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ARTICLE

Social Media Platforms within Internal Market Construction: Patterns of Reproduction in EU Platform Law

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Abstract

The European Union's new regulatory agenda targeting online platforms such as social media has been presented as a progressive watershed moment after a long period of regulatory restraint. The attempt to construct an internal market lends legal competence to the two centerpieces of this agenda—the Digital Services Act (DSA) and the Digital Markets Act (DMA). This Article analyzes the Union's attempts to govern online platforms as a part of internal market construction. After examining the underlying aims of the internal market, the Article proceeds to analyze how those aims have been operationalized in existing EU electronic commerce law and more recently in the DSA and DMA proposals. The Article argues that the Union regulatory agenda is not particularly transformative. While the DSA and DMA introduce many novel regulatory mechanisms with an equalizing potential, they also remain faithfully committed to the aims and pre-existing mechanisms of internal market construction that have enabled the rise of platform corporations in the first place. Thus, the proposals risk reproducing and legitimizing various inequalities in the European digital economy. The article seeks to connect alternative visions of platforms with the re-imagination of internal market construction.

Keywords: Platform law; Social media; Internal Market; Digital Services Act; Digital Markets Act

A. Introduction

The numerous corporate scandals and revelations regarding failures to address harms on social media have unleashed a torrent of views on how corporations cannot moderate themselves and how their power needs to be reined in.[1] In the European Union (EU) such incidents have given rise to a strong momentum for regulation, which has already taken a more specific form in the

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[1] *See, e.g.*, Chris Stokel-Walker, *Facebook Cannot Moderate Itself—Its Problems Have Only Just Begun*, GUARDIAN (Oct. 26, 2021), www.theguardian.com/commentisfree/2021/oct/26/facebook-moderate-problems-whistleblower; Natasha Lomas, *Youtube's Recommender AI Still a Horror Show, Finds Major Crowdsourced Study*, TECHCRUNCH (July 7, 2021),

flurry of legislative initiatives, including most prominently the upcoming Digital Services Act (DSA) and the Digital Markets Act (DMA).[2] Indeed, there is ample theoretical and mounting empirical evidence pointing to the need for constraining regulation.[3] In this vein, there is no shortage of accounts presenting the EU's new regulatory agenda as a watershed, a nod to its ambition and novelty.[4] My goal is not to dispute these accounts. Yet change does not occur in a completely disoriented way and it is just as important to subject the patterns of continuation and consolidation to scrutiny as it is those of transformation.[5] As Sheila Jasanoff has stated, institutions "offer ready-made instruments for putting things in their places at times of uncertainty and disorder."[6] Thus, it is apposite to analyze the current regulatory vision in the various formative contexts within which such thinking takes place in the EU. One such context concerns the collective understanding of the legally possible and desirable within the Union, that is, the context of EU law institutions.

This article analyzes how the EU attempts to govern online platforms, particularly social media, as a part of internal market construction. Internal market construction, namely Article 114 of the Treaty on the Functioning of the European Union (TFEU), lends the DSA and DMA proposals their legal basis.[7] As the Union's jurisdictional boundaries demarcate which visions it may entertain, the shared legal understandings of "what the internal market is" and "what it needs"[8] partake in shaping what platforms are in Europe, what is thought they should be, what their potentials and attendant risks to European societies are, and how to govern these platforms. Conversely, the shared legal understandings also affect what platforms are *not*, inhibiting other ways to think about them.[9]

The Article unfolds as follows. In Section B, I first explore how the internal market jurisdiction is conceptualized, that is, what is understood to be a rational construction of the internal market,

https://tcrn.ch/35hTqjz; Jennifer Breheny Wallace, *Instagram Is Even Worse Than We Thought for Kids. What Do We Do About It?*, WASH. POST (Sept. 17, 2021), www.washingtonpost.com/lifestyle/2021/09/17/instagram-teens-parent-advice/.

[2]*Commission 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*, COM (2020) 825 final (Dec. 15, 2020) [hereinafter DSA Proposal]; *Commission Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, COM (2020) 842 final (Dec. 15, 2020) [hereinafter DMA Proposal].

[3]For incisive scholarly analyses of the harms produced within digital economy, see generally JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM (2019); SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR THE FUTURE AT THE NEW FRONTIER OF POWER (2019); NICK COULDRY & ULISES A. MEJIAS, THE COSTS OF CONNECTION: HOW DATA IS COLONIZING HUMAN LIFE AND APPROPRIATING IT FOR CAPITALISM (2019). For accounts of evidence disseminated in media, see generally Cristiano Lima, *A Whistleblower's Power: Key Takeaways from the Facebook Papers*, WASH. POST (Oct. 26, 2021), www.washingtonpost.com/technology/2021/10/25/what-are-the-facebook-papers/; The Cube, *Social Networks Still Failing to Tackle COVID-19 Misinformation, Report Claims*, EURONEWS (June 24, 2021), www.euronews.com/my-europe/2021/06/24/social-networks-still-failing-to-tackle-covid-19-misinformation-report-claims; Stokel-Walker *supra* note 1; Lomas, *supra* note 1; Wallace, *supra* note 1.

[4]Martin Eifert, Axel Metzger, Heike Schweitzer & Gerhard Wagner, *Taming the Giants: The DSA/DMA Package*, 58 COMMON MKT. L. REV. 987, 994 (2021); Pieter Van Cleynenbreugel, *The Commission's Digital Services and Digital Markets Act Proposals: First Steps Towards Tougher and More Directly Enforced EU Rules*, 28 MAASTRICHT J. EUR. COMPAR. L. 667, 668 (2021); Anu Bradford, *A Reckoning for Big Tech?*, PROJECT SYNDICATE (Dec. 4, 2021), https://bit.ly/3IcUJ1R; Thierry Breton, *Thierry Breton: Capitol Hill—the 9/11 Moment of Social Media*, POLITICO (Jan. 10, 2021), www.politico.eu/article/thierry-breton-social-media-capitol-hill-riot/.

[5]Susan Marks, *False Contingency*, 62 CURRENT LEGAL PROBS. 1, 2 (2009).

[6]Sheila Jasanoff, *Ordering Knowledge, Ordering Society*, *in* STATES OF KNOWLEDGE: THE CO-PRODUCTION OF SCIENCE AND SOCIAL ORDER 13, 39–40 (Sheila Jasanoff ed., 2004).

[7]Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU]. *See* DSA Proposal, *supra* note 2, at 5–6; DMA Proposal, *supra* note 2, at 4.

[8]Marija Bartl, *The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit*, 21 EUR. L.J. 23, 35 (2015).

[9]Wiebe E. Bijker & John Law, *General Introduction*, *in* SHAPING TECHNOLOGY/BUILDING SOCIETY: STUDIES IN SOCIOTECHNICAL CHANGE 1, 3 (Wiebe E. Bijker & John Law eds., 1992) ("It is sometimes said that we get the politicians we deserve. But if this is true, then we also get the technologies we deserve. Our technologies mirror our societies. They reproduce and embody the complex interplay of professional, technical, economic, and political factors.").

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as expressed in the reasoning of the Court of Justice of the European Union (CJEU or the Court). I find that in the CJEU jurisprudence the internal market construction is animated by a twofold aim. In internal market construction, transnational private freedom is to be constantly negotiated with public interest concerns. In Section C, I go on to map how the internal market construction, as informed by the twofold aim, has already partaken in constituting the rise of the platform economy in Europe through specific legal mechanisms. Focusing on social media as an example, I show how these mechanisms have been implicated in the emergence of platforms' power and its attendant distributional inequalities in the first place.

In Section D, I then mirror the current "internal market rationality"[10] to the rationale for the DSA and DMA proposals. I argue that from the perspective of internal market construction, the EU's vision as exhibited in these proposals cannot be conceived of as particularly transformative. While the proposals introduce many novel regulatory mechanisms with an equalizing potential, they evince institution-preserving qualities as well by remaining committed to both the twofold aim of internal market rationality and the central mechanisms facilitating the platform economy. Thus, the proposals risk reproducing and legitimizing various distributional inequalities and power relations in Europe. I emphasize the need to consider alternative visions of platforms in conjunction with the re-imagination of internal market construction, including its twofold aim. While I refrain from proposing normative, legal, or technical solutions ready for implementation, my hope is that the article can help expand the horizon of institutional imagination in the name of egalitarian aspirations within legal and policy discussions in Europe.[11]

B. What the Internal Market Is and What It Needs

As a bread-and-butter issue for European lawyers, the EU may have recourse to any part of its legal toolbox only with proper legal competence, dictated by the principle of conferral in Article 5(2) of the Treaty on European Union (TEU).[12] Legislative intervention requires a legal basis in its Founding Treaties and thus the rules on legal jurisdiction are able to channel the direction of legal change. The Union is taken to have functional institutional design that focuses on common objectives.[13] It is expressed in the purposive formulation of legal bases, which empower the Union to achieve certain projects.[14] Therefore, to map the EU's reasoning, it becomes paramount to explore not only the techniques of governing but also the underlying aims in the name of which such techniques are deployed. The choice of competence also influences the specific nature of competence, legal instruments that may be used, and the process including the voting rules in the Council among others.[15]

The Commission has posited Article 114 TFEU as lending the Union competence to enact new platform law including the DSA and DMA.[16] Article 114(1) foresees that the Union may take

[10]Marija Bartl, *Internal Market Rationality: In the Way of Re-imagining the Future*, 24 EUR. L.J. 99 (2018).

[11]On institutional imagination, see Roberto Mangabeira Unger, *Legal Analysis as Institutional Imagination*, 59 MOD. L. REV. 1 (1996).

[12]Consolidated Version of Treaty on European Union, July 7, 1992, 1992 O.J. (C 191) 1.

[13]Bartl, *supra* note 10, at 104–106; Sacha Garben, *Confronting the Competence Conundrum: Democratizing the European Union through an Expansion of Its Legislative Powers*, 35 OXFORD J. LEGAL STUD. 55, 74–76 (2015).

[14]Case C-142/87, Kingdom Belgium v. Comm'n Eur. Cmtys, ECLI:EU:C:1989:335 (Sept. 19, 1989), ¶ 10, https://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-142/87&td=ALL (opinion of AG Tesauro); Case C-300/89, Comm'n v. Council, ECLI:EU:C:1991:244 (June 11, 1991), ¶ 10, https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-300%252F89; *see also* Gareth Davies, *Democracy and Legitimacy in the Shadow of Purposive Competence*, 21 EUR. L.J. 2, 2–3 (2015).

[15]Päivi Leino, *The Politics of Efficient Compromise in the Adoption of EU Legal Acts*, *in* EU LEGAL ACTS: CHALLENGES AND TRANSFORMATIONS 30, 35–42 (Marise Cremona & Claire Kilpatrick eds., 2018).

[16]The term platform law is used by Angelina Fisher and Thomas Streinz, who identify the Digital Services Act and Digital Markets Act as instances of "dedicated platform regulation." According to them: "Platform regulation consists of a complex and disparate set of laws deeply intertwined with the rise of platform companies and informational capitalism." Angelina

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action to "adopt the measures for the approximation of the provisions laid down by law, regulation, or administrative action in Member States which have as their object the establishment and functioning of the internal market." Thus, the fact that a market economy is partly constituted by supportive legal constructions is perhaps particularly apparent in the case of European internal market.[17] Yet if we reject the idea that the internal market would have some essential meaning that could be discovered by a method and could then claim objectivity over other competing meanings, it becomes crucial to delve into how it is imagined what the internal market is and what it needs.[18] First, Article 26(2) TFEU prescribes that: "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties." Second, Article 3(3) TEU now stipulates that the internal market shall also, among other ideals, aim at being "a highly competitive social market economy," seek social progress, justice and protection, and promote solidarity between generations and Member States.

Combined, these Treaty provisions appear rather indeterminate, lending credence to a host of heterodox meanings that possibly point in contradictory directions. Gareth Davies has argued that "[t]he legal bases are typically built around such open-textured concepts that almost any legislative act could be brought within a plausible interpretation of one of them."[19] Thus, to explore the current understanding of the internal market more specifically, one must turn to institutions that are in a privileged position to interpret the provisions. One of them is the CJEU,[20] which has stressed that the choice of legal competence must be grounded in objective factors amenable to judicial review, including the aim and content of the measure.[21] The aim and content of EU platform law must sufficiently express commitment to the CJEU's understanding of the internal market or risk annulment.[22] Therefore, the jurisprudence of the internal market legal basis appears to be a prime starting point for analyzing how internal market construction informs

Fisher & Thomas Streinz, *Confronting Data Inequality* 53–54 (N.Y. Uni. Sch. L., Inst. for Int'l L. & Just., Working Paper No. 2021/1, 2021). For other EU regulations dedicated to online platforms, which often while not always rely on Article 114 TFEU for competence, see Regulation 2019/1150 of the European Parliament and of the Council of June 20, 2019 on promoting fairness and transparency for business users of online intermediation services, 2019 O.J. (L 186) 57 (EU); Regulation 2021/784, of the European Parliament and of the Council of Apr. 29, 2021 on addressing the dissemination of terrorist content online, 2021 O.J. (L 172) 79 (EU); Directive (EU) 2018/1808 ch. IXA of the European Parliament and of the Council of Nov. 14, 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, Nov 28, 2018, 2018 O.J. (L 303) 69; and for upcoming regulations, see *Commission Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work*, COM (2021) 762 final (Dec. 9, 2021); *Commission Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising*, COM (2021) 731 final (Nov. 25, 2021) [hereinafter *legislation and legal proposals*].

[17]On the legal constructions of the market economy, see generally Simon Deakin, David Gindis, Huang Kainan & Katharina Pistor, *Legal institutionalism: Capitalism and the Constitutive Role of Law*, 45 J. COMPAR. ECON. 188, 189–198 (2017); Andrew Lang, *Market Anti-naturalisms*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 312, 321–326 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

[18]Marija Bartl, *Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political*, 21 EUR. L.J. 572, 589 (2015).

[19]Gareth Davies, *The European Union Legislature as an Agent of the European Court of Justice*, 54 J. COMMON MKT. STUD. 846, 848 (2016).

[20]TFEU arts. 263, 267.

[21]Case C-300/89, Comm'n v. Council, 1991 E.C.R. I-2867, ¶ 10.

[22]While it is broadly accepted that the role of the CJEU is indeed consequential in delineating the possibilities that the legislature can debate and then decide upon, there has been discussion on how and to what extent the CJEU affects the work of Union legislature. *See, e.g.*, Stephen Weatherhill, *The Limits of Legislative Harmonization Ten Years After Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide,"* 12 GERMAN L.J. 827, 848–49 (2011); Davies, *supra* note 19, at 847–49; Päivi Leino, *The Institutional Politics of Objective Choice: Competence as a Framework for Argumentation*, *in* THE DIVISION OF COMPETENCES BETWEEN THE EU AND THE MEMBER STATES: REFLECTIONS ON THE PAST, THE PRESENT AND THE FUTURE 210, 227–30 (Sacha Garben & Inge Govaere eds., 2017).

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the governance of platforms. In the remainder of this section, I probe into how, in the case law on the internal market legal basis, the CJEU understands what the internal market is and what it "needs."

To start with a relatively old case, in *Titanium Dioxide*, the Court determined that the directive, the legal basis of which was under dispute, sought to harmonize the environmental standards in the titanium dioxide industry and to improve the conditions of competition in that industry. It noted that the directive "thus pursues the twofold aim of environmental protection and improvement of the conditions of competition" which are "indissociable."[23] The Court further accepted the Commission's reasoning that this twofold aim could indeed be pursued within Article 100a of the Treaty Establishing the European Community,[24] a new device introduced by the Single European Act[25] and "particularly appropriate to the attainment of the internal market."[26] Through subsequent treaty amendments, this device would eventually become the current Article 114 TFEU.

Almost ten years later, the *Tobacco Advertising I* case concerned a directive that included a total ban on print advertising and sponsorship of tobacco products in the internal market.[27] For the CJEU, "genuinely" improving the internal market establishment and functioning meant the removal of obstacles to free movement.[28] The removal of disparities between national rules is not an end in itself.[29] Although it is now plain that either removing obstacles to movement or appreciable distortions of competition is sufficient for competence, the two are intimately connected and mutually reinforcing.[30]

Free movement refers to the Union's fundamental freedoms—free movement of goods, persons, services, capital, and freedom of establishment across nations' borders.[31] After brushing aside the implication that goods or services would move around on their own, it becomes clearer that the freedoms, as legal entitlements, are accorded equally to private actors seeking to cross the border of one Member State into another to advance their private projects.[32] In terms of subject production, this aim of transnational individual freedom and competition appears to disembed the subject from social settings, particularly from that of Member State polity. As Floris de Witte has argued, the emancipatory ethos of the Union seeks to uproot and liberate individuals from the exclusionary tendencies of the nation-state.[33] Fundamental freedoms and undistorted competition seek to ensure that individuals and other private actors have many transnational opportunities and choices in their pursuits. At the same time, this disembedding and the ensuing focus on the freedom of the atomistic individual tends to exclude a *relational* understanding of the subject, bracketing off the distributional inequalities and power relations between individuals and

[23]*Comm'n*, Case C-300/89 ¶¶ 11, 13.

[24]*Id.* ¶¶ 22–25.

[25]Single European Act art. 18, June 29, 1987, 1987 O.J. (L 169) 1.

[26]*Comm'n*, Case C-300/89 ¶ 23.

[27]Case C-376/98, Germany v. Parliament & Council, 2000 E.C.R. I-8419 [hereinafter *Tobacco Advertising I*].

[28]*Tobacco Advertising I*, Case C-376/98 ¶¶ 84, 86.

[29]*Id.* ¶ 84.

[30]*Comm'n*, Case C-300/89 ¶ 15. *See also* Alexander Somek, Individualism: An Essay on the Authority of the European Union 110, 129–30 (Oxford Univ. Press, 1st ed. 2008).

[31]*See* TFEU arts. 30, 45, 56, 63, 49.

[32]Case C-26/62, Van Gend en Loos v. Neth. Inland Revenue Admin., 1963 E.C.R. 1. *See* JHH Weiler, *Van Gend en Loos:* The Individual as Subject and Object and the Dilemma of European Legitimacy, 12 Int'l J. Const. L. 94 (2014).

[33]Floris de Witte, *Integrating the Subject: Narratives of Emancipation in Regionalism*, 30 Eur. J. Int'l L. 257, 264–68 (2019). Similarly, but with a more avowedly critical tone, see generally Alexander Somek, *The Individualisation of Liberty: Europe's Move from Emancipation to Empowerment*, 4 Transnat'l Legal Theory 258, 266–68 (2013); Michelle Everson & Christian Joerges, *Reconfiguring the Politics-Law Relationship in the Integration Project Through Conflicts-Law Constitutionalism*, 18 Eur. L.J. 644, 662 (2012); Dimitry Kochenov, *The Oxymoron of "Market Citizenship" and the Future of the Union*, *in* The Internal Market and the Future of European Integration: Essays in Honour of Laurence W Gormley 217, 219–20 (Fabian Antembrink, Gareth Davies, Dimitry Kochenov & Justin Lindeboom. eds., 2019).

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communities within the Union.[34] Such framing is aptly expressed in the economic term "externalities," effects on others that are thought to be external to the transaction activity itself.

As already visible in *Titanium Dioxide*, the furthering of private actors' transnational freedom and competition is by no means the only internal market need in the CJEU's imagination. The Court has sanctioned that the Union legislature may, and even should, also pursue several public interest objectives. In *Tobacco Advertising I*, AG Fennelly was rather candid in stating that "the internal market is not a value-free synonym for general economic governance."[35] Therefore, it is not necessary to interpret the internal market provisions of the TFEU "as a kind of liberal charter, entailing harmonization towards the lowest standard or even towards some sort of mean of the pre-existing national standards."[36] The CJEU has even accepted that a public interest objective may be the "decisive factor" in the legislative choices as long as a link to fundamental freedoms or competition is found.[37]

Indeed, a link may usually be found. While a public interest rationale rather than an economic one usually animates regulation,[38] the apparent tension between private freedom and public interest regulation may also be rationalized away. For instance, product bans may be framed as facilitating the free movement of *other* freely tradeable substitute products by helping, as in the case of a ban on seal products, to regain "consumer confidence *while, at the same time*, ensuring that animal welfare concerns are fully met."[39] That way, public interest regulation can be understood as market-*making* as legal arrangements animated by free movement and competition.[40] In other words, public interest regulation is equally internal market *construction*.

It appears that the public interest objectives—especially health, safety, environmental protection, and consumer protection as listed in Article 114(3) TFEU—are imagined as feeding into the uniform EU-level standard that then fixes the level playing field for competition. Alexander Somek has argued that the Court's understanding of the internal market competence amounts to "market holism" as opposed to "market liberalism," the latter being rejected by AG Fennelly and the Court in *Tobacco Advertising I*. Market liberalism would exclude the pursuit of public interest objectives and would correspondingly militate toward lowering protective standards.[41] Generally, holism often refers to approaches where certain values are thought to pervade the totality of social intercourse. They must be integrated into practices as evaluative guidance. This can also be referred to as "the internalization of externalities."[42]

Public interest regulation makes conditions safe and products environmentally sustainable, and improves the position of the consumer in transactions. Arguably, the role of such market-intervening regulation has progressively increased with the privatization of public services from the 1990s onwards.[43] Yet public interest protection also exhibits a disembedding of social matters

[34]Calling for attention to distributional justice, see generally Damjan Kukovec, *Taking Change Seriously: The Rhetoric of Justice and the Reproduction of Status Quo*, *in* Europe's Justice Deficit? 319, 320–23 (Dimitry Kochenov, Gráinne De Búrca & Andrew Williams eds., 2015); Alexander Somek, *From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination*, 18 Eur. L.J. 711, 724–25 (2012).

[35]*Tobacco Advertising I*, ¶ 83 (opinion AG Fennelly).

[36]*Id.* ¶ 85.

[37]*Id.* ¶ 88; ECJ, Case C-358/14, Poland v. Parliament & Council, ECLI:EU:C:2016:323 (May 4, 2016), ¶ 34, http://curia.europa.eu/juris/liste.jsf?num=C-358/14.

[38]Bruno de Witte, *A Competence to Protect: The Pursuit of Non-Market Aims Through Internal Market Legislation*, *in* The Judiciary, the Legislature and the EU Internal Market 25, 26 (Phil Syrpis ed., 2012).

[39]Case T-526/10, Inuit Tapiriit Kanatami v. Commission, ECLI:EU:T:2013:215 (Apr. 25, 2013), ¶ 44 (emphasis added), http://curia.europa.eu/juris/liste.jsf?num=T-526/10. *Id.* ¶ 47 ("[B]y reassuring consumers that . . . seal products are no longer marketed in the Union, the question of differentiating such products from those not derived from seals no longer arises and all the categories of product in question can circulate freely in the Union.")

[40]On this constitutive role of regulation, see Lang, *supra* note 17, at 321–26.

[41]Somek, *supra* note 30, at 88–92, 109–10.

[42]Ioannis Kampourakis, *From Global Justice to Supply Chain Ethics*, 12 Transnat'l Legal Theory 213, 223 (2021).

[43]Bartl, *supra* note 8, at 30; Wolf Sauter, *Public Services and the Internal Market: Building Blocks or Persistent Irritant?* 21 Eur. L.J. 738, 738–39 (2015).

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from local and national settings similar to the aim to liberate the individual. Public concerns are seen as rather anonymous and free-floating problems of governance to be resolved by universal expert reasoning.

During the last two decades, the Court's relaxed interpretation of "measures for approximation" in Article 114(1) TFEU has afforded the Union power to create a supranational constellation of satellite administrative agencies orbiting the Commission and engineering the economy.[44] In matters associated with less vital interests, the Union has since the adoption of the New Approach and the Global Approach sought to create transnational markets for services certifying the compliance of products with open-ended "essential requirements" laid out in directives.[45] In addition, the European Standardisation Organisations have been entrusted with drafting Union-wide standards that entitle their adherents to the presumption of compliance with the law.[46] As Somek highlights, regulation presupposes a trusting subject that adheres to universal expert reasoning by assuming that the experts know better,[47] thus accepting intervention into their individual freedom or, in the words of the Court, regulation "circumscribing that freedom."[48] Of course in practice, such circumspection is not uniformly accepted, as demonstrated by the legal challenges for judicial review initiated by UK corporations.[49]

After *Tobacco Advertising I*, the Court has confirmed this twofold aim of the internal market with remarkable consistency. Despite Treaty amendments, most notably the introduction of Article 3(3) TEU, the *Tobacco Advertising* test is still being applied by the CJEU.[50] As stated by AG Sharpston in a 2019 case that concerned a ban on specific types of guns in the Union: "The Court's case-law concerning tobacco products provides particularly useful guidance on the scope of Article 114 TFEU which can be applied by analogy here."[51] The Court's understanding may also reflect a more widely shared understanding of internal market governance in the Union, also because no such piece of internal market legislation appears to have been brought before the Court that would have invited its re-imagination.[52]

[44]*See, e.g.*, Case C-66/04, United Kingdom v. Parliament & Council, 2005 E.C.R. I-10553, ¶¶ 43–45 (discussing Regulation No. 1065/2003 (EC) on smoke flavourings); Case C-217/04, United Kingdom v. Parliament & Council, 2006 E.C.R. I-3771, ¶¶ 45–50 (discussing Regulation No. 460/2004 (EC): the European Network and Information Security Agency (ENISA)); ECJ, Case C-270/12, United Kingdom v. Parliament & Council, ¶¶ 102–105, ECLI:EU:C:2014:18 (Jan. 22, 2014) http://curia.europa.eu/juris/liste.jsf?num=C-270/12 (discussing Regulation No. 236/2012 (EU): the European Securities and Markets Authority (ESMA)).

[45]Jean-Pierre Galland, *The Difficulties of Regulating Markets and Risks in Europe Through Notified Bodies*, 4 Eur. J. Risk Reg. 365, 367–69 (2013).

[46]Rob van Gestel & Peter van Lochem, *Private Standards as a Replacement for Public Lawmaking?*, *in* The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes 27, 30–31 (Marta Cantero Gamito & Hans-W. Micklitz eds., 2020). On the law's role in constituting private standard governance more generally, see Harm Schepel, The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets (2005).

[47]Alexander Somek, *Europe: Political, Not Cosmopolitan*, 20 Eur. L.J. 142, 148–49 (2014).

[48]ECJ, Case C-482/17, Czech Republic v. Parliament & Council, ¶ 59, ECLI:EU:C:2019:1035 (Dec. 3, 2019) http://curia.europa.eu/juris/liste.jsf?num=C-482/17.

[49]*See, e.g.*, Case C-491/01, The Queen v. Sec'y State for Health *ex parte* Brit. Am. Tobacco (Invs.) & Imperial Tobacco, 2002 E.C.R. I-11453; Case C-58/08, The Queen v. Sec'y of State for Bus., Enter. & Regul. Reform, 2010 E.C.R. I-4999; ECJ, Case C-547/14, Philip Morris Brands v. Secr'y State for Health, ECLI:EU:C:2016:325 (May 4, 2016), http://curia.europa.eu/juris/liste.jsf?num=C-547/14.

[50]On post-Lisbon case law see, generally *Poland*, Case C-358/14; *Czech Republic*, Case C-482/17. For an analysis of this post-Lisbon consistency, see Inge Govaere, *Internal Market Dynamics: On Moving Targets, Shifting Contextual Factors and the Untapped Potential of Article 3(3) TEU*, *in* The Internal Market 2.0 75, 87–91 (Sacha Garben & Inge Govaere eds., 2021).

[51]Case C-482/17, Czech Republic v. Parliament & Council, ¶ 49, ECLI:EU:C:2019:321, http://curia.europa.eu/juris/liste.jsf?num=C-482/17 (Dec. 3, 2019) (opinion AG Sharpston).

[52]Of course, the CJEU is only able to consider legislation whose validity is challenged before it.

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The general tilt of the internal market is often argued to be, in various ways, toward "the economic," that is, fundamental freedoms and competition.[53] Yet within judicial review case law it has also been argued contrariwise—that the internal market basis enables "covert" public interest harmonization, where legislation ostensibly introduced to further economic freedoms in fact pursues a public interest.[54] I wish to refrain from positing the abstract fundamentality of either.[55] Therefore, even though the shared legal understanding of the aims of the internal market do orient its construction across settings, my contention is that the twofold aim is nevertheless being negotiated and operationalized iteratively case by case, directing the analyst's attention to how internal market rationality informs market construction in specific contexts.

C. Internal Market Mechanisms Constituting Online Platforms

I. The Internal Market Mechanisms of the Platform Economy

Thus far, I have explored the aims of internal market construction. I have argued that on the one hand, the internal market rationality, as expressed in the CJEU jurisprudence on internal market competence, pursues a twofold aim. On the other hand, it is connected to the facilitation of transnational freedom for private actors and a program for competition that largely brackets off concerns for distributional justice. Yet internal market rationality also seeks to infuse private activities with concern for public values through regulation informed by public and private expertise.

Now, situating online platforms within internal market construction firstly invites the question of what an online platform specifically means. In their article, *Platformisation*, Thomas Poell, David Nieborg, and José van Dijck define online platforms as "(re-)programmable digital infrastructures that facilitate and shape personalised interactions among end-users and complementors, organized through the systematic collection, algorithmic processing, monetisation, and circulation of data."[56] Within economics and management studies, platforms have been understood through the organizational logic of a two-sided or multi-sided market.[57] Based on algorithmic data analysis, platforms intermediate communication and interaction between distinct groups of users on different "sides," such as consumers, programmers, or advertisers.[58] Matching users draws upon the analysis of data that platforms produce and pool.

Julie Cohen has argued that a platform has also become the core organizational logic of a digital economy that transforms the market institution and makes it arguably more material.[59] By courting more and more users with the promise of access to information and connectivity, platforms scale up, creating "indirect network externalities" or network effects that make access increasingly valuable for everyone on any side of the platform.[60] It also becomes progressively harder for those *not* included to remain outside platforms "where everyone else already is." That way, the scaling of the platform may result in reinstituting the multi-sided platform structure in place of a market.

[53]Bartl, *supra* note 8, at 34–35; Sacha Garben, *Competence Creep Revisited*, 57 J. COMMON MKT. STUD. 205, 209 (2019); Gareth Davies, *Internal Market Adjudication and the Quality of Life in Europe* 13–16 (Eur. Univ. Inst., Working Paper No. 2014/07, 2014).

[54]*Czech Republic*, Case C-482/17 ¶¶ 21–23; *Poland*, Case C-358/14 ¶ 26; *Inuit Tapiriit Kanatami*, Case T-526/10 ¶ 26.

[55]*See* de Witte, *supra* note 38, at 27.

[56]Thomas Poell, David Nieborg & José van Dijck, *Platformisation*, 8 INTERNET POL'Y REV. 1, 3 (2019).

[57]*See, e.g.*, Jean-Charles Rochet & Jean Tirole, *Two-sided Markets: A Progress Report*, 37 RAND J. ECON. 645 (2006); Andrei Hagiu & Julian Wright, *Multi-sided Platforms*, 43 INT'L J. INDUS. ORG. 162 (2015).

[58]Hagiu & Wright, *supra* note 57, at 163–64.

[59]COHEN, *supra* note 3, at 42, 44.

[60]Bernard Caillaud & Bruno Jullien, *Chicken & Egg: Competition Among Intermediation Service Providers*, 34(2) RAND J. ECON. 309, 309–10 (2003).

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That the economic market order is constituted partly by supportive legal constructions may appear clear enough, but one may be more circumspect regarding the relationship between legal constructions and the ordering of platforms as "multi-sided markets," for which the material dimension may be more central. It is important to clarify that the relationship between the platform emergence and EU law mechanisms is not one-way in that supposedly autonomous technological innovation merely triggers a legal response. EU law works not just as a reactionary "coping mechanism" for the force of technological and attendant socio-economic change,[61] but also actively drives and shapes that change in the first place.[62] Online platforms and social order are mutually shaping.[63] Accordingly, internal market constructions not only constitute markets but also influenced the emergence of online platforms as multi-sided markets in Europe. Therefore, it now becomes paramount to scrutinize the specific legal mechanisms of internal market construction that have been implicated in this emergence.[64] I do not intend to present a comprehensive overview, but will delimit my analysis instead to a suite of techniques within the Union's electronic commerce law.[65] Many other legal constructions of intellectual property law and trade secrecy, and fundamental institutions of private law such as contract and corporate law that still largely remain within Member State competence, cannot be given proper credit here.[66]

To begin with EU primary law, while the free movement of goods used to serve as the leitmotif for early common market construction, for platforms the choice of fundamental freedom is that of services together with the freedom of establishment. The place of the former in the Union's imagination gained prominence through the drive to "complete" the internal market and its attendant Single European Act.[67] Following the "X-as-a-service" business template,[68] platform firms primarily sell access to a connection based on the insights gleaned from data analytics, not data itself.[69] Despite the wide range of possible business model variations, platform firms' overall imperatives to monetize users through data and money rents persist.[70] The Silicon Valley organizational template marries private platform start-up firms with venture capital markets oriented toward long-term returns that are expected after the platform has scaled up sufficiently.[71] Therefore, early-stage investors with ample patience play a crucial role in instituting the imperative to monetize users within the start-ups early on.

Platform firms may extract money rents from advertisers via data analysis insights, while access to a platform for end-users may be provided in exchange for data processing. They may also extract service-fee rents from buyers, sellers, or both; and they may provide two platform versions:

[61]Yane Svetiev & Giacomo Tagiuri, *The Opportunities and Dislocations of Technological Change: EU Law as a Coping Mechanism*, 24 COLUM. J. EUR. L. 612, 615–20 (2018).

[62]Jasanoff, *supra* note 6, at 16 (noting that "[l]egal and political institutions lead, as much as they are led by, society's investments in science and technology").

[63]JOSÉ VAN DIJCK, THOMAS POELL & MARTIJN DE WAAL, THE PLATFORM SOCIETY: PUBLIC VALUES IN A CONNECTIVE WORLD 32 (2018).

[64]Bartl, *supra* note 18, at 589 n. 88. *See also* J.C. Ribot & N.L. Peluso, *A Theory of Access*, 68 RURAL SOCIO. 153, 159 (2003) (defining mechanism as "the means, processes, and relations by which actors are enabled to gain, control, and maintain access to resources").

[65]For an overview of EU internet law, see generally ANDREW MURRAY & ARNO R. LODDER, EU REGULATION OF E-COMMERCE: A COMMENTARY (Andrew Murray & Arno R. Lodder eds., 2017).

[66]On how power relations have been inscribed in various strands of private law, see generally KATHARINA PISTOR, CODE OF CAPITAL: HOW LAW CREATES WEALTH AND INEQUALITY (Princeton Univ. Press, 2019).

[67]*Commission White Paper on Completing the Internal Market*, ¶¶ 95–99, COM (85) 310 final (June 14, 1985).

[68]Jathan Sadowski, *The Internet of Landlords: Digital Platforms and New Mechanisms of Rentier Capitalism*, 52 ANTIPODE: A RADICAL J. GEOGRAPHY 562, 567 (2020).

[69]Katharina Pistor, *Rule by Data: End of Markets?*, 83 L. & CONTEMP. PROBS. 101, 106 (2020).

[70]Kean Birch & D.T. Cochrane, *Big Tech: Four Emerging Forms of Digital Rentiership*, 31 SCI. AS CULTURE 1, 5–6 (2021); Sadowski, *supra* note 68, at 568, 571.

[71]K. Sabeel Rahman & Kathleen Thelen, *The Rise of the Platform Business Model and the Transformation of Twenty-First-Century Capitalism*, 47 POL. & SOC'Y 177, 194–95 (2019); Birch & Cochrane, *supra* note 70, at 7–8.

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A free standard version of the platform and another with additional features via a subscription.[72] The generously wide category of services "normally provided for remuneration" in Article 57 TFEU, and its equally lenient interpretation by the CJEU,[73] have enabled the development of various business models that the multi-sided platform structure permits. For instance, the CJEU has explicitly stated that the remuneration need not be "paid for by those for whom it is performed," thus sanctioning the provision of a platform service to consumers without a monetary price.[74]

As for the Charter of the Fundamental Rights of the European Union, its regulative function features prominently in legal scholarship, especially in the form of rights to privacy and data protection in Articles 7 and 8. At the same time, the Charter's facilitative potential for the digital economy are somewhat less pronounced. Consider, for instance, the freedom to conduct a business in Article 16 that has helped in legitimizing, often if not always together with Articles 15 and 17, platform firms' rent-seeking business as the exercise of a fundamental right. While the freedom may again be limited through public interest regulation,[75] in its jurisprudence on intermediary service providers, the CJEU has given weight to the service provider's freedom of economic activity against the interests of others.[76] For instance, it has ruled that in the context of online service provision, "[t]he freedom to conduct a business includes, inter alia, the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it."[77] This effectively sanctions and protects the firms' exclusionary control over platform design and governance processes.

Moving on to secondary law, the Union had started adjusting internal market construction for the digital economy well before the Juncker Commission's announcement of a Digital Single Market.[78] The horizontal Services Directive[79] was introduced after much controversy in 2006. Article 20 of the Directive lends background support for scaling platforms transnationally by obliging Member States to ensure that the recipients of a service are not placed at a disadvantage based on their residence or nationality. This resulted in prohibiting the practice of "geo-blocking" an online service.[80] Dariusz Adamski has noted that the Services Directive, along with another horizontal piece of the 2011 Consumer Rights Directive, was "primarily intended to facilitate

[72]VAN DIJCK ET AL., *supra* note 63, at 38–40.

[73]STEPHEN WEATHERHILL, INTERNAL MARKET AS A LEGAL CONCEPT 34–36 (2017).

[74]ECJ, Case C-484/14, McFadden v. Sony Music Ent. Ger., ECLI:EU:C:2016:689 (Sept. 15, 2016), ¶ 41, http://curia.europa.eu/juris/liste.jsf?num=C-484/14.

[75]ECJ, Case C-544/10, Deutsches Weintor v. Land Rheinland-Pfalz, ECLI:EU:C:2012:526 (Sept. 6, 2012), ¶ 54, http://curia.europa.eu/juris/liste.jsf?num=C-544/10.

[76]Case C-70/10, Scarlet Extended v. Société belge des auteurs, compositeurs et éditeurs (SABAM), 2011 E.C.R. I-11959, ¶¶ 46–49; ECJ, Case C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v. Netlog, ECLI:EU:C:2012:85 (Feb. 16, 2012), ¶¶ 44–47, http://curia.europa.eu/juris/liste.jsf?num=C-360/10; ECJ, Case C-314/12, UPC Telekabel Wien v. Constantin Film Verleih, ECLI:EU:C:2014:192 (Mar. 27, 2014), ¶¶ 47–53, http://curia.europa.eu/juris/liste.jsf?num=C-314/12. *See also* MICHELE EVERSON & RUI CORREIA GONÇALVES, *Freedom to Conduct a Business*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 437, 451 (Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward eds., 2014) (emphasizing how *Scarlet Extended* and *Netlog* are highly important cases in the development of Article 16 freedom towards "a quasi-subjective right").

[77]*UPC Telekabel Wien*, Case C-314/12 ¶ 49.

[78]*Commission Proposal to the European Parliament and to the Council on A Digital Single Market Strategy for Europe*, COM (2015) 192 final (May 6, 2015).

[79]Directive 2006/123, of the European Parliament and of the Council of 12 December 2006 on services in the internal market, 2006 O.J. (L 376) 36.

[80]Dariusz Adamski, *Lost on the Digital Platform: Europe's Legal Travails with the Digital Single Market*, 55 COMMON MKT. L. REV. 719, 729 (2018). More recently, rules on geo-blocking have been enacted in a separate regulation, see generally Regulation (EU) 2018/302, of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, 2018 O.J. (L 601) 1.

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the development of the new market environment," only seeking "to eliminate the most rudimentary negative externalities of the digital innovations."[81]

More consequential optimization of the internal market for platforms was brought about even earlier in 2000, well before platform ascendancy. At that time, the Union introduced a specific service category to facilitate the digital economy. While defined elsewhere,[82] the category of "information society services" is operationalized in the e-Commerce Directive.[83] The directive is deeply connected to the freedom to provide services and the freedom of establishment. For the Union, the task at hand with the directive, as Graham Pearce and Nicholas Platten summarize, was "to achieve a regime in which service providers, operating within the framework of law in their home countries, would be able to offer information society services to any client elsewhere in the EU."[84] This is epitomized most clearly in the internal market clause of Article 3 of the e-Commerce Directive, which according to AG Cruz Villalón "expresses in an instrument of secondary law a safeguard already provided for in primary law by Article 56 TFEU, and adapts it to the specific features required by the harmonisation of legislation on electronic commerce."[85] Rather than relying on harmonization of substantive law *per se*, the specific mechanisms combined in the internal market clause are mutual recognition and the country-of-origin principle.[86] The approach was aligned with the one adopted earlier to avoid "regulation for regulation's sake."[87]

These internal market techniques have enfranchised platform firms to establish themselves in propitious habitats within the Union, and most of the US-founded platform firms are now based in Ireland or Luxembourg. While the combined critique of internal market mechanisms and their interpretation by the CJEU has often been voiced in terms of regulatory competition,[88] these techniques tend to channel economic benefits to Member States that firms have selected as their hosts even without the race-to-the-bottom of public interest protection. The social consequences of transnational economic activity, however, often remain local and thus scattered around the peripheries of the Union.[89] Similarly, the country-of-origin principle serves as an intellectual device for centralizing public power within "the coordinated field" of law delineated in Article 2(h) of the e-Commerce Directive.[90] It channels front-line authority to the Member States hosting platform firm establishment, also legitimizing the fact that in most nations platform

[81]*Compare* Adamski, *supra* note 80, at 729, *and* Bartl, *supra* note 10, at 107 (analyzing the early online internal market).

[82]*See* Directive 2015/1535, of the European Parliament and of the Council of 9 September 2015, art. 1(1)(b), laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, 2015 O.J. (L 241) 1 (defining information society service as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services").

[83]Directive 2000/31, 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 O.J. (L 178) 1.

[84]Graham Pearce & Nicholas Platten, *Promoting the Information Society: The EU Directive on Electronic Commerce*, EUR. L.J. 363, 367 (2000).

[85]Joined Cases 509 & 161/10, eDate Advertising v. X, 2011 E.C.R. I-10269, ¶ 71 (Mar. 29, 2011) (opinion AG Cruz Villalón).

[86]EJC, Joined Cases 509 & 161/10, eDate Advertising v. X, 2011 E.C.R. I-10269 (Oct. 25, 2011), ¶ 57.

[87]*Commission Proposal of the European Parliament and to the Counctil on a European Initiative in Electronic Commerce*, at 14, COM (97) 157 final (Apr. 16, 1997).

[88]*See, e.g.*, Simon Deakin, *Regulatory Competition after* Laval, 10 CAMBRIDGE Y.B. EUR. LEGAL STUD. 581, 608–609 (2008); Olivier de Schutter, *Transborder Provision of Services and 'Social Dumping': Rights-Based Mutual Trust in the Establishment of the Internal Market*, *in* REGULATING TRADE IN SERVICES IN THE EU AND THE WTO: TRUST, DISTRUST AND ECONOMIC INTEGRATION 349, 365–73 (Ioannis Lianos & Okeoghene Odudu eds., 2012); JOHANNA STARK, LAW FOR SALE: A PHILOSOPHICAL CRITIQUE OF REGULATORY COMPETITION 38–41, 47–48 (2019).

[89]On the center-periphery relation, see generally Damjan Kukovec, *Law and the Periphery*, 21 EUR. L.J. 406 (2014).

[90]Paul Przemysław Polanski, *Revisiting Country of Origin Principle: Challenges Related to Regulating E-Commerce in the European Union*, 34 COMPUT. L. & SEC. REV. 562, 567–69 (2018). On the principle more generally, see Karsten Engsig Sørensen, *Enforcement of Harmonization Relying on the Country of Origin Principle*, 25 EUR. PUB. L. 381 (2019). National regulation, if outside the coordinated field of the e-Commerce Directive, may mandate local representation, see, for example, Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], July 12, 2017, § 5 (Ger.).

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firms lack any representatives who could be made easily accountable for local consequences for local authorities based on local evaluation criteria.

Article 4(1) of the e-Commerce Directive prohibits the prior authorization of information society services even by the country of establishment. As a result, the classification as information society service, and "intermediary service" as its sub-category, entitles the provider to disregard the pre-existing regulatory frameworks for underlying services altogether, a theme well-mapped in scholarship from various angles.[91] Through the last decade, the CJEU has slowly but surely affirmed the placement of various platforms, including eBay,[92] Google AdWords,[93] Airbnb,[94] Facebook[95] and YouTube[96] within these categories. A notable exception has been Uber, whose designation as a transport service instead of an information society service dislocated it from the scope of the Services Directive per Article 2(2)(d), and even from the free movement of services in Article 56 TFEU.[97]

II. Platforms' Socio-Political Implications: The Case of Social Media

Another special benefit of providing an information society service for platform firms is the provisional immunity against civil or criminal liability for harm in Section 4 of the e-Commerce Directive. A lot of effort has already been put into clarifying the conditions of this immunity, and I do not intend to reproduce those accounts here.[98] Instead, I would like to point out that even though the arguments for the exemption in contemporary debates are often framed by freedom of expression, around the turn of the millennium freedom to provide services was avowedly coupled with free expression. Recital 9 of the e-Commerce Directive notes that "[t]he free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression."[99]

Understanding the liability exemption as facilitating both free expression and the free movement of services illustrates another crucial aspect of the platform economy, namely the profound *interconnectedness* of platforms' economic and socio-political dimensions. Power ensuing from

[91]*See generally* Paolo Aversa, Annelore Huyghe & Giulia Bonadio, *First Impressions Stick: Market Entry Strategies and Category Priming in the Digital Domain*, 58 J. MGMT. STUD. 1721 (2021); Tarleton Gillespie, *The Politics of 'Platforms,'* 12 NEW MEDIA & SOC'Y 347 (2010); Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2017); and Philip Napoli & Robyn Caplan, *Why Media Companies Insist They're Not Media Companies, Why They're Wrong and Why It Matters*, 22 FIRST MONDAY, https://doi.org/10.5210/fm.v22i5.7051 (May 2, 2017).

[92]Case C-324/09, L'Oréal v. eBay Int'l, 2011 E.C.R. I-06011, ¶¶ 109–10.

[93]Joined Cases 236 & 238/08, Google Fr. v. Louis Vuitton Malletier, 2010 E.C.R. I-02417, ¶¶ 110–14.

[94]EJC, Case C-390/18, Criminal proceedings against X (Airbnb Ireland), ¶¶ 44–49, ECLI:EU:C:2019:1112 (Dec. 19, 2019) http://curia.europa.eu/juris/liste.jsf?num=C-390/18.

[95]Case C-18/18, Glawischnig-Piesczek v. Facebook Ir., ¶ 22, ECLI:EU:C:2019:821 (Oct. 3, 2019) http://curia.europa.eu/juris/liste.jsf?num=C-18/18.

[96]EJC, Joined Cases 682 & 683/18, Peterson v. Google, ¶ 117, ECLI:EU:C:2021:503 (June 22, 2021).

[97]EJC, Case C-434/15, Asociación Profesional Elite Taxi v. Uber Systems Spain, ECLI:EU:C:2017:981 (Dec. 20, 2017), paras. 40–44, http://curia.europa.eu/juris/liste.jsf?num=C-434/15; EJC, Case C-320/16, Criminal proceedings against Uber Fr., ¶¶ 24–27, ECLI:EU:C:2018:221 (Apr. 10, 2018) http://curia.europa.eu/juris/liste.jsf?num=C-320/16. For the Court's reasoning in *Elite Taxi* compared to *Airbnb Ireland*, see Maciej Szpunar, *Reconciling New Technologies with Existing EU Law—Online Platforms as Information Society Service Providers*, 27 MAASTRICHT J. EUR. COMPAR. L. 399, 401–405 (2020).

[98]*See, e.g.*, ALEXANDRA KUCZERAWY, INTERMEDIARY LIABILITY AND FREEDOM OF EXPRESSION IN THE EU: FROM CONCEPTS TO SAFEGUARDS (2018); Christina Angelopoulos & Stijn Smet, *Notice-and-Fair-Balance: How to Reach a Compromise Between Fundamental Rights in European Intermediary Liability*, 8 J. MEDIA L. 266 (2016); and more generally, THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY (Giancarlo Frosio ed., 2020).

[99]On the convergence of fundamental rights and freedoms in general, see Sacha Garben, *The 'Fundamental Freedoms' and (Other) Fundamental Rights: Towards an Integrated Democratic Interpretation Framework*, *in* THE INTERNAL MARKET 2.0 335, 339–45 (Sacha Garben & Inge Govaere eds., 2021).

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control over the platforms strikingly stems from the putative understanding of "the economic."[100] The largest platforms in particular cross the public-private divide rather spectacularly, implicating public values and converting platform firms into "public actors without public values."[101] Consequently, the co-production of platforms and legal institutions entails that the internal market mechanisms facilitating the platform economy are also implicated in the platforms' socio-political effects. The manifestations of these effects are most appropriately analyzed separately for each platform type. Even so, platforms' influence on public values is perhaps particularly conspicuous in social media. Social media platforms transform the conditions under which people communicate and access information online, changing the conditions of public deliberation.[102] Accordingly, internal market construction has facilitated not only the emergence of social media platforms, but also the transformation of the public sphere in Europe.

Social media platforms have enabled people to circumvent the homogenizing mass media whose social mechanisms of organizing and selecting information were seen as exclusionary for those that did not identify with the dominant media narratives, especially various minorities. These social media communities serve the same needs that other communities do.[103] Yet social media does not restrict the availability of communities by territory, as users may also select from transnational ones, affording individuals rather free play with group identification.[104] As the costs of adding new users to a platform are practically non-existent, and platform use requires comparatively little digital aptitude, social media could include and give everyone the opportunity to voice their concerns in a formally equal manner. All of these affordances have had emancipatory potential.[105] This potential also appears to exhibit a certain similarity to that of the EU with its subject freed from the constraints of one's location and lifted to the transnational plane of the internal market.[106]

Yet following the up-scaling of social media, predominantly from California and spearheaded by Facebook's connecting the world ethos,[107] the sheer volume of information has made its ordering "an extra-ehuman task" requiring automated systems of sorting and recommending.[108] Scaling also affected an unprecedented centralization of control over the information organization within platform firms. Due to the abundance of information on platforms, mere access to a platform is a necessary but insufficient condition for gaining visibility and recognition.[109] Marion Fourcade and Fleur Johns have argued that within machine learning systems "the benefits of inclusion now depend less on access itself, and more on one's *performance within* each system and according to its rules."[110]

On social media, visibility as a pre-condition for recognition becomes a scarce resource that must be continuously competed for,[111] creating a form of never-ending competition for the indicia

[100]José van Dijck, David Nieborg & Thomes Poell, *Reframing Platform Power*, 8 Internet Pol'y Rev. 1, 11 (2019). For an exemplary account of this interconnectedness, see generally Giovanni De Gregorio & Catalina Goanta, *The Influencer Republic: Monetizing Political Speech on Social Media*, 23 German L.J. 204 (2022).

[101]Linnet Taylor, *Public Actors Without Public Values: Legitimacy, Domination and the Regulation of the Technology Sector*, 34 Phil. & Tech. 897 (2021). *See also* José van Dijck, *Governing Digital Societies: Private Platforms, Public Values*, 36 Comput. L. & Sec. Rev. 1 (Apr. 2020), https://doi.org/10.1016/j.clsr.2019.105377.

[102]Mark Andrejevic, Automated Media 46 (. 2020).

[103]Cohen, *supra* note 3, at 86.

[104]*Id.*

[105]*See, e.g.*, Larry Diamond, *Liberation Technology*, 21 J. Democracy 69 (2010).

[106]de Witte, *supra* note 33, at 264–268.

[107]José Van Dijck, The Culture of Connectivity: A Critical History of Social Media 45 (2013).

[108]Andrejevic, *supra* note 102, at 44.

[109]Cohen, *supra* note 3, at 43.

[110]Marion Fourcade & Fleur Johns, *Loops, Ladders and Links: The Recursivity of Social and Machine Learning*, 49 Theory & Soc'y 803, 814 (2020) (emphasis added).

[111]Taina Bucher, If . . . Then: Algorithmic Power and Politics 84–90 (2018).

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of recognition in the network.[112] At a minimum, visibility requires ongoing participation—posting, sharing, liking—or else the user risks falling into invisibility.[113] At best, successful activation of the network may trigger platform algorithms' further amplification of one's views. In particular, various cultural workers have become highly dependent on social media visibility for their livelihood.[114] The gamification of social participation also keeps the flows of platform data running and the metric of monthly active users high. This ensures the capital markets' enduring preference for platform firms, maintaining their market capitalization, which currently amounts to an immense concentration of wealth.[115]

It is also at this level of performance within the platform, rather than access, where the persistent social inequalities between users seep in to reproduce distributive patterns and undermine social media's original emancipatory promise. Social media profiles usually encourage the convergence of one's online and offline identities,[116] while the response metrics of aggregated subscribers and likes make one's constantly fluctuating position in the visibility competition clearly visible.[117] Thus, those who are short of time and money are arguably worse off "not only because that makes them less desirable in the real world, but also because they cannot afford the effort and expense needed to overcome their disadvantage in the online world."[118]

Platform firms' imperative to monetize users exacerbates these effects through offerings of preferential placement for those with sufficient resources.[119] Targeted adverts empower marketers to find "good matches" for their messages, which are "perceived as natural because they fit well with how things already are."[120] Such control may result in intriguing offerings and valuable discounts, making ads that are more relevant a cause for celebration for many. At the same time, the control also enables acting on various automatically created categories of the disadvantaged which, while "low value" for some organizations, are specifically sought after by others.[121] Thus, misinformation may be channelled to those categorized as "interested in pseudoscience,"[122] online casino adverts to those with gambling problems, and predatory loan offerings to those already heavily in debt. Similar looping effects that circulate pre-existing disadvantages can be associated with current recommender systems that suggest new information. As algorithms cannot be trained on future data, the past is presumed to be a relevant indicator of future value.[123] On top of the platform mechanisms, "a whole industry of social media derivatives" has emerged to serve

[112]William Davies, *Post-liberal Competitions?: Pragmatics of Gamification and Weaponization*, *in* The Performance Complex: Competition and Competitions in Social Life 187, 197–198, 200–201 (David Stark ed., 2020); Cohen, *supra* note 3, at 82–83.

[113]Bucher, *supra* note 112, at 89; Fourcade & Johns, *supra* note 111, at 814.

[114]*See generally* Kelley Cotter, *Playing the Visibility Game: How Digital Influencers and Algorithms Negotiate Influence on Instagram*, 21 New Media & Soc'y 895 (2019); Caitlin Petre, Brooke Erin Duffy & Emily Hund, *"Gaming the System": Platform Paternalism and the Politics of Algorithmic Visibility*, Social Media & Soc'y 1 (2019), https://doi.org/10.1177/2056305119879995; Sophie Bishop, *Anxiety, Panic and Self-Optimization: Inequalities and the YouTube Algorithm*, 24 Convergence: Int'l J. Res. into New Media Techs. 69 (2018).

[115]Birch & Cochrane, *supra* note 70, at 3–4.

[116]Dominique Cardon, *What Are Digital Reputation Metrics Worth?: The Rise and Fall of Reputation Metrics on Social Media*, *in* Performance Complex: Competition and Competitions in Social Life 208, 212 (David Stark ed., 2020).

[117]*Id.* at 214.

[118]Fourcade & Johns, *supra* note 111, at 816.

[119]Cohen, *supra* note 3, at 43.

[120]Marion Fourcade & Kieran Healy, *Seeing Like a Market*, 15 Socio-Econ. Rev. 9, 17 (2017).

[121]Karen Yeung, *Five Fears about Mass Predictive Personalization in an Age of Surveillance Capitalism*, 8 Int'l Data Priv. L. 258, 265–266 (2018); Kelley Cotter, Mel Medeiros, Chankyung Pak & Kjerstin Thorson, *"Reach the Right People:" The Politics of "Interests" in Facebook's Classification System for Ad Targeting*, 8 Big Data & Soc'y 1, 3–4 (2021); Fourcade & Healy, *supra* note 121, at 22.

[122]Aaron Sankin, *Want to Find a Misinformed Public? Facebook's Already Done It*, Markup, https://themarkup.org/coronavirus/2020/04/23/want-to-find-a-misinformed-public-facebooks-already-done-it, (Apr. 23, 2020).

[123]Mireille Hildebrandt, *The Issue of Proxies and Choice Architectures: Why EU Law Matters for Recommender Systems*, SocArXiv 15–16 (Oct. 4, 2021), https://osf.io/preprints/socarxiv/45x67/; and in relation to machine learning more generally,

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the more affluent users through profile optimization, reputation management, and purchasable interaction.[124]

Effectively, social media platforms may have distributed attention and recognition perhaps less to oppressed minorities but rather to the same quarters that were already in a position to have ample public outlets for their voice. Yet platforms have also empowered other previously marginalized but at times well-resourced interests of vicious hatred, racism and conspiracy that have come to enjoy extraordinary stickiness in the online public sphere.[125] As platform interfaces do not enable seeing others' information feeds, comparing one's own information delivery to that of others becomes hard, thus directing concern away from others' relative disadvantage and toward the convenience of one's personal service.

D. The DSA and DMA as Internal Market Construction

I. Internal Market Rationality in the DSA and DMA Proposals

After analyzing the emergence of platforms in the internal market and some of its attendant inequalities in the case of social media platforms, I will now delve into the rationale for the new EU laws that are set to target online platforms more specifically than the earlier laws on platforms. My intention is to scrutinize the patterns of (dis)continuity in relation to previous internal market construction. While there is already a somewhat thick corpus of more specific legislation that could also be subsumed under the heading of platform law,[126] I focus here only on the DSA and DMA proposals because of their more horizontal character and relative importance within the Union's agenda. To be sure, much more could be said about the content of these proposals. My aim here is not to provide an all-encompassing analysis of the Articles' myriad contours, which are bound to be amended during the legislative process, but to focus on the animating reasoning running through the proposals. Such reasoning arguably remains more stable as the specificities of legal proposals are agreed upon, perhaps partly precisely because more fundamental rethinking may be expected to require a different legal basis, which, in turn, may be understood to be unavailable.[127]

The DSA is set to update the e-Commerce Directive, and it centers heavily on platforms. Even so, the Commission affirmed that: "This proposed Regulation is without prejudice to the e-Commerce Directive, and builds on the provisions laid down therein, notably on the internal market principle set out in Article 3."[128] Re-imagining internal market foundations was "discarded at an early stage" because "[t]he evaluation of the e-Commerce Directive and all other available evidence shows that the single market principle has been instrumental for the development of digital services in Europe. This principle increased legal certainty and reduced compliance costs significantly, which is crucial for smaller services in particular."[129] Similarly, the Commission affirms that "[t]he liability regime set in the e-Commerce Directive for online intermediaries is considered a cornerstone for allowing online intermediaries to emerge in the 2000s" while also fostering freedom of expression.[130] Under the fundamental rights impact assessment, the

see Mireille Hildebrandt, *Code-Driven Law: Freezing the Future and Scaling the Past*, *in* Is Law Computable?: Critical Perspectives on Law and Artificial Intelligence 67, 73 (Christopher Markou & Simon Deakin eds., 2020).

[124]Fourcade & Johns, *supra* note 111, at 815.

[125]Cohen, *supra* note 3, at 87–88.

[126]*See* legislation and legal proposals in *supra* note 16.

[127]In EU law scholarship, it has been argued that the Union politics is confined to the politics of means, bracketing out struggle on the ends of social action, see generally Marco Dani, *Rehabilitating Social Conflicts in European Public Law*, 18 Eur. L.J. 621, 635–636 (2012); Davies, *supra* note 14, at 2–3; Bartl, *supra* note 10, at 107.

[128]DSA Proposal, *supra* note 2, at 3.

[129]*Impact Assessment accompanying the document 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 Part 1/2*, Eur. Parl. Doc. (COM 825) ¶ 171 (2020) [hereinafter DSA Impact Assessment].

[130]*Id.* ¶ 111.

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Commission hastens to ensure that "[n]one of the measures in either one of the options should jeopardise the protection of trade secrets or proprietary products of online platforms."[131]

Building on these foundations, the DSA seeks to both harmonize "the conditions for innovative cross-border digital services to develop in the Union, *while* maintaining a safe online environment."[132] This twofold aim can only be achieved at the EU level.[133] Indeed, reliance on the mechanisms of mutual recognition and country-of-origin principle tends to summon the specter of fragmentation calling for unification. Thus, the underlying logic of the proposal is neatly aligned with internal market rationality—transnational freedom to provide services combined with public interest regulation to mitigate the societal consequences of such freedom. Undeniably, the emphasis is now on the latter aim. A safe online environment is envisioned to be brought about by fostering "responsible and diligent behavior by providers of intermediary services."[134]

In that regulatory vein, many of the DSA provisions seek to have the online platform firms, especially the largest ones, to internalize online safety standards in their services.[135] For instance, Articles 3–9 aim at careful modification of the tenuous relationship between the liability exemption and platform responsibility for illegal information, slightly in favor of the latter. More structural concerns, now dubbed "systemic risks," particularly concerning illegal information, threats to fundamental rights, and manipulation, should also be taken into account by very large platform operators, as provided for in Articles 26–27 of the proposal.[136] Which specific risks and how they should be taken care of is a task delegated to the corps of corporate bureaucrats, in particular the foreseen compliance officers and independent consultant auditors.[137] Yet as Ioannis Kampourakis has noted of such open-ended requirements, with much interpretative leeway for various professional communities there may be a "substantial space for regulated firms to decide the process by which they might achieve the outcomes sought."[138] Moreover, protective regulation will likely end up being market-making also in the sense of consolidating the downstream markets on content moderation, impact assessments and algorithmic auditing services.[139]

To be sure, public oversight provides a possibility to intervene if firms remain irresponsible and things go awry. On one hand, the proposal again commits itself to maintaining the country-of-origin principle, as changes to "the requirement for the country of establishment to supervise services would inherently undermine the development of digital services in Europe, allowing only the very large players to scale across the single market."[140] On the other hand, the proposal lifts the supervision of very large online platforms away from platforms' host states and centralizes it within the Commission itself.[141]

At the same time, users are thought to need more individual agency *within* platforms. For instance, at a minimum, very large platforms must provide the individual with "at least one option which is not based on profiling" and more control in determining the kind of information one

[131] *Id.* ¶ 259.

[132] DSA Proposal, *supra* note 2, at 6 (emphasis added).

[133] *Id.* at 6.

[134] *Id.*

[135] DSA Proposal, *supra* note 2, arts. 10–24.

[136] For the notion of systemic risk, *see* Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 389–95 (2017).

[137] DSA Proposal, *supra* note 2, arts. 32, 28.

[138] Ioannis Kampourakis, *The Postmodern Legal Ordering of the Economy*, 28 IND. J. GLOBAL LEGAL STUD. 101, 126–27 (2021). Similarly, Johann Laux, Sandra Wachter & Brent Mittelstadt, *Taming the Few: Platform Regulation, Independent Audits, and the Risks of Capture Created by the DMA and DSA*, 43 COMPUT. L. & SEC. REV. 1, 8–9 (2021).

[139] Johann Laux et al., *supra* note 139, at 7–8.

[140] DSA Impact Assessment, *supra* note 130, ¶ 171. On legal representatives of those providers not established in the Union but which offer services in the Union, see also DSA Proposal, *supra* note 2, art. 11.

[141] DSA Proposal, *supra* note 2, arts. 50–66.

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encounters on a platform.[142] In addition, Article 24 entitles them to more information on the delivery of adverts. In sum, the reasoning in the DSA proposal exhibits the perceived need to intensify the interventionist logic largely in the name of public interests, but with some individual empowerment added. Yet the envisioned regulatory framework is largely meant to be imposed *on top of* the various facilitative internal market mechanisms, some of which I have outlined in the previous section. These mechanisms are kept largely intact, demonstrating commitment to the twofold aim of internal market rationality in its entirety.

The DMA proposal foregrounds the aim of undistorted competition in digital services where platforms now dominate, branded here as "gatekeepers" in the area of "core platform services." According to the proposal: "A few large platforms increasingly act as gateways or gatekeepers between business users and end users and enjoy an entrenched and durable position."[143] Consequently, the proposal seeks to create an internal market for digital services "by ensuring that markets across the Union where gatekeepers are present are contestable and fair. This should promote innovation, high quality of digital products and services, fair and competitive prices, and free choice for users in the digital sector."[144] Corporate dominance in itself is not the targeted harm but rather dominant firms' certain business practices, which are seen as unfair. At the same time, the Commission is candid about its wish of seeing new (European) platforms emerge, as the DMA "will foster the emergence of alternative platforms, which could deliver quality innovative products and services at affordable prices."[145]

The DMA proposal consistently stresses that more contestable digital markets and the curtailment of unfair practices would be instrumental in lending individual users more choice in pursuing their personal interests.[146] Recital 32 further notes that the obligations of gatekeepers are needed "to address the risk of harmful effects of unfair practices imposed by gatekeepers, to the benefit of the business environment in the services concerned, to the benefit of users and ultimately to the benefit of society as a whole."[147] The increased individual choice is identified as being in the interest of society.

Both the mandatory obligations of gatekeepers in Article 5, and those whose application is at the Commission's discretion in Article 6, aim at enhancing businesses' ability to offer more choice in the service market and, correspondingly, individuals' ability to choose among the options.[148] As in the DSA, the interventionist regulatory techniques are to be deployed in the DMA proposal as well. The techniques listed in Articles 5 and 6 anticipate deep intervention into the current logics of platform business.[149] For instance, the foreseen interoperability mandate in Article 6(h) of the DMA proposal would potentially burrow deep into the platforms' technical protocols to enable the transfer of data between platforms.[150] Yet in the DMA this is not so much in the name of mitigating social consequences, but rather to further the other aim animating internal market rationality, undistorted competition and individual empowerment. From the competition law perspective such increased emphasis on the "*ex ante* approach" of regulation may amount to considerable innovation,[151] but from the perspective of the internal market, as we have seen, regulation in the name of many different values is nothing new.

[142]DSA Proposal, *supra* note 2, art. 29.
[143]DMA Proposal, *supra* note 2, at 1.
[144]*Id.* at 5.
[145]DSA Impact Assesment, *supra* note 130, at 2.
[146]*See e.g.*, DMA Proposal, *supra* note 2, recitals 2, 36, 37, 38, 41, 46, 50, 54.
[147]DMA Proposal, *supra* note 2, recitals 32.
[148]DMA Proposal, *supra* note 2.
[149]DMA Proposal, *supra* note 2, art. 5, 6.
[150]DMA Proposal, *supra* note 2, art. 6(h).
[151]Marco Cappai & Giuseppe Colangelo, *Taming Digital Gatekeepers: The 'More Regulatory Approach' to Antitrust Law*, 41 Comput. L. & Sec. Rev. 1, 2 (2021).

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II. Distributive Patterns of the DSA and DMA Proposals

I will now pin down the allocative effects of internal market rationality between various actors. First, there is the case that internal market freedoms systematically favor the mobile, that is, those with the means and motivation for transnational activity. Accordingly, the internal market freedoms are structurally biased toward more movable capital,[152] and the nature of the digital economy has enabled capital to become extraordinarily mobile indeed. Second, and more generally, the financial sector is among the recipients of benefits as shareholders in platform firms because the envisioned European alternative platforms would likely rely on the same financial model of patient venture capital as the Silicon Valley firms to scale up and challenge the dominant players.

Having said that, the actors to whom history has accorded the upper hand—the US-based platform behemoths—are the most prepared for undistorted competition in the digital service market. While the preserved internal market entitlements may help small businesses to scale up transnationally, the idealizing luster of European start-up entrepreneurs conceals the fact that through the law's universalizing logic these same entitlements are granted to Meta, Alphabet and Amazon. It may be that the incumbent firms are able to make the most of them.

The states continuing to benefit the most from the internal market mechanisms—investments and tax revenue—are the ones that have a relatively strong digital industry, generally in the European North, or those that have been able to invite the establishment of the US-founded platform behemoths, that is, Ireland and Luxembourg. Those that have less to gain are the Eastern and Southern Member States and their small businesses. Similarly, the country-of-origin principle continues to channel power primarily to the public authorities of host states while disempowering those of others. In addition, open-ended obligations of public interests entrust bureaucracies within the Commission, platform firms, and formally independent consultancies with epistemic authority to interpret and decide the meaning and distributional effects of amelioration and its trade-offs.[153]

This is not to claim that the incumbents' position is set to persist, nor to reject the regulatory measures' destabilizing potential. Regulation targets the largest platform firms the most, and likely evens out certain structural asymmetries peculiar to the digital economy. My point is that there is no equal starting position to which one could fall back to start market competition "anew," but the actors benefiting from historical accumulation do get a head start. Thus, when a framework of formally equal undistorted competition and transnational freedom is imposed on social reality characterized by pervasive inequalities, many distributional patterns are likely to be reproduced. This casts doubt on the delivery of competition's supposedly equalizing effects. For those that lack the possibilities to invest time and resources in starting a platform firm, say in Greece, or that fail to appeal to the whims and expectations of the venture capital market, there is less reason to feel sanguine about entitlements to fair competition against established players.

Finally, among individual social media users, those that likely benefit the most from the increasing agency within and among platforms are still the ones that already benefit from those services the most, that is, the more well-off. Again, my point is not to plainly dismiss the equalizing potential of regulation. For instance, removing illegal information more scrupulously may free up the space for marginalized voices. Similarly, while giving users more individual agency has some merit, it also responsibilizes disadvantaged users to opt out of feedback loops as the more well-off users may continue to enjoy the more rosy effects of targeting. At the same time, the internal market mechanisms help maintain the control over platform configurations within the platform firms and in line with their imperative of user monetization.

[152]Bartl, *supra* note 18, at 583.

[153]*See* Alexander Peukert, *Five Reasons to Be Skeptical about the DSA*, VERFASSUNGSBLOG (Aug., 31, 2021), https://verfassungsblog.de/power-dsa-dma-04/ (criticizing the establishment of "a communication oversight bureaucracy").

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In sum, both the DSA and DMA evince rather than question the animating twofold aim of current internal market rationality. They seek to offer individuals more freedom within and across online platform services. Yet the proposals also aim at mitigating the social externalities of platform businesses. Firms are to internalize the externalities of platform business by incorporating values such as online safety, fundamental rights and fairness into their operations. The goal is to have the platforms permeated with public interests while existing internal market mechanisms are preserved. While containing many novel regulatory devices with the potential to alleviate some inequalities, the proposals nevertheless risk reproducing and legitimizing many distributional patterns and power relations within the digital economy and the online public sphere. They are primarily instances of what Roberto Unger has called "progressive pessimistic reformism" as "the pursuit of programmatic goals, such as more economic competition or greater equality of practical opportunity and cultural voice, within the limits imposed by the established institutional order."[154]

E. Conclusion

This article has explored various patterns of continuation and change in how the EU attempts to govern social media platforms in particular as a part of internal market construction. I argued that the construction of the EU internal market is generally informed by a twofold aim. On the one hand, the goal is to ensure that individuals and other private actors may pursue a life that one sees as fitting across borders under the conditions of undistorted competition. On the other hand, the internal market also affords concern for the societal harms of private behavior through the imposition of mitigating regulation informed by public and private expertise. I then explored how specific mechanisms of internal market construction have participated in the emergence of social media platform power, and its attendant inequalities in Europe.

After mapping the internal market construction prior to the Union's recent platform law agenda, I turned to examine the rationale for the DSA and DMA proposals, arguably the EU's most important pieces of upcoming platform law. I argued that despite numerous regulatory innovations with potentially equalizing distributional effects, the proposals remain committed to both the twofold aim of current internal market rationality and many of the already existing mechanisms of the internal market. Therefore, from the perspective of internal market construction, these platform law proposals evince at least as much continuation and consolidation as they do change. Accordingly, they also risk reproducing various unequal distributional patterns and power relations in Europe.

My hope is that the analysis has conveyed the suggestion that counter-conducting projects aiming to resist platform power and harms in Europe should rethink and disrupt the existing aims and mechanisms of the current internal market rationality. This should extend even to the point of asking whether the current aims are "*the values we should have, in view of everything that we know about the world*."[155] While it is important to continue exploring and experimenting with regulatory techniques that could "tame the giants," there should also be room for more intensified questioning so that the existing internal market mechanisms as informed by the current internal market rationality, which have helped the current platforms rise in the first place, would be brought under serious scrutiny and re-imagination as well. To be frank, this kind of re-imagination should begin by sidetracking, at least to some extent, consumer choice and competition within or across platforms as its orienting virtues, taking the various unequal distributional patterns and socially embedded subject as its points of departure instead.

[154]Unger, *supra* note 11, at 18.

[155]Martti Koskenniemi, Professor Int'l L., Univ. Helsinki, *21st Annual Grotius Lecture: Enchanted by the Tools? An Enlightenment Perspective*, 35 Am. Univ. Int'l L. Rev. 397, 422 (Mar. 27, 2019) (emphasis added).

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Such re-imagination might also help drive and shape the emergence of radically different platforms for Europe.

Profound social change is possible in a piecemeal way if the direction of change persists.[156] One could re-frame many current efforts of resistance as intermediate episodic changes toward deeper social transformation. For instance, the attempts at platform interoperability, digital tax,[157] and changes to corporate law[158] could all be re-framed as intermediate steps toward a profound alternative vision of the digital economy. Nevertheless, envisioning such alternatives would likely also require extending the horizon of imagination beyond the currently dominant aims of transnational individual freedom and market competition.

[156]Unger, *supra* note 11, at 14.

[157]European Commission, *Fair Taxation of the Digital Economy*, COMMISSION (last visited Mar. 29, 2022), https://ec.europa.eu/taxation_customs/fair-taxation-digital-economy_en.

[158]*Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, COM (2022) 71 final (Feb. 23, 2022).

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