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Abstract

Big online platforms are targeted by various regulatory attempts, the last being the DSA. Due to their increasing power, they provide crucial avenues for public discourse, political speech, electoral campaigning and institutional interaction. This working paper provides an overview of the most discussed regulatory approaches in order to evaluate the solutions proposed in the DSA. To this end, this paper offers a preliminary evaluation of platforms' power. After exploring the existing regulatory framework at the EU level in Section One, Section Two canvasses the constitutional implications stemming from the role of technological platforms. While Section Three outlines the neoliberal approach dominant in the United States, Section Four outweighs the advantages and disadvantages of the use of the third-party effect doctrine. Section Five analyses the European approach to digital platforms' issues by distinguishing the legislative framework from the relevant case law. A special focus is devoted to the prospects opened by the Digital Services Act, since it appears to incorporate a tacit delegation of state-like powers to VLOPs, thus granting them extremely sensitive functions. Finally, Section Six underscores the importance of fine-tuning the regulation of large platforms with regard to potential constitutional issues which are still unresolved.

Keywords: EU Law, Internet, Tech Law, Very Large Online Platforms, Digital Services Act, Fundamental Rights

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Constitutional Avenues to Curbing Unrestrained Power of Very Large Online Platforms

Ylenia Maria Citino[1]

Introduction

This working paper takes stock of the three main constitutional approaches that lawmakers may choose to curb unrestrained power of big online platforms. This will allow an evaluation of the extant European framework and, in particular, the recently approved Digital Services Act (DSA).

Firstly, the minimalist approach is represented by the American neoliberal ecosystem and builds on the principles of non-intervention and the free market. In a jurisdiction where the Silicon Valley industry is a significant financer of politics (Zakrzewski, 2022), the policymaker is "captured" by the massive financial interests at stake[2] and fails to properly address platform oversight issues.

Secondly, the third-party effect doctrine is another constitutional avenue aiming at extending the reach of constitutional rights to limit private actors' action. This minoritarian approach is producing some caselaw in few legal orders, as well as being quoted in scattered case law at the EU level. Scholars supporting the idea of the extension of such an approach to control and restrain platform activities in the absence of a specific legal framework are growing in number. It will be demonstrated that despite the advantage of not requiring important legislative effort, the third-party effect doctrine is flawed by the great degree of legal uncertainty stemming from the substitutive, sometimes improvised, role played by the judiciary.

Thirdly, another constitutional approach may consist of a blend of soft-, co- and hard regulation, calling upon the relevant stakeholders for compliance in solving fundamental rights issues. This is the path undertaken by the European Union after the adoption of the Digital Services Act (DSA). The new Regulation, in fact, contains an enumeration of online rights and platforms' duties. Also, voluntary disclosure obligations require the cooperation of platforms. Starting from the many challenges that the DSA will have to confront, this working paper provides a first-hand analysis of the Regulation to see if the approach chosen is fit or if other approaches would have been preferable.

To this end, the paper limits its focus only on what the DSA denominates Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs). This limitation is based on

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[2] This posture is, for instance, slowing down the advancement of a major platform oversight bill, called the "American Innovation and Choice Online Act" (AICOA) introduced at the Senate and sponsored by Sen. Amy Klobuchar, <www.congress.gov/bill/118th-congress/senate-bill/2033> (last accessed on 14 Nov 2023). See Edgerton & Birnbaum, 2022.

the specific nature of the systemic risks posed by such platforms and is covered with extra obligations in the DSA.

Chapter One pictures the general context of platforms' action, by describing the opportunities and the repercussions for the free enjoyment of fundamental rights and the integrity of democratic processes. Chapter Two canvasses the overarching constitutional implications stemming from the power of technological platforms. Chapter Three broaches the dominant approach in the United States. Chapter Four examines the horizontal effects doctrine by weighing its advantages and disadvantages. Chapter Five provides an overview of the European approach to digital platforms and devotes special attention to the prospects opened by the approval of the Digital Services Act. Chapter Six underscores the importance of fine-tuning the regulation of large platforms to tackle the emergence of fundamental rights issues.

1. Context

In response to the growing power of online platforms, decision-makers around the world are weighing regulatory solutions that allow countering digital threats without suffocating technological innovation and progress.

Information and Communication Technologies (ICT) are increasingly intertwined with democratic processes: digital platforms act like gatekeepers of news and data and do not fit any traditional classification (Hess, 2014; Napoli & Caplan, 2017), having become powerful outlets for public discourse, political speech, electoral campaigning as well as avenues for interaction with public institutions.

Social media have optimistically been referred to as "democracy enablers" (Tucker et al., 2017). The increasing popularity of these platforms, life-givers of new forms of "collective intelligence", is associated with user-generated content, open collaboration, information sharing and propagation. In early 2013, the former CEO of Twitter, Dick Costolo, spoke out his vision for the company as a "global town square" similar to the ancient Greek Agora (Leetaru, 2015). Important public debates have been "platformized", even involving crowdsourcing legislation (Randma-Liiv & Lember, 2022; Aitamurto & Chen, 2017; Ranchordás & Voermans, 2017; Lastovka, 2015; Radu et al., 2015).

Nevertheless, privately-owned technologies can also function as powerful echo chambers, hosting anti-democratic forces, cyber-attacks and information influence operations (IIOs)[3], directed to interfere with open and democratic societies (Iosifidis & Nicoli, 2021). Tools provided by social media can be abused by state or non-state actors wanting to manipulate political discourse and polarize society on sensitive issues. Social networks, messaging applications, web hosting providers, search engines, and other kinds of platforms can transform into breeding grounds for disinformation campaigns. They can host fake or

[3] The European Commission's Communication on the European Democracy Action Plan (COM(2020)790 final, available online) specifies that "information influence operation refers to coordinated efforts by either domestic or foreign actors to influence a target audience using a range of deceptive means, including suppressing independent information sources in combination with disinformation", <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0790> (last accessed on 14 Nov 2023).

malicious accounts, *trolls' armies* or *bots' squads*, aiming at coercing politicians or governments, supporting anti-system political parties, obtaining media control, interference with the free press, and promoting terrorist or extremist content, just to name a few risks (Garcia-Camargo & Bradshaw, 2021).

This is even truer after the military aggression to Ukraine, following a years-long propaganda activity[4] and foreign interference by the Russian Federation (Buchhein & Abiri, 2022). Worrying developments, such as hybrid threats[5], purposedly seek to destabilize Western institutions through continuous meddling in elections and internal decision-making. Given the escalation of threats, in 2022, the European Union imposed for the first time a ban on state-owned outlets, namely Russia Today and Sputnik, forbidding the ownership to broadcast in the European territory and on online platforms until the conflict in Ukraine ceased.[6] Part of a broader set of restrictive measures, the sanction is extremely relevant because it denotes the shift from a libertarian approach to a constitutional approach by the European Union.

The institutional policy of the Union on this matter has just started to address the question of how to balance right holders' interests, corporate autonomy, and the general public interest to uphold in the name of the rule of law and democracy. Indeed, constitutional rights require protection *by* the public authority, not only *against* it.

The 2019-2024 priorities set by the European Commission for the "digital age" embrace a new vision that incorporates this new attitude. The 2020 Communication of the Commission on "Shaping Europe's Digital Future" stresses the need to accomplish the digital transition without neglecting the "substantive societal transformation" that it brings along (European Commission, 2020, p. 2). This push to regulation aims at safeguarding "digital sovereignty" (Fuertes López, 2021), fostering democratic resilience, as well as making Europe a "global player" in a globalized interconnected economy. Such commitments spill their effects on the constitutional level, giving life to a new "field" that some scholars labeled "European digital constitutionalism."[7]

[4] According to OED, *propaganda* is "the systematic dissemination of information, especially in a biased or misleading way, in order to promote a political cause or point of view". The full entry can be found online here: <https://www.oed.com/dictionary/propaganda_n?tab=meaning_and_use#28217086> (last accessed on 14 Nov 2023). For Merriam-Webster, *propaganda* means "ideas, facts, or allegations spread deliberately to further one's cause or to damage an opposing cause". The full entry can be found online here: <https://www.merriam-webster.com/dictionary/propaganda> (last accessed on 2 Nov 2023).

[5] See note below.

[6] Council Decision (CFSP) 2022/351 of 1 March 2022 amending "*Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*", in OJ EU L 65, 2 March 2022. According to the decision, the activity of the two broadcasters is reported as «weapons of hybrid threat». For hybrid threats, see Giannopoulos et al., 2021; Kalniete & Pildegovičs, 2021; Välimäki et al., 2022.

[7] The use of "digital constitutionalism" is the outcome of a mix of theorizations and it resulted a quite ambiguous notion. For Gill, it is "a common term to connect a constellation of [private, A/N] initiatives that have sought to articulate a set of political rights, governance norms, and limitations on the exercise of power on the Internet" (Gill et al., 2015). Others underline different aspects related to the "constitutional dimension" of platforms and propose various regulatory solutions, but the doctrinal framework is overall diverse (Suzor, 2018; Celeste, 2018; De Gregorio, 2021; Pollicino, 2021; De Gregorio, 2022).

2. Constitutional issues concerning big platforms as holders of public functions in the digital agora

Researchers approaching the study of regulatory patterns for large digital platforms from a constitutional perspective confront significant challenges.

The first one is the lack of a general definition for platforms that reaches sufficient consensus. Platforms differ in market size, sources of revenue, typology of users, and services offered. When comparing all relevant legal instruments, established findings suggest that platforms are targeted with a purposedly sector-based approach (Bertolini et al., 2021). As a consequence, providers face compliance to multiple legal disciplines, occasionally overlapping or ambiguous and, thus, incentivizing elusive behavior.

As stated in the opening, this paper focuses mainly on VLOPs because the societal risk arising from them is significantly more important than any other minor platforms' on account of their dominant position. As to Article 25, 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."

Given that other EU legislation targets platforms, the same platform provider can fall under the liability regime of the e-Commerce Directive (ECD)[8], being qualifiable as a "hosting service provider" (Article 14). It can be held legally responsible in his capacity as a "video-sharing platform provider", as for Article 1 of the Revised Audiovisual Media Services Directive (AVMSD)[9], while at the same time being a "data processing platform" according to the GDPR.[10] Furthermore, it may fall under different other definitions, including the one provided by other guidelines or soft law documents.

A second important challenge is due to the fact that online platforms do not fit in the traditional public/private dichotomy. Indeed, platforms combine the private dimension of service-regulating contracts to their exercising quasi-public functions. Their capacity to accept, disseminate, filter, or moderate online content, eventually resulting in "private censorship" (Monti, 2019), is a relevant task that can interfere not only with the protection of fundamental rights – free speech, above all – but also with state authority. More in general, all regulation concerning online speech and moderation raises several constitutional issues, many of which are still unresolved. At the time Lawrence Lessig wrote *Code and Other Laws of Cyberspace*[11], many authors suggested how such activities should be subject to constitutional scrutiny, and ever since the debate has been flourishing.

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[8] 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'), in EU OJ L 178, 17/07/2000, p. 1-16.

[9] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities (2018), in EU OJ L 303/69, 28.11.2018, p. 69-92.

[10] 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), in EU OJ L 119, 4/5/2016, p. 1-88.

[11] Lessig, 1999.

Platforms are equipped with an internal private ordering, whose main source is represented by the contractual Terms and Conditions (T&Cs)[12]. The 2022 report of the French *Conseil Constitutionnel* defined the general conditions as having a "quasi-constitutional force", because through their scope and relevance they govern and standardize the public spaces of millions, if not billions, of individuals. Online dispute resolution mechanisms add more fuel to this everlasting fire: the legitimacy, independence, and accountability of the new models of private adjudication are questioned by scholarship, investigating the compliance of said "courts", such as the Facebook Oversight Board (also, FOB), with the constitutional standards of judicial bodies and the rule of law.[13]

Platforms can sanction, block, ban or decide on every aspect of the "life" of each account, therefore exercising a quasi-statal power on their communities. Trump's being banned from major social networks after the 2021 attack on Capitol Hill set a seminal precedent for inflammatory speech violating community standards (Floridi, 2021). Censorship decisions can affect the enjoyment of fundamental rights and freedom. They can curtail citizens' free speech and right of information through content removal, nudge their free will through unsolicited advertisement or *feeds* ranking, affecting democratic processes.

State-like functions may expand in the future: the power to coin money is a major candidate. Platforms are planning to establish virtual currencies built on blockchain and non-fungible-tokens (NFTs) technologies. Facebook once launched a global cryptocurrency called "Libra" (Murphy & Stacey, 2022), but for the time being multiple regulatory barriers made the project sink (Talmon, 2019). The recently rebranded tech company Meta is lining up a new cryptocurrency for its immersive world named the Metaverse (Marr, 2022). It is not unlikely that governments may start discussing regulatory approaches to platform virtual money, given its potential to disrupt state sovereignty (see, for instance, the problem of money-laundering in the Metaverse (Mooji, 2023)).

Such an expanding power cannot only be read through the paradigm of a private entity enjoying unbridled freedom of enterprise and advocating an absolute (anarchic) freedom of speech. Similar claims find legal grounds in the neoliberal approach, which will be thoroughly examined in the next section. By now, it can be quoted, as an example, the immunity regime for providers as enacted in 47 U.S.C. §230 (the United States Code).[14] The combination of the "Good Samaritan clause" with the stronghold of the First Amendment shields online platforms from public prosecution. In particular, § 230 reads that "no provider […] of an interactive computer service shall be treated as the publisher or speaker of any information provided by

[12] T&Cs are officially acknowledged by the EU regulation. See Article 3 of 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, in EU OJ L 186, 11.7.2019, p. 57-79. See also Celeste, 2019. Belli & Venturini (2016) argue that these contractual terms, unilaterally defined, create a kind of private law-making system that applies transnationally.

[13] For Buratti (2022, p. 3) the FOB does not meet any of the commonly recognized standards, nor does it comply with the requirements set by the 2022 EU Digital Services Act. Rather, «it sets an environment where substantive individuals' rights and interests are determined in a flawed framework lacking any rule of law». In sharp contrast, Klonick (2020) optimistically reacts to the establishment of the FOB, considering it «a historic endeavor both in scope and scale». He does not, however, take into account the practical developments of this peculiar institution after its creation.

[14] US Code, <http://uscode.house.gov/> (last accessed on 15 Nov 2023).

another information content provider." Platforms are prevented from incurring civil liability on account of "any action voluntarily taken in good faith to restrict access to or availability of material that the provider […] considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected […]."

The First Amendment immunity granted to hosts and intermediaries excludes any editorial responsibility, granting to online services an exemption that is not given to government officials, broadcasters, or newspaper editors. However, while social media and other big platforms are gradually taking over traditional mass media in disseminating information and opinions, it shall be natural that such companies are regulated in order to protect pluralism of information and media freedom.

Compared to the US liberal approach, the EU institutions decided to take a different stance in a way that is consistent with the common constitutional traditions of its Member States. A shared constitutional value among them is that both freedom to establish a business and to exercise an economic activity, notwithstanding its "deregulatory bias" (Adams & Deakin, 2015), need to be balanced with the limitations provided by national constitutions. Such limitations span from the "safeguard of the national economy" (Article 38 of the Constitution of Spain) to that of "common good", "safety, liberty and human dignity" (Article 41 of the Constitution of Italy). Further limitations to the full enjoyment of said freedom can be found in the need to protect "the interest of the general public" (Section 74 of the Constitution of Denmark) or in other specific conditions prescribed by ordinary law.

By the same token, framing platform-related issues as only private can hardly be satisfying considering that back in 1982 Harvard University Professor, Duncan Kennedy, already pointed out the inadequacy of the public/private distinction in legal thought (Kennedy, 1982). Accordingly, a theory of "intermediate terms" surfaced allowing scholars to better explain the multifaceted role played by big private entities in their relationship with the individuals. Given that the power exercised is inevitably a mix of quasi-private and quasi-public, in the end, it has been defined as pure "corporate" power.

Accordingly, the problem of their liability has to be investigated through this unusual paradigm. Ciepley notes, however, that "corporate power that was once unaccountable because of state regulatory weakness now became unaccountable as a point of legal doctrine, as corporations came to be viewed even more thoroughly through the lens of private contract" (Ciepley, 2013, p. 139). According to Paul Schiff Berman, "instead of repeatedly trying to demonstrate that seemingly private activity is actually public, we could focus on the benefits we might derive as a people from using the Constitution to debate fundamental societal values, without relying so heavily on whether the activity is categorized as public or private" (Berman, 2000, p. 1268). Therefore, platform studies could better tackle the problem of accountability by mixing traditional constitutional theorizations with "plug-ins" from corporate law.

However, one could legitimately ask why looking specifically at big online platforms if they can be included in the well-developed debate on corporate sovereignty in the globalized world (Garrett, 2017). As previously explained, content-hosting platforms raise peculiar

constitutional issues that, for their impact, are more worrisome than multinational corporations in any industry that do not operate online. As said, platforms interfere with electoral processes, negatively impact democracy and the rule of law, and polarize society through filter bubbles, echo chambers, and algorithm biases (Sunstein, 2017). They rule on the enjoyment of fundamental rights by setting private standards that create a parallel legal order in a way that normally belongs to state authorities (Klonick, 2017, p. 1631). Growing evidence shows, for instance, that microtargeting through political advertising, massive personalization, and political surveillance by nongovernmental actors provoke a distortion in the use of digital tools, pose even higher risks to democracies (Dumbrava, 2021). To sum up, the remarkable societal power, economic influence, and political reach of online platforms make them the most pressing regulatory target.

In line with these arguments, it is necessary to assess which is the best approach to cope with a heterogeneous legal nature, bypassing the traditional private/public dichotomy. Anticipating the conclusions of this paper, the dilemma of whether a "law of platforms" is preferable to a case-by-case approach countering only the specific risks has to be addressed by giving precedence to legal certainty, clarity, and homogeneity. A unitary all-encompassing regulation, as this paper argues, shall be enthusiastically embraced for several reasons which will now be elucidated.

3. The neoliberal approach in the free marketplace of ideas

The neoliberal approach is still the dominant public policy concerning platform power (Pasquale, 2016, p. 489; Hathaway, 2020). It is easy to figure out why it pertains to the "culturally heterogeneous environment of the United States."[15] Given the potentially wide scope of application of the First Amendment, the Supreme Court of the United States never went so far as to recognize any public interest in social media activity. This allowed avoiding regulatory encroachments in sake of the "free marketplace of ideas" (Ingber, 1984). Indeed, the cornerstones of neoliberalism are known to be de-regulation, non-intervention, and the free market. A triad that works perfectly in facilitating big corporate dominance in selected industries.

Consequently, a deep contradiction emerges at the heart of neoliberal ideology, since the establishment of an oligopolistic market among transnational companies operating in borderless environment rules out the possibility that the Invisible Hand truly prevents market failures. Rather, this "economic superpower" gives rise to what has been aptly remarked as "authoritarian neoliberalism", or else the "coercive, non-democratic and unequal reorganization of societies" (Bruff, 2016).

Against this backdrop, scholars contend that globalization can facilitate the convergence of constitutional systems, while also necessitating the redefinition of most traditional

[15] It facilitates "communication among communities, so that a common democratic and public opinion may be formed", in the view of Post (1990, p. 603).

constitutional principles in order to ensure the continuous protection of fundamental human rights (Tushnet, 2008).

Nevertheless, the U.S. judiciary, entrenched in its "exceptionalism", remains closed to contamination from other jurisdictions. Specifically concerning platforms' power, US Justices are criticized for refusing global trends and remaining loyal to their liberal underpinnings.

State action doctrine is still "a central principle of constitutional law" in the United States (Chemerinsky, 2011, p. 519). However, scholars are unforgiving. They argue that it is a "confused doctrine" (Fox, 1979); "a collection of arbitrary rules that impede constitutional protection of liberty, equality, and fairness for no good reason" (Huhn, 2005, p. 1380); an "analytically incoherent" interpretation (Tushnet, 2008, p. 789); a "theory that is blind to the value of free expression (Peters, 2017, p. 1020). According to commentators, the Supreme Court uses state action doctrine to preserve an area of individual freedom in private relationships, thus misinterpreting the Fourteenth Amendment. This provision operates as a limitation of the reach of federal law and judicial power, but it does not fashion a generalized right to disregard constitutional principles of fairness, tolerance, and non-discrimination. Such principles shall apply both in tort law, contractual law, and property law.

As a result, state action doctrine should improve the performance of both the Fourteenth and First Amendments. Instead, in *Jackson v. Metropolitan Edison Co*.[16] the Supreme Court of the United States ruled that because a privately-owned utility is not a state actor, it has the right to discontinue service to any customer without prior notice, a hearing, or an opportunity to pay. According to Justice William H. Rehnquist, private actions are "immune from the restrictions of the Fourteenth Amendment". If these actions are unconstrained by the Constitution (meaning that they do not need to abide by constitutional rights and obligations), it is hard to establish the legal qualification of a specific entity. This reasoning applies, in the present case, also to digital platforms.

In *Jackson v. Metropolitan Edison Co*., the court further clarifies that even if a public utility is subject to extensive governmental regulation, this does not outspread the state action to it. Non-traditional commentators go even further. Sunstein exposes the faulty nature of the horizontal application of constitutional norms because the "state is always present, and the real question involves the merits – the meaning of the relevant constitutional guarantees" (Sunstein, 2002, p. 467). To put it another way, if an employer is permitted to discriminate against employees when hiring or firing them, this is not because the Constitution grants him such freedom, but simply because state-made provisions do not prohibit similar violations.

Scholars arguing that state action doctrine should be broadly interpreted to safeguard free speech in line with the First Amendment are conscious of the reasons behind the rapid increase of private power and, consequently, converge toward the idea of heavier constitutional scrutiny (Mulligan, 2004).

The First Amendment conceived a safeguard of private individuals from government action and state censorship. Historically, the right to gather and speak in the U.S. culture is protected in public spaces while individuals in private places are entitled to the right to exclude (*ius excludendi alios*). Nevertheless, as early as 1946, the Supreme Court, in the landmark *Marsh*

[16] Supreme Court of the United States, *Jackson v. Metropolitan Edison Co*., 419 U.S. 345 (1974).

v. Alabama case on corporate towns,[17] recognized that when a private forum undertakes the tasks and functions that usually belong to municipalities, it is to be considered a "state actor" or an entity carrying out a "public function."[18]

Similarly, this functional exception might be applied to internet platforms, in the belief that privately owned virtual spaces are nevertheless "*public fora*" and perform a vital function for public discourse.

Still, courts are constantly denying this feature, by merely saying that internet service providers do not exercise any activity which is traditionally or exclusively performed by the State. Offering an open discussion board for speech isn't something that has usually been carried out by governments, as the Supreme Court reported. In *International Society for Krishna Consciousness v. Lee*[19], the Court did not qualify airports managed by government agencies as *public fora* because of their being "modern" and not belonging to an immemorable tradition of expressive activity. Besides, locally established airport rules show opposition to speech, which may disrupt airport services.

Yet, Justice Kennedy wrote in a concurring opinion that the majority of the members of the court were incorrect because the actual physical attributes of airports are no different from public streets and sidewalks. Therefore, it is discriminatory that the right to speech does not find any protection in that context. A minoritarian fringe of judges, however, does not support property-based arguments (Jackson, 2014). Justice Jackson reported that similar positions are not convincing when looking at platforms: "[I]n light of the importance of social network websites in modern social and political life, and in light of the fact that protecting communications on social network websites would promote core First Amendment values, courts can and should hold that censorial acts by social network websites are state action subject to First Amendment scrutiny."

In three of his well-known main arguments from *Marsh v. Alabama*, Justice Jackson argues that: (1) In the same way as the State, the company has the power to limit free speech; (2) The property of the company is open and freely accessible for use by the general public prepared to accept the terms or rules of service so everybody should be able to enjoy his freedoms; (3) Holding the company constitutionally liable would promote better democratic self-governance since citizens or users have exactly the same right to be knowledgeable and their information shall be uncensored (Jackson, 2014, pp. 143–4). Such a reasoning can fit for platforms operating in the digital ecosystem.

The *Marsh* holding was stretched many times. Firstly, to comprise privately managed parks as per *Evans v. Newton*.[20] Secondly, to allow free speech also in shopping malls (*Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza* ruling).[21] The interplay between Supreme Court case law and state courts precedents on the state action doctrine would

[17] Supreme Court of the United States, *Marsh v. Alabama*, 326 U.S. 501 (1945).
[18] For a complete overview on possible arguments to test state action on company towns and residential areas, see Siegel (1998).
[19] Supreme Court of the United States, *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).
[20] Supreme Court of the United States, *Evans v. Newton*, 382 U.S. 296 (1966).
[21] Supreme Court of the United States, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968).

deserve additional examination, particularly in light of the substantial implications of another seminal case, *Pruneyard* from California.[22] As Peters observes, "the challenge of applying doctrine today lies at the junction explored in *Marsh*, where private and public spheres meet" (Peters, 2017, p. 994).

Although it is now established that the classic public forum theory does not apply to the Internet and virtual spaces, scholarship see a lot of commonalities with social networks promoting public dialogue in a substantive way (Jackson, 2014, p. 148). Despite that, the Supreme Court does not, for the time being, appear to be open to further expanding the doctrine to virtual spaces.

4. Third-party effect of constitutional rights and its applicability to platforms' governance

Constitutionalism embodies a set of commonly agreed principles established to avoid any arbitrary use of power (Sajó & Uitz, 2005). Power "may be limited by techniques of separation of powers, checks and balances, and the protection of fundamental rights along a pre-commitment" (Sajó & Uitz, 2017, p. 12) and this limitation is necessary to guarantee freedom of the citizens. In liberal constitutions, power limitation mechanisms were designed as a response to absolute sovereign monarchies. Constitutional commitments to safeguard fundamental rights are top-down bottom-up: an entitlement of the citizens against public power (Ladeur, 2019). They bind the state because they limit its action. Conversely, as Gardbaum remarks, "the horizontal position expressly rejects a public-private division in constitutional law, and its justifications reflect a well-known critique of the "liberal" vertical position" (Gardbaum, 2003, p. 395).

A thorough exam of the Digital Services Act will soon show that the privatization of increasing amounts of power, through "delegation" of its exercise to corporations, requires reviewing what used to be an undisputed assumption. This clearly gives leeway to a doctrine with a potential to expand: the horizontal or third-party effect of constitutional rights, or as the German most prominent scholarship puts it, *Drittwirkung der Grundrechte* (Walt, 2014; Frantziou, 2019; critically, Walkila, 2016).

While the American constitutional culture emphasises that the State has no obligation to ensure that constitutional rights are enacted in private relationships, as this would entail an intromission on the freedoms of those who could be made answerable, in many European countries the scope of the constitution can radiate to encompass relationships falling under private law (Kumm, 2006). According to German practice, the State has a positive responsibility to safeguard rights irrespectively of the public or private status of those who commit the violation. This approach has been studied as a "role model" (Brinktrine, 2001). Legal scholars distinguish two different types of third-party effects: *Unmittelbare* and *Mittelbare Drittwirkung*.

[22] See *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979) followed by the Supreme Court of the United States, *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

The first notion refers to the direct horizontal effect of constitutional rights, as enshrined in Article 9, para. 3 of the German Basic Law. The norm declares unlawful any agreement aiming at restricting the fundamental right to freedom of association. The direct horizontal effect theory receives limited acceptance: it applies mostly to the employer-employee relationship (Sigismondi, 2003). As a result, citizens can invoke constitutional rights against private parties' violations concerning labour issues. In the landmark case *Defrenne v. Sabena*, the European Court of Justice (ECJ) spelled out that the employee is entitled to seek relief and compensation from the judiciary for such violations.[23]

In other sectors, there is a scarcity of caselaw involving *Unmittelbare Drittwirkung* because this notion is alleged to be a circumvention of parliamentary sovereignty and an impairment of private autonomy.

The second notion (*Mittelbare Drittwirkung*) envisages an indirect application of constitutional rights through the radiating effects of indefinite legal terms and general clauses of the Constitution. The theory is also called *Ausstrahlungswirkung* inasmuch as there is a spill-over effect of the constitutional provisions embodied in the system of values that indirectly radiates to the relationship between private individuals. Being the constitution the lodestar of rights protection, the whole legal order must align and conform to its principles. This interpretation is starting to be used more frequently in the ECJ jurisprudence, particularly with regards to the rights enshrined in the Charter of Fundamental Rights of the EU (Leczykiewicz, 2013; Lenaerts, 2020).[24]

State courts are developing caselaw that enforces constitutional rights among privates. A recent case from the German Federal Court of Justice,[25] building on the landmark 1958 *Lüth* judgment from the *Bundesverfassungsgericht*, stated that major social networks, such as Facebook, are fundamental in creating virtual public spaces for communication and social life. Accordingly, they must be subject to the obligation to respect their users' fundamental rights. This implies that social networks' contractual clauses must comply with freedom of speech, a "fundamental right that unfolds its effectiveness through the regulations that directly control the respective field of law" (para. 54).

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[23] ECJ, Judgment of the Court of 8 April 1976, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, Case 43/75. ECLI:EU:C:1976:56.

[24] For the most recent cases, see *Mangold v Helm*, judgment of 22 November 2005, C-144/04; *Kücükdeveci*, judgment of 19 January 2010, C-555/07; *Egenberger*, judgment of 17 April 2018, C-414/16; *IR*, judgment of 11 September 2018, C-68/17; *Bauer and Willmeroth*, judgment of 6 November 2018, C-569/16 and C-570/16; *Max-Planck*, judgment of 6 November 2018, C-684/16, and *Cresco Investigation*, judgment of 22 January 2019, C-193/17.

[25] Federal Court of Justice, III Civil Senate, judgement from 29 July 2021 - III ZR 179/20, para. 54. From the *Lüth* case (BVerfG 7, 198, 205, from 15 January 1958): "*Im bürgerlichen Recht entfaltet sich der Rechtsgehalt der Grundrechte mittelbar durch die privatrechtlichen Vorschriften. Er ergreift vor allem Bestimmungen zwingenden Charakters und ist für den Richter besonders realisierbar durch die Generalklauseln*" [In civil law, the legal content of fundamental rights unfolds indirectly through the provisions of private law. These provisions are of a mandatory nature and their effect is particularly realizable for the judge through the general clauses]. Another seminal precedent is Case 1 BvR 3080/09, *Stadionverbot*, 11 April 2018. The innovation contained in *Stadionverbot* is well stated by Wiedemann (2020, p. 1173) explaining that "under certain circumstances, even private – as opposed to state – entities offering services to the general public can be indirectly bound by the principle of equal treatment (and other human rights) contained in the German constitution".

Horizontal effect applicability to platforms was recently discussed by the *BVerfG*: in *Der Dritte Weg v. Facebook Ireland Ltd*.[26], a small right-wing political party sought an interim injunction because Facebook blocked its account founding an infringement for hate speech during the electoral campaign. The Federal Constitutional Court explained that the case represents "a legal dispute between private parties regarding the scope of the civil law powers of the provider of a social network that has significant market power within the Federal Republic of Germany." To prove the consistency of the *Mittelbare Drittwirkung*, the Court quoted a conspicuous case law claiming the effectivity of fundamental rights beyond state action.[27]

BVerfG concluded that the constitutional complaint was founded and assessed "the consequences that would occur if the applicant were denied use of its website on Facebook, but later turned out that the respondent in the initial proceedings should have been obliged to reopen access." The German judges outweigh the consequences that would arise "if the respondent of the initial procedure would be temporarily obliged to restore access, but it later turned out that the blocking or refusal of access was justified" (para. 18). Also, the use of Facebook as a forum turns out to be "very important" in light of the number of people that uses it to comment political events, to exchange opinions or spread political messages. Therefore, *BVerfG* argued that "access to this medium, which is not easily interchangeable, is of paramount importance, especially for the dissemination of political programs and ideas." Conversely, a block or an exclusion represents a significant impairment in freedom of expression.[28]

Similar conclusions have been well documented by many scholars in other illustrative cases taken from EU countries (like Ireland and the Czech Republic), non-EU countries (like Canada and South Africa), or subnational entities (Hong Kong) (Gardbaum, 2003; Kumm, 2006; Pollicino, 2018; Tushnet, 2003) and even under a comparative perspective (Butler, 1993).

The promotion of the indirect third-party effect as a pressing doctrine extendable to VLOPs is heralded to solve the main problems deriving from the legislative inertia as well as gaps and contradictions of a multi-layered and multi-territorial legal regime.[29] However, such an ambitious objective requires outweighing advantages and disadvantages.

Horizontality could be helpful in tackling the impact of platforms' activities related to content management. Online providers, as a consequence of the libertarian approach, cannot be held liable for content shared on their platforms, because of the difficulty in screening all posts. Consequently, the *safe harbor* principle represents a key element of the discipline, except for the notice and takedown procedure for illegal contents. This implies that early European

[26] BVerfG, decision of the 2nd Chamber of the First Senate of May 22, 2019 - 1 BvQ 42/19 -, Rn. 1-25, available online, <https://www.bverfg.de/e/qk20190522_1bvq004219.html> (last accessed on 13 Dec 2023).
[27] See BVerfG 7, 198 <205 f.>; 42, 143 <148>; 89, 214 <229>; 103, 89 <100 >; 137, 273 <313 para. 109>.
[28] As the judges stressed, the decision was not meant to undermine Facebook's "private autonomy". They explained that by restoring the contractual relationship and removing the block, Facebook will not have incurred in any economic cost. With regards to the removal of illegal content, *BVerfG* further specified that the constitutional decision was not to affect moderation choices and that such an issue could have been reopened upon legal recourse to civil courts.
[29] This is also supported by the American doctrine, trying to transplant the German theorizations to address privacy and freedom of expression issues originating from the application of the state action doctrine (Markesinis, 1999).

legislation, such as the 2000 e-Commerce Directive, contained a "no general obligation to monitor" (Article 15). Accordingly, online providers do not have to scan their platforms to actively detect illegal content or illegal activities. Conversely, should they be aware or obtain knowledge that any illegal activity is being conducted through third-party content, hosts shall act "expeditiously" to remove or disable that content (Article 14).

Some argued that the notice and takedown mechanism may produce an incentivizing effect: "platforms will likely focus on minimizing this economic risk rather than adopting a fundamental rights-based approach" (De Gregorio, 2019, p. 81). Theorizations aiming at describing a sort of "collateral censorship" interpret this effect as the rise of an overblocking trend according to which internet providers may be induced to silence online speech since it would be more profitable than being subject to the risk of legal fines (Balkin, 2012, p. 2016). Therefore, it is even truer that "the people or corporations exercising 'private' power are actually exercising power conferred on them by laws creating and regulating market behavior" (Tushnet, 2003, p. 79).

A feasible option to avoid continual deprivation of free speech rights through wild content removal has been envisioned in the horizontal doctrine. Accordingly, while state courts should be empowered to enforce fundamental rights among private individuals, lawmakers shall rethink "the normative underpinnings of horizontality" (Frantziou, 2019, p. 138) otherwise platforms would be encouraged to solve issues through private adjudication.

In the effort to address the challenges arising from the Internet, potentially negative outcomes of this approach need to be taken into account. It is true that, as Teubner points out, we need to shift from an individualist perspective of constitutional rights to a new "collective-institutional dimension" requiring the digital world to be "institutionalized" (Teubner, 2017). Furthermore, Frantziou remarks that the third-party effect doctrine incorporates an inclusionary vision, because it results in considering individuals not as single right-bearers, but rather as actors of a political community underpinning its collective dimension and system of values (Frantziou, 2019, 140 ff.). Platforms undoubtedly carry a collective and political dimension. However, it is not less true that this ideal vision is hard to be transposed into "law in action", considering the complexity of the regulatory issues and the consequences of compliance to the sustainability of their business model.

From the reasoning in *Der Dritte Weg v. Facebook Ireland Ltd*., it can be deduced that only the most serious breaches of fundamental freedoms can successfully undergo the scrutiny of a constitutional tribunal, whereas minor violations ought to be better left to the competence of ordinary courts or, at worst, internal dispute resolution bodies.

The main disadvantage of this development is the shift to a one-dimensional, casuistic approach (Frantziou, 2019), depending on general clauses and values as the most reliable parameters, though bereft of a clear normative footing. This can degenerate in judicial activism, resulting in a fragmented, ever-changing discipline, lacking legal certainty. The establishment of compliance requirements – depending on the degree of the market dominance of the platform, the political, social, and economic positioning of the platform, the degree of dependence and the links to its ownership and business model, and so on – would be at the bar of courts.

The relevance of the negative implications of horizontality makes it difficult to support this theory for platforms' constitutional scrutiny (De Gregorio & Pollicino, 2021). Nevertheless, its significance "responds to the emergence of non-state intermediary social forces with the transfer of public law norms into private law relationships" (Teubner, 2017, p. 5). Consequently, it is crucial to establish which existing parameters are currently in force at the European level to assist judicial authorities in the enforcement of said rights, under both the procedural and the substantial point of view.

5. The European toolkit vis-à-vis the "return of the state"

In Europe, the return of state interventionism has been invoked to counter disinformation,[30] the spread of illegal content, electoral interference as well as other well-known societal risks in the name of democracy and the rule of law. National legislation was adopted following repeated calls for taming big US-based (and in the last years, also China-based) companies. Germany was the first to pass a *Netzwerkdurchsetzungsgesetz* (Network Enforcement Act - NetzDG) in 2017 to sanction online hate speech and unlawful content.[31] The law endows an administrative authority with the task to offer a remedy to private individuals' claims.

One year later, France followed with a law against electoral manipulation,[32] seeking to "ensure the clarity of electoral debate and to stop the risk of citizens being tricked in exercising their vote by preventing the spread of digital disinformation" (Couzigou, 2021, p. 4). A second French act is the so-called *Loi Avia*[33], aiming at fighting online hate speech and making platforms accountable by sanctioning them. It is worth noting that the *Conseil Constitutionnel* invalidated most of the content, stating that it breached the proportionality test with regards to the safeguard of freedom of expression.[34]

Furthermore, Austria adopted in 2022 a Communication Platform Act (*KoPl-G*)[35] and other countries have tabled similar bills on the matter.[36]

[30] With a specific focus on disinformation legislation, see Nuñez (2020).

[31] Available online, <https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html> (last accessed on 16 Nov 2023).

[32] *Loi organique n° 2018-1201 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information*, in JORF n°0297, 23 December 2018, available online, <https://www.legifrance.gouv.fr/eli/loi/2018/12/22/MICX1808387L/jo/texte> (last accessed on 16 Nov 2023).

[33] *Loi n° 2020-766 du 24 juin 2020 visant à lutter contre les contenus haineux sur internet*, in JORF n°0156, 25 June 2020, available online, <https://www.legifrance.gouv.fr/eli/loi/2020/6/24/JUSX1913052L/jo/texte> (last accessed on 16 Nov 2023).

[34] Conseil Constitutionnel, decision. n. 2020-801 DC, from 18 June 2020. See Wienfort, 2020.

[35] Bundesgesetz über Maßnahmen zum Schutz der Nutzer auf Kommunikationsplattformen (Kommunikationsplattformen-Gesetz – KoPl-G), in BGBl. I Nr. 151/2020, available online, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20011415> (last accessed on 16 Nov 2023).

[36] See the Italian "Camera dei Deputati", AC 2009, *Disciplina della propaganda elettorale mediante le piattaforme digitali [Regulation of electoral propaganda through digital platforms]*, Hon. Magi, 18 November 2021, available online, <https://documenti.camera.it/leg18/dossier/testi/AC0538.htm> (last accessed on 16 Nov 2023).

Fragmentation and different national regimes can, however, challenge the internal market of the European Union. This calls for the development of a common proposal aiming at greater harmonization (Cornils, 2020, p. 77).

All top national and EU officials agree that the abuses of constitutionally protected rights by dangerous speech provided by any kind of media outlet to foster anti-democratic propaganda need to be efficiently addressed.[37] The 2018 Final Report of the High Level Expert Group on Fake News and Online Disinformation,[38] the European Commission Communication on Online Disinformation,[39] the Action Plan on Disinformation,[40] and the Communication on Securing Free and Fair Elections,[41] to quote the most prominent documents, advocate urgent efforts to ensure electoral integrity in the digital environment. All these sources envisage the chance that platform providers' rights are constrained in order to safeguard the predominant interest of protecting democracy.

The European toolkit on platform regulation is heavily segmented. It is composed by sectoral legislation which is the result of a stratification over the years. However, it is possible to identify a first "regulatory wave", characterized by a typical competition law approach. The 2000 e-Commerce Directive (or ECD) epitomizes this effort,[42] symbolized by the already mentioned "safe harbor" principle. Only services characterized by a "remuneration, at a distance, by electronic means and at the individual request" fall into the scope of the Directive.[43] This regime "unleashed synergy effects" with the §230 U.S.C. and "created a *de facto* transatlantic market for platforms with user-generated content" (Heldt, 2022, p. 70).

Nonetheless, progress in technology quickly obsolesces even the most innovative piece of legislation (De Streel et al., 2020, p. 58). It is hard to believe that large platforms shall be

[37] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European democracy action plan, COM/2020/790 final, available online, <https://commission.europa.eu/document/download/63918142-7e4c-41ac-b880-6386df1c4f6c_en> (last accessed on 16 Nov 2023).

[38] Final report of the High Level Expert Group on Fake News and Online Disinformation, available online, <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50271> (last accessed on 16 Nov 2023).

[39] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Tackling online disinformation: a European Approach*, COM/2018/236 final, available online, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0236> (last accessed on 16 Nov 2023).

[40] Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Action Plan against Disinformation*, JOIN(2018) 36 final, available online, <https://commission.europa.eu/document/download/b654235c-f5f1-452d-8a8c-367e603af841_en?filename=eu-communication-disinformation-euco-05122018_en.pdf> (last accessed on 16 Nov 2023).

[41] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Protecting election integrity and promoting democratic participation*, COM(2021) 730 final, available online, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52021DC0730 (last accessed on 16 Nov 2023).

[42] Another relevant piece of regulation in this sense was the Directive 95/46/EC, in OJ L 119/1, known as the Data Protection Directive, now repealed by the GDPR.

[43] Art. 1 (b) of the Directive (EU) 2015/1535 of the European Parliament and of the Council 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, in OJEU L 241/1, 17.9.2015. This act repealed the old Directive 98/34/EC.

treated only as “mere conduits” or hosts of data and information. Therefore, the ECD regime became unsatisfying.

Other critical points concern the different implementation in the Member States and the vagueness in the subjective scope of application of the ECD. For instance, the obligation to remove illicit content marked a significant step towards the compliance of platforms with constitutional rights. However, a common definition of “illicit content” still does not exist and this ambiguity has not been overcome in the DSA so, basically, each Member State can craft its own notion.

The growing interest for mixed public-private governance regimes led to the exploration of new regulatory mechanisms, such as codes of conduct and voluntary commitments. This can be described as a second “regulatory wave”, comprising the Product Safety Pledge[44], the Memorandum of understanding (MoU) on the sale of counterfeit goods on the internet[45], the 2016 Code of conduct on countering illegal hate speech online[46] as well as the 2018 Code of practice on Disinformation[47], adopted after that the report of an *ad hoc* High-Level Expert Group pinpointed at the necessity to join forces with private stakeholders.

A third “regulatory wave”, in continuity with the second one, seems now oriented to adopt co-regulatory instruments – such as the 2022 Strengthened Code of Practice on Disinformation[48] – but also to return back to traditional, hard legislation. This would allow better addressing non-economic problems, including relevant constitutional issues. This wave comprises a bundle of existing legal acts: not only the general framework laid out in the DSA[49], but also sectorial disciplines, like the Digital Markets Act (DMA)[50], the eIDAS regulation on

[44] Product Safety Pledge, Voluntary commitment of online marketplaces with respect to the safety of non-food consumer products sold online by third party sellers, March 2021, available online, <https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/product-safety/product-safety-pledge_en> (last accessed on 16 Nov 2023).

[45] Memorandum of understanding on the sale of counterfeit goods on the internet, 2011 and revised on 20216, available online, <https://ec.europa.eu/docsroom/documents/43321/attachments/2/translations/en/renditions/native> (last accessed on 16 Nov 2023).

[46] 2016 Code of conduct on countering illegal hate speech online, available online, <https://commission.europa.eu/document/download/551c44da-baae-4692-9e7d-52d20c04e0e2_en> (last accessed on 16 Nov 2023).

[47] The 2018 Code of Practice on Disinformation, available online, <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_22_3664/IP_22_3664_EN.pdf > (last accessed on 16 Nov 2023), agreed under the auspices of the European Commission, proved to be a less-than-ideal alternative to voluntary individual initiatives. The self-regulatory approach was deceptive and revealed a lot of shortcomings, including low participation from stakeholders and a lack of a monitoring system or a clear set of key performance indicators (KPIs). Moreover, the Code emphasized the private dimension of the ISPs, evident in the fact that the problem of their definition was not addressed, and they were simply referred to as “relevant signatories” or “parties”. So, in May 2021, the Commission presented a new Guidance to strengthen the Code of Practice that eventually evolved into a co-regulatory mechanism.

[48] 2022 Strengthened Code of Practice Disinformation, available online, <https://ec.europa.eu/newsroom/dae/redirection/document/87585> (last accessed on 16 Nov 2023).

[49] 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 COM(2020) (Digital Services Act) in EU OJ L 277/1, 27.10.2022, p. 1-102. See the DSA Commentary from Raue & Hofmann, 2022.

[50] 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) in EU OJ L 265, 12.10.2022, p. 1-66.

electronic identification[51], the revised Directive on Audiovisuals (AVMSD)[52], the regulation on terrorist content online[53], the Data Governance act[54] and other regulation on copyright infringements, child protection, and illegal hate speech legislation.

We can include in this wave also the set of new proposals from the European Commission, currently under negotiation, intended to make platforms more compliant, with respect in particular to European constitutional values: the European Media Freedom Act proposal[55], the AI proposal[56], the Data Act proposal[57] and the proposal on the transparency and targeting of political advertising[58], just to name a few.

Against this backdrop, it is important to focus on the novelties that are introduced by the DSA, the new horizontal regime, aiming at serving as a *lex generalis* in its effort to complement all the other *leges speciales*. The entry into force of the Digital Services Act is an important milestone confirming, to some extent, the shift toward an emerging model of constitutional governance known as "digital sovereignty" (Fuertes López, 2021; Pohle & Thiel, 2020). The European intervention is inspired by the need to reset the boundaries of sovereign power and, at the same time, protect the Union's economic interests. Regrettably, this article will not analyze in detail the whole new discipline: we will delve on the main aspects related to large platforms' power and constitutional scrutiny.

5.1 The Digital Services Act as a *lex generalis*: a constitutional approach?

In line with the former considerations, it is now interesting to gauge to what extent the Digital Services Act represents an "overruling" of the neoliberal approach foreshadowed by the 2001 ECD through the adoption of new substantive and procedural rights for EU citizens.[59]

This "horizontal dimension" is plainly stated in recital 16, committed to preserving the existing ECD "horizontal framework" with the purpose of improving it in light of the new services and innovations that meanwhile emerged in the internal online market. Furthermore, also recital

[51] 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, in EU OJ L 257, 28.8.2014, p. 73-114.
[52] See the relevant note above.
[53] Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, in EU OJ L 172/79.
[54] 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), in EU OJ L 152, 3.6.2022, p. 1-44.
[55] 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) and amending Directive 2010/13/EU, COM(2022) 457 final.
[56] 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.
[57] 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.
[58] Proposal for a regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, COM(2021) 731 final.
[59] For the freshest comments on the DSA, check the thematic area of *Verfassungsblog* at <https://verfassungsblog.de/category/debates/dsa-practice/>, (last accessed on 20 Nov 2023).

110 mentions the "horizontal range of obligations" which are supposed to be enforced both at the EU and the national level by an articulated system of governance.[60]

The content of horizontal rights and obligations established by the DSA is quite innovative, especially in light of the double sources of law recognized: illegal content can be qualified as such upon violation both of EU and domestic law "irrespective of the precise subject matter or nature of that law" (Article 3(h)).

Fundamental rights from the EU Charter are equally a central plank of the whole regulation. They are not absolutized as it happens in the US approach. Instead, their recognition is persistently balanced with the parallel need to avoid hindering on economic innovation and technological progress fostering the internal market (Article 1.1).

Among the substantive rights granted to platform users (the so-called "recipients"), it is worth mentioning the right that the platform acts expeditiously to remove or disable access to illegal activity or content when it has knowledge of it (Article 5.1(e)). The ECD-based "no general obligation" to monitor the flow of content is expanded, given that content creation and content spread in very large platforms can be massive. Other relevant provisions are the one establishing a right to be informed of any T&Cs changes (Article 14.2); a right that restrictions by platforms are diligent, objective, proportionate and are taken with due regard to freedom of expression, freedom, and pluralism of the media or other fundamental rights (Article 14.4); the right to transparency on various aspects of the service provided by platforms (Articles 15, 24, 39); the right not to be nudged or manipulated by any deceptive design of the website (Article 25), by the recommender systems in advertisements (Article 27) or by profiling systems through personal sensitive data (Article 26.3), provided additional protection of minors (Article 28). In general, the DSA sets a right to make free and informed decisions (Article 25.1).

Very relevant is the establishment of a right to access to data: Article 40 states that VLOPS are obliged to enable the Commission or the DSC with full access to all necessary data, upon a reasoned request. It should be stressed that this "privileged right" is not granted to any interest-holder but only to the said specific subjects, to which the DSA also adds the category of "vetted researchers", who shall be affiliated to academic institutions and commit in conducting research to better understand platform-related systemic risks. To this purpose, they can also request to access, in confidentiality, any specific information.

DSA's substantive rights are safeguarded and strengthened by specific procedural rights. Firstly, the new Regulation formalizes relevant due process standards, through the provision of a right to lodge a complaint, to be heard, and to receive information about the procedure (Article 53), accompanied by a right to seek compensation for any damage and loss suffered by the platform's infringement of the DSA obligations (Article 54). Secondly, before sparking a dispute, users also have the right to ask for the removal of what they consider as illegal content. In case the right is denied, platforms have to provide information on redress mechanisms (Article 16.5). Whenever users are targeted with a restriction, such as banning of

[60] In particular, each Member State shall appoint a Digital Services Coordinator (DSC) entitled with the task to help enforcing the DSA, within the umbrella of a coordinator at the EU level, called the Board for Digital Services (BDS).

their account, content removal or delisting, restriction to the visibility of content, suspension of monetization, etc., they have the right to a statement of reasons (Article 17).

Beyond this dense system of rights, the DSA imposes specific obligations on platforms, some of which can be smoothly associated with the nature of privately owned companies. Due diligence obligations (Chapter III), the periodic obligation to report on content moderation (Article 15.1), the establishment of an internal officer charged with compliance functions (Article 41) as well as the recourse to independent auditing to ensure compliance both with DSA obligations and the commitments of other codes of conduct (Article 37) are the most prominent examples.

Additional obligations imposed on platforms highlight some of their characteristics suggesting their potential assimilation to quasi-public powers. See, for example, the obligation to report and notify suspicions of criminal offences of which the provider becomes aware (Article 18). See also the important risk assessment obligation (Article 34), under which platforms are required to monitor systemic risks related to the dissemination of illegal content. Such risks affect the exercise of fundamental rights and have consequences on civil discourse, electoral processes, and public security, to mention the most relevant points.

Thirdly, the DSA requires the establishment of an "internal complaint-handlings system" (Article 20), legitimizing private adjudication to protect users against any decision taken by the provider. Procedural principles related to this system are that a decision must be timely, non-discriminatory, diligent, and non-arbitrary; verdicts can be reversed if unfounded; also, users must be informed of alternative redress possibilities, such as the out-of-court dispute settlement body (Article 21) which, nevertheless, does not have the power to impose binding solutions. It seems, therefore, that users must trigger the two-tier appeal mechanism before referring to a state court. As Weinzierl remarks (2020), "Art. 14 [now 16] and 17 [now 20], unlike Art. 18 [now 21], contain no clause stating that the mechanism is without prejudice to the right to go to court."

Moreover, most of the above-mentioned obligations (report making, risk mitigating measures, audit, additional transparency) entail financial commitment for compliance by very large platforms, whereas minor platforms are not concerned.

VLOPs and VLOSEs are designated by a periodical decision of the Commission based on specific parameters: a platform may qualify as VLOP or VLOSE if it serves minimum 10 per cent of the EU population, roughly corresponding to 45 million "average active monthly recipients", as Article 33.2 reads.

Concerning the role played by national authorities, Article 4.3 spells out that national judicial or administrative authorities can require the service provider to "terminate or prevent an infringement." Furthermore, they are enabled by Article 52 to lay down penalties, but monetary fines are capped to a maximum amount. National authorities also have the power to enforce DSA obligations and supervise that all provisions are enacted (Article 56). The EU Commission, though, as Weinzierl puts it, is the "monarch" of the entire operation since, in the end, it is entitled to the global oversight on the enforcement of DSA obligations.

It is my contention, however, that instead of enthroning a single monarch, the DSA creates "autarchical fiefdoms", wherein each provider, similar to a "lord of the manor", holds the

power to pass laws (formulated in their Terms and Conditions), to make justice (by virtue of their private adjudication), to set their own standards of rights and freedoms in their virtual territory (through both T&Cs and content management practices). Not to mention the power to reign sovereignly in their forum by assessing democratic and political hazards. Finally, platforms hold the power to manage their own "state secrecy" by deciding what documents should be accessible and transparent and what should be undisclosed.

Scholars criticized the fact that despite its innovative character, involving new procedural safeguards, the bulk of the substantive provisions represents a codification of already existing practices, built on Facebook content moderation processes or membership management procedures. In fact, much of the activities affecting fundamental rights are still unregulated and left to the discretion of platforms' tribunals,[61] whereas courts have to judge fundamental rights cases with common legal safeguards, such as the principle of proportionality and the balancing tests (Belli et al., 2017, p. 41). An example is provided by the out-of-court dispute settlement bodies which, as "future decision-makers", are suspected to be far from the rule of law standards (Holznagel, 2021). More in general, while self-regulation and voluntary cooperation seem to triumph, limited public oversight is established, except as the last resort. The "beasts" are hard to tame, but much depends also on the availability of Member States to engage in a cumbersome and resource-consuming platform oversight.

5.2 Judicial law-making on platforms' power

Sweeping away most of the fragmentation that previously prevailed in the discipline, the DSA will be enforced by both the Union and the domestic judiciary. Due to their creative role, relying on the power of interpretation, they have already filled significant legal voids. However, much has to be done to avoid undermining the efficiency of the whole new regulatory ecosystem. Their role will be even more important considering the tendency to shift from a sheer intergovernmental approach to a new approach based on the constitutional primacy of the Union, in constant interplay with the national level. Judicial law-making is likely to perform an important role in the DSA, enabling the reconciliation of the existing legislation with the principles and values of the constitutional composite architecture. This will be even more evident in the teleological reinterpretation of platform issues, addressed with the goal of applying (or restoring) basic constitutional principles common to the traditions of all Member States.

The DSA will build on two existing types of case law. On the one hand, decisions over lawsuits claiming violations of freedom of speech and filed against overzealous platform censorship. On the other hand, rulings on platform inaction in the face of the necessity to remove illicit content.

As to the first set of jurisprudence, overblocking behavior can be interpreted by courts in different ways: some tribunals may tolerate content removal decisions, holding more rigorous standards before concluding that they result in a violation of the freedom of speech. Conversely, other tribunals may be prone to protecting the freedom of speech against

[61] Or even consumer groups, societal organizations and the community of researchers. See Husovec, 2022.

platforms decisions, going beyond the limits of morals or inappropriateness enshrined in the community standards or Terms of Service and creating, instead, legal standards.

The broader vision, protecting freedom of speech against content removal, is adopted in two decisions of the *Bundesverfassungsgericht*, no. 179 and 192/2020[62], commented by Denga (2021) and Müller (2022). Facebook, the defendant, deleted two statements claiming that they were hate speech and, subsequently, blocked the users' accounts. The BVerfG unexpectedly stated that the defendant has the power to require its users to comply with certain communication standards that go beyond the criminal law requirements. For Lutzi (2021), this leeway is granted to platforms with a view to the social interest in an active moderation of content. As remarked by Ferreau (2021), the reasoning adds a precedent to a series of rulings on "domiciliary rights"[63], where the legal entity acting under private law is free to design its own house rules.

Nevertheless, the defendant was not authorized to take those measures, in the light of a test of proportionality and equality. Since the German legislation does not consider the removed content as hate speech, it constitutes a legitimate exercise of freedom of expression.

Instead, Facebook not only violated the terms of the mutual contractual relationship but also obstructed the enjoyment of personal fundamental rights. By virtue of the third-party effect in private law, fundamental rights unfold their effectiveness "through the regulations that directly control the respective field of law" (point 54, Jdg. 179/2020). In the effort to deter further violations, the BVerfG lays out some procedural requirements. The user must be notified in advance if the platform intends to remove their content or block their account, thus being allowed to justify their conduct, then the platform shall make a new decision. To prevent arbitrary handling of said rights, the standard used in the legal reasoning is the principle of equality: the demeanour of the defendant consisted in a unilateral exclusion from the services based on its "structural superiority" which, in the context of its dominant position, is even more evident.

As for the second group of cases, the inaction of platforms can in general push users to lodge a complaint before a court to ask for a specific compliance order based on different grounds: hate speech, privacy violations, as well as failure to enforce the right to be forgotten.

Disinformation can also be at the core of a grievance when associated with illegal statements (e.g., defamatory) or when it represents an impairment of the right of the public to be informed. In the judgment rendered by the ECJ on the case *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*[64], the court established that internet providers can be obliged by the Member States to comply with the "notice and takedown" procedure for the removal of illegal content not only once but, in a way, continuously, by virtue of an extensive interpretation of the e-Commerce Directive. Providers are, in fact, required to terminate "any" alleged infringement of the procedure, and to do so they are compelled to remove the original illegal piece of information which was replicated and shared multiple times. The "notice and takedown" procedure has accordingly been judicially reinforced to include the obligation to

[62] Judgments of July 29, 2021 - III ZR 179/20 and III ZR 192/20.
[63] 6 BVerfG 148, 267 (284 Rn. 41, 287 Rn. 52) (*Stadionverbot*).
[64] ECJ, Judgment of the Court (Third Chamber), 3 October 2019, Case C-18/18, ECLI:EU:C:2019:821.

monitor and restrict the access or spread of content having the same wording or meaning as a previous illegal one.

In line with these examples, it follows that in the absence of a detailed or principle-based regulatory framework, creative courts act as a substitute for the lawmaker. We already elaborated on this, saying that it can have many advantages since judicial reasoning can help adjust the gaps of the legal background. Landmark decisions can set precedents for the future and acquire the same value and bindingness as a legal provision, thus contributing to the improvement of the regulation. However, especially in the European context, there is a clear risk of a non-harmonized framework, barring effective protection of fundamental rights and hindering legal certainty. Besides, it is preferable that crucial regulatory issues are left to Parliaments and to the EU legislator, in their capacity as democratic institutions, rather than to professional judges, to preserve the separation of powers.

6. Fine-tuning large platforms' legal order

The present analysis shows that the whole puzzle of platform regulation is still missing a lot of pieces.

The linchpin of the legal framework for hosting providers is, clearly, the notice-and-action procedure. The horizontal effect of fundamental rights cannot be fully exploited unless this procedure is based on an unambiguous normative underpinning. The DSA admittedly seeks to curb the excess power of platforms, mostly related to abuses of taking-down mechanisms. Such abuses may follow, as argued, from collateral censorship or overblocking. Furthermore, notices to takedown may be maliciously raised by private accounts for silencing a certain group of people. Platforms may reply to such notices through automated systems whose algorithms are programmed to operate with precautionary criteria. This mechanism once again incentivizes censorship practices.

In a 2018 report from DG CONNECT, it was found out that the notice-and-action procedure laid out by Article 14 ECD was implemented by the Member States in substantially different manners (European Commission. Directorate General for Communications Networks, Content and Technology, 2019). Rarely this was made through detailed legislation: most of the time, the implementation of criteria such as the "actual knowledge" was left to national courts. Often it applied only to intellectual property rights, thus leaving uncovered other rights.

A reasonable advice to escape arbitrariness is made by Llansó (2020), who notes how minimal precautions could help solve the problem: for instance, rules regarding the validity of the notice can positively affect the whole transparency and validity of the procedure.[65] Through these simple formalistic devices, platforms can refrain from undue removals and, in the end,

[65] To quote her proposal: "This should include concrete elements such as: the identity of the official issuing the notice, citation of the specific legal violation and the law that authorizes the issuing of the notice, the precise URL of the illegal content, a description of the allegedly unlawful content (which could include information such as the timestamp in a video or specific sentences in a long post)."

avoid incurring into liability, although none of the recommendations seems to have been incorporated by the DSA, which on the matter merely reproduces the ECD provisions.

To sum up, it can be highlighted that in the beginning the European lawmaker was relatively motionless facing platforms' rising economic power and the self-regulatory approach dominating the scene, both at the EU and at the national level. However, in the wake of an unexpected proliferation of threats to democracy, rule of law, and fundamental rights, Member States and the Union institutions had to swiftly review their regulatory method.

Now, co-regulation proved to work fine although it leaves off some legal blind spots. The coercive method provided by traditional regulation is increasingly restored to protect fundamental rights from major systemic risks thus entailing a return to State interventionism. Nevertheless, after the examination of the content of the DSA as a *lex generalis*, it is possible to detect specific (and sometimes relevant) fields where the legislator was "captured" by targeted platforms, allowing them to retain their private sphere of autonomy. It seems that a more binding solution was politically impossible to adopt unless one is willing to accept the risk of losing their voluntary cooperation in sectorial "code of conduct" agreements.

There is still time for fine-tuning large platforms' legal order to make them compliant with the established constitutional system at the European level. To this end, the positive state obligation approach shall be remembered. It could supplement the regulatory insufficiencies by creating an underpinning for the Member States allowing them to be active protectors of fundamental rights (Xenos, 2013) also in the digital ecosystem. This comprehensive approach, which is now developing also in the EU framework, has mostly been used within the European Convention of Human Rights to deal with cases characterized by the absence of direct interference by the state. In this direction, a new stream of thought is developing to underscore how it is "crucial to keep developing European minimal standards of protection in horizontal online relations, when human rights violation is the result of state's non-compliance with the positive obligation" (Krzywoń, 2022, p. 205).

Interim conclusion

The need to promote the significance of a digital constitutional framework to address fundamental rights issues demonstrates that its potential impact on large platforms is still underplayed. Lawmakers need to face the fact that digital services providers are not passive players in the digital market: rather, they are market makers and, increasingly, also lawmakers. The American neoliberal approach, probably backed by the political clout of the Silicon Valley lobbies, has gradually been "stripped from the State" (Pasquale, 2017). It provoked a transfer of power to opaque profit-driven oligopolistic multinationals, contributing to the erosion of democratic authority.[66] The need to oversee the severe risks hiding in platforms for the free enjoyment of rights, electoral integrity, civic discourse, and public security as much as territorial sovereignty, requires a shift in the approach.

[66] See, for example, the picture drawn by Michaels (2017) in his *Constitutional Coup*, underscoring that the trend in privatization of the governmental bureaucracy is a violence to the Constitution and threatens its stability and future longevity.

The third-party effect theory has some advantages in the fact that it does not imply the creation of a new enumeration of digital rights from scratch. The supports of this solution argue that existing constitutional rights can be a great fit to the digital world without having to revise them. Nevertheless, the third-party effect is affected by critical pitfalls, as it gives leeway to judicial activism thus potentially producing a very fragmented, uncertain, and volatile legal framework.

Against this backdrop, lawmakers around the world, both at the state and the supranational level, should join efforts to impose controls on the rights-endangering activity of the platforms. The European toolkit appears more advanced than the national ones already in force on the matter. In fact, it gives life to a comprehensive legal structure upon which shared constitutional values may be implanted. However, it is of the utmost importance that such legal structure develops in the right direction.

The success of the DSA in advancing platform regulation will depend on various factors. Firstly, the clarity and comprehensiveness of its legal framework shall be assessed by its practical functioning. Secondly, its enforcement mechanisms will have to be evaluated based on the experience. Thirdly, the DSA will be put to permanent test to see whether it can adapt to the quick pace of technological advancements in the digital ecosystem. Finally, a crucial determinant of the DSA's success is the degree of compliance from the digital industries, as the regulatory method depends quite heavily on this.

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