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FUNDAMENTAL RIGHTS AND CONFLICT RESOLUTION IN THE DIGITAL SERVICES ACT PROPOSAL: A FIRST APPROACH

DIREITOS FUNDAMENTAIS E RESOLUÇÃO DE CONFLITOS NA PROPOSTA DE REGULAMENTO SERVIÇOS DIGITAIS: UMA PRIMEIRA APROXIMAÇÃO

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Resumo: Os direitos fundamentais estão no centro da proposta de um novo Regulamento "Serviços Digitais", um regulamento da UE que visa atualizar a Diretiva de Comércio Eletrónico, a legislação nuclear sobre prestadores de serviços intermediários online. De especial importância entre esses prestadores são as plataformas online, as guardiãs da nova vida social, económica e política do século XXI digital. Tanto a gestão de conteúdos como a resolução de conflitos no âmbito das plataformas online enquadram-se nas disposições do Regulamento Serviços Digital e são fundamentais para uma adequada regulação da interação dos utilizadores, quer com as plataformas online, quer entre si, bem como para a proteção dos direitos fundamentais. O artigo analisa os mecanismos de gestão de conteúdo e de resolução de conflitos no âmbito da Diretiva de Comércio Eletrónico e da Proposta de Regulamento Serviços Digitais na perspetiva da proteção e promoção dos direitos fundamentais. O objetivo é oferecer uma primeira abordagem e avaliação dos mecanismos de resolução de conflitos instituídos pela proposta e verificar se cumprem o direito da UE e

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dos Estados-Membros e asseguram o exercício adequado e equilibrado dos direitos fundamentais.

Abstract: Fundamental rights are at the centre of the proposal for a new Digital Services Act (DSA), an EU Regulation that aims to update the e-Commerce Directive, the nuclear legislation on intermediary service providers. Of special importance among these providers are online platforms, the gatekeepers of the new social, economic and political life of the digital XXI century. Both content management and conflict resolution in the context of online platforms fall under the provisions of the DSA and they are key to an adequate regulation of users' interaction, both with the online platforms and among themselves and to the protection of fundamental rights. The paper analysis content management and conflict resolution mechanisms under the e-Commerce Directive and the DSA Proposal through the perspective of fundamental rights protection and promotion. The goal is to offer a first approach and appraisal to the conflict resolution mechanism put in place by the Proposal and ascertain if they comply with EU and Member States law and assure the adequate and balanced exercise of fundamental rights.

Palavras-chave: conteúdo ilegal; ponderação; direitos fundamentais; resolução de conflitos

Keywords: illegal content; balancing; fundamental rights; conflict resolution

1. Introduction

On April 22th 2022 the EU Commission, the EU Parliament and the EU Council, under a trilogue meeting, reached a political agreement over an important piece of legislation called the Digital Services Act (DSA). This proposed EU Regulation (hereinafter the Proposal[2]) is part of the European Union's Digital Strategy[3], which encompasses a wide range of legal diplomas such as the Digital Markets Act, the Artificial Intelligence Regulation, and the European Chips Act.

The DSA will play a key regulatory function within the EU Digital Strategy: it aims at regulating information society "intermediary services" (see article 2(d) of the Proposal), with special attention given to "online platforms" (see article 2(h) of the Proposal).

Online platforms are the gatekeepers to many of the most essential features of everyday life[4], and as such, they constitute an environment where law is applied continuously. In this way online platforms became tools to exercise rights and duties, some of them fundamental in a modern, constitutional sense. The Proposal therefore aims at regulating these tools and making sure that the operation of these service providers and the interaction with their users (and among them) does not happen with prejudice to fundamental rights. The DSA preparation has taken into account fundamental rights from the very beginning. Even before the Proposal was put forward by the Commission, the Parliament had already stated the importance of fundamental rights in regulating online service providers[5].

The proposal states again and again, on its explanatory memorandum, on the Recitals and finally on the legal text, the crucial quest of the DSA to strike a balance between the adoption of rules that assure the delivery of innovative digital services and the respect for fundamental rights. This extensive reference to fundamental rights must need not surprise us: the legislator when regulating any economic activity, such as intermediary service providers, is always in the process of balancing the fundamental

2. Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Brussels, 15.12.2020, COM(2020) 825 final, 2020/0361(COD).

3. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, Brussels, 6.5.2015, COM(2015) 192 final (Digital Single Market Strategy); see also: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en (last visualisation on 30.05.22)

4. See J. Van Dijck, T. Poell and M. de Waal, *The Platform Society – Public Values in a Connective World*, Oxford, Oxford University Press, 2018, pp. 13 and ff; M. Taddeo and L. Floridi, "New Civic Responsibilities for Online Service Providers" in M. Taddeo and L. Floridi (ed.), *The Responsibilities of Online Service Providers*, Cham, Springer, 2017, pp. 1 and ff; M. Taddeo and L. Floridi, "The Moral Responsibilities of Online Service Providers" in M. Taddeo and L. Floridi (ed.), *The Responsibilities of Online Service Providers*, Cham, Springer, 2017, pp. 13 and ff; E. Laidlaw, *Regulating Speech in Cyberspace Gatekeepers, Human Rights and Corporate Responsibility*, Cambridge, Cambridge University Press, 2015, pp. 36 and ff.

5. See European Parliament resolution of 20 October 2020 on the Digital Services Act and fundamental rights issues posed (2020/2022(INI))

freedom of expression and rights of property and economic enterprise of the service providers with several other rights and interests of equal hierarchical value[6]. When we look specifically, as we do in the present paper, to online platforms and their users, it is not surprising to find that the balancing exercise operates between the fundamental rights of platforms and the fundamental rights of users, through the intervention of the EU and Member-States institutions[7]. The exercise of fundamental rights in horizontal relations such as these is a very controversial subject in many legal systems[8] and contingent to each one but seems solved in a straightforward manner in the EU legal system, pursuant to article 51(1): the fundamental rights of the Charter have as (secondary) addressees only the "institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law". There cannot be any horizontal effects of legal positions derived from the Charter, i.e., between positions of their primary addressees, although this horizontal relation can be verticalized through the duty to "promote the application" of the Charter's rights, according to Article 51(1), 2nd sentence, making the legislator intervene to set specific, second-order duties and rights amongst the primary addressees of fundamental rights under the Charter[9]. The CJEU has recognised as much and it has practised it in its case law regarding copyright infringements[10]. This is widely accepted under human rights law[11], especially in the case law of the ECtHR, which is connected to

6. See R. Jørgensen and A. Pedersen, "Online Service Providers as Human Rights Arbiters" in M. Taddeo and L. Floridi (ed.), *The Responsibilities of Online Service Providers*, Cham, Springer, 2017, pp. 182 and ff.

7. See C. Geiger, G. Frosio and E. Izyumenko, "Intermediary liability and fundamental rights" in G. Frosio (ed.) *The Oxford Handbook of Online Intermediary Liability*, Oxford, Oxford University Press, 2020, pp. 138 and ff.; see also P. Van Eecke, "Online Service Providers and Liability: A Plea for a Balanced Approach", *Common Market Law Review*, 48, 5, 2011, pp. 1455 and ff; Jørgensen and Pedersen, *The Responsibilities*, pp. 182 and ff.

8. See A. Barak, "Constitutional Human Rights and Private Law" in D. Friedmann and D. Barak-Erez, *Human Rights in Private Law,* Oxford, Hart Publishing, 2001, pp. 13 and ff; C. Starck, "Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court" in D. Friedmann and D. Barak-Erez, *Human Rights in Private Law*, Oxford, Hart Publishing, 2001, pp. 97 and ff.; G. De Gregorio, "Democratising online content moderation: A constitutional framework", *Computer Law & Security Review*, 36, 2020, pp. 3 and ff.

9. See M. Eifert *et al.*, "Taming the Giants: the DMA/DSA Package", *Common Market Law Review*, 58, 2021, p. 1013.

10. See CJEU C-70/10, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), 24.11.2011, ECLI:EU:C:2011:771, § 43–4; CJEU, C-160/15, GS Media BV,08.09.16, ECLI:EU:C:2016:644, §31; see also C. Angelopoulos, "Harmonizing Intermediary Copyright Liability in the EU: A Summary in Giancarlo Frosio (ed.) *The Oxford Handbook of Online Intermediary Liability*, Oxford, Oxford University Press, 2020, pp. 315 and ff.

11. C. Louven, "'Verticalised' cases before the European Court of Human Rights unravelled: An analisys of their characteristic and the Court's approach to them", *Netherlands Quarterly of Human Rights*, Vol. 38, N. 4, 2020, pp. 246 and ff; A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press, 2006, pp. 317 and ff.; M. K. Land, "Regulating Private Harms Online: Content Regulation under Human Rights Law", in R. F. Jørgensen (ed.), *Human Rights in the Age of Platforms*, Cambridge, Massachusetts, MIT Press, 2019, pp. 306 and ff.; T. McGonagle, "The Council of Europe and Internet Intermediaries: A Case Study of Tentative Posturing" in R. F. Jørgensen (ed.), *Human Rights in the Age of Platforms*, Cambridge, Massachusetts, MIT Press, 2019, pp.

the Charter through its article 52(3)[12]. The DSA Proposal, as all the law of intermediary service providers and online platforms until now, can be seen as a way to pursue the proper exercise of fundamental rights within this context. EU and Member States legislation regarding online platforms, as a recent addition to legal systems, is but the closing stone of the arc of legislation that applies to the operation and use of online platforms. It is thus a necessary consequence of such reality that the *Law of platforms* is not only an interface law but it also reflects the state-of-play of online platforms regarding the moment when legislation is discussed, negotiated and passed.

For every applicable Law of platforms, in any given historical moment, there is an intrinsic challenge i) to legislators to correctly diagnose what it is that intermediary services and online platforms do and provide[13]; ii) to platforms to develop the responsive content management structure; and iii) for users to seek the best possible way to exercise their rights, including their fundamental ones[14].

Intermediary service providers can only achieve this goal through compliant content management[15]. What many of the service providers that come under the scope of the Proposal, especially online platforms, already do under the name of "content moderation"[16] and according to their Terms & Conditions (T&C), will soon have to be performed also according to the rules of DSA in what can be better called content management. This is also not new. Both the United States, with the infamous Section 230 of the Communications Decency Act (CDA)[17], from 1996, and the EU, with articles 12 to 14 of the e-Commerce Directive, from 2000 (transposition by 2002), which were influenced by the CDA, have defined rules on how content must be judged and therefore managed by online platforms. The CDA created the still prevailing standard of platform immunity to general liability, with very few exceptions based on the knowledge of illegality by service providers.

Prior to this seminal legislation and coming to present day, the Law of online platforms consists of the exercise of general freedom and more specifically the freedom of expression and enterprise of services providers

240 and ff; Jørgensen and Pedersen, *The Responsibilities*, pp. 181 and ff.

12. See T. McGonagle, "Free expression and Internet: The changing geometry of European regulation" in G. Frosio (ed.) *The Oxford Handbook of Online Intermediary Liability*, Oxford, Oxford University Press, 2020 p. 475.

13. Idem, ibidem, p. 476.

14. See C. Geiger and E. Izyumenko, "Blocking orders: assessing tensions with Human Rights" in in G. Frosio (ed.) *The Oxford Handbook of Online Intermediary Liability*, Oxford, Oxford University Press, 2020 pp. 569 and ff.

15. See EU Parliament Resolution..., point 2.

16. See K. Klonick, "The New Governors: the people, rules and processes governing online speech", *Harvard Law Review*, Vol. 131, 2018, pp. 1630 and ff; Van Dijck, Poell and Waal, *The Platform*, p. 44 and ff; see also N. Elkin-Koren and M. Perel, "Guarding the guardians: content moderation by online intermediaries and the rule of law in G. Frosio (ed.) *The Oxford Handbook of Online Intermediary Liability*, Oxford, Oxford University Press, 2020, pp. 669 and ff.

17. J. Kosseff, "The Gradual Erosion of the Law that Shaped the Internet: Section 230's Evolution Over Two Decades", *Columbia Science & Technology Law Review*, Vol. 18, No. 1, 2016, pp. 2 and ff.

and relies on a mix of contract law, framed and restricted by consumer, copyright, criminal and other areas of the law[18]. Consumer law and other domains of private law function as a limitation to contract law as used by online platforms. They function as restrictions to the fundamental freedom of enterprise inasmuch as such domains of the law comprise rules that impose duties on the platforms towards the users, in order to protect these from the stronger position of platforms. These restrictions are updated by legislators taking into account the evolution of the online environment from multiple perspectives, according to the different stakeholders. From the early nineties, when no online platforms existed, to present-day online platforms much as changed, especially the role taken by social platforms regarding the content supplied by users[19]. Early 90's bulletin and message boards on online servers had no content management other than groups' managers and administrators that did not work for the companies that owned the servers and provided the hosting service, but the evolution of online gatherings and discussions that led to the present social networks made the hosting providers – especially online platforms - a relevant part of content management, as we will analyse in more detail below.

The polygonal relations of present-day online platforms, where multiple users interact with each other mediated by service providers that manage the content supplied by users, has increased and changed the kinds of conflicts experienced from the early days of hosting services[20]. It is now clear that several fundamental rights are on the forefront of online conflicts, like freedom of expression and the right to privacy[21]. The DSA Proposal intends to respond to this increase and change concerning online conflicts with an upgrade from the rules approved in the e-Commerce Directive.

In the remainder of this paper content management and conflict resolution related to online platforms will be analysed. The DSA Proposal has a scope that goes beyond online platforms, encompassing intermediary service providers that offer "mere conduit" and "caching" services besides "hosting" services (see art. 2(f)) where online platforms fall (see art. 2(h)). But content management is mainly an issue concerning online platforms, that is why in Chapter III of the Proposal, after the general applicable rules to all providers of intermediary services, articles 14 to 24 comprise rules aimed specifically at online platforms, with articles 25 to 33 dedicated to very large online platforms (see article 25(1)). The paper is interested in the rules that address the problem of content management when conflict ensues. Conflict resolution has become an important component of content

18. See T. Ballell, "The Legal Anatomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU", *The Italian Law Journal*, Vol. 03, No. 1, 2017, p. 151.

19. See McGonagle, *The Oxford*, pp. 467 and ff; S. Stalla-Bourdillon, "Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the E-Commerce Directive as Well", in M. Taddeo and L. Floridi (ed.), *The Responsibilities of Online Service Providers, Cham, Springer*, 2017, pp. 275 and ff.; S. Stalla-Bourdillon and R. Thorburn, "The scandal of the intermediary: acknowledging the both/and dispensation for regulating hybrid actors" in B. Petkova and T. Ojanen (ed.), *Fundamental Rights Protection Online – The Future Regulation of Intermediaries*, Cheltenham, Edward Elgar, 2020, pp. 141 and ff.

20. See Ballell, *TILJ*, p. 157-158.

21. See Geiger, Frosio and Izyumenko, *The Oxford*, pp. 139 and ff.

management within online platforms[22]. This paper aims at i) describing in an analytic way the content management operations (under the DSA Proposal) that can originate conflicts; ii) ascertaining what mechanisms are foreseen under the DSA Proposal to address conflict resolution as a by-product of the interaction of users and content management by platforms, iii) understanding how these mechanisms work and iv) what entities play a role in them.

In the next section we will frame de big picture of users' interaction and conflict resolution, followed by a section dedicated to content management and its parameters (Terms & Conditions and the Law of platforms), both in the e-Commerce Directive and the Proposal and we will then address the topic of conflict resolution under the Proposal, looking from the perspective of bipolar and polygonal relations. The last section will appraise the relation of content management structures and mechanisms with the available conflict resolution tools.

2. Interaction of online platforms users' and conflict resolution

In the beginning it was interaction of users[23]. Some may not remember it, some may have not experienced it, but there was a time in the early stages of the Internet and the antecedents to online platforms where content management did not exist. Or, if one wanted to talk about content management one would have to admit that the only thing that could earn that name was self-restraint of users while using bulletin and message boards, chat rooms and first-generation social platforms like Six Degrees, Friendster. Sometimes one could also find a sort of content moderation exercised by special users with such titles as "administrators" or "moderators". Bulletins, boards, chat rooms and early platforms ranged from inexistent to incipient content moderation. It was mostly about users' discretion and self-regulation. Although this quickly evolved to content moderation by online platforms (see below) users' interactions remain the root of conflicts even when filtered through content management mechanisms, such as complaints[24]. Recital 26 addresses this framework stating that "[w]hilst the rules in Chapter II of this Regulation concentrate on the exemption from liability of providers of intermediary services, it is important to recall that, despite the generally important role played by those providers, *the problem of illegal content and activities online should not be dealt with by solely focusing on their liability and responsibilities. Where possible, third parties affected by illegal content transmitted or stored online should attempt to resolve conflicts relating to such content without involving the providers of intermediary services in question*. Recipients of the service should be held liable, where the applicable rules of Union and

22. The most notable case being the Facebook Oversight Board. See K. Klonick, "The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free", *Yale Law Journal*, 129, 2020, pp. 2422 and ff; see also see. Ballell, *TILJ*, p. 159

23. See D. M. Boyd and N. B. Ellison, "Social Network Sites: Definition, History, and Scholarship", *Journal of Computer-Mediated Communication*, 13, 2008, pp. 210 and ff.; see also Van Dijck, Poell and Waal, *The Platform*, pp. 11 and ff.

24. See Ballell, *TILJ*, p. 169-170.

national law determining such liability so provide, *for the illegal content that they provide and may disseminate through intermediary services*. Where appropriate, other actors, such as group moderators in closed online environments, in particular in the case of large groups, should also help to avoid the spread of illegal content online, in accordance with the applicable law. Furthermore, where it is necessary to involve information society services providers, including providers of intermediary services, any requests or orders for such involvement should, as a general rule, be directed to the actor that has the technical and operational ability to act against specific items of illegal content, so as to prevent and minimise any possible negative effects for the availability and accessibility of information that is not illegal content" (emphasis added). This means that conflicts emerging in online platforms exclusively between users and that do not spill over to the platforms because of breach of T&C or legal duties imposed on them are not specifically dealt with by the DSA Proposal. In these cases, as Recital 25 mentions, the applicable rules of Union and national law shall be used.

3. Content management and conflict resolution

3.1. Content management

Online platforms have evolved to be in the business of content management. Content is what supports the most common business model of online platforms: targeted advertising[25]. If platforms manage well the content provided by their users, they will be able to advertise better and therefore get higher revenues. This also means that managing content means managing people, as they are the suppliers of content. The content they provide will influence other content and the behaviour of other users. If a provider wants to have the better online platform, the one that attracts more users, it has to cater to an environment that enables this. It has to curate content[26]. Even if a platform is ideologically, politically or otherwise committed to certain minority values it will need to cater to the content provided by users in order to ensure that the content supplied is aligned with platforms' values and goals. If content management just meant checking and confirming compliance to Terms & Conditions platforms would not have problems or conflicts to solve. But if content made available by users is in violation of the T&C and/or considered illegal, harmful or even just obnoxious by other users, platforms soon or later must intervene so as to maintain the environment that keeps users coming back and using the platform as well as to avoid any foreseen legal sanctions. This is what is usually called content moderation and as we can see it only covers the adversarial or conflicting dimension of content management. In fact, content moderation presupposes some sort

25. See also Van Dijck, Poell and Waal, *The Platform*, pp. 33-34; R. F. Jørgensen, "What Platforms Mean When They Talk About Human Rights", *Policy & Internet*, vol. 9, N. 3, 2017, pp. 286-287; see Stalla-Bourdillon and Thorburn, *Fundamental Rights*, p. 151.

26. See Stalla-Bourdillon and Thorburn, *Fundamental Rights*, p. 149-150; M. Eifert *et al*., *CMLR*, p. 1006.

of content management strategy and methodology[27]. Platforms moderate content because they have devised a content management governance model that dictates when moderation mechanisms must be used. The aim is to avoid conflict between users and towards the platform itself and promote a balanced environment while complying with all the applicable legal norms.

Content management has thus two very relevant standards, even if they contingently coincide: i) Terms & Conditions, which follow from the freedom of enterprise and contract and allow considerable leeway to the platforms on how to frame and manage content[28] and ii) the Law of Platforms, which, as we have mentioned above, is a mix of provisions from different legal domains that act as restrictions on what online platforms can do. The first standard is one that sets a mode of self-regulation[29] and the second standard sets a mode of regulated self-regulation[30] or co-regulation[31] depending on what is foreseen in the legal provisions for each domain of the law. If users and online platforms breach the T&S there is not, *a priori*, any illegality, unless the clause from the T&S coincides with a norm from a legal provision or the breacher does not comply with consequences foreseen in the T&S and enforceable under contract law. On the other hand, the breach of the second standard, the Law of platforms, always constitutes an illegality inasmuch as a certain action is not in accordance with a legal deontic operator. Let us look deeper into these two different standards of content management to better understand the conflicts that can emerge from them.

3.1.1. Content management and Terms & Conditions

Terms & Conditions are the infamous expression of contract law applied to online platforms[32]. They are examples of standard contractual clauses that substitute negotiation among parties for deliberation and (if so) consent by users. Terms & Conditions of online platforms have long foreseen mechanisms that denote knowledge and control over content. Besides Terms & Conditions directed at users, the less known contracts between platforms and advertisers also confirm that platforms do control content

27. See Klonick, *HLR*, pp. 1641 and ff; see also, Stalla-Bourdillon and Thorburn, *Fundamental Rights*, p. 148-149.

28. See J. Venturini *et al*, *Terms of Service and Human Rights: an Analysis of Online Platform Contracts*, Rio de Janeiro, Editora Revan, 2016, pp. 13 and ff.; see also Stalla-Bourdillon and Thorburn, *Fundamental Rights*, p. 163

29. See G. N. Yannopoulos, "The immunity of Internet Intermediaries Reconsidered?" in M. Taddeo and L. Floridi (ed.), *The Responsibilities of Online Service Providers*, Cham, Springer, 2017, p. 51.

30. T. Wischmeyer, "'What is illegal offline is also illegal online' – The German Network Enforcement Act 2017" in Petkova *et al, Fundamental Rights Protection Online: The Future Regulation of Intermediaries*, Cheltenham, Elgar, 2020, p. 28 and ff; M. Bassini, "Fundamental rights and private enforcement in the digital age", *European Law Journal,* 25, 2019, p. 182 and ff.

31. See Jörgensen and Pedersen, *The Responsibilities*, p. 186 and ff.

32. See Venturini *et al*., *Terms of Service*, pp. 22 and ff.

and even foster it. For example, platforms suggest users what to buy, who to follow, what to read, where to go. This can only be based on knowledge of the content made available by users on online platforms which is in clear opposition to other business models where, for instance, Internet Service Providers (ISP) just allow users to connect to the Internet and transmit data or where file hosting providers allow users to store data. In these last two examples it is clear that as a regular activity service providers do not manage content, just the metadata, such as size and origin[33].

The evolution of Terms & Conditions shows the evolution of online platforms, from minimal interaction with users' content to supervision and moderation of users' content[34]. Whereas in the early days of online platforms they were similar to other intermediary service providers inasmuch as they did not manage content as a regular activity, today's online platforms operate complex content management systems[35]. This change increased conflicts over content and their management. Conflicts that previously existed only between users, now could also arise between users and platforms, some claiming that platforms went too far in their T&S and other claiming that T&S did not mandate platforms to go far enough.

Terms & Conditions reflect not only the business model and strategy but also the legal culture of the company creating them, which mostly reflects the legal culture of the country of incorporation[36]. This means that the standard that the T&C set is dependent on how the online platform wants to position its business.

Terms & Conditions are developed in order to protect the interests of platforms and these are not necessarily aligned with the interests of all the users of the platforms[37]. This means that even when users have agreed to the Terms & Conditions of online platforms it is almost impossible to prevent conflicts between users' actions and the T&C for the simple reason that given the nature of the service provided by online platforms the content shared by users may have different standards of interpretation when considered by the user and the platform. If content management relied only on platforms' standards of evaluation users could either choose to move to another platform or to contest the T&C. Leaving aside the free movement of users between available platforms, which is a problem for competition law, for a user to contest the Terms & Conditions of a platform it would have to show that they are in anyway illegal, i.e., that adopted and agreed clauses were in violation of legal rules or principles applicable in a given legal system[38]. And this is the main focus of conflict that emerges from the T&C: from the side of the online platforms, they must enforce their rules, claiming a virtual "hausrecht"[39], and on the other side, users claim to be able

33. On this, see Stalla-Bourdillon and Thorburn, *Fundamental Rights*, p.168-169.

34. See Klonick, *YLR*, pp. 1616 and ff.;

35. In similar fashion see Stalla-Bourdillon, *The Responsibilities*, pp. 278 and ff.

36. See Klonick, *YLR*, pp. 1621.

37. J. Wimmers, "The out-of-court dispute settlement mechanism in the Digital Services Act - A disservice to its own goals", *JIPITEC*, 12, 2021, p. 436-437.

38. See Yannopoulos, *The Responsibilities*, p. 50.

39. See D. Wielsch, "Die Ordnungen der Netzwerke. AGB – Code – Community Standards" in M. Eifert and T. Gostomzyk (ed.), Netzwerkrecht, Baden-Baden, Nomos, pp. 77

to exercise protective legal positions against such claim, either from specific provisions, such as the German NetzDG[40], contract law principles, such as good faith, or by appealing directly to fundamental rights, where their horizontal or verticalised effects are arguable. This happens even though users have consented on the T&C and such consent could be understood as a self-restriction on fundamental rights: the whole point of the conflict is that users claim that they did not know or could not know that certain clauses of the T&C would encroach on their fundamental rights and that no legal provisions would prevent it. We shall see below how the DSA Proposal deals with this kind of conflicts.

Another sort of conflict dealing with Terms & Conditions regards the non-application of the T&C among users, with certain users complaining that the online platform does not enforce the T&C to protect them or simply to promote a desired environment. In this case, as we will better see infra, beyond any internal mechanisms that the platforms make available the complainants will only be able to access added remedies if the T&C clauses deemed unforced or breached coincide with duties of the platform foreseen by law, collapsing this sort of conflict onto the kind of conflict analysed next.

3.1.2. Content management and the Law of platforms

We have seen that content on online platforms is primarily managed through the Terms & Conditions of the service providers. And we have also seen that a wide array of general provisions of different domains of the law frame and restrain the T&S and the contractual freedom that they express. The EU has chosen the DSA to offer its own solution to the problem of regulating the use of online platforms through legal provisions, under a model of regulated self-regulation[41] similar to the one adopted by Germany in 2018, under the NetzDG. This means that *illegality* takes centre stage under two different perspectives[42]. On the one hand several legal norms from consumer, copyright, criminal and other domains of the law are applicable online as much as offline and trump Terms & Conditions, even in many situations where consent was given. It is illegal to break them by sharing content online. On the other hand, the legislator enacts new legal norms foreseeing duties of the platforms that they would not otherwise adopt on their own. It is illegal for platforms not to comply with these duties. In both cases, because the T&C are an expression of fundamental rights of online platforms so must the legal rules that restrict or remove the T&C be, otherwise they would be defeated by the norms supporting the T&C. This is exactly what the DSA Proposal promises: balancing fundamental rights with a view to protecting those of users of online platforms, when deemed suited, necessary and proportionate. This follows, first and foremost from

and ff.; see also Decision from the *BVer*fG, 11.04.2018, 1 BvR 3080/09.

40. See Wischmeyer, *Fundamental Rights*, pp. 28 and ff.

41. See D. Tambini, D. Leonardi and C. Marsden, *Codifying Cyberspace – Communications self-regulation in the age of Internet Governance*, London, Routledge, 2008, pp. 43 and ff.

42. See M. Eifert *et al,* CMLR, pp. 988 and ff; Wimmers, *JIPITEC*, pp. 425 and ff.

an evolution of the case law of the two top courts in Europe. Both the CJEU[43] and the ECtHR[44] have framed the issues of online platforms content management, conflict and liability as a matter of balancing fundamental rights.

This again entails conflict on two different degrees: A) users may find themselves in situations where i) they find that other users have shared illegal content or ii) they find that they have not shared illegal content but, upon complaint by other users the online platform disagrees and acts to restrict the content or the user. And B) platforms or external public authorities may find that some users have shared content illegally and act to restrict the content or the user.

Illegality is, therefore, key in this second sort of content management. Online platforms must integrate mechanisms to ascertain and act upon illegality of content. Until the German NetzDG the standard response to illegal content management was very favourable to online platforms as it rested on the well-known mechanism of "notice and takedown". As the name suggests, online platforms had to be notified or become aware of illegal content in order to have any duty to deal with it. And even so, most legal systems demanded that the unlawfulness were manifest. Article 14(1)(a) of the e-Commerce Directive mentions "facts or circumstances from which the illegal activity or information is *apparent*" (emphasis added). This is thus the standard still dominant in the EU, with the exception of copyright, where the CJEU case-law carved out an important exception[45] that the Proposal now aims at generalising.

The German NetzDG changed the notice and take-down mechanism of the e-Commerce Directive, mandating platforms to notify the Federal Criminal Police Office for the purpose of enabling the prosecution of criminal offenses when content deemed illegal is removed upon complaint and there is concrete evidence ("konkrete Anhaltspunkte") that the content falls under certain criminal provisions (NetzDG §3a(1)3). It also innovated procedurally in regards to reporting obligations by online platforms as well as internal complaints mechanisms and out-of-court dispute resolution

43. See CJEU Grand Chamber, Case C-324/09 L'Oréal SA and Others v eBay International AG and Others, 12.07.2011, ECLI:EU:C:2011:474; CJEU, Third Chamber, Case C-70/10, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), 24.11.2011, ECLI:EU:C:2011:771; CJEU, Third Chamber, Case C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV, 16.02.2010, ECLI:EU:C:2012:85; CJEU, Grand Chamber, Joined cases Joined cases C-236/08 to C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL, 23.03.2010, ECLI:EU:C:2010:159; CJEU, Grand Chamber, Case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, 13 May 2014, ECLI:EU:C:2014:317; CJEUvCase-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH ECLI:EU:C:2014:192

44. See ECtHR, Delfi AS v. Estonia, App. No. 64569/09, 16.06.15, para. 154-162; see also, M. Maroni, "The liability of internet intermediaries and the European Court of Human Rights", in B. Petkova and T. Ojanen (ed.), *Fundamental Rights Protection Online – The Future Regulation of Intermediaries,* Cheltenham, Edward Elgar, 2020, pp. 257 and ff.

45. See Wimmers, *JIPITEC*, pp. 430-431

such as arbitration (NetzDG §3c) and mediation (NetzDG §3b). Many of these novelties can now be found in the DSA proposal as we shall see below, although with less detail[46].

The German NetzDG enhanced the discussion on illegality in the context of the Law of platforms. So much so that the DSA Proposal introduces a definition of "illegal content", under article 2(g): "any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law". But this definition is not particularly illuminating besides making clear that the parameters of (il)legality are both EU and Member State law. In fact, this definition is a simple pocket notion of illegality, i.e., the discrepancy of an action with an applicable legal rule. But what the e-Commerce first, and more recently the NetzDG, brought to the fore was really the analysis of the degree of confidence in the judgment of illegality. That is why the e-Commerce and the DSA Proposal (article 5(1)(a) refer to "apparent" illegality and the German NetzDG uses criminal law[47] as a parameter for online platforms to exclude content.

Imagine that a rule in a given legal system made it mandatory to have a ticket to enter a stadium to attend a football match. People controlling the entrance to the stadiums on matches' days would usually have no difficulties in judging the legality or illegality of people's behaviour: someone with a ticket would be conforming to legality and someone without a ticket trying to enter the stadium would be doing something illegal. But imagine that one person tries to enter the stadium saying that it does not mean to attend the game but only to visit the stadium and go to a restaurant inside. Would it still be illegal to let the person enter without a ticket? Imagining further that no other provision in this legal system addressed this matter, to determine if a person that wanted to visit the stadium without a ticket could indeed do it, one would have to perform legal interpretation and come up with a rule from the provision available that only the attendance of football matches require tickets to enter the stadium. A similar exercise in the determination of illegality happens on online platforms regarding content shared by users. Child pornography seems to be clearly illegal because the content that can be subsumed to this prohibition rarely poses any difficulty of identification and qualification. Copyrighted material presents a not so easy exercise inasmuch as although the rules that prohibit economic or intellectual appropriation of another's work are also well known, different standards and exceptions occurs, something that does not happen with child pornography. Also, it is very different to determine the violation of (known) copyright law when Madonna is involved or when an unknown author is targeted. When we finally come to misinformation, determining illegality becomes a very difficult judgment. On the one hand because most legislators have not made misinformation illegal, i.e., they have not enacted a norm that balanced the conflicting fundamental rights and came up with constitutionally admissible equilibrium. The reason why most legislators have not done so is because it is very difficult to set *a priori* limits to the

46. See Eifert *et al., CMLR*, p. 1009.
47. Idem ibidem, p. 1008-1009.

freedom of expression (as with other fundamental rights). Only specific cases and the application of a balancing method can provide the conditions to determine if the exercise of a certain fundamental right is illegal because it disproportionately restricts another fundamental right or norm. The crime of child pornography is one exception that serves as example to this *a priori* difficulty that legislators commonly experience when fundamental rights are involved: in this case legislators have not doubt that the exercise of freedom of expression disproportionately restricts the fundamental right to moral and physical integrity among other fundamental rights[48].

If the previous examples show anything is that the degree of confidence in the judgment of illegality rests on several factors: i) the degree of complexity of the norm formulation; ii) the degree of expected knowledge of the legal norm whose violation is in question, iii) the degree of knowledge of all empirical features[49], and iv) the adequate use of balancing when only highest-hierarchy norms conflict.

The second and third factors tell a tale of the importance of regulation to adequate content management and conflict resolution. Regarding the second factor, a regulator, such as the ones now set forth in the Proposal (articles 38 and ff), could do an important work in creating awareness of critical legislation that platform users should comply with, through guidelines and opinion akin to the ones issued by the European Data Protection Board (EDPB). The same can be said for the third factor, where the regulator can do important work on specifying categories of empirical features falling under norms that platform users must comply with, such as for example, types of copyright protected content, formulations of hate speech, among others. This could establish a virtuous dialogue of mutual influence between regulators and courts[50]. Again, similar to the one experienced over the years between the Article 29 Working Party/EDPB and the CJUE. In any case "judges should remember that, ultimately, the degree of platform responsibility depends on its exercise of control, together with the benefits it generates from its own activities"[51].

The last factor raises another important obstacle: as we have seen some legal systems do not allow citizens to demand the balancing of their fundamental rights against other citizens. In other words, citizens are not secondary addresses of fundamental rights. So, if an ordinary legal norm, that results from balancing the appropriate fundamental rights is not available for the citizens to invoke (for instance the criminal code norm that prohibits child pornography) they cannot, alternatively ask for that balance to be done *in casu*. One way to circumvent this disregard for horizontal effects of fundamental rights is to verticalise them, as we have stressed. The DSA Proposal verticalises what were otherwise the horizontal relations between

48. See A. Savin, "Regulating internet platforms in the EU - The emergence of the 'Level playing Field'", *Computer Law & Security Review*, 34, 2018, p. 1222.

49. See Stalla-Bourdillon and Thorburn, *Fundamental Rights*, p. 166.

50. Improving, from a perspective of balancing fundamental rights, the argument of the CJEU in Case-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH ECLI:EU:C:2014:192, §57; see also Stalla-Bourdillon, *The Responsibilities*, p. 289.

51. See Eifert *et al, CMLR*, p. 1006.

platforms and their users. The reason is the controversial topic of horizontal effects of fundamental rights under the several legal systems of Member States, coupled with the circumstance, already mentioned above, that the Charter only applies against the EU and Member States[52]. The EU prefers to adopt a two-fold strategy: i) by referring "illegal content" to Member States law does not close the door on the possibility of horizontal effects of fundamental rights and thus an illegality determined by a disproportional exercise of a fundamental right over another. And also, ii) by adopting an already established doctrine and case law of positive obligations of the States and the Union to enforce fundamental rights in horizontal relations. In this sense in the absence of ordinary norms that make certain content illegal and the possibility of users demanding the casuistic determination of illegality by balancing Member States constitutional norms, the DSA Proposal directly demands that platforms comply with fundamental rights. This is the great novelty of the DSA. Article 12 of the Proposal determines that: "Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, *including the applicable fundamental rights of the recipients of the service as enshrined in the Charter"* (emphasis added). This is one of the most important norms of the Proposal, marking a departure from the e-Commerce Directive. The online platforms retain their freedom to configure their Terms & Conditions within the constraints of existing law but when applying such T&C they must do it "with due regard" and in a "proportionate manner" vis-à-vis the fundamental rights of the users. This amounts to having the DSA Proposal making the online platforms active agents in balancing their rights (encapsulated in the T&C) with the rights of users. The interesting part follows: since the Charter is not applicable within horizontal relations[53] and in many Member States' constitutional systems the same happens with the catalogue of fundamental rights, users who can't argue directly for illegality of the exercise of the freedom of enterprise and freedom of expression of platforms when disproportionately restricting their fundamental rights can under the DSA use a proxy and invoke the breach of article 12 as an illegal action of platforms. The protection of fundamental rights is taken up by the DSA Proposal as a positive obligation of the Union and Member States and thus verticalises the horizontal relation between platforms and users. Recitals 34 and 35 of the Proposal clearly establish the connection between public policy and fundamental rights. The last sentence of Recital 35 is particularly enlightening: "Those harmonised due diligence obligations, which should be reasonable and non-arbitrary, are needed to achieve the identified *public policy concerns*, such as safeguarding the legitimate interests of the recipients of the service, addressing illegal practices and protecting fundamental rights online" (emphasis added). The "harmonised due diligence obligations" mentioned in the Recital are the content management obligations set out by the DSA Proposal and fall under the Law of the platforms that we are analysing. They are directly connected to "public policy concerns" and the protection of "fundamental rights online". The thread connecting these three dots is one of the hallmarks of the positive obligations of the Union and Member

52. Idem, ibidem, p. 1008.

53. See Eifert *et al., CMLR*, p. 1013.

States regarding the protection of fundamental rights, along with the e-Commerce prohibition of general monitoring obligations (kept by the Proposal under article 7) and notice and action mechanism (also kept by the proposal under article 14[54]). This poses a new content management challenge to online platforms and helps users to better protect their rights. We can now look at the DSA proposal in more detail and qualify the content management parameters and due diligence obligations.

2.1.3. Content management and the DSA

a) Law of platforms

The DSA Proposal starts to set its content management parameters and due diligence obligations through the perspective of illegality as we have seen. It's illegality that connects the DSA with the remainder of the Law of platforms and, picking up the structure of the e-Commerce Directive, article 5(1) confirms the inexistence of liability regarding the information stored by online platforms on the condition that the provider "(a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or (b)upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content". Given the dynamics, innovative character and diversity of the online platforms landscape this continuity since the e-Commerce Directive still seems proportionate, especially given the exceptions that are also foreseen and further (procedurally) elaborated on the Proposal[55].

The online platform has thus to manage content taking into account that if it becomes knowledgeable of illegal activity it must "remove or disable access to the illegal content". This implies a first judgment of illegality, that comes from the e-Commerce Directive and may foster the first kind of conflicts of the DSA Proposal, as the users that see their content removed or disabled will on several occasions be in disagreement over the reasons presented by the platform to find such content illegal (platforms are obliged to provide reasons pursuant to article 15, a novelty of the DSA Proposal).

National judicial or administrative authorities can also influence content management, under article 8(1), as they can issue orders aimed at platforms "to act against a specific item of illegal content", developing the mechanism foreseen in article 14(3) of the e-Commerce Directive. Also, under article 41(2) the Digital Service Coordinator, a new national supervisory authority, can i) order the cessation of infringements (lit. b), ii) impose fines (lit. c) and periodic penalty payment (lit. d), if they do not agree with the reasons provided by online platforms.

Besides platforms and public authorities, users can also influence content management by complaining about illegal content using notice and action

54. See also Recital 41.
55. See Eifert *et al, CMLR*, p. 1006.

mechanisms foreseen in article 14 of the Proposal. This mechanism develops the notice and takedown mechanism foreseen in the e-Commerce Directive (article 21(2)) that derived from article 14(1)(b) and is also present in the DSA Proposal under article 5(1)(b). Whereas these articles just hint at the need for a procedure to allow users to notify hosting service providers of illegalities, article 14 foresees a specific procedure that online platforms must offer their users. Under article 14(2)(a) users must explain the reasons why they consider the content in question to be illegal.

As we have seen, content management using the Law of platforms as parameter must take into account not only online platforms initiatives, which are not mandatory (article 7) nor can they be used against the platforms (article 6), but also public authorities and users[56]. Considering online platforms own initiatives to determine compliance, article 6 seems in contradiction with article 5(b) and therefore warrants additional explanation. Article 6, as explained in Recital 25, deals with *a priori* content management systems. Thus, the mere existence of such systems does not preclude the exclusion of liability set forth under article 5. However, if following a specific action of content management an online platform obtains knowledge of an illegality, article 5(1)(b) prescribes the duty of the platform to remove or disable the illegal content[57].

As elaborated above, the discussion must centre on what constitutes "knowledge" or "awareness" of illegality[58]. It can be argued that many content management systems operated by online platforms make them knowledgeable and aware of many illegalities[59]. Thus, the content management performed by platforms, deriving from any kind of initiative foreseen in the Proposal and analysed above, ultimately matters, especially when analysed from the perspective of fundamental rights and conflict resolution, vis-a-vis the criteria to accept that illegality should be known or made aware[60]. It cannot be argued that DSA foresees any distinction in the difficulty degree of illegality judgments other than the one prescribed to "claims for damages" where article 5(1)(a) demands the illegality of activities or content to be "apparent".

Illegality of content as a feature in the antecedent of norms in the DSA Proposal thus refers to[61]:

i) Liability (duty to compensate) (platforms) if illegality and non-removal of content (article 5(1)(b));

ii) Infringement of DSA (duty to obey orders) and liability (platforms) if illegality and non-removal of content (article 8(1));

iii) Infringement of DSA (duty to balance legal positions) (platforms) if illegality in applying T&C-based restrictions (violation of the principle of

56. See Recital 22.
57. See Eifert *et al, CMLR*, pp. 1006-1007.
58. See Stalla-Bourdillon, *The Responsibilities*, p. 281 and ff.
59. Idem, ibidem, p. 281 and 287.
60. See Bassini, *ELJ*, p. 192.
61. See Eifert *et al, CMLR*, p. 1009.

proportionality) (norm derived from article 12(2);

iv) Right to use notice and action mechanism and obtain a decision (users) if illegality (article 14(1) and (5))

v) Right to use internal complaint-handling system and obtain a decision, including reversion of removal (users) if illegality and removal of content (article 17(1) and (3))

vi) Right to use out-of-court dispute settlement bodies (users) if illegality, removal of content and non-reversion of decision (article 18(1).

This means that the DSA Proposal, as far as content management is concerned, requires online platforms to perform or assess (in the case of orders and notices from public authorities and users) any kind of illegality judgments, including the ones that derive from the application of the principle of proportionality when two highest hierarchy norms are involved, such as those from the EUCFR or Member States Constitutions. From these initial judgements follows a cascade of other judgments some of which may conflict with the previous ones, thus leading to conflict dispute and resolution. We shall analyse these mechanisms below. Before, however, we must still look at conflicts that may ensue in the context of content management having as parameter the Terms & Conditions of online platforms.

b) Terms & Conditions

Content management, under the DSA Proposal, using the Terms & Conditions as parameter has no parallel on the e-Commerce Directive. Article 12 of the Proposal is a gamechanger. Before the Proposal, online platforms would use their T&C as parameters designed to uphold their standards of conduct. The only limits would be the legal norms of the Law of platforms. If the T&C conformed to applicable legal rules (for instance, article 29 of the Proposal) online platforms could manage content as they wanted. The DSA Proposal verticalises the horizontal relation of fundamental rights. On the one hand it recognises that such relation exists in a material plane and that it is only in a processual plane that fundamental rights may not be exercised. On the other hand, by foreseeing a duty of balancing fundamental rights through the application and enforcement of the T&C, the Proposal opens the door to i) the removal of content due to a breach of the T&C (article 15(1) and (2)(e) or ii) a possible violation of the DSA if such balancing is not done or is done in violation of article 12(2). In any of these cases we will again be before conflicts derived from content management.

3.2. Conflict resolution in the DSA

As we may by now clearly understand, one of the main concerns of the DSA is with conflict. Conflicts arising from the interaction of users with the

service providers and amongst themselves. The conflicts envisaged by the DSA originate, as seen supra, from the cases described under articles 5, 12, 14 and 15 of the Proposal. If content is removed or disabled by the online platform own initiative (articles 5 and 12) or because of a complaint by a user (article 14) and the supplier of content deemed illegal or in violation of the T&C does not accept the reasons offered by the platform (article 15), a conflict ensues.

Conflict resolution in the DSA Proposal can be analysed through a division between conflicts of a bipolar structure or of a polygonal structure. In the first case the conflict is between a user and the platform[62], with no formal intervention by other users. In the second case a user (or users) complains to the online platform about another user. The Proposal treats these situations differently and so will we.

3.2.1. Bipolar conflicts

The DSA Proposal foresees a new duty to offer reasons when there is the removal or disabling of access of user's content, under article 15. The removal or the disabling, as we have seen, may be based on the illegal nature of content or due to a breach of the T&C. When users do not accept the reasons provided by the online platform justifying the removal of their content, they now have two options: go to court, as it is explicitly mentioned under Recital 42 (*in fine*), or use the new mandatory "internal complaint-handling system" foreseen in article 17. As the judicial process varies according to Member States' legal systems and does not fall under the scope of the DSA we shall focus our attention on the other alternative, the internal complaint-handling system.

The system envisaged by article 17 must i) be available for at least six months following the removal decision, ii) be fully online, iii) free of charge (article 17(1)), easy to access, user-friendly and "facilitate the submission of sufficiently precise and adequately substantiated complaints" (article 17(2)). The decisions must follow the conditions of article 17(3) and (5). Pursuant to this norm the platforms must reverse the removal or disabling decision when the platform finds that i) there is not illegality or ii) breach of the T&C, or even iii) when although the first two grounds may verify there is enough "information indicating that the complainant's conduct does not warrant the suspension or termination of the service or the account". If the platform confirms the removal or the disabling of content two other options remain for the user: going to court and an out-of-court dispute settlement body, under article 18, if available. Due to its importance to our subject, we will analyse this provision in more detail below.

62. Under the bipolar structure of conflict, one could also include the conflict deriving from article 8, when the online platforms do not agree with the orders issued by the relevant national judicial or administrative authorities, but we will not address this kind of conflict here.

3.2.2. Polygonal conflicts

Under the "notice and action mechanisms" of article 14, a user or several users may notify an online platform of content considered to be illegal. Article 14(1) is silent on the possibility of this mechanism being used to notify the platforms of breaches to their Terms & Conditions, thus this remains an option to be included in such mechanisms.

Article 14(2) repeats an important reference in the quest to determine the sense of illegality that the Proposal adopts, following article 12(2). The provision speaks of "the submission of sufficiently precise and adequately substantiated notices, on the basis of which a *diligent* economic operator can identify the illegality of the content in question". Again, the legislator tries to set a standard to the conditions of the judgement of illegality. To what amounts the diligence of an online platform in making a judgment of illegality regarding content? It seems reasonable to conclude that the judgment on the due diligence of platforms be supported by legal opinions and that those legal opinions take into consideration not only the applicable rules but also the relevant case law regarding them.

Of great importance is also article 14(3) inasmuch as it determines that a complaint that obeys the requisites of article 14(2), especially the explanation of the reasons why the content is considered illegal, will verify article 5, meaning that the online platform will no longer be able to invoke ignorance of the facts that determine said illegality.

If the online platform agrees with the complaint, we will again be under article 15 and the subsequent procedure analysed in the previous section. But if the platform finds that the complaint has no grounds the only action that the Proposal mandates the platform to take towards the complainant is to informed her "on the redress possibilities in respect of that decision". Surprisingly, given the importance that the Proposal attributes to conflict resolution, the mechanism of article 18 – the out-of-court dispute settlement mandatory for platforms – is not available for the complainant. This is perplexing. If two users conflict on an online platform over the exercise of the freedom of expression and the right to privacy and one of them uses the mechanism of article 14 to notify the platform of an illegal exercise of the fundamental right due to violation of the principle of proportionality, why shouldn't both users be able to use the mechanism of article 18?[63] In the given case, articles 14 and 17 protect both users, depending on who presents the complaint, but after the decision only the user that has her content removed is able to access article 18 and not the user who saw the allegedly illegal content maintained[64]. This "asymmetric design"[65] of article 18's mechanism seems to raises an issue of equality of protection and enforcement of rights under the Charter and must surely be changed before the final version of the DSA.

63. This is the case, for example, under Portuguese law, pursuant to article 18 of the Portuguese e-Commerce Law, Law no. 7/2004, of January 7th, that transposes the e-Commerce Directive.

64. Also noting this fault, see M. Eifert *et al., CMLR*, p. 1010-1011.

65. Idem, ibidem, p. 1010-1012.

3.2.3. The out-of-court dispute settlement body

It is not possible to appraise the redress mechanism put forward by article 18 of the Proposal if one does not understand what it comprises. The Proposal does not specify the kind of out-of-court mechanisms that can be certified in accordance to article 18(2) but from paragraph 1 it can be concluded that it must be a mechanism of third-party adjudication, such as arbitration. This conclusion results from article 18(1) that states that platforms "shall be bound by the decision taken by the body". This is in line with other EU legislation, especially in consumer matters[66] such as these. The reference to an out-of-court dispute settlement mechanism is not new in the context of intermediary service providers and article 18 of the Proposal develops article 17 of the e-Commerce Directive that gave a powerful boost to Alternative Dispute Resolution (ADR) in consumer disputes, as well as to online dispute resolution (ODR). Article 18 of the Proposal builds from this base. While article 17 of the e-Commerce Directive commands Member States to assure that their legislation "does not hamper the use of out-of-courts schemes", article 18 of the Proposal sets a mandatory settlement mechanism for platforms. This dispute settlement mechanism fits into the broader ADR/ODR EU law framework.

This ADR/ODR EU law landscape has been criticised by some authors has posing a problem to the "enforcement of mandatory consumer rights, the compliance with fundamental values of due process, and the efficiency (welfare) effects associated with it"[67]. Article 18(2) tries to address these concerns by defining the requisites that the settlements bodies must meet. Of special importance is the threshold of qualifications that its members must meet, with article 18(2)(b) demanding that the body has "the necessary expertise in relation to the issues arising in one or more particular areas of illegal content, or in relation to the application and enforcement of terms and conditions of one or more types of online platforms, allowing the body to contribute effectively to the settlement of a dispute". Reading all the requisites set forth in article 18(2) the out-of-court dispute settlement body comes out as having to be i) impartial and independent, ii) expert and effective, iii) swift, efficient and cost-effective; iv) compliant to clear and fair rules of procedure. Article 18(1)(c) raises the question if the Proposal determines these mechanisms to be ODR bodies, as it refers to them being "easily accessible through electronic communication technology" which is not exactly the same as being a full ODR mechanism under the Regulation on consumer ODR[68].

66. See Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); Regulation (EU) no 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

67. See H. Eidenmüller e M. Engel, "Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe", Ohio State Journal on Dispute Resolution, Vol. 29, N. 2, 2014, p. 287; see also G. Wagner, "Private Law Enforcement Through ADR: Wonder Drug or Snake Oil", Common Law Market Law Review, 51, 2014, pp.165 and ff.

68. Regulation (EU) no 524/2013 of the European Parliament and of the Council of

It seems clear that the out-of-court settlement mechanism raises procedural and substantive challenges. On the procedural front it is of the utmost importance that the people preparing and issuing the decisions be experts in the sense of the Proposal. Article 18(2)(b) bodies seem to answer the concerns of some authors[69] but regulatory measures will have to be put in place to assure compliance with the DSA as far as expertise is concerned, and further guidelines would be welcome. Also, the rules of procedure must assure the standard of protection afforded by article 47 of the EUCFR and article 6 of the ECHR[70], including the right to appeal to a court for both parties to the process[71].

Enforcement will also have to be given special care[72] as it is decisive in cases concerning illegal content (or in breach of T&C) and it is not dealt specifically by the DSA Proposal. Legal positions that conflict over content in online platforms, once assessed for compliance with the law and Terms & Conditions, should be protected accordingly as quickly as possible, either by removing or restoring content.

On the substantive front it must also be clear that out-of-court settlement bodies will deal with the same standards as courts do: the law of platforms and Terms & Conditions. Unless there are constitutional restrictions to the material scope of out-of-court settlement bodies. This means that there is no distinctive substantive problem from the one faced by courts: in every conflict arising from online platforms there is a duty to balance competing legal positions[73]. This is line with CJEU case law, as shown above, and does not come as a surprise.

4. Appraisal from a fundamental rights perspective

The DSA Proposal rests on the defence and promotion of fundamental rights. This may seem at odds with the dogma of non-horizontal effects of fundamental rights inasmuch as most fundamental rights issues posed by the online platform's environment are in the context of horizontal relations between users and between the users and the platforms. Recital 3 opens a window to this puzzlement: "Responsible and diligent behaviour by providers of intermediary services is essential for a safe, predictable and trusted online environment and for allowing Union citizens and other persons to exercise their fundamental rights guaranteed in the Charter of Fundamental Rights of the European Union ('Charter'), in particular the freedom of expression and information and the freedom to conduct a business, and the right to non-discrimination". Why, one could ask, would the "responsible and diligent behaviour by providers" of online platforms

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69. See Eidenmüller e Engel, *OSJDR*, pp. 288 and 289.

70. See ECtHR, Oleksandr Volkov v. Ukraine, No. 21722/11, 9 January 2013, paras. 88–91.

71. Cf. Wimmers, *JIPITEC*, p. 438.

72. See Wagner, *CLMLR*, pp. 166 and ff.

73. See Eifert *et al, CMLR*, p. 1011.

be "essential [...] for allowing Union citizens and other person to exercise their fundamental rights guaranteed in the Charter" taking into account that there is a wide agreement that the Charter, pursuant to its article 51(1) does not have private persons as second addressees. The answer can be found in Recital 34 where the protection of fundamental rights is presented as a "public policy objective", thus framing it as a positive obligation of the Union and Member States. Does this mean, however, that online platforms and users are exempt from dealing with fundamental rights except when the Union and Member States are concerned? Definitely not. While substantive horizontal relations are triangulated through the concept of positive obligations, the processual horizontal relations are mediated by public authorities or private entities bestowed with adjudicative power.

Under the substantive dimension of the EUCFR my freedom of expression does not have as secondary addressees every other legal subject, imposing a duty not to illegally restrict my right. The secondary addressees are the Public Authorities, but since they have a positive duty to protect fundamental rights, they have to offer me means to act or protection against an illegal restriction of my freedom of expression by any other legal subject. It is exactly this reasoning that is imbued in the DSA Proposal. And because this positive obligation has the effect of recognising and triangulating a horizontal relation where fundamental rights are at play it would be impossible to erase such relation from the domains of law. So, the DSA Proposal demands that not only users but also online platforms continuously judge the exercise of their fundamental legal positions vis-à-vis other legal subjects' fundamental legal positions. This is what can be called descriptive illegality and it is a task called upon every legal subject of a system. It would be strange to think of a legal system where legal subjects were not the first to assess compliance of their actions with (at least some) applicable rules. This is of course different than legally foreseeing who has the normative power to settle cases of illegality with normative consequences and within these, who has the last word (prescriptive illegality).

As we saw across the present paper, the DSA Proposal prescribes legal consequences to illegality judgments made by online platforms as a norm antecedent (articles 5(1), 8, 12 and 15) and by users (articles 14, 17, 18). These illegality judgments in many occasions may result in conflict between parties with different illegality judgments concerning the same situation. These conflicts will be able to be settled through the out-of-court mechanisms discussed above and the courts, but ultimately, having fundamental rights involved means that it will be up to the CJEU and the ECtHR to say the last word concerning the prescriptive status of the illegality judgment that formed through the DSA procedures. This seems to entail that the DSA Proposal i) foresees illegality as the antecedent of several of its norms, ii) foresees one instance of possible prescriptive illegality in the cases where the mechanism of article 18 is used and there is no appeal to any court, and iii) relays all the other cases of prescriptive illegality to international instruments (ECHR), EU (TEU and TFEU) and Member State law (the Constitutions).

The importance given to descriptive illegality in the Proposal fosters the role of fundamental rights in the context of online platform regulation. Many

of the judgments of illegality that online platforms and users will have to do concern fundamental rights, either because they are directly addressed at other legal subjects under Member States law or because they will allow platforms and users to perform actions to protect those fundamental rights as well as to demand actions from public authorities to assure that very goal.

In this light, the problem raised by embedding fundamental rights into the DSA Proposal is procedural. Analysing the case law of constitutional and human rights courts, one can rapidly conclude that the case-law concerning restrictions of fundamental and human rights is complex and calls for a complex legal apparatus. This in turn demands that any other bodies that deal with illegality in a normative stance, in order to settle the descriptive illegality judgments called upon by the DSA, be of highly technical qualifications and experience. This being said the administrative and governance structure of these bodies, if the technical qualifications and experience standards are met, can promote other domains of great importance to judgments of illegality regarding the interactions on online platforms, such as IT, Artificial Intelligence, Ethics, among others, to better evaluate and weight the circumstances of every case. Although fragmentation cannot be avoided in the absence of an exclusive european EU law post-national laws[74], it can however be mitigated by the coherence and conformity functions of the CJEU and ECtHR case law. A system encompassing out-of-court conflict settlement bodies with experts in the field of online platforms and applying fundamental and human rights case law seems a combination in line with EU and Member-States constitutional law. This would offer the promise of an effective alternative to courts and, in the event of appeals to courts and higher courts it could help refrain the regulatory sting that the case law of new fields always suffers[75], by having regulators and out-of-court dispute settlement mechanisms deal in the frontlines with the empirical context of the judgments of illegality of content.

74. See Wimmers, *JIPITEC*, p. 434.

75. See A. Callamard, "Are courts re-inventing Internet regulation?", *International Review of Law*, *Computers & Technology*, 31, no. 3, 2017, pp. 334 and ff. For an interesting international case-study, see C. Iglesias Keller, "Policy by judicialisation: the institutional framework for intermediary liability in Brazil", *International Review of Law, Computers & Technology*, vol. 35, no. 3, 2021, pp. 185-203.

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