Platform Regulation and the Protection of Fundamental Rights

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Abstract: *The emergence and spread of online platforms have had a disruptive effect on society, bringing about significant changes in many social subsystems. Although the social impact of online platforms can be examined from a wide variety of perspectives and disciplinary viewpoints, the focal point of this paper is their impact on democracy and fundamental rights from a constitutional law perspective. Due to the specificity of operating models, online platforms have a disruptive effect on the exercise of fundamental rights and on democratic publicity and procedures. Hence, for years, the academic discourse has been advocating the imposition of public interest obligations on service providers, in order to protect the fundamental rights of users and preserve the integrity of democratic processes. The protection of fundamental rights is traditionally conceived as a constitutional safeguard against state repression (infringement): it compels the state to respect rights (in some cases, to ensure the enforcement of rights) and/or provides people the individual right to enforce their fundamental rights if need be. However, there are increasingly strong and convincing arguments suggesting that fundamental rights require protection not only against the state but also in private relations (horizontal effect). Such voices are only reinforced by the restrictive power of online platforms.*

Key words: *platform regulation; fundamental rights; protection of constitutional rights with horizontal effect; vaccine law; Digital Services Act.*

1. A preliminary issue concerning methodology: theoretical considerations for the regulation of online platforms

Law, a key normative instrument for regulating social coexistence, does not exist in a vacuum. On the contrary, social reality and the resulting social needs influence the content of the "current law". If law does not reflect social reality, follow (preferably without delay) changes in society, and adapt to changes in social values and technological innovations, it will become dysfunctional: either due to the unwillingness of the majority of the addressees to abide by the law (this results in the lack of voluntary compliance, a basic requirement for the law to be effective), or due to a significant damage caused by unregulated technology to individuals or the community at the societal level. The methodological dilemma described by David Collingridge (Collingridge 1980) is

significant in relation to the struggles of effectively regulating technological innovation. This dilemma outlines that (mainly legislative) efforts to influence or control the direction of technological development are often confronted with a double difficulty. On the one hand, the effects of innovative technology are not easy to predict until the technology is extensively developed and widely used (information problem). On the other hand, it is rather difficult to change the operation of unregulated technology or technology under inadequate (outdated) rules by regulation when it is already widely entrenched in society (power problem). That is, early regulation can stifle innovative technological solutions that could positively influence society (chilling effect), while a belated regulation can deprive the legislature of the opportunity to control the given technology (Croy 1996). Both negative outcomes can cause significant societal damage, which may lead to a setback in economic growth, competitiveness, and the well-being of individuals, and may even limit the exercise of fundamental rights. In a society driven by technological innovation or – with a term coined by MIT researcher Gary T. Marx – "engineering society", the ethics of rationalisation becomes dominant as a sort of ethos, manifesting itself in the application of innovative means to ends (Marx 2015, 117–124). In this sense, the fetishisation of goal-orientation implements the principle "the end justifies the means", but also carries the hidden danger that the use of the wrong (possibly dangerous) means to achieve the right ends may entail negative consequences. Therefore, state regulation must be developed with a good sense of timing and with an effort to promote public interest.

The emergence of online platforms fits well into this process. The boom in social media platform services[1] has led to extraordinary changes in the structure of social publicity. Although partly technological in nature, these changes often do not stop at the level of technological consequences, but also erode some of the pillars of society's "good old morals". Let us consider just one example: the spread of viral but time and again false content on social media is sometimes not an attempt to cause damage to our wallets or bank accounts, but an endeavour to influence democratic processes in order to promote certain political, power, and economic interests. Legal action against fake news and disinformation [Action Plan against Disinformation, Brussels, 5.12.2018, JOIN (2018) 36 final] seems undoubtedly indispensable. Nonetheless, it is difficult to reconcile such action with the centuries-old constitutional understanding of the fundamental right to freedom of expression, and with the rationales for the constitutional protection (recognised and invoked by constitutional courts) – in fact, it directly conflicts the theory that the truth will emerge from a "marketplace of ideas" first expounded by John Milton in his Areopagitica (Milton, 1644) and later attributed to John Stuart Mill (Mill, 1859). An equally significant problem concerning fundamental rights is the fact that platform providers carry out their content management activities without any constitu-

[1] Although online platforms cover a much broader range of services, for the purposes of this study we will only discuss social media platforms. Accordingly, where we refer to online platforms, we will refer to social media platforms unless otherwise indicated.

tional support (or even in the lack of any normative rules, for that matter), in violation of the fundamental rights of their users.

This paper attempts to briefly illustrate the impact that the changes caused by platforms in the publicity structure have on the doctrine of fundamental rights and on the conditions for the enforceability of such rights. In doing so, it shall present a new example of fundamental rights protection through the instruments of platform regulation.

In this paper, I shall briefly describe the characteristics of fundamental rights protection with horizontal effect, the features of platform regulation (as a "vaccine law"), and the way they are implemented in the new EU regulation, the Digital Services Act forming the general part of the platform regulation.

2. The renewal of the traditional doctrine of fundamental rights protection

Certain centuries-old axioms of constitutional thought cannot be eroded by time, social or even technological progress. Considering the protection of fundamental rights as an example, although the number of rights has increased and the content of recognised rights has been enriched, the general doctrine of the protection of fundamental rights is changing (evolving) only very slowly, characterised by a slow evolution rather than a revolution, linked inextricably to constitutional traditions. Another traditional characteristic of fundamental rights protection is (or was) that the legal relationship concerning such rights has historically been construed as vertical: between the state exercising public power and the individual exposed to that power, where the individual is in need of protection against the state's authority. Therefore, fundamental rights – understood in the context of the relationship between the state and the individual – impose public-law constraints on the power of the state in the form of safeguards to protect the freedom and autonomy of the individual, and also provide grounds for claims for certain public services (Sári and Somody 2008, 33).

Both in general (principles, standards, etc. of limitation of fundamental rights) and in relation to individual fundamental rights, the doctrine of fundamental rights has been shaped by centuries of tradition in national constitutional systems. This tradition of constitutional law permeates international human rights mechanisms, as well as the Charter of Fundamental Rights, which is based on the common European constitutional values of the Member States [Charter of Fundamental Rights of the European Union (2016/C 202/02)]. Freedom of expression (as a parent right) and the high constitutional value and protection of fundamental rights that belong in the field of communication rights – such as freedom of speech and freedom of the press – are also deeply rooted in the constitutional tradition (Udvary 2008). Technological evolution (sometimes revolution), however, has led legal regulation and application to rethink and renew old rules and to

adapt them to the new social environment.[2] In their own time, the impact of the Gutenberg and Marconi galaxies on social public sphere was no less important than the power of the new media to "disrupt" social discourse.

The guiding idea of the discursive-deliberative democracy theory is that open, free and wide-ranging social debate (i.e., the functioning of democratic discourse) is an indispensable precondition for democratic processes. Given the available technology, the new media age[3] promised and in many respects delivered the possibility of a more pluralistic public sphere than ever before. At the same time, the public sphere of new media carries patterns of traditional public spheres in many respects, which, despite their ostensible unrestrained nature, result in an overly narrow space. A specific feature of platform technology, this phenomenon includes both the promise of unlimited space and the reality of scarcity. As a result of their private norm-building and private norm enforcement, social media platforms – the most significant players in the public sphere of new media – have an extraordinary impact not only on individual fundamental rights, that is, on the subjective side of freedom of expression, but also on the objective, collective side of the parent right: the development of public debate and the composition of democratic discourse, without having to account for the enforcement of the constitutional requirements of fundamental rights limitation. Hence, the thinkers with work related to fundamental rights formulated a claim for the protection of such rights – particularly freedom of expression – also as a public-interest constraint imposed on the activities of platforms as private legal entities.[4] The mechanism for the protection of fundamental rights enshrined by the Digital Services Act is one of the first legislative outputs that attempts to adequately address this challenge, covering the protection of the fundamental rights of EU citizens.

Despite the common standards identified in many respects, a number of obstacles stand in the way of developing a single European system of fundamental rights protection. Among the factors working against unification, we find – among others – the principle of subsidiarity, a key factor in the functioning of the European Union, as well as the presence of national sovereignty in the development of constitutional rules and the legitimate need of Member States to preserve their constitutional identity. Although there are strong arguments in favour of preserving the constitutional sovereignty and identity of the Member States, the need for certain unifying tendencies cannot be

[2] On the theoretical issues of the impact of technology on media publicity, see Udvary 2007, 197–215.

[3] There are several terms used to describe the public space for the storage, transmission and organisation of different content by platform providers, and there is no uniformly accepted terminology in the international or national literature. For my part, I will use the term new media, although the use of the term needs clarification at several points (Koltay 2019 and Klein 2020).

[4] On this in Hungarian literature see: Koltay 2019, Török 2022, 195–207, Papp 2022, Gosztonyi 2022, Klein 2020, Papp 2024, and Szikora 2024.

disputed. “Founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”, the European Union necessarily includes a degree of unity of fundamental rights, based on the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (ECHR), as well as on the case-law of the Court of Justice of the European Union and the European Court of Human Rights. The Charter of Fundamental Rights provides the legal binding force of the ECHR [Article 52(3) of the Charter of Fundamental Rights of the European Union.].

However, the technological developments analysed above do not have the same impact on each of the fundamental rights. Some are affected more intensively, including freedom of expression (see Török 2018) and freedom of the press (see Koltay 2019 and Klein 2020). In this paper, I shall attempt to present the way the Digital Services Regulation affects the exercise and enforceability of fundamental rights on digital platforms, with particular regard to the fact that the text of the Regulation, applicable from 17 February 2024, lays down rules for the protection of fundamental rights in private law relationships between service providers and users.

3. Specificities of fundamental rights protection in private law relationships

A most recent development in constitutional law thought is the need for private law actors – particularly multinational corporations – to have a legally (internationally) enforceable obligation to respect and ensure human rights is. In their contractual relations, private actors with impressive economic power have now acquired an overriding authority whose effects often exceed the potential infringing ability of states in terms of fundamental rights. Companies, which dominate asymmetric legal relations and pursue a business logic in their market activities, are acting in accordance with their economic interests in relation to the fundamental rights of individuals (typically their consumers). They often claim to be socially responsible, while, as a result of cost-benefit analysis, actually restricting fundamental rights. This practice is particularly widespread in the platform economy. Restrictions on fundamental rights are therefore often a direct consequence of the economic patterns of the business model, which operators are rarely prepared to go against voluntarily, without being legally bound to do so. It is therefore the law that must create and enforce the means of protecting individual rights.

However, corporations should be – at least secondary – subjects of international law for it to impose binding normative and enforceable provisions on them. This recognition is nevertheless not expected in the near future. The impact of non-binding standards and recommendations, on the other hand, may have very little effect, since they are not incorporated into international law and – in a worst-case scenario – may even have the effect of creating the appearance of frivolity, dysfunctionally impeding the achievement of the primary objectives.

At the same time, alongside the ambitious but moderately realistic hope of a single international legal regulation, there is great potential for action by strong states or

confederations of states, if they share the same values in terms of human rights protection. Being a strong state, the United States of America may take effective action can through its the judicial system in, but the European Union could also develop an effective rights protection mechanism. Reflecting specific European values, the DSA holds out the prospect of achieving that goal.

As pointed out in the introductory reflections, historically – in the fundamental rights catalogues of the first written constitutions – the protection of fundamental rights was formulated against the state as the power holding public authority with the potential – according to (historical) experience – to suppress the freedom of the individual. If we recall the ideological and historical antecedents of fundamental rights, we also see a system of relations between the public authority and the individual, where divine right or (social) contract limits the public authority in order to protect the rights and freedom of the individual. The famous legal declarations of constitutional history were also intended to limit the power of the state, in varying degrees and within varying scopes. For more than two centuries of constitutional history, the effect of the protection of fundamental rights has been almost exclusively vertical, understood in the vertical, public law relationship between the individual and the state, declaring the rights of the individual and providing constitutional safeguards against the state a dominant power with the potential to infringe the fundamental rights of the individual. The vertical protection of fundamental rights thus follows from the historically developed, classical power-limiting function of fundamental rights, as one of the main functions of liberal constitutions was to protect the rights of the individual against the state possessing public power. It therefore is (or was) not obvious that these rights could be extended to horizontal private law relationships between private individuals based on the principle of mutual equality.

In recent decades, however, an increasingly clear demand emerged in societies and became accepted in constitutional law that fundamental rights should not only be interpreted in the vertical, public law relationship between the individual and the state with public power but should also be applied horizontally in private law relationships. However, despite the increasingly intense academic debate,[5] the broad recognition of the horizontal effect of fundamental rights remains a divisive academic issue. Although constitutional courts[6] are increasingly recognising the protection of fundamental rights in private law relationships, the doctrinal foundations of horizontal protection of fundamental rights and the standards for the protection of individual fundamental rights are not nearly as well developed as the centuries-old constitutional system of requirements for vertical protection of such rights in the context of relationships between the individual and the state.

[5] From Hungarian literature see: Gárdos-Orosz 2010a, Gárdos-Orosz 2010b, Bedő 2018, and Gárdos-Orosz and Bedő 2018.

[6] The Hungarian Constitutional Court's practice is the first to mention: Decision 8/2014 (III. 20.) AB, ABH 2014. 174.

In terms of constitutional theory, the protection of fundamental rights asserted – or, perhaps more accurately, enforced – in private law relationships, originates in the state's obligation to protect the rights of the individual. In addition to the obligation to respect such rights, this also includes an active obligation of the state: a constitutional obligation to ensure the conditions guaranteeing the exercise of fundamental rights, identified by the Constitutional Court of Hungary as an active obligation to protect institutions. The institutional protection of fundamental rights may be ensured by the state in several different ways and means.

Nonetheless, a regulatory solution enshrining that a fundamental right is binding not only on the state but also on private parties cannot be automatic, but it requires constitutional justification in all cases. A possible constitutional justification is that the given private legal entity is so closely linked to the public authority that its actions can be interpreted as actions of the state. This, inter alia, is exemplified by the *state action doctrine* developed by the US Supreme Court, which provides that the constitution is directly applicable only if it can be established that the violation of a fundamental right is attributable to a public body or that the action of a private individual is the result of a decision, action or obligation of the state.[7] The European constitutional systems also recognise the (horizontal) obligation to respect fundamental rights in private law relationships. And even though in Europe it is recognised only in exceptional cases, such approach has a more profound influence on private law relationships than the constitutional understanding based on the state action doctrine in the US. Known as the third-party effect[8] (Drittwirkung in the German constitutional court's terminology),[9] the application of fundamental rights in private law relationships and their impact on the

[7] The American concept of the state action doctrine is in fact a very narrow definition of fundamental rights-based interference in private law relations. The starting point of the state action doctrine is to distinguish between state interventions prohibited by the constitution and private interventions that are not prohibited, since according to the classical US constitutional conception, individual rights guaranteed by the constitution provide protection only against state interventions (primarily through legislation), since constitutional rules contain limits on state power. Thus, the question to be considered in the context of an individual's wrongful conduct is whether the non-state actor is performing a public function or serving the community (public function), cf. Evans v. Newton, 382 U.S. 296 (1966).
In the US, only the 13th Amendment (prohibiting slavery) is interpreted to apply unconditionally to private individuals.
While it is not excluded that the activity of a private individual, which is not related to the exercise of public authority by the state, may explicitly infringe the rights of another(s), in such cases the courts will judge the unlawful conduct in accordance with the rules of the relevant jurisdiction (e.g. criminal law, civil law).

[8] Third-party effect means that, in addition to the rightful individual (the holder of the fundamental right) and the obligated state, a third party is also affected by the protection of the fundamental right, and his or her rights and obligations (legal situation) are also affected by the fundamental rights relationship.

[9] Lüth case, see. BVerfGE 7, 198 (1958).

content of such relationship is achieved through the intervention of the state as the primary duty-bearer.

In the theory of fundamental rights, the two types of horizontal protection are the model with direct horizontal effect and the model with indirect horizontal effect. As the primary duty-bearer in terms of the protection of fundamental rights, the state is obliged to ensure that these rights are recognised, respected, and enforced. And, as pointed out above, the state must also guarantee enforcement against infringements by non-state actors. The state may fulfil this constitutional obligation by creating either direct or indirect legal instruments, as well as by means of extra-legal instruments, which may be complemented by certain soft law instruments or policy strategies (Chronowski 2022, 38-39). In European constitutional thought, the use of indirect legal instruments is the most widely accepted method: the state fulfils its obligation by developing sectoral or cross-sectoral regulation to ensure that the constitutional values providing a frame for the protection of fundamental rights permeate the legal system as a whole.

The widely accepted constitutional concept in Europe is therefore the doctrine of indirect horizontal effect. According to this approach, the norms enshrining fundamental rights not only oblige the state not to interfere (to respect rights), but also set out an objective structure of constitutional values, which must permeate the legal system as a whole and be enforced throughout it. All legal provisions are to be consistent with this objective system of values and interpreted accordingly when applied. This constitutional system of values is mediated primarily by legal acts, represented by the general clauses laid down in the codes of various branches of law, since the fundamental constitutional norms cannot be applied directly in private law disputes but can only be invoked as an aid to interpretation in the course of dispute resolution. The constitutionally underpinned general clauses laid down in the codes of the relevant branches are to be considered by the courts in their judgments, and courts must interpret the legal provisions in accordance with the (fundamental rights) values set out in the constitutional norms.

In addition to the theory of indirect horizontal effect, another approach is the direct application of fundamental rights protection in private law relationships. Nonetheless, the acceptance of the latter concept can so far be considered an exceptional view even in the literature. According to the latter approach, an individual can base his legal claim in a private law dispute directly on the provision enshrining the fundamental right. That is, he could take legal action by derogating from or disregarding the relevant private law provision.[10] This is precisely where the horizontal protection of fundamental rights with direct effect would be the most controversial, since it would transform private law

[10] However, the direct horizontal scope is not an unprecedented constitutional solution, since the Irish Constitution provides protection against the activities of private individuals that violate fundamental rights, so that a person whose fundamental rights have been violated can base his or her action directly on the constitutional norm.

disputes into fundamental rights disputes and would empty the normative content of the relevant code.

However, given their specific nature, there are still some fundamental rights which are (partially) directly protected in private law relationships. These include the right to equal treatment and the right to the protection of personal data, which has recently become a model in the European data protection regime through the provisions of the GDPR.

While there are constitutional standards for the protection of fundamental rights with horizontal effect, the extent to which they are enforced largely depends on the willingness or ability of ordinary courts to enforce them on a case-to-case basis.

The constitutional basis of the ordinary courts' fundamental rights adjudication – or, to put it more modestly, the case-law of the ordinary courts that consider to the protection of fundamental rights – is laid down in Article 28 of the Fundamental Law of Hungary, according to which "[in the application of the law,] courts shall interpret the text of legislation primarily in accordance with its purpose and the Fundamental Law."[11] The Constitutional Court of Hungary also clearly accepts the indirect effect: "The debate as to whether fundamental rights [...] have an effect on private law is nowadays only about how the constitutional law has an effect on private law. In other words, the methods and intensity of the impact are the subject of debate. Under the doctrine of indirect effect, however, civil relations remain civil even after the constitutional law has been enforced. The rights enshrined in the Constitutional Law can filter into the private legal system through the general rules of private law."[12]

Although the framework for the enforcement of fundamental rights in private law relationships has been developed in national constitutional systems, recently a qualitatively new form has clearly emerged in terms of the infringement of fundamental rights in private law relationships, linked almost exclusively to violations by multinational, global corporations. In these cases, the system national constitutional safeguards, and the legislative and enforcement activities of the states provide very limited possibilities for effective remedies,[13] as jurisdictional limits and the problem of extraterritoriality restrict the scope of national judicial protection of fundamental rights.

[11] Article 28 of the Fundamental Law of Hungary

[12] Decision 8/2014 (20.III.) AB, ABH 2014. 174. 185.

[13] For a long time, the redress rules of online platforms and the practices based on them resembled Schrödinger's cat, where one could only think along the lines of a theoretical thought experiment about whether or not redress would achieve its goal, or whether the cat of redress was alive or long dead. And, in fact, the parallel is valid even with regard to the absurdity that the living or dead state of the remedy cat depended on whether one observed this state. On the remedial practices of online platforms, especially Facebook, see: Szikora 2022 or, reflecting on the DSA in the more recent literature: Gyetván 2023.

4. Specificities of platform law as a distinct area of law / Characteristics of platform regulation and its impact on the protection of fundamental rights

4.1. Do the rules on platform rights form a separate area of law?

It is open to debate whether the plural, eclectic set of rules of platform regulation forms a distinct, cross-jurisdictional area of law with its own internal regulatory logic (Szilágyi 2003, 323), which can be coined platform law. The question is answered in the affirmative with convincing arguments in Zsolt Ződi's excellent monograph on platform law. To justify the existence of a distinct platform law, it is necessary to identify specific characteristics that distinguish it from other fields of law. The *principium divisionis* (i.e., specific and homogeneous regulatory subject-matter and method) is often artificial, especially in the case of border areas, or at least – as Tamás Sárközy (Sárközy 1979)[14] and András Jakab (Jakab 2005 and Jakab 2007) argue – over-estimated, subjective and relative in the absence of precise criteria (Tóth J. 2019, 25). Its theoretical foundation is doubtful (Szabó 2006, 112), and it may change as a result of social changes (as new branches of law may be created, others may cease to exist) (Szigeti 2011, 138-139), yet its stakes are high in general and in the case of platform law, also in particular. As Ződi points out, many of the institutions of user protection are not governed by the DSA (which forms the general part of platform law), but by in a set of sectoral rules. As judges are obliged to make a clear decision, in the cases where ex post liability issues arise, it is particularly important whether the liability issue concerned "falls within the scope of sui generis platform law" or is to be considered to fall under liability rules established by other branches of law. (Ződi 2023, 209). In my view (and this is in line with Zsolt Ződi's use of the term), the plural, complex sets of rules (the set of general and sectoral rules) of platform regulation can be considered a separate area of law, with distinguishing characteristic features. At the same time, I do not believe that its character as an independent field of law can be justified, due to the fragmented nature of its regulatory subject matter and the plurality of its regulatory methods. However, given that the theoretical issues of the legal separation are highly contingent, and the classification of the various legal sectors is open to debate, arguments can be made against the separation of legal sectors and in favour of homogeneity.

4.2. The specificities of platform law – "lawyers' law" v. "vaccine law"

Platform law – which is a distinct area of law, as I have indicated above – has characteristics that are not only specific to platform law, but also to the law of modern technologies in a broader sense.[15] These characteristics are the following: the dominance of

[14] Tamás Sárközy is responsible for the theory of basic branches of law and secondary (or intersecting) branches of law, see Sárközy 1979.

[15] In this context, I think it is important to note that I consider the unified legal field character of modern technology law (e.g. by calling it "technology law") less justifiable than platform law. The regulation of modern technologies operates with such a variety of regulatory solutions and, in the wake of technology-driven societal changes, includes potential, ad hoc and heterogeneous

risk-preventive (risk-mitigating), precautionary ex ante rules, the dominance of self- and co-regulation (partial outsourcing of norm-making to the regulated), and the prevalence of technology regulation and regulation by technology. These three characteristics (particularly the ex ante rules) mean that platform regulation has a compliance nature, a preventive goal, and it is largely formed by non-decisional provisions, that is, it is not a "lawyers' law" (to use a term coined by Ződi) in the classical sense. In several of my previous works I have coined the term "vaccine law" for preventive regulations that have a mostly invisible mechanism of action, aimed at preventing trouble, and, thus, acting like a vaccine used to prevent disease or epidemics. The difference in the characteristics of regulation is already conceptualised in the international literature by distinguishing between the terms "law" and "regulation".

Platform law therefore contains ex ante provisions to prevent future harm, enforcing the *precautionary principle*.[16] In general, the precautionary principle first appeared in the regulation of situations involving significant risk and threat of harm as a consequence of crises with devastating social consequences. In a paradigmatic sense, it was applied only later, in the licensing of medicines and in environmental regulation (Ződi 2023, 210). In the past, high-risk activities and the damage they caused were also governed by traditional "lawyers' law", as in the case of the strict liability rules that emerged in relation to industrial production. The provisions on strict liability prescribed stricter rules of exemption in tortious liability than those on general liability. Such provisions did not impose preventive obligations on the user of the risky technology (the operator under strict liability), even though its message for the operator was to "take caution when carrying out activities involving a high risk, since if damage occurs he shall be exempted from compensation only if he can prove that the damage was caused by an external circumstance."

In simple terms, self- and co-regulatory obligations mean that the legislator outsources part of the regulation to the private sector, that is, the platform providers. These "by design" rules seem to be the opposite of ex ante rules, since while the latter increasingly tie the hands of the recipients, the technique of outsourcing regulation ensures that they have as much individualised regulatory leeway as possible. The contradiction is,

solutions of dubious durability to legal development that it does not constitute a single legal field.

[16] A certain proliferation of rules based on the precautionary principle is often a response to moral panics generated by fears of unknown technologies. Cass R. Sunstein (Sunstein 2005) warns of the dangers of fear rules, which often use legal-bureaucratic instruments to restrict innovation based on irrational fears: In his book, Sunstein explains that although the precautionary principle takes many forms, they all share the basic idea that the legislator (regulator) must be able to prevent potential harm from occurring, even if the causal chain is not clear or if we cannot be sure that harm will occur. The emerging legislation on artificial intelligence in Europe is a good example of this, which has been burdened with an increasing number of debatable fear clauses in the legislative process.

however, is but ostensible, since ex ante rules are generally procedural in nature, containing formal and procedural provisions, filled with content by substantive rules developed in the course of self- and co-regulation.

Another feature of platform regulation is the collaboration between technology and regulation, which is closely linked to ex ante regulation and the risk prevention principle, as certain risks can be more easily addressed by technology than by mere legal prohibition, using pre-programmed, parameterised (modelled) tools. In the process of regulation by technology, the (legal) norm (rule) is transformed into a certain technology (e.g., an algorithmic command, or a code, i.e., the legal language is transformed into a programming language) which, according to the purpose of the rule, prevents (or minimises within a statistical margin of error) the occurrence of the harm to be avoided, the potential violation of the rule. In the case of the direct regulation of technology, the law is obliged to develop and operate technology (procedures, measures, mechanisms) that guarantee the achievement of certain objectives through a specific technological specification. In fact, the collaboration of regulation and technology is achieved through algorithmic coordination of the operation of platforms, that is, the law uses algorithmic means to limit platform power and the algorithmic coordination on which it is based.

The fourth sui generis feature of the new area of law, which, in Ződi's view, is unique to platform law, is user protection, standing for both the justification and the purpose of platform law. The system of rules for user protection was born out of the realisation that the law is not prepared for and therefore has no means of dealing with the power of impersonal algorithms that violates users' rights. Inspired by the regulatory logic of consumer and investor protection law, Ződi identifies five typical instruments of user protection:[17] protection against illegal content, mandatory elements of user contracts, protection of digital identity and freedom of expression, transparency of algorithm coordination mechanisms, and specific complaint handling and dispute resolution procedures. These specific platform law rules respond to the specificities of the platforms, are different from traditional legal solutions, did not exist before – at least not in the same form –, and provide the framework for a separate area of law.

5. Platform law as a new special instrument for the protection of fundamental rights

In addition to the four characteristics of platform law as a distinct area of law identified by Ződi, I would like to mention a fifth feature. Even though it does not fall far

[17] The rules on user protection use and adapt the tools of several specific areas of law to achieve their own objectives. Among the rules of user protection, some instruments of consumer protection and investor protection can be clearly identified, but in addition, in my view, the rules have been significantly influenced by the doctrine of fundamental rights protection. The latter will, in my view, have a far-reaching impact on the instruments of user protection, on the enforceability of user rights, on the way in which interests are weighed up, but will also have a substantial impact on the traditional structure of fundamental rights protection as known in constitutional law.

from the issue of user protection, this last feature deserves special mention due to its primary importance. The broad enforcement of fundamental rights in private law relations (protection of fundamental rights with horizontal effect) is an actual constitutional novelty, appearing in general for the first time in the DSA (the general part of platform law).

Indeed, historically – in the fundamental rights catalogues of the first written constitutions – the protection of fundamental rights was formulated against the state as the power holding public authority with the potential – according to (historical) experience – to suppress the freedom of the individual. If we recall the ideological and historical antecedents of fundamental rights, we also see a system of relations between the public authority and the individual, where divine right or (social) contract limits the public authority in order to protect the rights and freedom of the individual. The famous legal declarations of constitutional history were also intended to limit the power of the state, in varying degrees and within varying scopes. For more than two centuries of constitutional history, the effect of the protection of fundamental rights has been almost exclusively vertical, understood in the vertical, public law relationship between the individual and the state, declaring the rights of the individual and providing constitutional safeguards against the state a dominant power with the potential to infringe the fundamental rights of the individual. The vertical protection of fundamental rights thus follows from the historically developed, classical power-limiting function of fundamental rights, as one of the main functions of liberal constitutions was to protect the rights of the individual against the state possessing public power. It therefore is (or was) not obvious that these rights could be extended to horizontal private law relationships between private individuals based on the principle of mutual equality.

In recent decades, however, an increasingly clear demand emerged in societies and became accepted in constitutional law that fundamental rights should not only be interpreted in the vertical, public law relationship between the individual and the state with public power but should also be applied horizontally in private law relationships. However, despite the increasingly intense academic debate,[18] the broad recognition of the horizontal effect of fundamental rights remains a divisive academic issue. Although constitutional courts[19] are increasingly recognising the protection of fundamental rights in private law relationships, the doctrinal foundations of horizontal protection of fundamental rights and the standards for the protection of individual fundamental rights are not nearly as well developed as the centuries-old constitutional system of requirements for vertical protection of such rights in the context of relationships between the individual and the state.

[18] From Hungarian literature see: Gárdos-Orosz 2010a, Gárdos-Orosz 2010b, Bedő 2018, Gárdos-Orosz and Bedő 2018 and Török 2021.

[19] The Hungarian Constitutional Court's practice is the first to mention: decision 8/2014 (III. 20.) AB, ABH 2014. 174.

However, some fundamental rights are still (partially) directly protected in private law relations, given their specific nature. These include the right to equal treatment, which dates back several decades, and, more recently, the right to the protection of personal data in the European data protection regime, through the provisions of the GDPR. The novelty of the GDPR was that it applied the fundamental rights instruments in private law relationships between data controller and data subject not as an exception but as a general rule in relation to a specific fundamental right, the right to the protection of personal data. At the same time, the horizontal scope of fundamental rights protection was *lex specialis*, since it applied to only one fundamental right, the right to the protection of personal data.

The fundamental rights protection mechanism of the DSA – understood as the general part of platform law – can be considered a paradigm-shifting novelty, because within the framework of platform law, fundamental rights protection becomes a general legal protection mechanism in the private law relationship between platforms and users. The rationale for this new form of fundamental rights protection is not difficult to find in the asymmetric legal relationship between the platform provider, who holds the platform rights, and the user (who is in many ways in a vulnerable position). This specific legal protection goes far beyond consumer or investor protection instruments, since it takes a more explicitly fundamental rights approach, which, in addition to creating a subjective right for the user, also creates certain institutional protection instruments.

At several points and not only in a formal way, the DSA refers to the Charter of Fundamental Rights of the European Union [Charter of Fundamental Rights of the European Union (2016/C 202/02).] and the fundamental rights enshrined therein, thus laying the normative foundations for a specific new mechanism for the protection of fundamental rights. Although the fact that the term "fundamental right" is used a total of 43 times in the text is a quantitative indicator that is not even close to be suitable for qualitative conclusions, it is still an indication of the DSA's commitment to fundamental rights. The DSA thus treats the regulatory challenges of online platforms as a fundamental rights issue with clear openness, and its regulatory approach also refers to the protection of fundamental rights as the main objective of internal market regulation: "the aim of this Regulation is to contribute to the proper functioning of the internal market for intermediary services by setting harmonised rules for a safe, predictable and reliable online environment that facilitates innovation and in which fundamental rights enshrined in the Charter […] are effectively protected." [DSA Article 1(1).] The DSA, in addition to regulating the functioning of the market as reflected in its title, has a strong focus on the protection of the fundamental rights enshrined in the Charter.

Also, in the general clause on fundamental rights [DSA Article 14.] and in the risk mitigation measures for giant platforms, the DSA contains provisions that can be interpreted as a fundamental rights test for the fundamental rights of private parties. The intermediary provider may only impose objective and proportionate restrictions on freedom of expression when determining the contractual terms and conditions as part of its

duty of diligence, which can also be interpreted as a fundamental rights test applying a necessity–proportionality test.[20]

Giant platforms should use reasonable, proportionate, and effective solutions as part of their risk mitigation measures, taking into account the impact of the solutions adopted on fundamental rights. This provision, like the general clause, can also be understood as a proportionality test for a fundamental rights restriction, allowing for a proportionate restriction of rights only where it is necessary and effective, that is, capable of achieving the desired objective.[21]

Where the Charter of Fundamental Rights is applied in the balancing of fundamental rights required by the DSA,[22] the test under Article 52(1) of the Charter must also be taken into account: any limitation of rights must be provided for by law and respect the essence of such rights, subject to the principle of proportionality (limitations of fundamental rights may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others) [Article 52 (1) of the Charter].[23]

The proportionality test applied in relation to the fundamental rights thus creates the possibility of balancing such rights, where the fundamental rights of the recipient of the service are weighed against the fundamental rights of third parties (e.g. the right to reputation, the right to privacy, etc.) and the specific interests of the service providers. It will also be up to the courts to determine whether certain fundamental rights can be limited, and to establish the standards to be applied in resolving conflicts of fundamental rights.

It should be noted, however, that the DSA's general rule and its test of fundamental rights balancing constitute a general, minimum test of limitation of rights, which may be supplemented by stricter standards for certain fundamental rights entitled to special protection. As to the freedom of expression, which is also protected at a higher level with regard to its particularly high constitutional value, the criteria for restriction must be stricter than mere proportionality. Such enhanced protection of fundamental rights in private relations will necessarily be based on the fundamental rights justifications for freedom of expression and will be based on the principle of content neutrality and the guarantee of the conditions for individual freedom and democratic discourse and will presumably be linked to the *clear and present danger* test. The development of a

[20] However, in this respect, it is debatable that if the legislator had indeed intended to introduce a classical proportionality test, he could have used its classical terminology.

[21] As in the previous footnote reference, this interpretation is open to debate, in particular from the point of view of the reasonableness criterion, since the interpretation of reasonableness as necessity is open to debate, since it is not disputed that a case may arise in which a rule restricting a fundamental right, which might otherwise be considered reasonable, cannot be accepted as necessary.

[22] The application of the Charter of Fundamental Rights is a very complex theoretical and practical issue, see Chronowski 2014, 85–98.

[23] Article 52 (1) of the Charter of Fundamental Rights.

fundamental rights limitation test is one of the most important tasks facing the Court of Justice of the European Union in the application of the DSA.

We are not yet convinced of the effectiveness of the new fundamental rights mechanism, but it has the potential to change the paradigm of our thinking on fundamental rights. Obviously, as thoroughly demonstrated by Ződi, the same fundamental rights standards cannot be applied to the private power (platform power) as to the state in the traditional, vertical relationships concerning fundamental rights (Török 2022 and Klein 2023). Nonetheless, in my view, the partial extension of the fundamental rights tests *mutatis mutandis* to the relationships concerning platform rights is a welcome development in itself.

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