity, which still accompanies the judicial balance between the rights to data privacy and conflicting or alternative rights or interests such as freedom of expression and national security.[93]

Today and in light of the recent case law, there is no need to engage in a 'balancing of interests' where the EU measure in question breaches the essence of an EU fundamental right and is thus declared invalid.[94] This absence of balancing may be viewed as problematic if one considers the 'act of balancing' as part of a democratic exercise by the judiciary. The 'essence test' is in fact contested in the EU law literature. Sebastien Platon gives an excellent critique of this test.[95] According to

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[90] Ibid. According to Mylly, this implies that the CJEU should show more self-restraint and decide on the basis of available Union legislation. When unavailable – it could decide in favour of the Union or domestic legislators, as also suggested by some of the Advocate Generals in the studied case law of his Chapter.

[91] Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* (n 71).

[92] Case C-362/14, *Schrems*, ECLI:EU:C:2015:650, paras 94-95. See also Schrems II. In that respect, see Atik and Groussot (2021) and C-311/18, *Facebook Ireland and Schrems* (Schrems II), EU:C:2020:559.

[93] Case C-131/12, *Google Spain,* ECLI:EU:C:2014:317, paras 38-40, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, ECLI:EU:C:2014:238, and Case C-203/15 *Tele2 Sverige*, CLI:EU:C:2016:970, para 101.

[94] Tinière and Vial (2020). See also Groussot and Pétursson (2022). See also AG Pitruzella in Case C-817/19, Ligue des Droits Humains, para 91.

[95] Platon (2020), p. 317. Article 52(1) Charter. According to Platon, the essential test can be found in only nine of the Member States: Germany, Portugal, Spain, Poland, Estonia, Hungary, Czech Republic, Slovakia and Romania.

him, the CJEU has not succeeded in developing a coherent approach by failing to draw a distinction between 'essence test' and the test of proportionality.[96] It is impossible to distinguish a stable methodological line of case law and even if the 'essence test' is formally distinct from the test of proportionality it integrates in fact such a control.[97] As could be argued, the breach of the essence of the rights constitutes an incommensurable disproportion.[98] He rightly considers—with an interesting parallel with the concept of national identity—that the 'essence test' might become a notion with strong symbolism but is semantically empty.[99] The 'respect for the essence' part of Article 52(1) of the EU Charter, has to be looked upon in the context of the non-absolute nature of those fundamental rights in the Charter, that are subject to limitations based on Article 52(1) of the EU Charter.[100] An essence test, or more precisely a requirement not 'impairing the very substance of the rights guaranteed',[101] did not have frequent appearance in the case law of the Court prior to the EU Charter, but still mentioned in some foundational cases, in particular related to the principle of freedom to pursue a trade or profession and the right to property and acceptable limitation to those rights.[102] However, this was seemingly more as an abstract requirement/statement, or a reminder, that the limitation of the fundamental right was not to eliminate the very core of the right.[103] The initial question surrounding the introduction of Article 52(1) EUCFR was, therefore, if the requirement, as mentioned in Article 52(1) EUCFR, was meant to bring about any material change, i.e. such as making an 'essence test' a self-standing condition, and/or if it is different from the Court's approach so far—which could have indicated that it was 'empty' of a substantive content.

In any case, this discussion on the framework of Article 52(1) EUCFR shows the significance of the principle of proportionality in EU law and its crucial role in the development of judicial review of legislation and thus as a marker of a strong EU rule of law. There is no strong EU rule of law without a strong principle of

[96] Ibid, 330–337.

[97] Ibid.

[98] Ibid.

[99] Ibid, 337.

[100] See Groussot and Pétursson (2022).

[101] Or as put in *Nold*, Case C-4/73, ECLI:EU:C:1975:114, a limitation to the right is possible: 'on the condition that the substance of these rights is left untouched', para 14.

[102] See for a discussion on the case law of the CJEU on the 'essence test', Groussot and Petursson (2015).

[103] See also Iliopoulou-Penot (2022), pp. 989 and 1006.

proportionality. Some studies have highlighted that the intensity judicial review of EU legislative acts by the CJEU has increased in recent years.[104] The causes of such a shift are explained by the rise of the EU Charter at the apex of EU constitutional law and the increase of litigation in areas which are politically charged, such as digitalization.[105] Interestingly, the CJEU in *Ligue des Droits Humains* seems to provide a new path to the application of the principle of proportionality.[106] In this case that concerns the digital sector, the CJEU reviewed in detailed the breach of EU fundamental rights through the framework of Article 52(1) EUCFR.[107] The analysis undertaken and the balancing of rights realized by the CJEU appeared to be enough to invalidate the respective EU secondary legislation. However, the CJEU did not annul the PNR directive. Instead, the Court seems to add additional safeguards to be implemented by the EU legislature. As put by Alberto Miglio, 'it is hard to assess the extent to which the judgment effectively enhances the protection of fundamental rights. And it would be naïve to assume that upholding the legality of the PNR Directive leads to better law enforcement'.[108] We shall see what will be the development of this apparently new EU law doctrine, where the Court enters into an invisible dialogue with the EU legislature. Does this mean a decrease in the protection of the EU rule of law? Or is it a more democratic way to deal with such a type of litigation in a '*constitutional demoicracy*'.[109] That case may provide a constitutional junction between the legislative and judicial dimensions of the digital rule of law.

[104] See also Opinion 1/15 *on the EU-Canada PNR Agreement*, EU:C:2017:592, para 136. It is important to note, however, that the court held in Opinion 1/15 on the EU-Canada PNR Agreement that the rights enshrined in Articles 7 and 8 of the EU Charter are "not absolute" and that even severe interferences with those rights can be justified by "an objective of general interest of the European Union" (see at para 151). However, any such limits to the exercise of fundamental rights must be "necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others", according to Article 52(1) of the EU Charter. Hence, the balance struck between the different fundamental rights in the DSA and DMA respectively can only be approved through judicial review on a case-by-case basis, which may ultimately result in further legal challenges before the European courts instigated by the various addressees or otherwise affected parties.

[105] Harvey (2019) see particularly Chapter 8 of the dissertation. In recent years, the intensity judicial review of EU legislative acts by the CJEU has increased. Darren Harvey shows very well the evolution of the CJEU case law in cases concerning serious interferences with fundamental rights of EU legislative acts. This evolution leads to a stricter proportionality test and a reduction of the traditional wide margin of discretion.

[106] Case C-817/19 *Ligue des Droits Humains*, EU:C:2022:491.

[107] Ibid.

[108] Miglio (2022). See also Engel (2023).

[109] Nicolaidis (2012).

5 Conclusion

This chapter has examined the legislative and judicial dimensions of the digital EU rule of law and its current and future building. It has first looked into the reasons for growth in EU law litigations within the digital field, and secondly, whether this growth constitutes a positive development for the protection of the rule of law in the European Union – thus making the rule of law great again in a time of 'rule-of-law anxiety'. As has been shown, it is of no coincidence that the 'age of regulation' correlates with the 'age of digitalisation'. In fact, the very nature of a 'wild West' internet seems to have evoked the EU's regulatory impulse. Indeed, the Union is equipped with some powerful tools in the form of Article 114 TFEU to regulate in the Digital Single Market and thus to promote European values at internal and global scales.

As has been observed, a lack of fundamental rights in digitalisation fosters an asymmetric relationship between end users and Tech Giants. Therefore, we brought forward the argument that a horizontal application of Charter rights is necessary in order to remedy some of the problems related to the weak application of the *i-rule of law* by a judicial empowerment of individuals in the digital society. In addition, we have demonstrated that there is no strong EU rule of law without a strong principle of proportionality. The close relationship between proportionality and the rule of law may even lead to an understanding of proportionality as a European value where the balancing act becomes an essential part of the democratic exercise by the judiciary and the digital rule of law.

A more invisible dialogue between the judiciary and the EU legislature as seen in *Ligue des Droits Humains* may pave the way for a shift in the intensity of judicial review in politically charged policy areas, such as digitalization. The new approach taken by the court on the application of fundamental rights and the principle of proportionality thus constitutes a constitutional junction between the legislative and judicial dimensions of the digital rule of law.

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