Disentangling the horizontalisation of fundamental rights in the Digital Services Act: What obligations for online intermediaries?*

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Abstract

This paper analyses the legislative technique adopted in the DSA to refer to fundamental rights in defining the obligations of private entities. First, it introduces the horizontalising effect of fundamental rights brought about by these new obligations, drawing a comparison with other EU legislative initiatives. Second, it looks at two questions raised by the horizontalisation of fundamental rights in the DSA, i.e. what elements should guide the balancing between fundamental rights and the other interests at stake in this context, and how far should the obligations of online intermediaries go. By answering these two questions, this paper concludes on the factors that should be taken into account in understanding the horizontalisation of fundamental rights under the DSA, and how they could guide the interpretation of the relevant obligations for online intermediaries.

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Keywords

EU digital policy – Digital Services Act – protection of fundamental rights – online intermediaries – content moderation

1. Introduction: the protection of fundamental rights under the DSA

Since it started to apply on 17 February 2024, the Digital Services Act ("DSA")[1] has radically changed the legal landscape for providers of intermediary services ("online intermediaries"), i.e. the providers of mere conduit, caching and hosting services[2]. In particular, it has marked the shift from a regulatory approach focussed on *ex post* intermediary liability, first established in the E-Commerce Directive[3], to an approach that also features *ex ante* platform regulation[4]. Under this new approach, providers of intermediary services are seen as more accountable and proactive actors in relation to the risks posed by their services. That is especially the case for larger providers, and for providers of services that can have a significant impact for the online media ecosystem, such as online platforms[5], who are subject to more stringent due diligence obligations.

One of the key objectives of the *ex ante* regulatory approach is the protection of the fundamental rights that may be adversely affected by the provision of intermediary services. The relevant fundamental rights are all those protected by the Charter of Fundamental Rights of the European Union[6] (the "Charter"). Therefore, while the

[1] 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) [2022] OJ L277/1.

[2] According to art. 3, lit. g), of the DSA, «'intermediary service' means one of the following information society services:
(i) a 'mere conduit' service, consisting of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;
(ii) a 'caching' service, consisting of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request;
(iii) a 'hosting' service, consisting of the storage of information provided by, and at the request of, a recipient of the service».

[3] 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] OJ L 178.

[4] M. C. Buiten, *The Digital Services Act: From Intermediary Liability to Platform Regulation*, in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law,* 12, 2021, 361.

[5] According to art. 3(i) of the DSA, an online platform is a «hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation».

[6] Charter of Fundamental Rights of the European Union [2012] OJ C 364/01.

legal basis for the adoption of the DSA was art. 114 of the Treaty on the Functioning of the European Union[7] ("TFEU") on the harmonisation in the internal market, the protection of fundamental rights is one of the overarching objectives of the Regulation. This is explicitly recognised in art. 1 of the DSA, where it is stated that the DSA aims to enable a safe, predictable and trusted online environment in which the fundamental rights enshrined in the Charter are effectively protected. It is also explained in multiple recitals[8].

The DSA provides for different instruments to enhance the protection of fundamental rights in the online environment. First, there are procedural safeguards that translate rule of law principles to private online infrastructures. Scholars have discussed for a long time about the need to have in place solutions based on the rule of law to the challenges posed by the private ordering of online intermediaries[9], and in particular of online platforms. Such demands have in part been met by the safeguards laid down in the DSA[10]. The DSA provides for procedural safeguards that constrain online intermediaries and render them accountable for their actions that can impact fundamental rights. Examples of such procedural safeguards include the obligation to state reasons on content moderation decisions[11], the obligation to put in place notice and action mechanisms[12], the obligation to set up an internal complaint-handling system[13], and the obligation to engage with out-of-court dispute settlement bodies[14]. These safeguards aim at protecting users against arbitrary and non-transparent content moderation practices, while holding providers of intermediary services accountable for their actions. They are complemented by transparency obligations on terms and conditions[15] and on recommender systems[16]. Second, there are two substantive obligations requiring providers of intermediary services to take into account fundamental rights when they carry out their activities. First, under art. 14, para. 4, of the DSA, providers of intermediary services are required to have due regard to the fundamental rights of service recipients when they apply restrictions to content. Second, arts. 34 and 35 of the DSA lay down risk assessment and mitigation obligations for certain providers, in relation to the risks deriving from the provision of their services. These substantive obligations introduce fundamental rights concepts in private relationships, as such

[7] Treaty on the Functioning of the European Union [2012] OJ C 326/01.

[8] See recitals 3, 9, 22, 40, 41, 47, 51, 52, 63, 79, 81, 86, 155

[9] J. P. Quintais-N. Appelman-R. Fahy, *Using Terms and Conditions to apply Fundamental Rights to Content Moderation*, in *German Law Journal*, 24(5), 2023, 881.

[10] See, among others: N. Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, in *Social Media and Society*, 4(3), 2018, 1; E. Celeste, *Digital Constitutionalism: A New Systematic Theorisation*, *International Review of Law,* in *Computers & Technology*, 33(1), 2019, 76; G. de Gregorio, *Digital Constitutionalism in Europe: reframing rights & powers in the algorithmic society*, Cambridge, 2022.

[11] See art. 17 of the DSA.

[12] See art. 16 of the DSA.

[13] See art. 20 of the DSA.

[14] See art. 21 of the DSA.

[15] See art. 14, para. 1, of the DSA.

[16] See art. 27 of the DSA.

concepts define the contours of the duties of private actors. This leads to a phenomenon where there is, at least in part, an horizontal application of fundamental rights concepts. This phenomenon, defined as "semi-horizontalisation" for the purposes of this paper, is described more in detail below.

2. Substantive obligations to protect fundamental rights: semi-horizontalisation and constitutional dilemmas

2.1. Semi-horizontalisation in EU legislation

For a long time, constitutional law scholars have discussed the imposition on powerful private actors, including online platforms, of obligations to respect, or at least take into account, individual fundamental rights[17]. This call was based on the consideration of the role, and the power, enjoyed by private actors in the contemporary society and economy, and the resulting ability to interfere with individuals' enjoyment of their fundamental rights. In the recent years, the EU legislator has enacted legislation requiring private actors to assess the risks that their activities pose to fundamental rights, and to take fundamental rights into account, on multiple fronts. This is part of a novel fundamental rights strategy aimed at increasing the accountability of private actors engaging in risky activities, and at ensuring that they have systems in place to mitigate the risks they pose. Therefore, new legislation has led to fundamental rights acquiring a stronger horizontal relevance, in private-to-private relationships, compared to their traditionally vertical application as obligations binding state action.

This strategy has shaped EU legislation outside of the context of the digital single market. The recently adopted Directive on corporate sustainability due diligence ("CSDDD")[18] lays down obligations for companies to conduct risk-based human rights due diligence[19]. The CSDDD has thus rendered binding in the EU legal framework due diligence commitments similar to those already set out in the United Nations Guiding Principles on Business and Human Rights ("UNGPs")[20]. The UNGPs have been an important first attempt, at the global level, to frame the responsibilities of private actors when it comes to protecting fundamental rights. Although being a non-binding instrument, the UNGPs have influenced national and regional frameworks, and they have been relied on in national case-law to interpret the duties of

[17] G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford, 2012; A. Jr Golia-G. Teubner (eds.), *Digital Constitution: On the Transformative Potential of Societal Constitutionalism*, in *Indiana Journal of Global Legal Studies,* 30(2), 2023, 1; G. de Gregorio, *Digital Constitutionalism in Europe,* cit.; D. Bilchitz, *Fundamental Rights and the Legal Obligations of Business*, Cambridge, 2021; Id., *Do Corporations Have Positive Fundamental Rights Obligations?,* in *Theoria: A Journal of Social and Political Theory,* 57, 2010, 1.

[18] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L, 2024/1760, 5.7.2024.

[19] See art. 5 of the CSDDD.

[20] United Nations, Guiding Principles on Business and Human Rights, 2011.

private actors towards fundamental rights[21].

However, it is within the new legislative initiatives on the regulation of the digital single market that this strategy is most noticeable[22]. It can be found in the Terrorist Content Online Regulation[23] that entered into force in 2021. Art. 5, para. 1, of the Regulation mandates hosting service providers to address, through terms and conditions, the misuse of their services for the dissemination to the public of terrorist content. However, in so doing hosting service providers are required to have due regard to the fundamental rights of the users, with particular attention to freedom of expression. This provision appears to have an horizontalising effect, as it imposes on private actors the obligation to take into account fundamental rights[24]. This strategy can also be found in the Artificial Intelligence Act[25], which contains multiple provisions that oblige developers and deployers of AI systems to assess risks to fundamental rights. Developers of high-risk AI systems and of general-purpose AI models must assess and mitigate the risks to fundamental rights posed by their systems and models[26], while deployers of certain AI systems must conduct a fundamental rights impact assessment[27]. The Digital Services Act contains provisions that resemble those of both the Terrorist Content Online Regulation and the Artificial Intelligence Act, as is explained in the section below.

All of these provisions lead to a form of horizontalisation of fundamental rights in private relationships. As they are part of EU legislation adopted with the objective of harmonising the internal single market, and since the EU is not conferred any competence in the area of fundamental rights under the Treaties, it has been argued that they cannot be interpreted as establishing new fully-fledged horizontal effects of fundamental rights for private actors[28]. This interpretation would entail the recognition of a competence on the part of the EU legislator to create fundamental rights *ex novo*,

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[21] Rechtbank Den Haag, *Milieudefensie v. Shell* [2021] C/09/571932 / HA ZA 19-379.

[22] Since 2021, the European Commission identified areas where protection of fundamental rights in the digital age should be strengthened, including online content moderation as one of these areas. See: Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Protecting Fundamental Rights in the Digital Age - 2021 Annual Report on the Application of the EU Charter of Fundamental Rights* [2021] COM(2021) 819 final.

[23] Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online (Text with EEA relevance) [2021] OJ L 172/79.

[24] T. Mast-C. Ollig, *The Lazy Legislature: Incorporating and Horizontalising the Charter of Fundamental Rights through Secondary Union Law*, in *European Constitutional Law Review*, 19(3), 2023, 462.

[25] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 [2024] OJ L2024/1689 of 12.7.2024.

[26] See, respectively, art. 9 and art. 55 of the Artificial Intelligence Act.

[27] See art. 27 of the Artificial Intelligence Act.

[28] T. Mast-C. Ollig, *The Lazy Legislature,* cit.; M. Viljanen, *A Horizontal Meta-effect? Theorising Human Rights in the AI Act and the Corporate Sustainability Due Diligence Directive,* in E. Gill-Pedro-A. Moberg (eds.), *YSEC Yearbook of Socio-Economic Constitutions*, Cham, 2023; M. Krajewski, *Mandatory Human Rights Due Diligence Laws: Blurring the Lines between State Duty to Protect and Corporate Responsibility to Respect?*, in *Nordic Journal of Human Rights*, 41(3), 2023, 265.

which are additional to, and different from, those already enshrined in the Charter. They may be interpreted as the recognition of pre-existing horizontal fundamental rights obligations stemming directly from the Charter, without being constitutive of such obligations. The recognition of horizontal effect for fundamental rights under the Charter is still a widely debated issue in legal scholarship[29], with proposals on the legal bases for such recognition[30]. However, a generalised horizontal application of the Charter has never been affirmed to date by the European Court of Justice ("ECJ"), and direct horizontal effects have been recognised only for three fundamental rights[31]. With the exclusion of the creation of new fundamental rights, and with the lack of recognition of horizontal effect under the Charter, the new provisions in EU legislation can be seen as establishing new types of horizontal obligations whose content is, at least in part, shaped by fundamental rights concepts. Therefore, while not instituting full direct horizontal effects, these obligations can be seen as leading to a "semi-horizontalisation" of fundamental rights.

2.2. Semi-horizontalisation in the DSA

As already discussed in the introduction, the provisions of the Digital Services Act that explicitly lay down fundamental rights obligations for providers of intermediary services are art. 14, para. 4, and arts. 34 and 35.

Art. 14, para. 4, of the DSA is formulated similarly to art. 5, para. 1, of the Terrorist Content Online Regulation. It requires all providers of intermediary services to enforce restrictions on online content having due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as freedom of expression, and other fundamental rights as enshrined in the Charter. The exact interpretation of these provisions gives rise to doubts[32], but it undeniably entails that providers of intermediary services are bound by some sort of fundamental rights obligations. At a minimum, it requires fundamental rights to be taken into account when terms and conditions pertaining to restrictions on online content are drafted, i.e. that fundamental rights cannot be disregarded and must be factored in during the decision-making processes leading to the drafting of terms and conditions. However, it is not clear if this provision entails only a procedural obli-

[29] See, among others: D. Leczykiewicz, *Horizontal Application of the Charter of Fundamental Rights*, in *European Law Review*, 38(3), 2013, 479; E. Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, in *European Law Journal*, 21(5), 2015, 657; S. Walkila, *Horizontal Effect of Fundamental Rights in EU Law*, Groningen, 2016; E. Gualco-L. Lourenço, *"Clash of Titans" - General Principles of EU Law: Balancing and Horizontal Direct Effect,* in *European Papers*, 1(2), 2016, 643.

[30] E. Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, in *European Law Journal*, 21(5), 2015, 657.

[31] For the rights to non-discrimination, effective judicial protection and paid annual leave. See: ECJ Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (2018) EU:C:2018:257; ECJ Case C-569/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* (2018) ECLI:EU:C:2018:871.

[32] T. Mas-C. Ollig, *The Lazy Legislature*, cit.

gation to take fundamental rights into account, or a stronger requirement to ensure respect for fundamental rights in practice. Different alternative interpretations have been advanced so far on the meaning of art. 14, para. 4,[33]. It is beyond the scope of this paper to exhaustively discuss this issue and determine the correct interpretation. For the purposes of this paper, it suffices to state that, irrespective of the precise interpretation to be given, this provision requires private actors to take fundamental rights into account and apply the related concepts when they determine the contractual rules governing their services. The grounds for restrictions provided for in terms and conditions may also correspond to the risk mitigation measures adopted by certain intermediaries under art. 35 of the DSA. The paragraphs below discuss the role that fundamental rights acquire in that specific context.

Arts. 34 and 35 set up a mechanism for systemic risk assessment and mitigation. This mechanism leaves obliged entities with wide discretion in assessing risks and designing measures to address them, under the supervision of the European Commission. They apply only to providers of very large online platforms[34] ("VLOPs") and of very large online search engines[35] ("VLOSEs"). These are a subcategory of providers of intermediary services who are subject to additional requirements under the DSA, in consideration of the systemic risks that their services can pose to a number of protected public and private interests[36], including fundamental rights. Art. 34 requires VLOPs and VLOSEs to identify and assess the systemic risks arising in the Union from the design, functioning and use of their services and related systems, by carrying out risk assessments at least once a year. Based on the identified systemic risks, art. 35 requires VLOPs and VLOSEs to put in place mitigation measures. When adopting risk mitigation measures, VLOPs and VLOSEs must have particular consideration to the impact of such measures on fundamental rights. The adopted risk mitigation measures should be respectful of fundamental rights, without leading to illegitimate interferences. Therefore, the obligations to take into account fundamental rights go in two directions, demanding to address risks to fundamental rights by adopting mit-

[33] For an overview of the authors that discussed the interpretation of art. 14, para. 4, of the DSA, see: T. Mast-C. Ollig, *The Lazy Legislature*, cit.; J. P. Quintais-N. Appelman-R. Fahy, *Using Terms and Conditions to apply Fundamental Rights to Content Moderation*, cit.; M. Wendel, *Taking or Escaping Legislative Responsibility? EU Fundamental Rights and Content Regulation under the DSA*, in A. von Ungern-Sternberg (ed.) *Content Regulation in the European Union*, Trier University and Verein für Recht und Digitalisierung e.V., Institute for Digital Law Trier (IRDT), Volume I, 2023.

[34] According to art. 3(i) of the DSA, an online platform is defined as a «hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation».

[35] According to art. 3(j) of the DSA, an online search engine is defined as an «intermediary service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found».

[36] Online platforms and search engines qualify as VLOPs and VLOSEs if they have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million, and are designated by the European Commission pursuant to art. 33 of the DSA.

igation measures, but also requiring that such measures are themselves respectful of fundamental rights.

The mitigation measures that can be adopted relate to the entire legal and technical architecture of the service, including terms and conditions, internal procedures and organisational arrangements, interfaces and algorithmic systems[37]. The risk-based obligations resulting from Arts. 34 and 35 attribute wide discretion to VLOPs and VLOSEs, that essentially assume the role of risk regulators in relation to the public and private interests at stake[38]. The attribution of this role stems from the recognition that such entities are best placed to understand the risks their services pose and how to mitigate them[39], and for this reason the EU legislator determined that they should bear primary responsibility for systemic risk assessment and mitigation.

As risk regulators, VLOPs and VLOSEs may be called to take measures that interfere with the enjoyment of fundamental rights, especially when they implement content moderation policies. In the scheme of the DSA, the identification of systemic risks is a moment of crucial constitutional relevance, as it triggers the obligation to adopt measures that protect public and private interests, but that can also entail restrictions with the fundamental rights of users and of providers. Therefore, it can be said that in this context risk acts as a proxy for the balancing of conflicting interests: the public interests that may be harmed by systemic risks, the fundamental rights of users that may be interfered with through mitigation measures (e.g. freedom of expression), and the freedom to conduct a business of VLOPs and VLOSEs.

As risk acts as a proxy, fundamental rights concepts acquire relevance in the choice of the most appropriate mitigation measures to adopt. If the situation arises where the protection of fundamental rights must be balanced against a conflicting interest, VLOPs and VLOSEs will need to take into account concepts that pertain to fundamental rights law, such as proportionality, in order to determine whether and how the interference with a fundamental right should take place. A relevant example is the adoption of mitigation measures to address the risks posed by the spread of disinformation online. The spread of disinformation poses systemic risks, for instance to civic discourse and electoral processes, public security and public health. This is explicitly recognised in recitals of the DSA that refer to disinformation as information that may generate systemic risks[40]. As a consequence, VLOPs and VLOSEs may have to adopt mitigation measures that reduce the spread of disinformation, for instance by demoting or removing content. In either case, if the content is *per se* lawful, the mitigation measure would lead to an interference with the freedom of expression of recipients of the service. In this case, VLOPs and VLOSEs are required to take into

[37] P. G. Chiara-F. Galli, *Normative Considerations on Impact Assessments in EU Digital Policy*, in *Rivista di diritto dei media*, 1, 2024, 86.

[38] N. Zingales, *The DSA as a paradigm shift for online intermediaries' due diligence: hail to meta-regulation*, in J. van Hoboken-J. P. Quintais-N. Appelman-R. Fahy-I. Buri-M. Straub (eds.), *Putting the Digital Services Act Into Practice: Enforcement, Access to Justice, and Global Implications*, Amsterdam Law School Research Paper No. 13, Institute for Information Law Research Paper No. 03, 2023, 216.

[39] C. Cauffman-C. Goanta, *A New Order: The Digital Services Act and Consumer Protection*, in *European Journal of Risk Regulation,* 12, 2021, 758.

[40] See recitals 9, 83, 84 and 104 of the DSA.

account the freedom of expression of affected persons, ensuring, among others, that the interference is proportionate to the objectives pursued.

3. Fundamental rights obligations for online intermediaries: how, and how far?

3.1. Framing the problem

The obligations on fundamental rights protection under the DSA are part of a larger trend in EU legislation, but they present unique features that deserve separate examination. As obligations instituted *ex novo* by the EU legislator, they may entail different requirements based on their legislative context and formulation, despite the undeniable similarities with the provisions of other legal texts.

This paper aims to discuss certain interpretive issues related to the fundamental rights obligations of the DSA. This limited scope allows to consider, for the purposes of the analysis, the particularities of the DSA regime and the situations it aims to regulate, i.e. the impact on fundamental rights of certain services provided by intermediaries that enjoy asymmetrical bargaining power. In the discussions that follow, the asymmetrical power relations between intermediaries and users are an important factor that is taken into account for the interpretation of the fundamental rights obligations laid down in the DSA. This factor is important for two reasons. First, this asymmetry of power can justify the introduction of public law concepts and mechanisms in private law relations[41]. As intermediaries can unilaterally impose their private ordering through terms and conditions on the users of their services, with close-to-absolute power over the functioning of online public fora, their ability to interfere with fundamental rights is comparable to those of state entities, in some respects. The new obligations on fundamental rights protection laid down in the DSA can thus be seen as a recognition by the EU legislator of the state of dominance of certain online intermediaries[42]. Second, the effective power of intermediaries in shaping online infrastructures, such as online platforms and search engines, is relevant to determine how far can their fundamental rights obligations go, i.e. what can be reasonably expected of them to effectively protect fundamental rights in the context of their activities.

The interpretive issues addressed in this paper are the following. First, there is the question of how fundamental rights concepts should be applied in private-to-private relationships such as those regulated under the DSA, since these concepts have been conceived and traditionally interpreted for state-private relationships. This issue is addressed in Section 3.2 below. Second, there is the question of how far fundamental rights obligations should go. In particular, taking inspiration from the concept of

[41] G. Teubner-A. Golia, *Societal Constitutionalism in the Digital World: An Introduction*, MPIL Research Paper Series No. 2023-11, 8; G. de Gregorio, *Digital Constitutionalism in Europe,* cit.; E. Celeste, *Digital Constitutionalism,* cit.; L. Belli-J. Venturini, *Private Ordering and the Rise of Terms of Service as Cyber-regulation*, in *Internet Policy Review,* 5(4), 2016, 1.

[42] J. P. Quintais-N. Appelman-R. Fahy, *Using Terms and Conditions to apply Fundamental Rights to Content Moderation*, cit.

positive obligations under international human rights law, this paper discusses whether providers of intermediary services should merely aim at refraining from putting in place interferences with fundamental rights, or should also aim at taking proactive actions that ensure the effective enjoyment of such rights. This question is addressed in Section 3.3 below.

3.2 Fundamental rights balancing in the private sphere: how?

3.2.1. Private obligations to carry out a proportionality test

Under arts. 14, para. 4,, 34 and 35 of the DSA, providers of intermediary services may need to balance fundamental rights with other conflicting interests. In the legal system of the EU, any balancing of fundamental rights with other interests shall take place in accordance with the proportionality test. Proportionality is a well-established principle of EU law, and it is of central importance in the EU fundamental rights regime. In particular, it is one of the conditions laid down in art. 52, para. 1, of the Charter for the legality of any interference with fundamental rights. There are normally three stages in a proportionality inquiry under the case-law of the ECJ: i) whether the measure is suitable to achieve the desired end (the "suitability test"); ii) whether the measure is necessary to achieve the desired end (the "necessity test"), iii) whether the measure imposes a burden on the individual that is excessive in relation to the objective pursued (the "proportionality *stricto sensu* test")[43]. Essentially equivalent stages make up the proportionality test in the case-law of the European Court of Human Rights ("ECtHR").

Under EU law, when EU bodies and, in certain cases, Member States interfere with a fundamental right, any balancing exercise would need to be conducted in accordance with the proportionality test. Proportionality can be seen as a process of reasoning that provides for a reasonable and accountable method for balancing conflicting interests. As such, it can be seen as suitable for multiple different scenarios of conflict between normative considerations, beyond public-to-private relationships and including private-to-private ones. Even though the exact nature of the obligations to take into account fundamental rights in the DSA is unclear, it can be argued that proportionality is the most appropriate process of reasoning to guide compliance with such obligations. This can be argued on the basis of the observations made above, i.e. that proportionality provides for the most reasonable method to balance conflicting interests. Moreover, a reasoning by analogy leads to the conclusion that it should acquire relevance in horizontal relationships as well as vertical ones. The proportionality enquiry was designed to render state actors accountable in recognition of the asymmet-

[43] P. Craig-G. de Búrca, *Review of legality: grounds of review*, in P. Craig-G. de Búrca, *EU Law: Text, Cases, and Materials*, Oxford, 2020, 583-584.

rical power dynamics with citizens[44], by requiring states to follow a rigorous process to justify any action or law interfering with fundamental rights[45]. In essence, it imposes a burden of proof on the entity restricting the right. Based on this perspective, it can be argued that proportionality should equally guide the balancing exercises of online intermediaries in asymmetrical power relations. This holds true especially in consideration of the rationale of the DSA to address the unbalanced power relations between providers of intermediary services and online users.

Some examples can better illustrate how providers of intermediary services would need to apply proportionality to comply with their DSA obligations. Under art. 14, para. 4, when restrictions are imposed, either as mitigation measures pursuant to art. 35 or for other reasons, providers are expected to have due regard to the fundamental rights of affected persons in designing and applying the restrictive measures. This would entail a balancing exercise on the part of the providers, who would need to assess whether the applied restrictions are necessary and proportionate to their ends. Let us imagine that an online platform decides that certain content posted by users should be removed because it demeans the quality of the service. In this case, the commercial interest in moderating the content should not justify the imposition of arbitrary restrictions, but should be balanced against fundamental rights following the proportionality test. Under art. 35, mitigation measures should be proportionate to the aim pursued when they entail an interference with fundamental rights. For instance, due regard should be had to the freedom of expression of affected users when measures are taken to restrict the dissemination of disinformation.

3.2.2. An analytical framework for the horizontal proportionality test under the DSA: a primer

Having ascertained the central role of proportionality in any balancing exercise that intermediaries have to undertake in complying with their obligations under the DSA, the question arises as to how the proportionality test should take place in an horizontal relationship. Applying the proportionality test in private-to-private relationships poses significant challenges related to the different nature of the actors putting in place the infringement, which are private, profit-making entities, with different expertise, resources and mission than state bodies. Moreover, in the context of the DSA, the specific characteristics of the intermediaries that must conduct the proportionality test acquire relevance in establishing which factors should be taken into account for the balancing with fundamental rights. It is beyond the scope of this paper to provide precise recommendations on how the proportionality test should be conducted in the horizontal relationships to which the DSA obligations apply. This paper aims to only set out the key challenges that arise in this context, and to provide the high-level theoretical assumptions that could guide a proportionality enquiry in such horizontal

[44] D. Bilchitz, *Fundamental Rights and the Legal Obligations of Business*, cit., 277.

[45] F. Schauer, *Proportionality and the Question of Weight* in G. Huscroft-B. W. Miller-G. Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, New York, 2014, 178.

relationships. These challenges are discussed below in relation to each step of the proportionality enquiry.

First, there must be an identifiable legitimate purpose that justifies the infringement of a right. In the case of states, public bodies generally have predetermined purposes laid down in the law, their statute or internal rules of procedure. Such purposes relate to the public interests that the public administration is entrusted to protect and fulfil, and are easy to identify when looking at the functions of a public body and the administrative and constitutional rules they are subject to. Courts have accepted lawful purposes pursued by public bodies as legitimate purposes[46]. However, it is conceptually harder to identify legitimate purposes of private actors that can justify an infringement of fundamental rights. As the concept of legitimacy in the proportionality enquiry has been developed with state authority and the related public interests in mind, the perspective would need to shift to a new analytical framework[47]. The General Data Protection Regulation[48] already offers an interesting example of how private interests can be balanced against a fundamental right, as it allows the rely on the legitimate interest of a controller or a third party, who may also be private actors, as a legal basis for the processing of personal data[49]. The case-law and administrative guidance on what qualifies as legitimate interest offers interesting insights that could inform, *mutatis mutandis*, the balancing exercises under the DSA.

An important factor in identifying the purposes that can justify an interference with fundamental rights is the nature of the relevant actor and its function in society[50]. In the context of the DSA, this requires to consider the role of intermediary service providers. For example, providers of VLOPs and VLOSEs are characterised by the fact that they operate large online platforms and search engines, thus controlling societally relevant online infrastructures. This is pertinent to determining the purposes that may justify an interference with fundamental rights. On the one hand, some of these purposes are already identified in the DSA. Arts. 34 and 35 already indicate on which grounds VLOPs and VLOSEs should take measures that can interfere with fundamental rights, in consideration of the risks posed by their services. These grounds correspond to the existence of the systemic risks referred to in art. 34, which include risks to civic discourse and electoral processes, public security, fundamental rights, gender-based violence, public health and minors, physical and mental well-being. Therefore, the mitigation of systemic risks is already recognised by the EU legislator as a purpose that can justify the restriction of fundamental rights. On the other hand, besides the cases where restrictions correspond to risk mitigation measures under art. 35, a legitimate purpose should still be identified to comply with art. 14, para. 4,

[46] D. Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, in *The University of Toronto Law Journal*, 57(2), 2007, 383.

[47] D. Bilchitz, *Fundamental Rights and the Legal Obligations of Business*, cit., 281.

[48] 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), OJ L 119 of 4.5.2016.

[49] See art. 6, par. 1, lit. f), of the General Data Protection Regulation.

[50] D. Bilchitz, *Fundamental Rights and the Legal Obligations of Business*, cit., 277.

in applying restrictions to online content. To this end, a clear analytical framework needs to be defined for the identification of legitimate purposes. Such framework should be built on the basis of the commercial and social functions that providers of intermediary services can have. For instance, VLOPs and VLOSEs may restrict online content in order to improve the value of the service or the quality of the information disseminated on an online platform or provided by a search engine. This may happen when algorithmic systems systematically prioritise the recommendation of content provided by sources considered as reliable, such as government websites, and demote or remove content from dangerous sources. In this case, the legitimate purpose would not only be that of making profits, but also to improve the quality of a service that can be beneficial for the exercise of freedom of expression and civic discourse more generally.

Second, the suitability and necessity of the interference must be assessed in light of the identified legitimate purpose. Suitability is an assessment of whether the measures interfering with fundamental rights are suitable to achieve their legitimate purpose. Since this is an assessment on the potential effectiveness of a measure, it does not raise major interpretive issues of adaptation in the context of private-to-private relationships. While the legitimate purposes against which suitability is assessed are clearly different in a corporate or public setting, the nature of the assessment does not change. The specific commercial purposes of online intermediaries may require to take into account not only profitability benefits, but also other benefits related to the social function of the intermediary[51], such as reputational risks, quality of the service, employees' satisfaction, and so on. However, a significant difference with a vertical application of the suitability test lies in the possibility to have an external scrutiny over how the test was carried out. In the case of a public interference with a fundamental right, the legitimate interest pursued relates to the objectives of public bodies and can be assessed by a court in light of public law concepts. As public bodies are expected to pursue public interests, an easier scrutiny can be made from courts and civil society in general. In horizontal applications of the test, an examination of the motives may be harder to conduct due to the fact that any legitimate interest, and the context where it is pursued, is specific to the organisation and pertains to private interests. It would also seem unreasonable that external observers judge on what means can be considered commercially appropriate for a corporation to pursue their objectives. Therefore, any external review of a horizontal suitability test may mainly consist of verifying that such an assessment was conducted, as entering into the merits of the test may be less feasible than it would be in a vertical setting[52]. As concerns necessity, this test consists of identifying the measure that achieves the intended purposes with the lesser impact on the affected fundamental right(s). In this case, similar considerations can be made to those advanced on suitability above, as in this case there is an assessment of the

[51] *Ibid.*, 291.

[52] For instance, the guidance of the Article 29 Data Protection Working Party does not mention suitability in relation to the legitimate interest test under Directive 95/46/EC. See Article 29 Data Protection Working Party, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, 844/14/EN WP 217, 2014.

array of alternative means at disposal that can achieve the intended purpose. In other words, the comparative suitability of all the alternative means at disposal must be assessed. However, this test also requires some degree of balancing, given that a balance must be struck between ensuring the lesser impact on a right and choosing the means that best achieve the intended purpose. In this regard, the challenge of providers of intermediary services lies in applying fundamental rights concepts and proceed to complex balancing exercises, which may prove difficult due to the lack of fundamental rights expertise of these entities. This challenge is further discussed below, in relation to the proportionality *stricto sensu* test.

Third, the last stage of the proportionality enquiry entails the balancing between the conflicting interests at stake, assessing whether the interference with the fundamental right(s) is proportionate to the objective pursued. This test, commonly known as proportionality *stricto sensu*, requires a value-laden judgement that attributes weights to the interests of the intermediary and of the individuals whose fundamental rights are being restricted. While more often applied in the balancing between public interests pursued by a state and fundamental rights, the balancing between conflicting fundamental rights, or between private interests and fundamental rights, is not a novelty, and there is extensive case-law that shows how this test could be conducted[53]. However, two separate challenges can be identified in relation to the horizontal balancing of fundamental rights under the DSA. First, the entities that are entrusted with the task to conduct such balancing, i.e. intermediary service providers, may not have the expertise nor the interest in balancing the conflicting interests impartially. This is especially a problem when risk acts as a proxy for the balancing exercise. Under arts. 34 and 35 of the DSA, VLOPs and VLOSEs have the responsibility to take decisions on contestable matters of significant social and political relevance, such as when legal speech can be restricted because its dissemination harms public and private interests. The technology-neutral obligations on risk management leave private actors with discretion on important design choices[54] and on making value judgements on what qualifies as risk. Scholars have already highlighted the non-objective nature of risk management exercises in relation to data protection law[55]. DSA risk management obligations are framed through imprecise provisions that do not qualify the nature of the risks to be mitigated. This may lead to technocratic risk management that, despite its contestable and societally relevant nature, is manipulated by private actors to focus on the most convenient risks and mitigation measures[56]. For this reason, it

[53] For instance, there is well-developed ECJ and ECtHR case-law on the balancing between freedom of expression and the right to privacy.
In ECJ case-law: ECJ Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (2014) ECLI:EU:C:2014:317.
In ECtHR case-law: ECtHR, *Von Hannover v. Germany* app. no. 59320/00 (2004).

[54] M. Almada, *Regulation by design and the governance of technological futures*, in *European Journal of Risk Regulation*, 14(4), 2023, 697.

[55] N. van Dijk-R. Gellert-K. Rommetveit, *A risk to a right? Beyond data protection risk assessments,* in *Computer Law & Security Review*, 32(2), 2016, 286.

[56] R. Mares, *Securing human rights through risk-management methods: Breakthrough or misalignment?,* in *Leiden Journal of International Law*, 32(3), 2019; 517; J. E. Cohen, *Between Truth and Power*, New York, 2019; J. E. Cohen-A.E. Waldman, *Introduction: Framing Regulatory Managerialism as an Object of Study and Strategic*

has been argued that risk management under the DSA should not be treated as a dry and technocratic issue[57]. Second, it is still to be determined, in the specific context of the DSA, what weight the social function of online intermediaries should have in the balancing exercises. While providers of intermediary services are profit-driven corporations, they also have an important social function as they intermediate online civic discourse and shape the online media ecosystem. This is especially the case for VLOPs and VLOSEs, who have a crucial function for the online media, freedom of expression and democracy[58]. Therefore, besides the restrictions that are mandated under the DSA, there may other instances where the purpose behind an interference with fundamental rights put in place by an online intermediary cannot be reduced simply to profit-making. As a consequence, the weight to be attached to this purpose in the balancing may be higher because it comprises both commercial and social purposes. This requires an analytical framework to factor in the social function of online intermediaries in balancing exercises that involve fundamental rights. As an example, let us imagine that the provider of an online platform decides to demote or remove all content that is verifiably false, irrespective of whether it creates a systemic risk. The scope of this restriction would thus go beyond what can be required under art. 35 of the DSA. In this case, the purpose behind the restriction may relate to profit-making, as the provider intends to enhance the quality of the service by improving the quality of the information disseminated online, which can ultimately increase profitability. However, it can also serve a social purpose, by facilitating functional civic discourse and tackling malicious disinformation campaigns. These restrictions can in turn also benefit fundamental rights, by enabling the enjoyment of the right to receive information of the general public, or by facilitating freedom of expression in cases where the dissemination of disinformation impedes a functional civic discourse. The social function served by online intermediaries in this example should be recognized by attributing a heavier weight to the purpose behind the imposition of restrictions on online content. This requires an understanding of how the social function of online intermediaries interacts with fundamental rights, and how it can be factored in for balancing exercises in order to have a clearer interpretation of fundamental rights obligations in horizontal settings.

3.2.3. Interim conclusions

The observations made in the paragraphs above lead to two key takeaways on the ap-

Displacement, in *Law & Contemporary Problems*, 86(3), 2023; G. Quijano-C. Lopez, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?*, in *Business and Human Rights Journal*, 6(2), 2021; 241. M. Power, *The risk management of everything: rethinking the politics of uncertainty*, London, 2004.

[57] R. Griffin, *What do we talk about when we talk about risk? Risk politics in the EU's Digital Services Act*, in *DSA observatory*, 2024.

[58] At the institutional level, it has been explicitly recognised by the European Commission in its communication on the European democracy action plan. See 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, 2020.

plication of the proportionality test when horizontally balancing fundamental rights with conflicting interests under the DSA. The first is the need for an analytical framework to understand the legitimate purposes of intermediary service providers and how they can be balanced against individual fundamental rights when conflicts occur. Such framework goes beyond more classical balancing exercises between freedom to conduct a business and other fundamental rights, given that providers of intermediary services have unilateral control over infrastructures of potentially great societal relevance, as is especially the case for large online platforms and search engines. By laying down due diligence obligations, the DSA harnesses the role of online intermediaries to align the online media ecosystem with public and societal interests through a meta-regulatory approach[59]. Therefore, the EU legislator has explicitly recognised the societal relevance of such infrastructures with the adoption of the DSA, and has entrusted online intermediaries with important responsibilities. However, there is at current little guidance on how to interpret the social function of online intermediaries in balancing exercises that involve fundamental rights, and in particular how to factor in the respective weights of societal and commercial interests when they are behind the purposes that justify restrictions with fundamental rights. The second takeaway is that the risk-based balancing between fundamental rights and other interests may lead to a biased prioritisation of the commercial interests of the same entities that are entrusted with the responsibility to conduct such balancing, i.e. VLOPs and VLOSEs. The risks associated with entrusting the task of protecting fundamental rights to online intermediaries have already been observed in relation to other pieces of EU legislation[60], and are even more present under the DSA. By entering the domain of risk management, the interpretation and application of fundamental rights no longer takes place within the usual adversarial legal processes in courts, but is determined unilaterally by the risk manager. For this reason, it is essential to ensure that the horizontalization of fundamental rights balancing in the context of risk management is accompanied by safeguards to ensure its objectivity, such as consultations with interested stakeholders and appropriate supervision.

3.3. Duty of online intermediaries to protect fundamental rights: how far?

The second question about the interpretation of the fundamental rights obligations laid down in the DSA pertains to their extent. In particular, should intermediary service providers be required only not to interfere with fundamental rights, save where justified, or also to take proactive actions to ensure that there are the conditions for

[59] N. Zingales, *The DSA as a paradigm shift for online intermediaries' due diligence: hail to meta-regulation*, in J. van Hoboken-J. P. Quintais-N. Appelman-R. Fahy-I. Buri-M. Straub (eds.), *Putting the Digital Services Act Into Practice: Enforcement, Access to Justice, and Global Implications*, Amsterdam Law School Research Paper No. 13, Institute for Information Law Research Paper No. 03, 2023, 216.

[60] In relation to the EU Directive on Copyright in the Digital Single Market (CDSMD), see: M. Senftleben, J. P. Quintais, A. Meiring, *How the EU Outsources the Task of Human Rights Protection to Platforms and Users: The Case of UGC Monetization, Berkeley Technology Law Journal,* 38(3), 2023, 933.

the effective enjoyment of such rights, putting in place measures that *enable* their exercise? In other words, should they be subject only to negative obligations to respect fundamental rights, or also to positive obligations to protect and enable them? This question requires to look into the conceptual foundations of positive obligations in international and EU law, and to consider whether they are needed for an effective protection of fundamental rights under the DSA.

Under international human rights law, the obligations of states towards fundamental rights have been qualified as not only requiring to refrain from directly interfering with such rights, but also to actively protect persons' rights by ensuring that there are the conditions for their effective enjoyment. Zooming in on the European landscape, under the European Convention on Human Rights (the "ECHR"), the ECtHR has held that human rights give rise to positive obligations on the part of states[61]. The conceptual basis for such obligations has shifted over time under the case-law of the ECtHR. At times the ECtHR held that they stemmed directly from the provision laying down the substantive right[62], while other times it affirmed that they originate from the combined reading of this provision and art. 1 of the ECHR[63]. Art. 1 affirms the general duty of states to secure to everyone within their jurisdiction the rights and freedoms defined in the ECHR, and it has been interpreted by the ECtHR as holding states accountable for any violation of the protected rights occurring within their jurisdiction[64].

Positive obligations require states to take steps in protection of a right from any infringement, irrespective of its source[65], including by regulating the actions of private parties, but without having to guarantee success or a certain result[66]. While originally developed for the protection of fundamental rights against non-state actors and official misconduct, they have been subsequently extended to infringements caused by natural hazards. Positive obligations are distinguished in human rights theory between obligations to protect individuals and groups against private and third actors, and ob-

[61] For a systematic picture of the relevant case-law, see ECtHR, *Siliadin v. France* (Application no. 73316/01, 2005). For a comprehensive description of the concept and the relevant case-law, see: J. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights,* in *Human Rights Handbooks*, No. 7, 2007.

[62] This happened, for instance, in relation to the right to the protection of private and family life. See ECtHR, *Marckx v. Belgium*, app. no. 6833/74 (1979).

[63] See, for instance, ECtHR, *Assenov and Others v. Bulgaria*, app. no. 24760/94 (1998).

[64] ECtHR, *Assanidzé v. Georgia*, app. no. 71503/01 (2004).

[65] B. Björnstjern, *Due Diligence and the Duty to Protect Human Rights*, in H. Krieger-A. Peters-L. Kreuzer (eds.), *Due Diligence in the International Legal Order*, Oxford, 2020.

[66] W. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford, 2015; B. Björnstjern, *Due Diligence and the Duty to Protect Human Rights*, in H. Krieger-A. Peters-L. Kreuzer (eds), *Due Diligence in the International Legal Order*, cit.; Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence,* 2011; O. de Schutter, *International human rights law,* Cambridge, 2019; E. V. Henn, *International Human Rights Law and Structural Discrimination: The Example of Violence against Women*, Berlin, 2019.

ligations to fulfill fundamental rights[67]. Both legal scholarship[68] and ECtHR case-law[69] have conceptualized positive obligations as duties to mitigate risks to fundamental rights. Moreover, it has been affirmed that they are well-suited to address structural issues in order to prevent future violations of fundamental rights, by mitigating abstract risks on an institutional, systemic level[70]. For instance, this has been claimed also in relation to structural discrimination[71], where both the Inter-American Commission on Human Rights and the ECtHR have stressed the importance of a systemic response to systemic issues[72]. The systemic dimension of positive obligations establishes an important connection with risk management, as mitigating risks also pertains to creating favourable conditions for the effective enjoyment of fundamental rights.

While positive obligations have been developed exclusively in relation to states' responsibility to protect fundamental rights, the translation of fundamental rights concepts in the private sphere raises the question of whether they could also inform the interpretation of the obligations of private actors. Taking into account the conceptual foundations of positive obligations, this question requires to look at the risks that the services of online intermediaries pose to fundamental rights. Should a "negative" protection not be sufficient to ensure an effective enjoyment of fundamental rights, it can be argued that the general principle of effectiveness of EU law[73] requires an interpretation of due diligence obligations under the DSA that encompasses a proactive, enabling, protection of fundamental rights.

New risks to fundamental rights have arisen as a result of the combination between digital technologies that have high analytical and computational capabilities, such as artificial intelligence, and the business models pursued by online intermediaries in the digital economy. These practices create risks that may not be addressed by a negative protection of fundamental rights. Some examples in relation to specific fundamental rights can better illustrate this point. As concerns the protection of freedom of opinion, the algorithms used by online platforms and search engines, especially when powered by AI applications, can enable individual and granular targeting, coupled with the customisation of choice architectures based on the characteristics of each online user[74]. Data surveillance business models can thus enable manipulative microtargeting

67 E. V. Henn, *International Human Rights Law and Structural Discrimination,* cit.

68 B. Björnstjern, *Due Diligence and the Duty to Protect Human Rights*, cit.

69 ECtHR, *Karaahmed v. Bulgaria*, app. no. 30587/13 (2015).

70 B. Björnstjern, *Due Diligence and the Duty to Protect Human Rights*, cit.

71 E. V. Henn, *International Human Rights Law and Structural Discrimination,* cit.

72 IACommHR, *Maria da Penha v. Brazil*, Report No. 54/01, 2000, Case 12.051; ECtHR, *Nachova and Others v. Bulgaria*, app. nos. 43577/98 et al. (2005).

73 The principle of effectiveness is a general principle of EU law developed by the ECJ. It has assumed multiple connotations in ECJ case-law. One of these is the understanding of effectiveness as a standalone principle that requires to interpret EU provisions with a view to effectively achieving the intent of legislation. See: K. Lenaerts-J. A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice,* in *Columbia Journal of European Law,* 20(2), 2014, 3-61.

74 K. Yeung, '*Hypernudge': Big Data as a Mode of Regulation by Design*, in *Information, Communication & Society*, 20(1), 2017, 118; S. Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, New York, 2019; S.A. Teo, *How to Think About Freedom of Thought (and Opinion) in the Age of Artificial Intelligence*, in *Computer Law & Security Review*, 53, 2024, 105969.

and other forms of abusive practices that exploit the vulnerabilities of online users[75]. These practices have been described as a strong form of nudging, for which the term "hypernudging" has been coined[76]. Users can thus be subject to subtle instances of manipulation that are close to impossible to perceive[77]. Nudges can be put in place for users at a systemic level, personalising the online experience of each single use and creating a dispersed form of manipulation that is made up of different triggers spread across interfaces and algorithms of an online platform. It has been argued that manipulation would be difficult to prove in such cases due to the subjective nature of online users' instances of manipulation, that impede comparability of a given user's experience with the "average" online experience in order to ascertain whether there are differences that warrant a finding of manipulative practices[78]. When manipulation occurs in a dispersed, systemic manner, safeguards that appear *prima facie* to protect the mental autonomy of online users, such as consent, may not be sufficient. On the contrary, it may be necessary for online intermediaries to take positive steps that preserve conditions of autonomy for online users, thus enabling freedom of opinion. For instance, it has been proposed that online platforms deploying AI systems take a number of positive, procedural steps to enable conditions of mental autonomy in the provision of their services[79]. With regard to the right to non-discrimination, online intermediaries may implement content moderation and curation policies that, while not directly realising instances of direct or indirect discrimination, can create structural conditions that undermine their effective enjoyment. This may be the case, for example, when algorithms facilitate the dissemination of content representing harmful stereotypes[80], or where architectural choices ease abusive and harassing behaviours[81]. Similarly, as concerns freedom of expression, the systemic and constant dissemination of disinformation or other content that "pollutes" online civic discourse can undermine the effective enjoyment of the right to receive information, as well as to impart it.

In these cases, a negative protection of fundamental rights may not be effective. When the entire architecture of an online platform creates structural and collective issues that impede an effective enjoyment of fundamental rights, but without realising direct individual infringements, an individualistic and negative focus of fundamental rights protection would not be sufficient[82]. Positive obligations can offer a solution to some

[75] B. Sander, *Democratic Disruption in the Age of Social Media,* cit.

[76] K. Yeung, '*Hypernudge': Big Data as a Mode of Regulation by Design*, cit.

[77] D. Susser, *Invisible Influence: Artificial Intelligence and the Ethics of Adaptive Choice Architectures*, Proceedings of the 2019 AAAI/ACM Conference on AI, Ethics, and Society, 2019.

[78] S. A. Teo, *How to Think About Freedom of Thought (and Opinion) in the Age of Artificial Intelligence*, cit.

[79] *Ibid.*

[80] For an account of how this content would not lead to a violation of the right to non-discrimination, see: P. Hacker-F. Z. Borgesius-B. Mittelstadt-S. Wachter, *Generative Discrimination: What Happens When Generative AI Exhibits Bias, and What Can Be Done About It*, in P. Hacker-A. Engel-S. Hammer-B. Mittelstadt (eds.), *The Oxford Handbook of the Foundation and Regulation of Generative AI*, Oxford, forthcoming 2024.

[81] B. J. Renninger, *Where I Can be Myself: Where I Can Speak My Mind": Networked Counterpublics in a Polymedia Environment*, in *New Media & Society,* 17 (9), 2015, 1513.

[82] B. Sander, *Democratic Disruption in the Age of Social Media,* cit.; R. Griffin, *Rethinking Rights in Social*

of these problems by requiring online intermediaries to put in place the conditions for the effective enjoyment of fundamental rights. As a general principle of EU law, effectiveness should guide the interpretation of any provision of the DSA, supporting the attribution of a meaning that best ensures the protection of fundamental rights.
Another argument in favour of the recognition of positive obligations lies in the role and power of certain providers to shape online information ecosystems. On the one hand, it must be noted that positive obligations have been developed in relation to states, who have the legitimacy and institutional capacity to bear responsibility for enabling the exercise of fundamental rights, while the same cannot be said for private actors. On the other hand, however, providers of intermediary services have the power to unilaterally determine the rules governing their services, creating a state of subjection for individual users that is comparable to that of citizens vis-à-vis state authorities[83]. In the case of providers of large online platforms and search engines, this entails the power to shape the online experiences of millions of users on societally important infrastructures. In such infrastructures, fundamental rights can be enabled or hindered in a way comparable to the power enjoyed by states in shaping real-life infrastructures. This can be argued more easily in relation to VLOPs and VLOSEs. These categories of providers are already under an explicit obligation to minimise systemic risks to fundamental rights pursuant to art. 35 of the DSA. It can be argued that, under the principle of effectiveness, this provision should be interpreted in the sense that online intermediaries must structure their services in a manner that best minimises the risks to fundamental rights, including by taking positive, enabling actions. In this regard, the social function of VLOPs and VLOSEs can also support the claim that these intermediaries should be required to contribute to societal goals, including the realisation of fundamental rights[84]. The case-law on the positive obligations of states developed under international and European law can thus offer useful guidance on the interpretation of the duties that VLOPs and VLOSEs have under art. 35. Nonetheless, the interpretation of obligations for private actors in a sense that goes beyond a negative protection of fundamental rights would create uncertainty as to the extent of such obligations. In particular, the positive dimension of these obligations in concrete cases would be less straightforward to define than its negative one. In this regard, comfort can be offered by the understanding of positive obligations as obligations of conduct. In line with the interpretation of positive obligations under international human rights law, also in the context of the DSA they may be interpreted as requiring to take certain procedural steps that ensure an architecture for intermediary services that is enabling of fundamental rights, rather than prescribing specific results.
Based on these considerations, it is possible to argue in favour of the recognition of positive obligations to protect fundamental rights, at least for VLOPs and VLOSEs who already have the responsibility to mitigate systemic risks to fundamental rights under art. 35 of the DSA. However, their operationalisation would be far from

Media Governance: Human Rights, Ideology and Inequality, in *European Law Open,* 2(1), 30, 2022.

[83] G. de Gregorio, *Digital Constitutionalism in Europe*, cit.

[84] For a development of this argument with regard to corporations in general, see: D. Bilchitz, *Do Corporations Have Positive Fundamental Rights Obligations?,* cit.

straightforward, and it presents challenges in striking the balance between an effective protection of fundamental rights, preserving conditions of legal certainty and ensuring that the burden for online intermediaries is proportionate.

4. Conclusions

The new obligations to have due regard to fundamental rights laid down in the DSA raise many interpretive issues. While at this stage there are still unanswered questions, an analysis of the horizontalising effects that they bring about can help to provide some clarity on their interpretation. In particular, by adopting horizontalization as a key to interpretation it is possible to draw the main differences between the obligations of online intermediaries to respect fundamental rights under the DSA and those of states or of other private actors. A focus on the horizontalizing effects of these provisions enables to understand the power dynamics at play and the specific features of the actors involved, which are essential to guide the legal interpretation.

Based on this approach, this contribution has provided two key takeaways regarding the nature and extent of the obligations at hand.

First, the social function of online intermediaries is expected to have an important weight in assessing the proportionality of any interference with fundamental rights that they put in place. Online intermediaries regulated under the DSA, and especially large online platforms and search engines, play a role of societal relevance that distinguishes them from both public actors and other private actors. The DSA confers important tasks on such entities who have to weigh the social and commercial purposes of their own actions against the expected impact on the fundamental rights affected. However, the balancing conducted by online intermediaries, especially when they use risk as a proxy to implement restrictions to fundamental rights, also raises issues on the objectivity of such balancing and the possibility to have external scrutiny.

Second, it can be argued that certain online intermediaries, i.e. VLOPs and VLOSEs, should not only refrain from interfering with fundamental rights, but also take positive measures to enable their effective exercise. This argument is supported by two observations. The first is that the risks posed by the provision of intermediary services, especially when they are provided on far-reaching and complex online infrastructures, may not always be adequately addressed by a negative protection of fundamental rights. The principle of effectiveness would thus require an interpretation of obligations on VLOPs and VLOSEs that includes the positive dimension of the protection of fundamental rights. The second lies in the capacity of VLOPs and VLOSEs to control large online platforms and search engines of great societal relevance, with an ability to determine the conditions for an effective exercise of fundamental rights online that is comparable to that of states in offline scenarios. However, the recognition of positive obligations for VLOPs and VLOSEs may be met with wide criticism, with fair arguments on why they would lead to a disproportionate burden for these intermediaries and diminish legal certainty. Despite the legal arguments in support of the recognition of far-reaching, positive obligations, it is a decision that also relates to the political and

policy rationale behind the DSA, and would require clarification in the future from the European Commission or the ECJ.

As an overarching takeaway, it can be noted that the horizontalisation of fundamental rights induced by the DSA does not come without challenges. It requires to address new questions that have never arisen as explicitly in the past, i.e. how should the social function of online intermediaries be balanced against fundamental rights, and how far should the obligations of large providers go.