Edited by
Catalina Goanta, Marlene Straub, Jacob van de Kerkhof

Radical Reforms

Bringing Fairness to Social Media Contracts

Verfassungsbooks
ON MATTERS CONSTITUTIONAL

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Verfassungsblog gGmbH
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info@verfassungsblog.de

Cover design by Carl Brandt

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Foreword

In a constant search for new ways to generate revenue, social media giants are transitioning from business models that have largely been focusing on (targeted) advertising, to capitalising on the social transformation of influence. In these new ecosystems monetizing attention and parasocial relations, traditional contractual relationships are altered in ways we do not yet fully grasp. Gratuitous contracts with payment as counter-performance coexist with cascading new digital services around subscriptions, tokens, micro-transactions, and other forms of monetization that allow social media platforms to rely less on advertising business models.

The *Verfassungsblog* Radical Reforms symposium is based on the presupposition that the social media landscape is changing. Coined as "the new public forum" (see for example *Packingham v North Carolina*[1], also Pozen's *The Perilous Public Square*[2]), we see that that public square is now filled with citizens selling products, promoting services, and charging for subscriptions. Simultaneously, the owner of the square is incentivising attention-seeking behaviours (also known as "clout-chasing"). In that changing landscape, a regulatory quest for fairness manifests itself. How can a space that is becoming increasingly commercialised, monetised, and is a source of income for many be *fair*?

Departing from this foundational question, this symposium pursues many more granular ones, each anchored in whether and how the rights of users in social media spaces can be

strengthened vis-à-vis dominant platforms. One point of departure are the standard agreements that users conclude when joining social media; does the extant contract law paradigm sufficiently protect the user online? Centrally, a division emerges between the average user and the so-called "influencer". Some user groups who generate content and, in turn, income, may demand their share in a fair division of value. But in the pursuit of attention, clout, and eyeballs, not every means of surpassing minimum thresholds necessary for generating income may be desirable from a societal point of view. Indeed, as society is gradually enmeshing "real" with "virtual", the dynamics of the privately owned, increasingly commercialised virtual world can skew how information is shared and spread to the average user. Can social media contracts contribute to making the status quo bearable for society at large, and fair for average users and influencers on the personalised level? In the end, the sum of these questions all boils down to power: Who gets to decide on the digital landscape, and with whose interest in mind should that decision be made?

Against an increasingly complex background, even basic questions relating to the expectations of parties (especially consumers) to social media contracts, or the nature and content of their performances, threaten existing legal doctrines and fundamental principles aiming to alleviate the imbalance of power in these transactions, such as fairness, good faith or unconscionability. So what if we rethought social media contracts in a radical way? What values should we prioritise in the relationships between users and social media platforms, and

how can they be facilitated? This symposium invites its participants to rethink social media contracts, whether based on insights from technology, behaviour and/or legal doctrine, to map and address the inherent vulnerabilities of this space and the individuals affected the most therein.

What About Rights?

The idea of fairness online can be assessed from the perspective of rights and obligations. Users and platforms have rights and obligations toward one another. If those rights are violated by either, the violation causes a change in the relationship. But in defining rights and obligations, the question of what legal sources those rights should arise is a first stumbling block. In this context, *Laura Aade* reflects on the absence of formalism when concluding contracts with social media platforms. Conceptually, there is a big distance between clicking "yes" on a clickwrap agreement, versus putting your signature under a physical contract, although the contractual relationship exists either way. The predicament of informal social media contracts compounds, as the wording of their standard terms is moving towards increasingly oversimplified and (potentially) legally meaningless fluff. The consequences are a threat to the establishment of a fair contractual relationship between platforms and users.

Social media users' rights and obligations are currently laid down in a uniform manner: the same rules apply to all users, whereas not all users use the multifaceted social media space in

the same manner. In *Omri Ben-Shahar's* contribution, reflecting his recent book[5] with Ariel Porat, he explores how social media data can serve to inform more granular, personalised contracts, and immediately qualifies its utility: the behaviours displayed online generate a data profile which is not suitable to inform contracts in areas requiring deliberate choices, informed by individuals' real preferences. Rather, on social media, the surrounding choice architecture drives individuals and manipulates them to forge gut responses based on instantaneous emotional allure. The implication for personalised social media contracts is that the data source informing granularity may be inappropriate, if not deliberately skewed.

Delving into other rights, such as intellectual property and copyright, it is doubtful where fundamental rights, such as freedom of expression, stand in contrast to rights which are primarily commercial in nature when pursued on social media. This is what *Sunimal Mendis* explores in her contribution, reflecting upon the tension between platform power and the possibility of imposing obligations on social media to safeguard their users' rights to rely on quotation and parody exceptions.

Meanwhile, when a social media user qualifies as a consumer, they can rely on consumer protection frameworks vis-à-vis platforms. It remains the subject of debate to what extent a social media platform is responsible for offering such protection to consumers against third parties. Drawing on the "horizontal effects" doctrine, introducing the need to interpret fundamental rights in some private relationships, *Mateusz Grochowski*'s contribution portrays freedom of speech on social

media as a consumer service. In the provision of this service, tensions may arise between the Digital Services Act's holistic approach to standard terms and the existing unfair terms protection that requires a case-by-case analysis, in that it may bifurcate enforcement. *Hans Christoph Grigoleit* notes in his piece that the existing legal frameworks on contract law and consumer protection are already enabled to curtail many of the excesses of the use of social media, such as dark patterns, unfair contracts and addicting features. The question is whether *another* regulatory reform is likely to yield any improvements in the quest for fairness.

Contrasting this viewpoint, and singling out the content creator, or "prosumer", *Vanessa Mak* critically reflects on the need for a regulatory framework that would enable content creators to reclaim power over their creations from the hand that feeds them; Big Tech companies monetize prosumers' content. While extant consumer law frameworks may protect from disempowerment, true fairness and a recognition of prosumers' *use value* would require a deeper evaluation of the ways in which contract law views economic exchange.

Equally important for this understanding is the angle of business users, who often suffer from the same unequal bargaining position towards platforms as their own consumers. Focusing on platform-to-business (P2B) transactions, *Niva Elkin-Koren, Ohad Somech and Maayan Perel* emphasise the contractual lens for addressing the rights of businesses in P2B transactions: Contract law has the potential for greater sensitivity to contract classifications because different types of con-

tractual relations invoke different values and trade-offs. Courts can better posit them in the spectrum between business and consumer contracts while securing business users' unique interests.

What About Value?

More than ever, *value* is created on and through social media spaces, causing a pressing need for radical reform, as already touched upon by Vanessa Mak's contribution. At the most basic level, users create value by sacrificing data and attention in order to use social media platforms. *Johann Laux* contemplates whether the application of that data and attention to the creation of personalised law can lead to a fairer use and provision of social media. This depends on the interests such personalised law seeks to serve; if personalisation serves the interest of advertisers, as it currently does, we are simply postponing solving the inequitable problems private platforms cause, creating "the future's future problems". Beyond the exchange of intangible data and attention, users increasingly pay monetarily to use social media platforms, across a spectrum of subscription features. According to *Christoph Busch*, this trend reflects the crisis of the advertising-based business model, and requires a rethinking, as we transition into the subscription economy: social media platforms are no longer a public square, they are above all a marketplace, with novel legal implications.

Users who monetise content and market themselves do not only navigate complex relationships with social media plat-

forms but negotiate what creates value and is valued with every post. Analysing the knife's edge, *Giovanni De Gregorio* questions the monetization of harmful but legal content. In the marketplace of attention, it is usually sensational, lawful but awful content that produces the most engagement and, in turn, income. This reality raises a multi-dimensional fairness issue: is it fair to those who suffer detriment from harmful content that such content may go "viral", and generate revenue to individuals exercising their right to spread such content at scale? De Gregorio highlights the often superficial boundaries between illegal and harmful content, as well as between political and commercial speech, all of which have important implications on the content monetization pipeline.

What About Society?

The call for fairness is also a reconciliatory effort; how do we reconcile the interests of individuals, of the platforms facilitating their exchange, and of society at large. An area that has not been given sufficient attention in this regard is how social media accounts survive individuals who are no longer among us, and no longer have agency. What are the inheritance implications of social media contracts, and what societal values do they challenge? This is precisely what *Chantal Mak* addresses in her contribution, based on a co-authored report for the Dutch Ministry of Internal Affairs.[4]

Finally, when some creators push their content into the grey areas of the law and start selling or promoting content or goods

and services that may be detrimental to consumers, additional risks arise for society. Is it desirable or fair that a society is increasingly confronted with such content, especially considering the fact that we are becoming aware of the risks that misleading content can produce? *Felix Pfücke* tackles this issue by referring to the growing activity of financial influencers, who often convey investment information to consumers without having any of the formal requirements of providing such advice. It follows that in regulating an essentially private law and increasingly commercial phenomenon, it is important to account for its societal effects.

In actuality, the way fairness is framed in the social media space will affect public discourse, election outcomes and as such, public well-being. That point in itself is scary enough to radically rethink how social media contracts are viewed.

Concluding

The regulatory quest for fairness in the social media space is a never-ending one, due to the lagging nature of regulation in a fast-paced environment like the internet. With this symposium, we challenged our participants to radically rethink social media contracts. In this introduction, we looked at what social media may not be. It may not be solely a public square, because content monetization and social commerce are booming and turning social media platforms into actual marketplaces. Yet they may also not be mere marketplaces, as whatever happens on social media affects the public interest. Free speech

on social media is also no longer a triangle, as Jack Balkin once famously held,[5] given that the stakeholders and the networks involved go way beyond states, platforms and individuals. We have businesses of all sizes, industries of all types, consumers acting as traders, and a lot of other complex relations. So what is social media then in 2023? It is everything, everywhere, all at once,[6] which unfolds at the click of a button launching someone into a contract.

The contributions in this symposium address different aspects of social media contracts, all in search of fairness. In some of these aspects, a radical rethinking of those contracts is proposed: the development of the social media space has outpaced the regulator significantly, requiring us to radically change our approach. Other contributions are more conservative: Despite acknowledging the rapid development of the internet and its sometimes radical excesses, current legal frameworks provide enough tools to address them and ensure fairness. The future will require us to continue to rethink social media contracts, most likely in an ever-more radical way; the internet is built for a regulatory cat-and-mouse game in pursuit of fairness.

Catalina Goanta, Marlene Straub & Jacob van de Kerkhof

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Contents

Laura Aade

The Invisible Contract

Rethinking the Principle of Informality on Social Media Platforms

Social media contracts are concluded on a constant basis. Not only do they define the rights and obligations of the parties, but they also establish a legal framework for solving legal disputes that may arise between a platform and its users. Despite the central role played by these contracts, many users do not realize that by creating a social media account, they are entering into a legally binding agreement with the platform.

This contribution argues that such a phenomenon might result from the informal manner in which social media contracts are presented to users, and identifies two trends turning them into meaningless documents: their presentation as clickwrap agreements, and the simplification of the legal language used in the terms of service. Social media platforms adopted these trends based on the principle of informality in contract law. It establishes that a contract does not need to be presented in a specific format to be considered legally valid. However, this lack of formalism has transformed social media contracts into invisible ones, leading many users to enter into a contractual relationship without realizing it.

It might be time to radically rethink the principle of informality on social media platforms. Towards this end, this contribution offers two possible ideas to adopt a more formal and structured approach to presenting social media contracts to users. In doing so, these contracts can regain their importance, and users might become more aware of the contractual implications of clicking on the "I Agree" button.

The Principle of Informality in Contract Law

In contract law, the principle of informality refers to the fact that no specific form is required for a contract to be legally valid. It is based on the idea that the intention of the parties to be bound by a contract is enough to create a binding agreement.[1] It is therefore not necessary to write down the terms of the contract, to use formal language, or to involve a notary to have a legally valid contract. However, certain contracts do require a specific form to be valid or to demonstrate their existence. For instance, contracts related to the sale of real estate must be in writing and executed in the form of notarial acts. Interestingly, formalities (e.g., requiring the contract to be put in writing) are on the rise again, due to the desire of legislators to balance the unequal bargaining power between the parties by requiring the stronger party to provide more information to the other. Social media contracts are no exception to this trend.

Beyond Consent: The Importance of Formalism in Social Media Contracts

Social media contracts already adhere to some formalism in the sense that they are presented to current or potential users in written form. The main function of this formality is to provide information to social media users, as platforms must comply with disclosure duties under European law. For instance, they must provide information about their content moderation practices and internal complaint handling systems to users ac-

cording to Article 14(1) of the Digital Services Act[2] (DSA). Such information should be provided in a "clear, plain, intelligible, user-friendly, and unambiguous language", and should be made publicly available in an "easily accessible and machine-readable format". Another example can be found in Articles 13 and 14 of the General Data Protection Regulation[3] (GDPR). They require social media platforms to provide users with specific information about the collection and processing of their personal data. Article 12 GDPR specifies that this information must be presented in a "concise, transparent, intelligible, and easily accessible form, using a clear and plain language" and provided "in writing, or by other means including, where appropriate, by electronic means".

Besides their information function, formality requirements in social media contracts aim to warn users that they are about to enter into a contractual agreement. Given the power of social media platforms, the European legislator implicitly recognized that the mere agreement between the parties was insufficient for the contract to be legally valid, as it would bind them too easily. As a result, the obligation to put the terms of service in writing also intends to offer users a final opportunity to reflect on their decision to create a social media account. However, the limited formalism in social media contracts is gradually losing its effectiveness. This contribution identifies two trends transforming social media contracts into meaningless documents with little to no visibility.

Two Alarming Trends

Presentation of Social Media Contracts in Clickwrap Agreements

The first trend refers to the simplistic format of social media contracts. Presented as clickwrap agreements, they are designed to simplify the process of agreeing to the terms of service, allowing users to indicate their consent with a single click. The history of clickwrap agreements can be traced back to the early days of the Internet. At the time, clickwrap agreements were a relatively novel concept, and there was some uncertainty about their legal status. However, as electronic commerce continued to grow, courts began to recognize clickwrap agreements as valid contracts.[4] Their legal validity was first established in the 1996 case *ProCD, Inc. v. Zeidenberg*[5], where the court held that a software licence agreement presented to users via a shrinkwrap agreement (i.e., paper-based agreement included with the software packaging) was an enforceable contract. Clickwrap agreements offer several benefits to social media platforms: they simplify the process of agreeing to the terms of service, they improve user experience, and may potentially attract individuals for whom complex contractual formalities are daunting.

However, this contribution argues that clickwrap agreements may contribute to the idea that social media contracts are mundane and insignificant documents. The ease with which it is possible to enter into a contractual relationship with a social media platform is alarming, given the pivotal role these

agreements play in the digital sphere. Users may view ticking a box as a mere banality for accessing platform services, rather than an acknowledgement to enter into a legally binding agreement. This misconception may cause them to underestimate the potential legal consequences of their actions online, or worse, to unknowingly enter into a contract – raising questions about the validity of their consent, as research has extensively discussed.[6] The cautionary objective pursued by imposing formalities in social media contracts is therefore rendered obsolete by the (extra)simplicity of clickwrap agreements. If a social media contract can be concluded with a single click, the purpose of putting the terms of service in writing to warn users that they are about to conclude a binding agreement is undermined. Consequently, presenting social media contracts in clickwrap agreements may not adequately convey their importance and seriousness to users.

Oversimplification of the Legal Language Used in Terms of Service

The second trend concerns the oversimplification of legal language used in the terms of service. Some social media platforms, such as TikTok or Pinterest, have adopted the practice of summarizing each term of service into basic statements. This practice is in line with Article 14(5) DSA, that is primarily based on the Unfair Contract Terms Directive[7] (UCTD). It essentially requires very large online platforms to "provide recipients of services with a concise, easily, accessible, and machine-readable summary of the terms and conditions in a clear and

unambiguous language". Recital 48 DSA specifies that such summary should include the main elements of the terms and conditions, including the possibility to opt-out from optional clauses.

Translating legal concepts into everyday language may seem like a sensible approach at first. It aims to address the issue of many users ignoring the terms of service, prevent them from agreeing to legally binding clauses they do not fully understand, and make them aware of the contractual implications of their actions online. However, reducing legal concepts to plain language can be a double-edged sword. Contracts are drafted to provide legal clarity to the parties involved in the contractual relationship, outlining their respective rights and obligations. To achieve this level of clarity, legal language is used as it offers a level of detail and specificity that everyday vocabulary cannot match. Each legal term has a particular meaning, shaped by case law and established legal practice. By translating the terms of service into basic statements, the benefits of putting social media contracts in writing and using specific legal vocabulary are threatened. Doing so can create a disconnect between established legal concepts and the language used in these simplified statements, leading to confusion and misinterpretation. Furthermore, essential information that social media users should and must be aware of may be lost in translation. As a result, they may unintentionally violate the terms of service, which can have potential consequences such as content removal or account suspension.

Another important aspect to consider is the legal validity of

these simplified clauses. While the original terms of service are legally binding, it remains unclear whether their summarized versions carry the same legal weight. Are they considered an integral part of the contract? Do they fall within the scope of the UCTD for social media users qualifying as consumers? What if a dispute arises between parties: should they refer to the full or simplified version of the terms? Ultimately, social media platforms should be careful when simplifying legally binding terms as to maintain legal certainty and keep a certain level of formality – like in most contracts in the offline world.

Now What?

This contribution identified two alarming trends turning social media contracts into meaningless and invisible documents: their presentation as clickwrap agreements and the oversimplification of the legal language used in the terms of service. Despite some formal requirements imposed by the European legislator, social media platforms still enjoy a wide freedom in the way they present their terms of service to users. This lack of formalism, in turn, poses a threat to the establishment of a fair relationship between platforms and users. To address this issue, this contribution suggests reconsidering the principle of informality in contract law and adopting more structured approaches to presenting social media contracts. Some possible ideas include:

Requiring a Written (Electronic) Signature Instead of Ticking a Box

The first proposal suggests replacing the current method of users ticking a box to express their consent to social media contracts with a written electronic signature. This approach would increase the formality of the acceptance process, provide more certainty about the user's intention, and make social media contracts more visible. Furthermore, it aligns with the cautionary function of formalities, by giving users a final opportunity to consider whether or not they want to create a social media account.

However, using electronic signatures as a means of expressing consent to social media contracts may raise issues regarding identity verification, particularly when users are using pseudonyms. Electronic signatures are typically linked to an individual's legal identity, and the reliability of the signature depends on the level of its verification. If users are allowed to create accounts and sign contracts under pseudonyms, it may be challenging to verify their identity and ensure that they are legally bound by the terms of service they have agreed to. Additionally, requiring users to reveal their legal identity to sign social media contracts may conflict with legitimate interests such as privacy concerns, freedom of expression, or personal branding. Therefore, if electronic signatures are to be used for social media contracts, it is necessary to balance the need for identity verification with the legitimate interests of users who wish to remain pseudonymous. Possible solutions could include offering users the option to verify their legal identity without re-

vealing it to the public or using alternative means of identity verification, such as biometric data or multi-factor authentication.

Introducing Chatbots as Digital Notaries

The second proposal is to introduce chatbots as digital notaries on social media platforms. In civil law jurisdictions, notaries are usually responsible for drafting the contract, establishing the intention to be bound by the parties, and informing them about the legal consequences of their actions.[8] In this proposal, chatbots would not have the same legal status as a traditional notary, and would merely focus on the latter function. They could be programmed to interact with users when they first sign up for a social media account, and guide them through the contractual implications of such action. Rather than social media platforms offering vague summaries of their terms of service, these digital notaries could clarify sophisticated legal concepts, and answer questions users might have about the content of the contract. This proposal aligns with the objective pursued by the information requirements imposed at the European level. Moreover, the use of chatbots as digital notaries would add a degree of formality to social media contracts, increase their visibility to users, and provide the legal certainty that contracts are initially intended to offer.

The ultimate question is who should be responsible for providing legal advice and information to users through the use of chatbots as digital notaries: social media platforms them-

selves or neutral external parties? The responsibility could potentially be assigned to social media platforms as part of their obligation to provide users with clear and comprehensive information about the terms and conditions of their services. However, it could also be outsourced to neutral parties that have expertise in providing legal information and advice to users. Ultimately, the decision on who should be responsible for providing this information would depend on a range of factors, including legal and regulatory frameworks, industry practices, and user preferences.

Conclusion

None of these suggestions aim to solve the issue of users not reading the terms and conditions, but instead seek to introduce more formalism into social media contracts. The underlying objective is to ensure that users are aware that creating a social media account also involves the creation of a contractual relationship with the platform. Although more research is necessary to determine the effectiveness of these proposals (e.g., understanding the social conception of a contract), this contribution argues that it is crucial to increase the visibility of social media contracts to users.

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Omri Ben-Shahar

Personalised Law and Social Media

Laws apply in context. A dark rainy night requires greater care by drivers. A sale of a dangerous product requires more pronounced warnings. And the sanction for a criminal act depends, among other things, on the harm it caused. The more circumstances the law counts as relevant in issuing specific commands, the more granular and contextualized it is.

But while counting many of the situational circumstances as relevant to the legal outcome, laws rarely count the *identity* of a person and their subjective characteristics. Interpersonal variance is not only ignored; it is regarded as illegitimate ground for differential treatment by law. For millennia, laws announce their aspiration for uniformity. Justitia, the Goddess of Justice whose blindfolded image adorns the facades of courthouses, assures the public: judges are impartial. They will not treat you differently based on *who* you are.

In 2021, Ariel Porat and I published a book that challenged law's interpersonal uniformity axiom. In *Personalized Law: Different Rules for Different People*[1], we argued that rather than blindfolded, the law ought to know everything that's relevant about people and use this information to tailor personalised legal commands. Many goals of many laws could be better achieved if one-size-fits-all rules were to be replaced by a scheme that recognizes relevant differences between people. Personalisation – a paradigm that has been widely and successfully embraced in other areas of human activity, and primarily on social media – may be ready for the law. If medicine, education, or even parenting can treat, teach, or nurture better when personalised, the law too may be a candidate for a radical

transformation, and reap the benefits of personalisation.

Our book tried to show that it would be more just and efficient for the law to impose duties that vary person-by-person. Tort law, for example, would pose greater standards of due care on people who create greater risks. In a personalised negligence regime, duties would be tailored not to the "reasonable person" but instead to a novel normative metric – the "reasonable you". Dangerous drivers would have to comply with more exacting traffic laws, drive slower, and perhaps pay higher fines. Similarly for tailored rights: why not bestow greater consumer protections on consumers who need them more? The entire arsenal of protections, from the most exacting (like mandatory warranties and rights to withdraw) to the most permissive (like default rules and information rights) could be personalised. Consumers who are less sophisticated, experienced, educated, affluent, or cognitively sharp need stronger protections, and under personalised law they would receive them.

In this contribution to the symposium, I revisit the question where might the data for personalising legal commands come from? How would lawmakers and judges measure the relevant difference between people? Specifically, I suggest one rich source of data – social media – but then immediately qualify it. The gist of my argument is this: social media elicits from people numerous quick and thoughtless decisions. A personal profile emerging from this environment is suitable only for legal areas that seek to personalised rules for similarly spur-of-the-moment irrational actions (like driving); it is unsuitable for regulating environments characterized by people's "slow",

more reflective, decisions (like borrowing).

How Could the Law Be Personalised?

The list of regulatory techniques that could be personalised is almost unlimited. Criminal sanctions could be personalised (as they sometimes already are) in a manner that would potentially diminish the existing distortions of the criminal justice system.

Food labels or drug warnings could be designed to show each person a different subset of information, more relevant to their diet and health. A statutory age of capacity – to drive, purchase alcohol, or pilot a plane – could be based on each person's statutory safety score. Methods applied by auto insurers to classify and predict each policyholder's risk could be adopted by governmental licensing bureaus who would vary the age of capacity and the licensing restrictions based on each person's risk profile.

Personalised law is a novel jurisprudential template with many "moving parts". One design question is how "precise" the tailoring ought to be. This question is closely related to, and the answer to it is derived from, how granular is the information fed to the screening model. Personalised law could be, and sometimes already is, crude. For example, personalised speed limits for drivers could be "high", "medium", and "low", and personalised rights to withdraw could create "long" and "short" duration categories. Such crudeness would be a sensible design choice when the information about people's differences is less refined. And, conversely, personalised law could be max-

imally granular. Fueled by big data and implemented by algorithms, the scheme may account for numerous differences between people and issue commands along a continuum, to each citizen their own rule. It is this radical limit case that our book imagined. Each person would be "fitted" with a personal legal regime. It would be based on vast personal data about the person's preferences, skills, risks, needs, and experience. The data would be processed with the help of statistical and machine learning models to generate commands that advance the objective underlying the law.

This prototype of personalised law has weighty challenges and problems. It might seem to conflict with fundamental values of distributive justice and equal protection. Is it fair to treat people so differently? Shouldn't "equal protection" be equal? It is also very possible that personalised law would have unintended effects, for example of stigmatizing people who are singled out as "risky" or "needy". Or that it might chill people's incentives for personal improvement, for example, when the acquisition of skill and knowledge would reduce the personalised legal protections they are granted.

Some of the most pressing concerns hanging over personalised law have to do with information. The optimal administration of any law requires information, and first order of business for any legal reform is to soberly recognize information costs and constraints. Personalised law needs information about the relevant differences between people, but where would this information come from?

The Data Needed for Personalised Law

All around us we are witnessing a massive growth of personalised environments that rely on personal data collected by digital services and platforms. People read their news online, shop in e-commerce stores, stream their entertainment, meet through social media sites, and drive connected cars, and the data footprint they leave behind when engaged in these digitally supplied activities makes it possible for commercial parties to personalise the information, the products, the recreation, the social environments, and the insurance premiums they offer. Imagine if the government were able to acquire some of these databases and use them to personalise legally mandated disclosures and product warranties, licensing requirements, and duties of care. This might send chills up your spine. You might be worried about privacy and abuse of power. In the hands of the government such vast data are dangerous. The Chinese social credit system, which collects personal data to generate civic reputation scores and is used to silence dissent and to deny people access to primary services, is a startling warning of governmental abuse of data-driven personalised law.

But the issue I want to comment on here is the quality of the data and their suitability for designing legal commands. Let's assume, for a moment, that legal rules could be personalised by a benevolent government with data from social media. Imagine, that is, that information about what people like, choose, buy, read, say, and visit can be used in tailoring legal

commands. Platforms and advertisers find such information invaluable in advancing their commercial goals; would it also be valuable for the law? If so, for what purpose?

It might seem, at least at first glance, that social media data is ideally relevant for the law. It provides a rich perspective on each person, obviating the use of demographic proxies. For example, social media postings could identify some people as vulnerable to "status spending" or other disastrous but avoidable expenditures, and the law could require sellers and lenders to target red-flag warnings only to these people. Assembling snippets of evidence about people's behaviours, preferences, regrets, and risks could be relevant to the personalisation of licenses, rights, warnings, and duties. Social media could provide a rich body of such snippets.

This is an argument Porat and I made in the book, but I now tend to think that it may have been a bit hasty. Social media may indeed expose some truths about people. However, it may also – and quite often – display and even heighten the thoughtless, impulsive, and biased sides of their actions. This exposed gap between "preferences" and "choices" provides both an opportunity but also a critical limit for personalised law.

Regulating "Fast" versus "Slow" Decisions

We know that many choices people make on social media are impulsive. They have thirty seconds in an elevator to check their "feeds" and react, and so it is not surprising that the output of this meditation does produce filtered, reflective deci-

sions. On social media, people instinctively "like" some content; click on news feeds based on momentary temptation; drawn to the sensational; and say things that they later regret. The profile of a person that emerges from the sum of these infinitesimal manifestations of uninhibitedness may be very different from who the person really is. Just think of some of your thoughtful, introspective friends who parade injudicious social media avatars. Tailoring an environment for an individual based on the sorrier half of their personality – especially a legal environment – could get things very wrong.

What we learn about a person from their social media profile could be relevant for some laws but not others. It is relevant for laws that address the impulsive and thoughtless side of their conduct. For example, branches of consumer protection law that protect buyers from the consequences of rash and reckless purchases, such as cooling off laws, are particularly useful for people who are prone to such behaviour, and this propensity could be reflected in, and inferred from, social media. In contrast, that same information is less relevant for laws that govern thoughtful and slow choices, such as mortgages, insurance, or the writing of wills. It would be silly to predict how a person would want to bequeath their estate (for the purpose of a personalised intestate allocation rule) by observing who they "friend" on Facebook.[2]

Put differently, in areas of deliberate choice, where the so-called "system two" thinking is active, the law wants to help people make good choices that serve their deep-rooted preferences, but here information from social media would be quite

useless. The tools used by law in these occasions aid individuals in overcoming poor information or of lack of expertise. Here, personalised law needs information about people's real preferences, not their impulsive ones. On social media, what people choose may not be what they truly prefer, since the surrounding choice architecture drives them and manipulates them to forge gut responses based on instantaneous emotional allure. An algorithm trained on such mindless behaviours infers people's preferences with great error.

The information such algorithm processes, and the predictions it makes, could be valuable for other areas of law – those that address behaviours governed by people's thoughtless and automated "system one" processes. Driving is the ultimate system-one operation, and laws of the road are designed to address the dangers associated with the mindlessness with which drivers create risks. Different people have different tendencies for imprudent driving, and these attributes are likely correlated with degrees of imprudence on social media. Granted, there are better information sources for predicting drivers' idiosyncratic tendencies for risky manoeuvres. Tracking data collected by auto insurers come to mind. The general point, however, holds. Social media data are informative in analyzing people's fast decisions; many risks that the law regulates emerge from fast decisions, and they could be addressed in a personalised manner with the aid of these data.

Conclusion

In sum, people who display more offensive and thoughtless behaviour on social media are, all else equal, destined to make other poor heat-of-the moment decisions, such as driving intoxicated, speeding dangerously, buying expensive things they cannot afford, or falling prey to online scams. If such correlations are strong, then social media data could predict the personal propensities that are relevant to the regulation of such activities. Using these data in the design of personalised standards of due care, personalised age of capacity, or personalised cooling off periods, could save lives, money, and hardship.

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Sunimal Mendis

The Magic Bullet That Isn't!

The Limited Efficacy of Article 14 DSA in Safeguarding Copyright Exceptions to Quotation and Parody on Social Media Platforms

Article 17 of the European Union (EU)'s Copyright in the Digital Single Market Directive[1] (DSM, 2019) continues to face harsh criticism for its failure to effectively safeguard user rights to rely on copyright exceptions for quotation and parody in sharing user-generated content (UGC) on social media platforms. UGC involves the transformative use of existing informational and cultural content in creative ways for purposes of social commentary and critique (e.g., parodies, memes, GIFs, commentaries). Itthereby offers a powerful means of dissecting contemporary social and political narratives (Peverini, 2015[2]) and provides an "unprecedented platform for the exercise of freedom of expression" Poland v Council, para. 46[3]. Copyright exceptions for quotation and parody facilitate such transformative uses of in-copyright content and therefore have a vital function in protecting users' freedom of expression. For this reason, the Court of Justice of the EU (CJEU) has vested these exceptions with the character of user "rights" as opposed to mere user freedoms or privileges (*Deckmyn*[4], *Funke Medien*[5], *Pelham*[6],*Spiegel Online*[7]). As noted by AG Saugmandsgaard Øe in his Opinion[8] in the *Poland v Council* case, a significant proportion of content uploaded by users to social media platforms willcome within the scope of these two exceptions (para. 145). Thus, Article 17 DSM's failure to effectively safeguard these copyright exceptions can gravely undermine users' freedom of expression in the digital public sphere.

Against this backdrop, the enactment of Article 14 of the EU Digital Services Act[9] (DSA, 2022) offered fresh hope. Could it be the eagerly awaited "magic bullet" that ensures effective

protection of user rights to rely copyright exceptions to parody and quotation on social media platforms? As this essay seeks to demonstrate, the possibility of such an outcome is doubtful.

Article 17 DSM's Failure to Effectively Safeguard User Rights to Quotation and Parody

To provide a brief recap, Article 17 DSM constitutes sector-specific legislation that is *lex specialis* to the general EU intermediary liability framework provided under Articles 4-6 of the DSA. It imposes primary liability on online content-sharing service providers (OCSSPs) – which include social media platforms – for copyright infringement materially committed by users of the platform (Article 17(1) DSM) and denies them protection under the Article 6 DSA "safe harbor" (Article 17(3) DSM).

In order to avoid this high degree of liability, platforms are obliged under Articles 17(4)(b) and (c) DSM to engage in preventive monitoring and filtering of user-uploaded content. Shortly after its enactment, Poland went before the CJEU to seek annulment of Articles 17(4)(b) and (c) DSM (*Poland v Council*[10]) on the grounds that the fulfilment of these obligations compel platforms to carry out prior automatic filtering of user-uploaded content in a manner that undermines users' fundamental right to freedom of expression as guaranteed by Article 11 of the EU Charter on Fundamental Rights (CFR)[11]. The CJEU in its decision, conceded that the aforesaid provisions could in fact impose prior restraints on users' freedom of expression,

particularly by restricting their ability to share user-generated content (UGC) (*Poland v Council*[12], paras. 45-58). Yet, the CJEU rejected Poland's application for annulment, particularly on the grounds that safeguards for copyright exceptions (including the exceptions for parody and quotation) in Articles 17(7) and 17(9) prescribe a specific result to be achieved by platforms and establish "clear and precise limits" (*Poland v Council*[13], para. 85) on the measures they are permitted to implement in fulfilling their obligations under Articles 17(4)(b) and (c) DSM. In the CJEU's view, these provisions effectively circumscribe platforms' freedom to arbitrarily impose prior restraints on users' freedom of expression through content moderation (*Poland v Council*[14], paras. 78, 80, 85).

Despite the optimism displayed by the CJEU, the practical efficacy of Articles 17(7) and 17(9) in protecting users' freedom of expression are moot. Neither provision can be interpreted as imposing enforceable legal obligations on platforms to design and implement their content moderation systems in a way that safeguards user rights to benefit from the above exceptions. Article 17(7) stipulates that content moderation should not prevent the sharing of user-uploaded content that comes within the scope of copyright exceptions and limitations (E&L). But the obligation to ensure that users are able to benefit from the exceptions for quotation and parody in sharing UGC is imposed on Member States (as opposed to platforms). Article 17(9) DSM, obliges platforms to "inform their users in their terms and conditions" that they can rely on copyright E&L. Given the vague wording of Article 17(9) DSM, it is uncertain whether it consti-

tutes a mere information obligation or if it could be interpreted to grant users a contractual entitlement to benefit from E&L in the sharing of UGC.

Given the fact that no liability is imputed to platforms for failure to comply with these provisions and in the absence of a regulatory mechanism to oversee compliance, it is difficult to ensure that platforms will design and implement content moderation systems in a way that can achieve the "prescribed result" which the CJEU was so confident of accomplishing.

Enter Article 14 DSA

Article 14(4) DSA obliges platforms to have "due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the *freedom of expression*" in *applying* or *enforcing* any restrictions which they impose in relation to the use of their service [emphasis added]. Recital 47 reiterates this obligation but extends its scope also to the *design* of the restrictions.

According to Article 14(1) DSA, such restrictions include "policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review" [emphasis added]. The question arose whether Article 14(4) could be interpreted as imposing positive obligations on social media platforms to design and implement their content moderation systems in a manner that effectively protects users' freedom of expression.

The term "due regard" in Article 14 DSA is vague and am-

biguous. However, it has been argued that Article 14(4) DSA could be interpreted to give indirect horizontal effect to the fundamental rights of platform users as enshrined in the CFR (Quintais, Appelman and Fathaigh, 2022[15]). If this view is upheld, two further questions arise.

Application of Article 14 DSA to Copyright Enforcement: Lex Generalis vs. Lex Specialis

The first question is whether Article 14 DSA would apply to aspects of content moderation that aim to fulfil obligations imposed under Article 17 DSM? As mentioned before, Article 17 DSM is *lex specialis*. Article 2(4)(b) DSA read with Recital 11 stipulates that the DSA is without prejudice to EU law on copyright and related rights including the DSM Directive, which should remain unaffected. This is in accordance with the general principle of *lex specialis derogat legem generalem*. On the other hand, the application of Article 14 DSA to Article 17 DSM does not result in a conflict of norms. On the contrary (as per CJEU's interpretation of Articles 17(7) and 17(9) DSM in *Poland v Council*[16]), these provisions complement Article 14 DSA by seeking to ensure that content moderation systems are designed and implemented in ways that safeguard users' ability to benefit from copyright E&L, particularly the exceptions to parody and quotation. In addition, the importance of achieving an adequate balance between copyright enforcement and the protection of users' freedom of expression is already enunciated Article 17(10) DSM and Recital 84 DSM. Thus, there are strong

arguments to be made in favour of extending the application of Article 14 DSA to content moderation aimed at copyright enforcement on social media platforms.

If so, other provisions of the DSA which aim towards operationalizing Article 14 should also apply to aspects of content moderation aimed at copyright enforcement on these platforms. For instance, "due diligence" obligations to provide periodic reports on the use of automated systems for content moderation (Article 15(1)(e) DSA), to carry out periodic risk assessments of systemic risks for freedom of expression stemming from the design or functioning of automated and non-automated content moderation systems (Article 34(1)(b) DSA) and to put in place reasonable, proportionate and effective measures to mitigate these systemic risks (Article 35(1)(c) DSA).

The due diligence obligation in Article 15 DSA would normally apply to content moderation systems deployed by social media platforms in their character as intermediary services, and those in Articles 34 and 35 DSA would apply to social media platforms which fall within the definition of "Very Large Online Platforms" (VLOPs) under Article 33(1) DSA. However, given the *lex specialis* nature of Article 17 DSM, there is an uncertainty whether they would also apply aspects of content moderation which are specifically aimed towards copyright enforcement. The application of Article 14 DSA to Article 17 DSM would conclusively support such an extension of these "due diligence" obligations. Thus, the periodic risk assessment reports would need to include an assessment of the efficacy of the

content moderation system in accurately identifying uses of in-copyright content that fall within the scope of the quotation and parody exceptions in a manner that can effectively protect users' freedom of expression. Where a high risk of wrongful blocking is indicated, the social media platform would be obliged (pursuant to Article 35(1)(c) DSA) to put in place effective measures to mitigate these shortcomings (e.g., enhanced oversight by human moderators who have been trained to correctly identify uses falling within these exceptions). Thus, the application of Article 14 DSA to Article 17 DSM would lead the way for enhanced regulatory supervision of content moderation systems deployed by social media platforms for the purpose of copyright enforcement. It could be reasonably expected that this could lead to a gradual improvement in the ability of content moderation systems better safeguard copyright exceptions for quotation and parody, which would certainly prove a very positive outcome.

Enforcement of User Rights to Rely on Copyright Exceptions

If Article 14 DSA could apply to Article 17 DSM, then, the second question is what would be the impact of Article 14 DSA on users' ability to enforce their user rights to rely on copyright exceptions to quotation and parody? Unlike direct horizontal effect, indirect horizontal effect does not impose positive obligations on private parties to safeguard fundamental rights in their legal relationships with other private parties. Rather, it merely enables a court to interpret and enforce private law obligations

in a manner that is consistent with fundamental rights, thereby resulting in the permeation of these constitutional norms into the private law sphere (Phillipson, 1999, p. 830[17]). Could the application of Article 14 DSA enable a court to order platform owners to adjust their content moderation systems to ensure that the exceptions to quotation and parody are given effect in a manner that safeguards users' freedom of expression? The answer to this question heavily depends on how EU courts would interpret Article 17(9) DSM. As noted above, the wording of Article 17(9) could be construed to grant users a contractual entitlement to benefit from the exceptions for quotation and parody in the sharing of UGC. If so, were UGC that comes within the scope of the exceptions to quotation and parody wrongfully blocked by a platform, the aggrieved user would be able to bring a claim under breach of contract for violation of Article 17(9) and demand that the platform design and implement their content moderation systems in a way that safeguards her freedom of expression?

Conclusion

As is evident from the foregoing discussion, the impact of Article 14 DSA in safeguarding copyright exceptions on social media platforms is, as yet, uncertain. Its potential to lead the way for enhanced regulatory supervision of aspects of content moderation systems aimed at copyright enforcement is indeed propitious. However, its efficacy in terms of imposing direct/indirect obligations on social media platforms to ade-

quately safeguard user rights to rely on the quotation and parody exceptions remains doubtful.

Much depends on how the scope and intended legal effects of Article 14 DSA and Articles 17(7) and 17(9) DSM is interpreted by courts in the future. However, it is likely that Article 14 DSA will not prove the "magic bullet" that copyright scholars and social media platform users have eagerly been awaiting. On the other hand, if clear legislative guidance and creative judicial interpretation is forthcoming, Article 14 DSA holds the potential to serve as a normative basis for ensuring stronger protection of user rights to benefit from copyright exceptions to quotation and parody. Social media platforms form a core component of the contemporary digital public sphere and constitute essential infrastructures for public discourse (Dolata, 2019, p.185[18]). Thus, preserving the freedom of expression of social media platform users to engage in social commentary and critique through transformative uses of in-copyright content (e.g., quotation, parody) is vital for preserving and promoting the participatory democratic process within the EU. It is earnestly hoped that in the coming months and years, the EU will demonstrate the necessary legislative will and judicial initiative for achieving this goal. For the moment, we can but "wait and see".

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Mateusz Grochowski

From Contract Law to Online Speech Governance

For years, contract law has been a hidden protagonist in the in the discourse on platform governance. Although it would be hard to doubt that the platform-user relationship is contractual in nature,[1] very few practical conclusions have been drawn from this in practice. The consent a user indicates to a platform's terms and conditions (ToS), which forms the backbone of this relationship, has usually been on the margins, a purely formal act to access the platform's infrastructure and submit to its regulatory framework. Admittedly, contract formation in the platform economy is usually almost negligible (limited to merely ticking "I accept" in the ToS box) and hence may not seem to be the most imminent concern for platform regulation. The sound of this silence is especially salient against the backdrop of recent European case law that uses the contractual toolbox to infuse social media ToS with fundamental rights, in particular the freedom of expression. In this way, contract law has produced – somewhat counterintuitively – one of the most telling responses to the key constitutional issue of social media: how to reconcile freedom of expression as a public value with the private nature of social media platforms. The following observations offer a preliminary glimpse into this overlooked and yet surprisingly dynamic pathway of platform regulation.

Terms of Service Review

The trend in question was spearheaded in the EU by the CJEU and the German Federal Court of Justice (*Bundesgerichtshof* –

BGH), with other national legal orders following suit.[2] All of them built on the contractual backdrop of online platforms in order to facilitate protection of individual users (or of clusters of users) vis-à-vis a platform. The bulk of these solutions utilize tools that allow for contracts to be reviewed and for terms that disfavour platform users to be discharged. From the European perspective, a review of B2C contracts on the basis of domestic rules implementing the UCTD Directive played the most prominent role.[3] The UCTD Directive introduces a general scheme for reviewing standard (i.e., non-negotiated) terms in consumer agreements. If they violate the standard of good faith and at the same time create "a significant imbalance in the parties' rights and obligations" to consumers' detriment (Article 3 (1) UCTD[4]), such terms can be declared unenforceable against a consumer. With this scheme, EU law provided a targeted tool for addressing imbalances in the B2C contractual relationship. Besides the UCTD, similar effects can be also achieved, beyond consumer rules, under general instruments in civil law (e.g., invalidation of clauses due to breach of good faith) as well as in common law (e.g., unconscionability[5]) jurisdictions.

The premise that a platform's ToS form part of a B2C contract did not raise any substantive doubts in the CJEU case law. Long before platform regulation rose to the top of the EU digital markets agenda, the 2016 *Amazon* judgment had already clearly confirmed it.[6] Responding to a preliminary reference on the choice-of-law clause in the Amazon ToS, the Court expressed no doubt that Amazon's ToS should be subject to review for unfairness under the UCTD, just as the terms of any

other pre-formulated consumer contracts would be. Beyond a doubt, the same logic applies to social media platforms. The CJEU clearly confirmed that the liaison between platform and user is based on a consumer contract, and it may lose this feature where the user's online activity turns "predominantly professional" (*Schrems* judgment[7]).

The follow-up came down in German case law. In a number of decisions, German courts grappled with claims of individual social media users who deemed a platform (in most instances: Facebook) to have infringed on their rights. In all these disputes, the pivotal point of contention was a ToS clause that vested the platform with various entitlements vis-à-vis the user. Ultimately, German courts of various instances had no doubt that the proper yardstick for reviewing these cases was the unfairness test under §§ 305–310 BGB[8] (which implemented the UCTD). Due to the specific subject matter and the individual rights involved, most of these cases had the potential to be groundbreaking. Indeed, some of them sparked intense academic discussion and proposals for legal reform.

The BGH's "Horizontal Effect" and Beyond

The first notable stage of this story was the 2018 BGH judgment in what is known as the "digital inheritance" case[9]. The plaintiffs sought access to their late daughter's Facebook account, which the platform refused to provide, contending that its ToS forbid it. The BGH concurred with the parents' claim, finding the relevant clause in the ToS unfair (within the mean-

ing of UCTD) and hence granting access to the deceased's account. Apart from sparking immense interest for its inheritance law implications, the judgment was the first to trace the outline of an approach that subsequent German rulings would develop into a full-fledged pattern. The BGH referred, amongst other reasons for the unfairness of a post-mortem clause in Facebook's ToS, to the contradiction with the protection of heirs under Article 14 (1) of the German Constitution (*Grundgesetz*[10]). In this way, the BGH invoked a fundamental right (protection of proprietary interests of heirs) as a benchmark for its assessment of the good faith and reasonableness of a ToS clause for a platform user/consumer.

The cases that followed, which pertained to various kinds of governance of online communities as practised by online platforms, made this way of thinking even more plain. All these cases build upon the seminal idea, which originated with[11] the German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG), that the creation of a space for public discourse entails a higher degree of responsibility for respecting fundamental rights. Although none of these decisions tackled social media directly, their conceptual blueprint was directly adopted in the platform-related cases. Several BGH decisions delved more deeply into platforms' speech moderation schemes. The court in these decisions made liberal use of fundamental rights – in particular freedom of expression – as a benchmark for review of whether the speech moderation rights, set one-sidedly by platforms in their ToS, met the expected standard of user protection. This approach was voiced, first and foremost, in the

2021 "hate speech" BGH judgments (III ZR 179/20[12] and III ZR 192/20[13]), two cases in which the BGH addressed the claims of Facebook users who had experienced temporary account suspensions and removals of comments they had left under other users' posts. In attempting to justify these sanctions, Facebook pointed out that in both cases users had violated the platform's community standards[14] by using hate speech. According to the BGH, this regulation of speech was contrary to good faith and amounted to an excessive intervention into the users' freedom of expression. The BGH further pointed out that this right must be balanced with the platform operator's right to carry out a business activity, which the German constitution equally guarantees. The checklist for reviewing Facebook's ToS, which the Federal Court of Justice established in this case, therefore consists of three main building blocks: freedom of speech, market liberty, and the interests of platform users as consumers. Hence, despite the seeming simplicity of the question posed by online freedom of speech, resolving it requires balancing a broader and more diverse array of rights that juxtapose the speech- and economy-related layers of the issue.

Soon afterwards, the BGH resorted to similar reasoning in another pair of cases: III ZR 3/21[15] and III ZR 4/21[16], with judgments issuing in early 2022. These cases dealt with the Facebook ToS provision (currently no longer in force) that mandated that users use their real names on the platform and banned their hiding behind false names or "nicks". In both cases, the BGH found that blocking a Facebook account for violation of this rule constituted a disproportionate violation of freedom of

expression under the *Grundgesetz*. And a clause that required using one's own name on Facebook the BGH found to be unfair towards the user because the freedom of expression also guarantees liberty in choosing how one wants to present herself publicly.

Similarly to the earlier cases, the fundamental rights argument was the key criterion for review of a social media site's ToS. Although the foundational question in the latter judgments was different, in that it concerned not *what* can be said online but rather *how* a speaker may present herself, all these problems fit under a common umbrella of freedom of speech as a tenet of consumer interest. Behind this conclusion, however, is a backdrop as thought-provoking as the Court's reasoning itself.

Freedom of Speech as a Consumer Service

The application of the UCTD-based unfairness test by the BGH presupposed that the clauses it was scrutinizing shared two parallel features: that they arose in a business-to-consumer contract; and that they directly addressed the interests of consumers. Although the reason for the former assumption is clear, the reason for the latter assumption, which the BGH subsumes without any substantial explanation, is less apparent, especially given the conceptual framework of consumer law up to now. The tacit assumption of consumer protection so far has been its clear economic vector. Under this view (which the UCTD shares), the consumer has been protected from ex-

cessive prices, substandard goods and services, market barriers and other factors that threaten her interests in the market and can be expressed in pecuniary terms. The emergence of social media opened a new perspective for understanding consumption patterns in modern society.[17]

With social media, the relationship between the user or consumer and the business is outside the classical concept of consumption. In exchange for their personal data and attention, consumers receive access to a forum of social interactions built by a platform. Such "infrastructure of expression" encompasses not only IT architecture but also the rules contained in a ToS document and accompanying internal documents. This way, freedom of speech shifts from a political value to a consumer service. It follows that consumers may legitimately expect this service to be of a certain quality, encompassing not only a degree of safety vis-à-vis other users on a platform (i.e., protection from hate speech, defamation and certain types of disinformation) but also freedom from excessive interventions by a platform in the role of speech regulator.[18] This issue was the cornerstone of the four BGH judgments, mentioned earlier, that put limits on platforms' private governance of speech. As the court implicitly assumed, the degree of individual freedom in choosing "what" and "how" to speak in the platform's forum is a key feature of the "speech service" that consumers could expect from a platform. Although the idea of Facebook being an infrastructure for expression as a consumer commodity (and that platform is an infrastructure for it) clearly looms in the background of the Facebook ToS review. The same in-

tuition also emerges in an earlier decision of the (*Oberlandesgericht*) in Munich[19] that referred to "Facebook services" under the platform-user contract. This epitomizes an ongoing shift in how the legal nature of social media is perceived, from mere networks for social interaction to contract-based consumer commodities.

The DSA Revolution?

This bottom-up review of platform governance via ToS has recently been confronted with a momentous, top-down regulatory attempt: the Digital Services Act.[20] Parts of the two approaches diverge; the mindset differs. Judicial review of unfair terms caters to decentralized platform governance based on case-by-case (hence possibly less coherent) analyses with the individual consumer's interest in mind. The DSA, on the other hand, adopts a more holistic perspective. It endeavours to embrace all online intermediaries (not only social media) within a uniform set of standards and rules and possibly within consolidated enforcement schemes.

How might these two mechanisms interact after the DSA comes into force? Will the DSA's targeted rules on private regulation by platforms and online content moderation replace the UCTD-based review of ToS? The simplest and most convincing answer is: Hardly at all. Although the DSA clearly overlaps[21] with several elements of existing consumer law (see, e.g., Article 14 on standard terms), it mostly steers clear of any direct liaisons with consumer protection. In this way, the advent of

the DSA shunts online market governance into two silos: content moderation under platform-specific rules on one hand and the older consumer toolbox on the other. Although this bifurcation provides a broader array of tools to protect individuals online, it is not complimented with any coordination scheme. The outcome is that the same issue (e.g., the permissible standard for suspending a user account) may be framed differently by courts performing the unfairness review as opposed to digital market regulators appointed under the DSA. Such incongruences may occur at both the EU and the domestic levels as well as between them. The chances of courts and regulators actually coordinating their approaches at these levels seem rather slim. Consequently, one of the main purposes of the DSA venture – unifying European platform governance and restraining jurisdiction-shopping by tech companies – may be corrupted.

Quite ironically, it was in contract law – which so far has been marginalized in the discourse about platforms – that some of the earliest responses to the social media issue were developed. This pathway of reviewing the content of contracts had been overlooked as a tool of platform regulation. It turns out to be more powerful than might have been expected: not only does it allow the introduction of fundamental rights and other political values into the platform–user relationship, it also provides users themselves with greater agency. The contract law toolbox – with consumer protection in the foreground – brings fundamental rights standards to granular relationships between non-state entities and allows users to invoke them directly vis-à-vis a platform. A similar result would hardly be pos-

sible horizontally without the channel of contract law. Infusing social media practices with freedom of speech and other fundamental rights would instead require top-down intervention by public enforcers. And in many instances, this would be less expeditious and less sensitive to atypical circumstances than contract law measures.

In Europe, it was thus – rather unsurprisingly – the consumer component of contract law that turned out to be particularly successful in "regulating the regulators" of online speech. The assumption that use of social media constitutes consumption *per se* opens broad avenues for individuals to seek protection from a "speech infrastructure" that is qualitatively degraded by platforms. With the growing awareness of online speech moderation and the developing body of EU and domestic rules, the consumer toolbox is likely to be intensely explored in the foreseeable future.

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Hans Christoph Grigoleit

Digesting the (Not So) Free Lunches of Social Media

"Dark Patterns" and Party Autonomy

Popularized by Milton Friedman, it has become common wisdom that "there is no such thing as free lunch." Social media shows us daily how true this provocative observation remains until today. We are all accustomed to using platforms such as Facebook, Instagram, YouTube and others – seemingly – for free. The "conventional" business model of these platforms focuses on data exploitation, with companies financing themselves via advertising proceeds. There is a recent tendency, however, to pursue direct payments – via "freemium" models (free basic subscription – charges for premium services) or via "in-app-sales", where the customer can pay to get certain additional features.

Academics and lawmakers have turned their attention to business practices surrounding social media and other digital services and have discovered "dark patterns", a term used to identify objectionable conduct by service providers. In response, the potential for new legal action is being considered. While it is obviously worthwhile to explore objectionable business practices in e-commerce and on social media, this contribution suggests that the discourse on "dark patterns" is somewhat sketchy and incomplete – and in need of more specificity.

Background Observations

To approach the discussion on "dark patterns", it is worth noting three general observations, on free elements of services, on the relevance of specific autonomy deficits and on market mechanisms.

"Gratuitous" Elements

The aspect of "freedom of charge" is not only non-existent but also legally irrelevant. The commercial quality of everyday digital services is obvious. Everybody knows that providers pursue commercial interests, be it at least through advertising and data exploitation. In consequence, it is not justified to presume lesser customer awareness in such "gratuitous" contexts. In the absence of genuine gratuity, it is clear that providers are not entitled to privileges (liability or otherwise) granted by law to genuinely gratuitous contracts.

Searching for Material Autonomy Deficits

The potential trigger for legal intervention should be the imbalance caused by the algorithmic power of the providers – by their unilateral dominance in terms of access to algorithmic tools. The flipside of this dominance is an inevitable ignorance on the side of the customer, not only of the respective algorithmic tools employed, but also of the potential relevance of these algorithmic tools for their decision-making.

This imbalance is ubiquitous, essentially familiar from conventional commerce and innocuous by itself. It should only be qualified as legally relevant if the algorithm design causes an autonomy deficit by misleading the customer or by exercising undue psychological influence. The autonomy deficit must be material in so far as its significance clearly exceeds that of conventional marketing and promotion tactics.

Market Mechanisms

The significance of autonomy deficits is largely controlled by market mechanisms. It appears that *continuous* success in e-commerce is strongly related to *continuous* customer satisfaction and not so much to enforcing maximized profits on each single transaction. Rather than the current transaction, the follow-up transactions drive the success of the business. One may find this trend embodied in what *Amazon* has defined as its core principle no. 1: "customer obsession". Whatever counts as a "dark pattern" may arguably not strengthen customer satisfaction and the reputation of the provider.

It is quite surprising how little attention is paid to these counter-effects in the current discourse on "dark patterns". Legal intervention is costly. It is sensible only where there is a clear market failure, that is, where an autonomy deficit cannot be expected to be resolved by market mechanisms. In this assessment, "pre-existing" protection tools, such as withdrawal rights, termination rights, et cetera, should be taken into account when calling for legal action.

Shaping the Issues

The focus can be further narrowed by separating out certain issues that clearly relate to relevant autonomy deficits and market failures, but need to be addressed by specific tools. In these areas, the label "dark patterns" has a particularly obscuring tendency.

Protection of Minors

This holds true firstly for the protection of minors. Some questionable practices target minors, which consequently should be addressed by specific instruments of minor protection. Conventional contract law already provides for the voidness of transactions and the restitution of payments. This is supplemented by specific rules for the digital sphere, such as Art. 28 of the Digital Services Act (2022/2065/EU[1], "DSA").

Data Protection

Data protection is another field that deserves legal attention. Besides the trend towards monetary considerations, exploitation of customer data continues to provide a source of proceeds for providers. Consequently, data protection issues remain. Particularly worrisome, from a customer perspective, is the lack of clarity about the extent of data exploitation. Current legal tools like the provisions of the General Data Protection Regulation (2016/679/EU[2]) are not very specific and little targeted; especially the consent model is ridiculously ineffective while being enormously costly. Much more research is therefore needed on data exploitation, both from a technical and a normative perspective.

Hit-and-Run-Enterprises

Also clearly outside the scope of market mechanisms are providers who do not seek to establish an ongoing business-customer relationship from the outset and try to evade legal action. Such hit-and-run enterprises may well engage in objectionable practices that can rightly be described as "dark patterns". The crucial issue here is the effectiveness of public enforcement, which by itself depends upon resources and on international cooperation. If enforcement can be ensured, hit-and-run enterprises do not require subtle new conduct requirements, but can be tackled on the basis of existing coarse principles, such as fraud, usury, unconscionability, et cetera.

Searching for "Dark Patterns"

While the discourse on "dark patterns" refers to many marketing practices that may fall short of the threshold of material autonomy deficits (see above), some practices are certainly worthy of more legal scrutiny.

Gaming – Abusing Addictive Patterns

In the case of online gaming, legal concerns may arise from the abuse of addictive tendencies, which impede reliably autonomous decisions.

Potentially exploitative practices include "pay2win" games, where players who purchase virtual items – usually through

microtransactions – gain a competitive advantage. Player autonomy may be compromised by artificially creating frustration that can only be resolved by microtransactions. The abuse of addictive tendencies in gaming is aggravated by "loot boxes" that give players a random selection of in-game items. Characteristically, the content of the loot box is selected at the free discretion of the game provider and probabilities are not disclosed. Exploitative potential particularly arises from the combination of elements of chance with incentives for incalculable financial investment in a potentially addictive gaming setting. Similarly, online games often provide for an in-game currency, which is used to purchase in-game content. Typically, in-game currencies obscure the outflow of real-world money and are therefore another exacerbating factor in the field of gaming. Some gaming structures even combine all the above-mentioned practices.

From the legal perspective, online games may be addressed by (conventional) gambling regulations. Gambling is commonly defined as wagering a stake with monetary value in games of chance. In online gaming, loot boxes are based on chance and can thus possibly be classified as gambling if in-game contents can be resold on a secondary market. In many countries, providing gambling without a license by a public authority is legally prohibited or a criminal offence (e.g. Germany, sec. 284 German Criminal Code[3]), causing restitution claims in case of infringement.

It is worth considering expanding the restrictive scope of gambling regulations to include extreme cases of exploitation

in online gaming practices. For less significant misconduct outside the scope of gambling regulation, exploiting addictive behavior of online gamers should call for legal action, particularly where a lack of transparency and predictability can be identified. This is the case with loot boxes, in-game currencies and pay2win games. Potential legal tools of low intensity include mandatory transparency requirements of different sorts.

Luring into Financial Commitments and Impeding Termination

Other business patterns, which are widely and rightly criticized, relate to mechanisms surrounding the initiation and retention of enduring financial commitments. Prominent examples are subscription models that automatically converse from free trial periods to paid subscriptions. As such mechanisms neutralize the alert resulting from the pay threshold, customers are lured into continuous payments. Therefore, express consent should be required for the conversion and it should be prohibited to make free trial periods dependent upon payment details suitable for "automatic withdrawals".

Similar issues arise from models relying on impeding termination for long-term subscriptions that may even fall below the attention threshold of the customers due to the insignificant volume of the charge. Providers should be required to facilitate termination through an easily accessible and clearly visible termination button (as mandatory according to sec. 312k German Civil Code[4]) and to issue reminders before auto-renewal.

In contrast to the above-mentioned positive cases of exploitative practices, there are many areas where "dark patterns" are suggested by the current discourse but where, on closer examination, there is little need for complex new regulation. A prominent example that causes excessive noise in the legal discourse are influencers, who may make misleading statements and commercialize the personal affections of their followers. As the commercial background of influencers activity is usually obvious, disclosure requirements – as they are laid down in many jurisdictions – are somewhat formalistic and presumably futile. The only effective tool to tackle influencers' misconduct is to establish and strictly enforce liability for (culpably) false and misleading statements.

One More (Meaningless?) General Standard?

It is characteristic for the discourse on "dark patterns" that this term is referred to as if it were a new general clause directed at different types of objectionable conduct. On the one hand, its central metaphor – "darkness" – resonates with the general sentiment that customers are helplessly misled by businesses in online transactions. On the other hand, the use of the term "dark patterns" masks its own obscurity and the inability to specifically define what exactly qualifies business conduct as objectionable in such a material way that it triggers the need for legal control (see above).

Further obscurity results from some of the definitions that are presented to specify "dark patterns". An illustrative example is the definition of dark patterns presented by Martini et al.[5]: "Dark patterns are digital design choices which deliberately mislead users to act in a certain way, which is contrary to their 'actual' interests or to carry out actions that they would have not carried out if it were not for dark patterns." (translated) A behavioural study by Lupiáñez-Villanueva et al.[6] refers (among others) – to (1) hidden information/false hierarchy, (2) preselection/nudging, and (3) nagging. The ELI Response Paper by Sørensen et al.[7]. identifies abuse of "cognitive biases" that exist across all population demographics as the legal challenge.

Any move towards new general clauses must take account of two considerations: First, a general clause amounts to a delegation of legislative power from the legislature to the judiciary. Secondly, there are already numerous general clauses in force to protect customers and e-commerce from objectionable business practices. Any new general clause must therefore be thoroughly justified in the light of the legal status quo.

As to the status quo of general clauses, one can on the European level relate to the most recent Article 25 par. 1 DSA[8] ("[…] deceives or manipulates […] [or] materially distorts or impairs the ability […] to make free and informed decisions"). The scope of application of this prohibition is basically focused on b2b-transactions, as the Unfair Commercial Practices Directive (2005/29/EC, "UCPD"[9]), with its own general standards, takes priority according to Article 25 para. 2 DSA[10].

Further protective clauses are provided by the Unfair Contract Terms Directive (93/13/EEC[11]) and the Consumer Rights Directive (2011/83/EU[12]). At the level of national private laws, there are – more or less in all member states – additional general protective standards, for instance concerning unconscionable contract terms, breach of good faith, abuse of rights et cetera.

Fine-tuning of Sanctions

Sanctions are characteristic for rules of law. They are critical for the quality of lawmaking. Without the specification of sanctions, the demand for protection against "dark patterns" remains speculative and nonsensical.

At the heart of the sanctions issue lies the choice between public and private enforcement. At the level of EU law, public enforcement has been the dominant choice, as provided for in consumer contract law by the Representative Actions Directive (2020/1828/EU), by the UCPD and, recently, by the DSA. By contrast, the relevant EU legal acts do generally not provide for private law sanctions. However, there are some exceptions. Most notably, the DSA establishes a damages claim for customers against providers, if the customers have suffered losses from DSA violations (Article 54 DSA). Even more notably, the ECJ has held that, in the absence of explicit EU provisions, damages claims might be based upon the principle of effectiveness, if the EU legal act in question is designed to protect individual interests (see recently ECJ, Mercedes-Benz Group, C-100/21). It is obvious that on the level of European member state laws,

various sorts of private law sanctions might be connected to whatever qualifies as relevant "dark pattern"-prohibitions (e.g., invalidity of contract, restitution, damages).

Both public and private enforcement have relative advantages and disadvantages. From the perspective of maximum prevention and deterrence, it may seem desirable to combine the relative advantages and to open up both public enforcement and private law tools, in particular, damages claims. However, among other considerations, it is essential to take into account the litigation costs potentially arising from private enforcement and damages claims. This is particularly relevant where claims can be based on vague general standards – as we see in the discussion on "dark patterns": The more vague the elements of the claim are, the greater the leeway for opportunistic rent-seeking by the "litigation industry" and the greater the risk of social harm through overdeterrence. By the same token, public entities committed to the "common good" may be better placed to initiate the enforcement of vague general standards, thereby flexibly controlling the "if" and "how" of fine-tuned sanctions.

Concluding Remarks

Picking up on the conference theme: It may be comforting and tempting to be radical in obscurity. But in a legal context, it is preferable to pursue specificity – in taking account of the context, defining conduct requirements and in linking them to sanctions. The discourse on "dark patterns" may remind us to

avoid bringing too much fairness into social media contracts:

(1) In a legal context, "dark patterns" need to be specified taking into account the algorithmic power imbalance on the one hand and the protective effects warranted by market mechanisms on the other.

(2) Some of the issues raised under the slogan "dark patterns" are already addressed by specific sets of rules.

(3) It might be worthwhile to direct legal attention

- to exploitation of addictive behaviour in gaming – especially, where elements of opacity are involved, and
- to luring customers into subscriptions and impeding their attention for termination.

(4) The relevance of "dark patterns" should be determined in the context of the numerous general standards already in force.

(5) Sanctions must be specified in line with specific conduct requirements.

(6) With regard to vague conduct requirements – as we see them in the discussion on "dark patterns" –, it is essential to consider the litigation costs that may arise from private enforcement.

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Vanessa Mak

The Contractual Rights and Obligations of Prosumers on Social Media Platforms

Recognizing Use Value

"The hideous ugliness of the term *prosumer* (the online creator, after Toffler 1980) should not hide the potential for the individual to move far beyond a caterpillar-like role as a producer of raw silk and encompass their ability to regenerate into a butterfly or moth", said Brown and Marsden in their 2013 monograph *Regulating Code. Good Governance and Better Regulation in the Information Age*[1] (see also SSRN[2]). Translated into legal terminology, what they professed was a wish to create a regulatory framework that would enable content creators on the internet to take back some power over their creations from the Big Tech companies monetizing it based on generously drafted licensing agreements.

To this day, the question how to balance the rights of users against the powerful position of Big Tech remains a topic of contention. The European legislator has been a frontrunner with the adoption of the Digital Services Act (DSA) and the Digital Markets Act (DMA) in 2022. Still, these acts focus primarily on creating a "safe" online environment for users of internet services and online platforms. They do not address the question how the position of content creators – that is: prosumers – can be improved with regard to the value that they create, of which the operators of websites and platforms are still the main beneficiaries.

This contribution will consider the question how contract law can contribute to a fair balance between the rights of prosumers and online platforms, with a specific focus on social media platforms. It starts with an assessment of the values that contract law should reflect, proposing the recognition of *use*

value alongside the exchange value of products on the market. The second part of the contribution will consider which mechanisms in contract law could be employed to do justice to both values.

Values

Alvin Toffler coined the term "prosumer" in his 1980 book *The Third Wave*, conflating the concept of the consumer with that of the producer. The prosumer is a natural person, not acting in the course of a business (i.e., a consumer) but also a creator (i.e., a producer).

The relevance of this concept is that it relates to a part of the economy that is mostly invisible. It concerns value created outside the market for mass-produced goods and commodities, referred to by Toffler as Sector B. Taking note of the rise of "do it yourself" practices and in general acknowledging housework as part of economic productivity, Toffler stated: "But even in these words the "productivity" of the consumer is still seen only in terms of Sector B – only as a contribution to production for exchange. There is no recognition as yet that actual production also takes place in Sector A – that goods and services produced for oneself are quite real, and that they may displace or substitute for goods and services turned out in Sector B."[3]

This conceptualization of markets can be applied without difficulty to content creators on social media platforms. They are creating the content that makes these platforms viable – TikTok videos, Facebook photos, Instagram vlogs – and can

therefore be seen as prosumers.

But how does their work get rewarded? Although some content creators are earning large amounts of money through social media platforms, most are not. They are, however, not considered to be badly off. It has been said that "[i]t's difficult to think of prosumers as exploited. This idea is contradicted, among other things, by the fact that prosumers seem to enjoy, even love, what they are doing and are willing to dedicate long hours to these activities without receiving anything" (Ritzer & Jurgenson 2010[4]).

Whilst that statement may be true, or may have been true for a long time, it dates back to the earlier days of social media use. Where we stand today, the rise of Big Tech has led to an increasing disparity between users and platform operators. The latter are earning billions of dollars on the basis of business models built on the analysis of user data, which allows for targeted advertising and hence attracts business users and advertisers. It seems at least dubious, morally as well as economically, that users are not seeing any of that income go into their own pockets.

To address this imbalance, one step forward would be to give recognition to the value created by users that does not have *quantitative* economic value on the market. That value, named exchange value, is recognized by law and forms the basis of the ways in which Western private law systems balance the interests of businesses, consumers and other private actors (see on European private law, for example, Michaels 2011[5]). As was seen, however, prosumers on social media platforms also cre-

ate *qualitative* value. They post photos, videos and other digital content aimed at connecting socially with other users of the platform. That social goal is not reflected in the exchange value that can be quantified in relation to products exchanged on a market. It should rather be seen as a satisfaction of needs in a qualitative way – a *use value* (see Henrique do Nascimento Goncalves & Furtado 2021[6]).

That leads us to the question: how can contract law facilitate the recognition of the *use value* generated by prosumers on social media platforms?

Contract Law

One answer is straightforward: the parties to the contract have the possibility to stipulate such a reward. In some cases, social media platforms have started to offer payment to content creators, and in innovative ways. TikTok, for instance, contains a function allowing users to live stream content and collect payments from other users of the platform, for example, by performing a challenge. Australian "sleepfluencer" Jakey Boehm earned 34,000 dollars this way, simply by allowing other users to disrupt his sleep in exchange for money (Weiss, Bradley and McAlone 2022[7]).

Such reward schemes will only benefit the most popular content creators on social media platforms. In order to more generally reward *use value*, contract law itself could be assessed with an eye to strengthening the contractual position of prosumers vis-à-vis platforms. As a starting point for further de-

bate, the following focuses on transparency and unfair terms control as means for addressing the imbalance between prosumers and social media platforms.

Licensing & Transparency

Most social media platforms stipulate in their terms and conditions that users, in exchange for having access to the platform's software and interface, grant the platform a license for using the content that they create. Such licenses tend to give very broad permissions to the platform, as exemplified by Facebook's terms of service[8], clause 3.3:

> *Specifically, when you share, post, or upload content that is covered by intellectual property rights on or in connection with our Products, you grant us a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings). This means, for example, that if you share a photo on Facebook, you give us permission to store, copy, and share it with others (again, consistent with your settings) such as Meta Products or service providers that support those products and services. This license will end when your content is deleted from our systems.*

For individual users of the platform, this clause is part of

the general terms and conditions. They are therefore in a "take it or leave it" position: access to the platform is only available if they accept this term as part of their contractual agreement with the platform. However, if they reside in the EU and if they act in a non-professional capacity, they may garner some protection from the Unfair Contract Terms Directive (UCTD, Directive 1993/13/EEC[9]). It stipulates that terms that are not individually negotiated can be set aside if they lack transparency or if they are substantially unfair; the latter is to be determined by a national court.

In a report[10] for the European Parliament's JURI committee, Marco Loos and Joasia Luzak note that Facebook's previous iteration of this licensing clause was struck down by a Paris tribunal for lack of transparency. The tribunal considered the term unclear and confusing for not specifying the scope of the license, nor allowing users to terminate the license with the effect that their content would be removed (see their report[11], p. 40-41). Loos and Luzak recommend placing such terms on the grey list of the UCTD, containing terms that are presumed to be unfair and may be set aside at the request of the consumer or *ex officio* by a national court. That would mean that a term would only be valid if the platform provider proves that it has been brought specifically to the consumer's attention at the moment of conclusion of the contract, and that it has been individually, separately and explicitly accepted by the consumer (p. 41). Of course a practical solution for the platform operator is to amend their terms and conditions so that they do pass the transparency test, which Facebook appears to have done.

The protection against a lack of transparency, of course, only goes some way towards protecting users of social media platforms. If the term is clear and intelligible, the user who agrees to it is bound by it. Another question is whether the term, substantially, creates an imbalance of rights and obligations between the parties that would, taking account of the requirement of good faith, constitute an unfair term in the meaning of Article 3(1) UCTD. As things stand, that is not the case. There is no regulation preventing platforms from stipulating such a broad license. Under the EU's Digital Content Directive (2019/770[12]) the consumer's provision of personal data (in the form of content) could even be seen as an exchange or counter-performance in relation to the platform's supply of digital services (Article 3(1) DCD).

Unfair Terms Control

Unfair terms protection can still be an instrument for addressing the imbalance of power between social media platform and prosumer. The UCTD has already had an effect on the fairness of terms used by social media platforms, even on platforms not located in the EU, to which it is not applicable. By way of illustration: Google updated its terms of service so as to comply with the European rules. Where its 2016 terms and conditions contained a clause on unilateral change of terms that violated the UCTD for lack of explanation (see Loos & Luzak 2016[13], p. 69), its current terms of service[14] (as of 21 April 2023) are compliant.

The adaptation of terms and conditions by social media platforms located outside the EU can be seen as part of the "Brussels effect" (Bradford 2020[15]). It makes a difference for users of social media platforms, as US law does little to protect them against unfair terms (for comparison, see Becher & Benoliel 2021[16] on the lack of unfair terms control US law).

Further strengthening of this regulatory framework is in the making. As part of the EU's digital single market agenda, the UCTD is now up for reassessment to determine whether it needs updating to ensure fairness for consumers in digital markets. Part of this so-called "Digital Fairness Fitness Check" are also the Unfair Commercial Practices Directive (2005/29/EC[17]) and the Consumer Rights Directive (2011/83/EU[18]). The responses to the European Commission's consultation reveal that many stakeholders find that additional regulation is required to ensure fairness in the digital market. European consumer organization BEUC recommends blacklisting certain practices that result in disempowerment of the consumer in the digital market, such as terms giving the trader the right to unilaterally delete a consumer's user account (see BEUC position paper[19], p. 11). Regulation should, however, as acknowledged by other stakeholders too, be considered in combination with alternatives such as "fairness by design" (compare the response of the Dutch Authority for Consumers & Markets[20]).

Further Re-evaluation

Contract law, therefore, contains some tools that can push towards a fairer balance of rights between content creators and social media platforms already. Transparency is a first step, substantial fairness a second one. To radically change the position of prosumers on social media platforms, however, a thorough reassessment of fairness in digital markets is needed. Restricting the possibilities for platforms to unilaterally change their terms or to delete the user's account will not in itself lead to a reward for *use value* generated by content creators. It will only protect them from disempowerment by the platform, for example in the form of losing access to their followers or fan base. The recognition of *use value* would require a deeper evaluation of the ways in which contract law views economic exchange.

Further avenues for research could examine whether data portability – that is, the possibility to move content from one platform to another – could effectively open up new ways for content creators to take control over their own creations (Kuebler-Wachendorff et al. 2021[21]), or even more radically: whether content creation should be recognized as an economic activity for which platforms should be required to provide a reward in the form of payment.

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Niva Elkin-Koren, Ohad Somech, Maayan Perel

A Non-Binary Approach to Platform-to-Business Transactions

Social media is a disruptive technology. It has not only transformed political discourse and social interactions but has also shaped the market economy, by disintermediating traditional players and creating new dominant powers. This transformation is challenging fundamental distinctions in contract law, between an employment contract and an independent contractor agreement, or between consumer and business transactions, to name a few.

In this commentary, we demonstrate how contract law may evolve to address such challenges. Contract law legal doctrines are applied with great sensitivity to contract classification because different types of contractual relations invoke different values and trade-offs. New classifications might be introduced when a pattern of typical features makes these contractual relations sufficiently different from existing categories. By recognizing the unique features of platform-to-business relations, courts can better posit them in the spectrum between business and consumer contracts, while securing business users‘ unique interests.

Business Users on Social Media

Social media has introduced new opportunities for individuals to launch their own small business and establish direct communication with suppliers and prospective customers. Users can now profit from promoting their art and music and commercializing their proficiencies, from selling homemade cookies to offering online private lessons. Users may add a business page

to their personal profile, often interconnected through various channels, such as Facebook, Instagram and WhatsApp in the case of Meta. This new business-to-user-through-platform model is disrupting the traditional value chain, converging functions previously performed by manufacturers, wholesalers, retailers and consumers.

Intermediation by social media platforms has some key unique features, which shape the role of those engaging in market transactions. First, digital platforms operate in a two-sided market, where services are provided for "free" in one market, only to be leveraged and attract suppliers and advertisers in the other market. Second, platforms intermediate among the different stakeholders by controlling data on both the demand side – what users like to watch and read or how fast they make purchase decisions – and on the supply side – how much of a certain product was sold and at what price, or how many views a video received and at what times. This provides platforms with unprecedented information on the market as a whole and enables them to not only respond but also to anticipate and shape market trends and preferences. Finally, blurring private/social/business boundaries, digital platforms dominate multiple areas of everyday life. For instance, META channels may facilitate intimate exchange and business transactions (WhatsApp), community building (WhatsApp groups), promotion and marketing (Instagram), and political protest (Facebook). Users on digital platforms, therefore, may play multiple roles on social media: one may use a single platform as a worker, friend, creator, student, and political activist, with

the distinction between these roles often obscured by design.

Users are providing platforms with meaningful considerations.[1] As forcefully argued by numerous scholars,[2] users are "paying" with their attention ("eyeball") to advertisements and their personal data, which is then sold by platforms to third parties. Moreover, users are often the producers of content – original music shared on YouTube, photos uploaded to Instagram, and posting on Facebook – which is the main draw for other users, thereby strengthening the leverage of (already dominant) platforms. Similarly, small businesses and social entrepreneurs build communities of followers, which also invoke multiple interests and expectations.

Consequently, in a platform economy, the question of who is a consumer and what is a consumer transaction becomes increasingly complex.

Contract Classifications Re-Examined

Contract law often distinguishes between business transactions and consumer transactions. In business transactions, both parties presumably entertain equal knowledge, sophistication and bargaining power, and are therefore considered formally equal agents, free to fashion their transaction however they see fit. A consumer contract, by contrast, is usually a short-term, one-time transaction, involving the transfer of assets or services in exchange for payment between a sophisticated and legally savvy business and a non-sophisticated individual. Accordingly, consumer protection laws would typi-

cally apply disclosure obligations, prohibit misleading actions and offer a right to revoke the contract in case of unfair or deceptive practices.[3] Indeed, the distinction is so entrenched that some contract scholars consider the law of consumer contracts as separate and distinct from the law of (business) contracts,[4] and for the American Law Institute to draft a Restatement of Consumer Contracts alongside its Restatement of Contract.[5]

This classification, however, does not neatly fit the contractual relationship of small and midsize enterprises (SMEs) and platforms. The dominant market power of digital platforms and their multiple functions create new vulnerabilities in business users, which are not adequately addressed when viewed as simply a business-to-business transaction.

The typical example of a business-platform dispute regarding account blocking may illustrate this misfit. Buffie Purselle, an influencer and former TV reality star was kicked out of her Instagram account,[6] causing her to lose over 130,000 followers and associated profits. She is not alone. A report recently published by the Israeli Internet Association describes a pattern of online hijacking and fraud targeting the META accounts of small businesses.[7] Though accounts may be blocked for various reasons, including platforms' arbitrary or opportunistic ones, financially-driven hackers pose a distinct and significant threat to business users. Often, the objective of the attacker is to obtain exclusive control over the victim's digital property, most importantly the advertising accounts linked to his or her credit cards. Attackers, however, might also be competitors or other adversaries, who maliciously exploit the platforms' automated

content moderation systems, by posting unlawful content for a system to automatically detect as a violation of its terms of service (ToS), and to subsequently block the account. Similarly, political activists and human rights organisations have been silenced,[8] as strategic players, such as governments, have sent notices to social media at massive scale, claiming that the human rights postings were illegal content.

Platforms rarely offer any procedural or substantive remedies for unwarranted account suspensions,[9] relying on their ToS to retain unlimited discretion to suspend or terminate accounts. In the US, most lawsuits brought against platforms for termination in breach of contract were dismissed.[10]

The disputes around business account blocking thus demonstrate the shortcomings of applying the standard consumer-business classifications to such disputes.

Digital platforms govern all communication channels of business users; not only with their friends and family, but also with suppliers, customers, and future customers. While the automated systems of content moderation were designed to protect users from harm caused by unlawful content, these systems make it difficult for victims, erroneously identified as offenders, to report and flag the attack and receive remedy. Moreover, in addition to the loss of intimate contacts and connection with social acquaintances, business users incur severe and sometimes-irreversible commercial harms – elimination of their businesses' transaction histories, the disruption of their order tracking, both from suppliers and to customers, and their ability to use payment services. These harms to the day-to-day

operation of their business may also lead to reputational harm, and to the loss of a community of followers. Small businesses, which pay the platform for business promotion and invest in sustaining a customer base, experience another layer of sunk cost.

However, consumer protection law offers only limited remedies to affected users, typically providing them only with the right to revoke the contract, which is hardly relevant to account suspension scenarios, and to receive limited damages.

The platform to businesses (P2B) transaction may also not fit the underlying assumptions and contractual expectations of a simple business transaction, as personal uses and business practices, are often converged. Sometimes, personal content is posted to generate a community of followers (as in the case of influencers for instance) and other times, relationships with potential customers may intertwine with social or political engagement. The P2B transaction is often long-term, and success (for both the business and the platform) may depend on collaboration in developing and sustaining a community of followers.[11] The boundaries between personal, communal, market and political practices are often blurred. Moreover, in P2B relations, there are often significant gaps in knowledge, sophistication and bargaining powers. Business users tend to be completely dependent on the platform for running their business, lacking any independent offline management, and are themselves a user in the ecosystem created and controlled by the platform.

At the same time, when viewed as a business transaction,

contracting parties are often held to a higher standard and are expected to incur the risks associated with the bargain (including the risk of suspension/termination), and to ensure the contract fits their desirable risk allocation. Thus, neither categorization provides business users with helpful remedies for their predicament, leaving them entirely dependent on the platforms' goodwill.

Moving Beyond Binary Classifications

In a forthcoming paper, we show how the principles of contract law were applied by courts in Israel to construe P2B transactions.[12] These courts have extended the classification of consumer contracts to apply in some circumstances also to businesses. Based on the analysis of this body of cases, we propose to move away from the binary classifiers of business/consumer, and to adopt a spectrum approach, where P2B transactions might be located between B2C and B2B depending on the particular circumstances.

In recent years, Israeli courts have been called upon to construe the contract[13] between business users and digital platforms in the context of Meta ToS, providing that "any disputes concerning a Consumer" will be litigated in the jurisdiction where he or she resides and according to the local law, while all other disputes involving Meta will be resolved by courts in California and will be governed by the laws of the State of California. Meta has routinely filed a motion to dismiss, claiming that pursuant to its ToS the court lacks any jurisdiction over suits

filled by business users. In a series of decisions discussed below,[14] courts have dismissed this claim, thus developing a more flexible broad definition of a consumer in digital platforms.

A consumer is commonly understood as a person who buys property or receives a service for personal, domestic or family consumption. That is, as opposed to business actors, who purchase assets and services used for the production of products, rather than for their self-consumption.

In *Necht v. Facebook*,[15] the district court addressed a lawsuit concerning the alleged unlawful termination of both a personal profile and the linked business pages used by the plaintiff to promote some online courses. The court denied a motion to dismiss, holding that the plaintiff should be considered a *Consumer*, since the mixture of personal use and business affairs was generated by design. The court further held that disparities of power between Facebook and the plaintiff were so significant that they blur any distinction between business and consumptive uses of the platform.

The issue of contract classification was further addressed by the Israeli Supreme Court in two recent decisions. *Gal v. Facebook* (2022),[16] involved the purchase of advertising services. The plaintiff argued that Facebook failed to ensure that the advertising met its standards, contrary to its obligations under the ToS, and consequently, it was removed and the account was blocked. In denying Facebook's motion to dismiss, the Supreme Court determined that the plaintiff should be classified as a consumer under the contract, reasoning that even though the advertiser was a „business-commercial" actor, he was not nec-

essarily a sophisticated enough player to remedy the disparity of bargaining power with Facebook. Interestingly, the court explained that SMEs are often more similar in their bargaining power to consumers, and are even inferior to consumers since they are completely dependent upon Facebook for advertising services.

An important milestone in developing the flexible notion of *Consumer* for P2B transactions, was *Troym Miller Ltd. v. Facebook Ireland Ltd* (2022).[17] The case involved the owners of fashion fairs and lifestyle business, which used Facebook's advertising services as their main advertising platform. In a lawsuit filed against Facebook, they alleged that it was negligent in combining their separate business accounts, causing Troym Miller severe damages. Both lower instances had accepted Facebook's claim that the dispute does not pertain to a consumer, and therefore, per the ToS, should be adjudicated according to the laws of California. In denying Facebook's motion to dismiss, the Supreme Court held that the definition of a consumer is not a static one. Instead, the scope of the definition may depend on the purpose for which the law seeks to protect consumers, primarily on *information gaps* and *disparities in bargaining power*. Accordingly, a consumer in Facebook ToS may include SMEs that have purchased advertising services, if there are immense disparities in bargaining power and information gaps. At the same time, the court excluded SMEs from the definition of consumer, when they are large sophisticated businesses, with financial power, relevant experience and expertise.

The Israeli Supreme Court decisions are particularly strik-

ing, considering Israel Standard Contract Law, which applies to all types of transactions and allows courts to invalidate terms which accord drafters with an unfair advantage. In other words, the Court found commercially-orientated users to constitute consumers despite having available legal tools to address bargaining inequalities in P2B transactions.

In other P2B disputes, courts have also acknowledged that SMEs may have some additional duties, which do not otherwise apply to consumers. These include, for instance, a duty to examine the contractual environment where a business is a sophisticated repeat player (*Viva Media v. Google*[18]), or duties to inquire and avoid any injury or violation of the rights of others, such as intellectual property rights (*Zohar v. Facebook*[19]). In both cases, the court also found the user to constitute a business.

It is only by looking beyond any particular decision, then, that the emerging notion of P2B contracts expands the definition of a consumer beyond self-consumption, and conceives P2B contracts as a spectrum, which is not entirely classified as B2C, but at the same time not quite B2B. It is this non-binary approach that would enable courts to secure users interests under the ToS, which are standard form contracts, drafted unilaterally by platforms who exercise dominant market power, and at the same time, leave room to hold businesses accountable to some obligations depending on the circumstances.

P2B contractual lens

Europe has taken a regulatory approach to P2B contracts. A new P2B Regulation[20] came into force in 2020, defining platform obligations towards business users. Enforcement is mostly at the hands of the authorities or business representative organisations. Moreover, the Digital Service Act[21], which entered into force in November 2022, provides an additional layer of protection to users' rights, such as securing some procedural safeguards that require a warning before blocking and a right of appeal.

These two strategies for addressing the rights of businesses in P2B transactions – regulation and contracts – are not mutually exclusive. Our research demonstrates the advantages of the contractual approach,[22] which could offer a complementary solution to the obligations of platforms imposed by regulation. Contract law offers several advantages in this respect. Regulation may suffer from an enforcement failure where authorities do not have sufficient incentives or resources for effective enforcement. A related issue is regulatory capture, and state co-optation, especially as governments become more dependent on digital platforms for implementing policy and law enforcement.[23] A contractual strategy may help overcome such failure.

Finally, and most importantly, the contractual lens enables a more careful and nuanced evolution of the legal norms pertaining to P2B. Unlike regulation, it does not assume *ex-ante* the desirable norm, but instead develops it on a case-by-case basis. This may enable a nuanced consideration of the reason-

able expectations of different stakeholders and a more gradual development of legal norms.

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Chantal Mak

Data After Life

The Protection of Users' Development of their Digital Identity

"What if we rethought social media contracts in a radical way?" With this question, Catalina Goanta and her research team invited speakers to present new ways in which to think about contracting by digital platforms at the *Radical Reforms* conference[1]. In this contribution, I would like to address their question on the basis of a legal problem that is of both a practical and a legal-philosophical nature, namely that of *digital inheritance*, in particular concerning access to and use of social media accounts of deceased persons. Contract law in Europe currently has little grasp on the balancing of interests of social media users, their heirs, platforms, and society at large, which means that platforms play a key role in determining how digital legacies are handled. This contribution submits that a human rights perspective can offer starting points for reforms that do more justice to the protection of the digital identities of social media users.

After Life

Until recently, the idea of a digital inheritance might have seemed a topic for science fiction. In an award-winning episode of the series *Black Mirror*, for instance, a simulated reality called "San Junipero" is imagined as a virtual space in which people can continue life after death. *Black Mirror*, which is known for showing the darker side of digitalisation, thus, provides a glimpse of what the future could look like if technology developed one step further from where it is today. "San Junipero" is an episode that uncharacteristically strikes a somewhat lighter

tone and invites reflection on what choices we would (and should) make for a digital afterlife if we could continue living and governing our lives online.

Looking at possible futures of current societal challenges from this viewpoint, the question arises of how we deal with digital legacies at this moment and, furthermore, what this means for the way in which we make choices on post-mortem use of our personal data during life. In a report co-written by researchers from the Institute for Information Law (IViR) and the Amsterdam Centre for Transformative Private Law (ACT) for the Dutch Ministry of the Interior and Kingdom Relations, these queries formed the starting point for an investigation on "data after death" (*Data na de dood*[2]). To this research, which was led by Mireille van Eechoud, Marco Loos and I contributed insights from consumer contract law. Moreover, my contribution included fundamental rights aspects of digital inheritances. A further reflection based on these two legal frameworks may provide some inspiration for reforms of the regulation of social media contracts – after as well as during life.

Limits of EU Contract Law

The realm of digital inheritances turns out to be one in which digital service providers, including social media platforms, are very powerful. This is not so much because of their active engagement with the topic, but rather because of a striking absence of regulation in this area. Perhaps this can be explained by the unease of considering matters relating to the end of life

or the relatively new phenomenon of inheritances extending to the digital world. In any case, our report on data after death made clear that only a few jurisdictions have so far developed specific rules on digital inheritance (the US and Australia, and some EU jurisdictions; an overview is provided in section 6 of the report *Data na de dood*[3]). Their approaches mostly rely on data protection law or principles of inheritance law. In the Netherlands, where inheritance law does not put digital assets on the same footing as physical goods, some district courts have considered a contractual approach. They took inspiration from a judgement of the German *Bundesgerichtshof*[4], which relied on an analogy of access to e-mail accounts with the inheritance of physical letters. From a legal-comparative perspective, nevertheless, the role of contract law in addressing the balance of interests of affected parties so far appears to be quite limited.

In EU law, as Marco Loos and I found, the most likely candidates for addressing the contractual dimension of data governance after death are the Directives on Digital Content[5], Unfair Terms[6] and Unfair Commercial Practices[7]. The Directives, however, only have a limited impact on the topic, since most platforms have not developed clear legal practices or terms for digital inheritances. Some have policies, such as the possibility to indicate a trusted person to manage a Facebook memorial page after death, but such policies are often not formalised in general terms and conditions. Insofar as platforms have provided standard terms, these often include a 'no right of survivorship clause', according to which the digital account and any rights related to it expire upon death. Such clauses also

bind the heirs, who succeed the deceased person in contractual relationships. No-survivorship clauses may to some extent be challenged, insofar as contractual provisions that entail the automatic expiration of rights upon death might be considered to be unfair. Even if this is accepted, nevertheless, it remains unclear if more than a prolongation of the contract can be secured. The law on unfair terms does not specify if the contractual relationship allows heirs full access to social media accounts.

From a normative perspective, furthermore, a question is if contract law *should* allow heirs to obtain full access and the possibility to continue using the deceased person's social media accounts. The interests of heirs do not necessarily align with those of social media platforms, society at large and, importantly, the wishes of the deceased person. Heirs might have interests of an emotional nature in having access to personal messages and photos of their loved one, as is underlined by the scarce case law on the topic (discussed by Lilian Edwards and Edina Harbinja[8]). Given the personal nature of users' accounts, platforms may, however, wish to bar or limit access to such personal information and, as we just saw, currently have quite extensive power to contractually shape possibilities and conditions for access. In addition, there is a more general interest in protecting the memory of deceased persons by regulating access to their personal assets, which still needs to be further articulated for digital inheritances. Interwoven through the balancing of these interests is a question to which an answer can no longer be obtained from the one whose digital assets are concerned, the deceased person: what would they have

wished to happen to their digital legacy? A human rights perspective may provide some starting points for integrating the protection of their digital afterlife in the contractual balance.

Post-mortem Privacy, Digital Identity and the EU Charter of Fundamental Rights

A human right that immediately comes to mind in this context is the right to protection of one's private life and correspondence. Lilian Edwards and Edina Harbinja[9], as well as J. C. Buitelaar[10], have argued for the recognition of a post-mortem right to privacy. They primarily base this view on the dignity of the deceased person, which in their opinion deserves protection not only in the physical world but also, and perhaps even more so, in the digital sphere. Full access and use of social media accounts after death may endanger the dignity of deceased persons. The extension of privacy rights to the digital afterlife could serve to draw boundaries.

Taking inspiration from the work of Stefano Rodotà, my proposal is to take an even more comprehensive view on digital human rights after death. Since privacy rights only address certain aspects of digital inheritances, and especially under common law are restricted in scope, they currently have a limited impact on the contractual regulation of access to and use of social media after death. Building on Rodotà's *Il diritto di avere diritti*, a more general right to digital identity may be imagined.[11] According to Rodotà, the right to respect one's privacy can be understood as a basis for a right to develop the narrative

of one's own life. This right, which could be deemed "a right to digital identity", in his view surpasses the understanding of the right to privacy as a negative "right to be left alone". It also comprises a positive dimension, which concerns the free development of one's personality and the right to tell one's own life story.

Considering the integrity and continuity of narratives of people's lives, Rodotà's approach provides a reason for extending the right to the protection of digital identity after death. Insofar as digitalisation has increased social vulnerability and poses a threat to self-determination, such dynamics do not stop at the moment of death. Access to and use of the personal data of deceased persons may profoundly affect their social representation and dignity. In this respect, as Mireille van Eechoud and Luna Schumacher observe, the analogy with physical letters does not seem to hold up.[12] Where letters take longer to compose, have a different quality and are not always kept by the receiver, digital communications are mostly of a more fleeting nature, greater in volume and easily stored and distributed. Using digital data to create an image of the deceased person may, thus, lead to distortions of their personality and image, especially if technologies to create digital avatars[13] take flight[14] – Edwards' and Harbinja's analysis[15] of another *Black Mirror* episode, "Be Right Back", provides a telling example. Therefore, the protection of the digital identities of social media users remains relevant when life ends.

As Rodotà has argued, a legal basis for a right to digital identity is already available. It can be found in the EU Char-

ter of Fundamental Rights, in particular in Articles 7 and 8, which safeguard the rights to respect for private and family life and protection of personal data respectively, he submitted. Whether the current state of the case law of the Court of Justice of the EU on the horizontal effect of the Charter supports this idea is not uncontested. In its judgement in the case of *Bauer & Broßonn*[16], the CJEU held that all Charter rights have the potential to directly bind private actors, provided they are "mandatory and unconditional in nature". It is far from sure whether Articles 7 and 8 of the Charter will be recognised as providing such a basis for a comprehensive right to digital identity. Still, the debate on the understanding of these provisions may already contribute to a rethinking of the contractual regulation of social media platforms.

The Right to Be Oneself

In a historical overview of the legal protection of aspects of identity, Guido Alpa has recently shown how dignitary concerns played a crucial role in the development of a "right to be oneself" (*Il diritto di essere se stessi*[17]). A view from the imaginary future world of "San Junipero" teaches us that a rethinking of platform contracts should encompass questions on dignity and identity protection as well, both during life and after death. Human rights, in particular Articles 7 and 8 of the Charter, it was suggested here, offer a basis for rethinking what a comprehensive right to identity could look like. In conclusion, a radical reform of social media contracts should consider which limits

are posed to platforms' contractual power in light of individual users' interest to freely develop their online personalities and narratives of their lives, as well as a more general societal interest in protecting their memories.

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Christoph Busch

Pay to Play

Social Media Meets the Subscription Economy

Social media platforms are at the epicenter of the attention economy.[1] On Facebook, Instagram or Twitter, content creators and advertisers compete for the scarce resource of users' attention. For their part, users do not pay with real money but with their eyeballs. Real money is paid by advertisers. In 2019, Facebook generated $70 billion from advertising, more than 98% of its total revenue[2] for that year. Recently, however, there have been signs of a change in the business model of social media platforms. In search of new sources of revenue, Twitter, Instagram and Snapchat are experimenting with paid subscriptions following the model of various types of membership businesses such as Patreon, OnlyFans or Substack. Is this just a passing fad or a longer-term trend? Will the new subscription models be the future of social media, as some commentators[3] have suggested? And if so, what does this mean for creators and consumers?

In this short essay, I will discuss the emerging trend of social media subscriptions from a consumer law perspective. I will address the topic in four quick steps. First, I will briefly unpack the different types of subscription models that are currently offered by social media platforms. I will then turn to the economic context that pushes social media platforms towards subscription models. In a third step, I will argue that EU law only provides a rather patchy regulatory framework for subscription business models and is lacking clear legal protections for users of subscription-based social media services. Finally, I will suggest several options for updates of the existing regulatory framework with a particular focus on design duties and

regulatory intermediaries[4] such as payment service providers and app stores.

Two Types of Social Media Subscriptions

There are two different types or tiers of subscriptions on social media. The first type is aimed at followers and allows them to subscribe to exclusive content offered by their favourite creators. This category includes so-called Fan Subscriptions on Instagram and Facebook, TikTok Live Subscriptions and Super Followers on Twitter. One prominent example is the "Twitter Super Follows"[5]) feature introduced in September 2021. Recently it was rebranded as "Twitter Subscriptions"[6]. Subscribers get access to exclusive tweets and special subscriber-only spaces where they can engage with their favourite creators. They also get a special Super Follower badge. The subscription fee ranges from 3 to 10 USD. Instagram offers a similar service called "Instagram subscriptions"[7].

The second type of subscription is aimed at content creators or influencers and enables them to increase their visibility on the platform by paying a monthly subscription fee. An example of this type is "Twitter Blue"[8] which was introduced in 2021 and relaunched[9] in December 2022. Subscribers can post longer tweets and videos, and their posts get increased visibility in replies and search. In other words, subscribers to "Twitter Blue" pay for greater reach. The service also features a higher level of account security through two-factor authentication, less advertising and the well-known blue check mark.

In February 2023, Mark Zuckerberg announced that Meta will introduce a similar subscription service called "Meta Verified"[10] for creators on Instagram and Facebook. Subscribers to the new service will be verified with a government ID and their accounts will get extra protection from impersonation and hacking. Additional features include access to account support from a real person. Subscribers will also benefit from increased visibility on the platform.

Media reactions to Meta's announcement have been rather critical. The Washington Post[11] even argued that Facebook's new fee-based service is "straight out of Don Corleone's playbook". In particular, they criticized that Facebook makes creators pay for security and basic customer service when their accounts get hacked. According to the Washington Post this resembles a mobster-style "protection racket". This may seem a bit exaggerated. But one could indeed wonder whether reasonable account security and customer service should be basic features rather than a premium service.

Some Economic Context

In a sense, social media platforms are only following a much broader trend towards subscription-based business models. Subscriptions are not a new concept. Book-of-the-month clubs have been around for decades, newspaper and magazine subscriptions even longer. But the past few years have seen subscription-based business models spreading across a broad range of industries – from streaming services (Netflix) and

cloud storage (Dropbox) to meal box kits (HelloFresh), beauty boxes (BirchBox) and gaming subscriptions (Xbox Game Pass). There are even entire digital ecosystems based on subscriptions, such as Amazon Prime. One of the reasons why subscriptions are wildly popular, especially among venture capitalists is, that they provide companies not only with recurring revenue but also deep data about subscribers' consumption patterns.

In the case of social media, there are also some industry-specific reasons for the shift towards subscriptions. One key factor is the current crisis of the advertising-based business model.[12] Recession concerns and inflation are negatively affecting ad spending on platforms. Also, the new App Tracking Transparency feature,[13] introduced by Apple in 2021, is tormenting Meta, Twitter and Snapchat. Apple's new opt-in privacy framework requires all iOS apps to ask users for permission to share their data. After the announcement of Apple's new privacy rules, the stock price of several major social media companies fell off a cliff.[14]

According to some estimates,[15] the change in Apple's privacy features will cost Facebook $12 billion in advertising revenue per year. These economic problems are further exacerbated by stricter regulation of online advertising. In the European Union, the Digital Services Act[16] (DSA) will prohibit targeted advertising aimed at minors (Article 28(2) DSA) and advertising based on sensitive data categories such as health, religion, ethnic origin or sexual preferences (Article 26(3) DSA). Against this background, some social media companies hope that paid subscriptions could offer a viable alternative to the

ad-based model. From the perspective of creators, subscriptions aimed at followers offer a new way of monetizing from social media. At the same time, subscriptions may be a tool for increasing user loyalty and engagement.

Social Media Subscriptions: The Current EU Regulatory Framework

A good test case for assessing whether EU consumer law and platform regulation are ready for the subscription economy is the question of whether the existing rules make it easy for subscribers to cancel their social media subscriptions.

The first piece of EU law that is relevant in this context is the Unfair Commercial Practices Directive Guidance[17] to the UCPD, "traders should follow the principle that unsubscribing from a service should be as easy as subscribing to the service". More specifically, consumers should not be "forced to take numerous non-intuitive steps in order to arrive at the cancellation link". Such practices could be considered misleading or aggressive commercial practices under Articles 7 and 9 UCPD. However, the UCPD only applies to unfair business-to-consumer practices. Therefore, only subscription contracts between creators and their super followers are clearly within the scope of the UCPD. For subscriptions aimed at creators, this is less clear. In many cases, creators will not fall under the consumer definition in Article 2(a) UCPD.

The UCPD will soon be complemented by Article 25 DSA which stipulates that providers of online platforms shall not de-

sign, organize or operate their online interfaces in a way that deceives or manipulates the recipients of their service. One example of such manipulation is "making the procedure for terminating a service more difficult than subscribing to it" (Article 25(3)(c) DSA). Article 25 DSA applies to the contractual relationship between the platform operators and the recipient of their service. As a consequence, this provision would only apply to the relationship between the platform, say Twitter, and the content creator. In contrast, Article 25 DSA is not applicable to the subscription contract concluded between the content creator and the Super Follower via Twitter. Even if one would argue that the term "service" includes services offered by third parties via the platform, Article 25 DSA would not be applicable to "Twitter Subscriptions", as the UCPD takes precedence over Article 25 DSA according to Article 25(2) DSA.

A third piece of EU legislation that may be relevant here, is the Digital Markets Act[18] (DMA). Article 6(13) DMA stipulates that gatekeepers shall ensure that termination of core platform services can be exercised without undue difficulty. Recital 63 of the DMA further specifies that unsubscribing to a service should not be made more difficult than subscribing to the same service. However, Article 6 DMA only applies to designated gatekeepers. The European Commission will designate the first gatekeepers in August or September 2023. It is to be expected that Facebook will be among them, Snapchat rather not; for Twitter, it is still unclear. In summary, the existing EU regulatory framework for social media subscriptions looks rather patchy.

Possible Starting Points for the Regulation of Social Media Subscriptions

This brief overview raises the question of how the regulatory framework for social media subscriptions and for subscription contracts in general could be updated. Here are four areas where law reform might be useful: (1) Positive design duties for easy cancellation (in addition to the negative prohibition of dark patterns); (2) Reminders about auto-renewal of subscriptions; (3) Reminders about long-term inactive subscriptions; (4) Stronger focus on the role of regulatory intermediaries such as payment services providers and app stores.

Positive Design Duties for Easy Cancellation

Recently, several member states have introduced new legislation that imposes positive design duties in order to make terminating a subscription as easy as entering into a subscription. In July 2022, the German legislator introduced a "cancellation button" (§ 312k BGB[19]) that shall allow users to cancel online subscriptions with just two clicks. Similarly, from June 2023 onward, French consumers will be able to cancel certain subscription contracts with the new "bouton résiliation en trois clics" (Article L-215-1-1 Code de la consummation[20]). There might be even more buttons in the future. The recent proposal[21] for the revision of the Directive on distance marketing of financial services suggests introducing a "withdrawal button" (Article 16d(5) of the Proposal) that shall facilitate the ex-

ercise of withdrawal rights. Certainly, one may criticize this as a new type of techno-legal micro-management and say that we are heading towards a " buttonization of consumer law".[22] On a more serious note, however, this new approach rightly acknowledges the importance of user interface design and the fact that in a digital environment "law" needs to be translated into "code".

This new trend towards positive design duties is also reflected by a recent revision of the California regulations for the automatic renewal of subscriptions. Assembly Bill 390[23], which entered into force in July 2022, requires traders to provide a cost-effective, timely and easy-to-use mechanism for cancellation. This could either be a prominently located direct link, a button or a pre-formulated termination e-mail that the consumer can send without any further formalities. In addition, in March 2023, the US Federal Trade Commission published a regulatory proposal[24] that seeks to introduce tightened requirements for subscriptions. Taking inspiration from California regulations, the new rules would require businesses to provide a simple cancellation mechanism ("click to cancel").

Reminders About Auto-Renewal of Subscriptions

The new California law on auto-renewals could also serve as a source of inspiration for EU consumer law, with its new duty to send consumers a reminder before the auto-renewal of a subscription or at the end of a free gift or trial period. In particular, the new rules stipulate that a reminder shall be sent to

the consumer at least 15 days and not more than 45 days before the contract automatically renews. This shall ensure that the reminder comes neither too early nor too late. EU law knows such auto-renewal reminders from sector-specific regulation. For example, the European Electronic Communications Code[25] (EECC) requires businesses to inform consumers in a "timely manner" before the automatic renewal of their contract (Article 105(3) EECC). This rule could be generalized to cover also subscriptions in other sectors. And for the sake of legal certainty, it might be helpful to clearly specify what a "timely" reminder is.

Reminders About Long-Term Inactive Subscriptions

Reminders might also be necessary in case of long-term inactive subscriptions. In January 2022, the UK Competition and Markets Authority secured undertakings[26] from Microsoft to contact customers who haven't used their Xbox gaming membership for more than a year and to inform them how to cancel their subscription. Interestingly, the European Commission has indicated in its recent consultation[27] for the "Digital Fairness Fitness Check of EU Consumer Law" that it is also considering such reminders after a longer period of inactivity.

Stronger Focus on the Role of Regulatory Intermediaries

Finally, it might be helpful to think about the role of regulatory intermediaries[28] that could play a supporting role in enforcing

fair and transparent conditions for subscriptions. One example is payment service providers. In April 2020, the credit card company VISA updated their subscription billing policy.[29] Under the new rules, merchants who want to bill a subscription via VISA have to send a reminder to consumers about the end of a trial period. Moreover, VISA requires merchants to provide an easy way to cancel their subscriptions online. That's an interesting example of private ordering, almost two years before such requirements were introduced as a mandatory requirement by the California legislator.

More recently, Mastercard, another major credit card company, has followed the model of VISA and also updated their rules[30] for subscription billing as of September 2022. Mastercard's new rules even go further than the VISA subscription billing policy. It would be interesting to explore whether other payment service providers (like PayPal and ApplePay) have similar policies. But why are VISA and Mastercard concerned about fair and transparent subscription rules? It seems that the answer is the following: They want to reduce the number of chargebacks and consumer complaints because these place an administrative burden upon them. So, some credit card companies are forcing transparency in their own interest. But at the same time, they serve as regulatory intermediaries in helping to enforce fairness and transparency in the subscription economy.

Other regulatory intermediaries could also contribute to the effective enforcement of consumer law with regard to subscriptions. For example, the operators of app stores could be re-

quired to ensure that they only offer third-party subscription apps that contain a "cancellation button" and that send reminders about auto-renewals to consumers. App stores already have extensive vetting processes in place, in order to verify that third-party apps comply with their app store review guidelines.[31] It would probably not be too difficult to verify also whether the app complies with EU rules for subscriptions. Such a "design responsibility" for app stores would be in the spirit of Article 31 DSA which already stipulates that providers of online platforms design their interface in a way that enables traders to comply with their obligations under EU consumer law.

Conclusion

The rise of subscription-based business models in social media is part of a broader trend that can be observed in many industries. Against this background, it is necessary to adapt European consumer law to the new risks of the subscription economy. In view of the upcoming Fitness Check of EU consumer law on digital fairness,[32] the debate[33] on whether EU consumer law is ready for the subscription economy will most likely gain further momentum of the next few months. Recently, the European Law Institute[34] has also joined the debate. Further insights are also expected from the Osnabrück Subscription Observatory[35], a new hub of expertise on the subscription economy which is part of a research project funded by the German Ministry of Consumer Affairs. The proposals briefly outlined above show there are many different starting points for improv-

ing consumer protection in the context of subscription models. Design-based solutions such as the "cancellation button" seem particularly promising. It is not enough to give consumers rights on paper. Nor is it sufficient to inform consumers about their rights in the small print. Effective consumer protection in digital markets requires a user interface design that enables consumers to exercise their rights with a simple click.

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Johann Laux

The Shape of Personalisation to Come

Whether Done in the Interest of Consumers or Traders, Personalisation Requires a (Platform) Governance Perspective

Change can happen unexpectedly fast in the business of social media. While targeted advertising is still a money-making machine for social media platforms, its motor has begun to sputter. Since Apple gave its users control over whether apps can track their behaviour in 2021, data for targeting has suddenly become scarcer.[1] Subscription-based business models[2] are on the rise. Alternative ways of monetisation, such as creating content that is little else but advertising, are blossoming.[3]

The adaptation of monetisation strategies does not mean the end of big-data analytics as a core value proposition behind social media. The advertising-based business model created an ecosystem which merged economic engineering with data science.[4] As Viljoen et al. state in their critical take on the platform economy, platforms deploy mechanism design to select an outcome and then reverse-engineer rules and conditions to achieve it.[5] Mechanism design had been developed in economic theory to arrange settings in which participants reveal their preferences. Auctions, which are now widely used to distribute online advertising, are one such mechanism by which advertisers can be incentivised to bid the price they are actually willing to pay for placing their ad.

In theory, mechanism design serves social welfare by optimising the allocation of value in society.[6] As Viljoen et al. argue, in its real-world application, the allocation of options to consumers optimises platforms' revenue and/or informational advantage. Mechanism design has been turned from a tool to reveal preferences to one for inferring preferences from be-

havioural data or statistical associations.[7] However, data on people's past choices do not always reveal their preferences. Inferences can be wrong and the large-scale effects of an algorithm distributing social-media content that has been trained on biased data are significant.[8] Failing to identify preferences correctly is one issue, deliberate manipulation is another. Not every algorithmic recommendation for content and not every targeted advert aims to meet consumers' "true" preferences; some merely aim to take advantage of consumers' failures to act rationally.[9] With artificial intelligence ("AI"), the potential is even greater for companies to discover and exploit biases and vulnerabilities[10] in consumers that they themselves are not aware of. The point of this dive into the economic engineering of personalised environments on digital platforms is to highlight the intentional creation of algorithmically curated choice sets for consumers. How can the law ensure their fairness?

In this short essay, I consider the law's potential for reform to address personalisation done in the interest of platforms, advertisers, and traders. I contrast this effort with the option to revolutionise the law by personalising the law itself in the interest of consumers. In the history of science, it has been said that the ultimate test for sticking to a paradigm is whether it is a good guide for future problems.[11] Applied to the theoretical debates about personalisation and the law, the need for reform or revolution should be measured against the problems stemming from the unleashing of personalisation technologies.

From the Consumer Society to the AI Society

Since the 1950s, Western societies have developed from consumer societies into service societies and more recently into digital societies.[12] Today we seem to be on the verge of morphing into AI societies.[13] So far, consumer law has accompanied these changes through reform, sticking to its information and reasonable consumer paradigms. The information paradigm stipulates that consumers will make rational decisions if only they receive enough information.[14] The benchmark against which violations of consumer law are measured is an average consumer who is reasonably well-informed, observant, and circumspect in the choices she makes. Behavioural law and economics have of course long questioned consumers' ability to decide rationally, due to limitations in their cognitive capacity, as well as the emotions and motivations involved in making a decision.[15] In light of these behavioural insights, it's quite literally an expensive normative passion for the law to keep the reasonable consumer paradigm alive, demonstratively leading consumers to overspend.[16]

Bracketing behavioural insights, when moving from the consumer to the service society, reforming the law under the existing paradigms was arguably sufficient. Under the impression of the crass information asymmetries of the digital and especially the AI society, reforms may no longer be enough to guide consumers through the problems created by personalisation. Revolution looks increasingly attractive. For the paradigms of consumer law, the future is therefore now.

Pushing the Limits of the Current Legal Order (Reform)

Looking at today's problems with digital consumer vulnerability,[17] we may ask whether reforming the current legal status quo could make digital markets fairer. Alternatively, we could try to use the existing paradigms to undo personalisation in the interest of platforms, advertisers, and traders. The first approach is evolutionary, the second is conservative. I argue that both could be beneficial for consumers.

An Evolutionary Approach

Let us begin with the evolutionary approach. It has been shown before that even within the traditional elements of law, there is room for reform and modest granularity.[18] I have argued elsewhere that when consumers are solely targeted based on their behavioural profile, judges could apply consumer law in a more granular manner by tightening the average consumer test.[19] Instead of considering how an idealised, reasonable consumer would react to targeted ads, judges could assume that the targeted consumer behaves just as predicted by the data-based behavioural profile which advertisers created of her.

This may be called a negative form of personalising the law: taking the personalisation done in the interest of advertisers at its face value. If a consumer receives targeted advertising based on an inference about her current mood, say because she just lost her job, would it then not be fair to assume that she is in fact as susceptible to commercial messaging because of her

anxious emotional state, as predicted?

The idea is not to argue that judges should always give up their discretion and assume consumers behave as predicted by targeted ads. The particularities of the choice environment should have a moderating influence. In a concentrated market environment in which consumer profiles are distributed via ad intermediaries with great market power,[20] the likelihood of a targeted consumer seeing adverts which are not based on the same exploitative personal profile can be diminished. In such a situation, restoring fairness via a tighter average consumer test appears normatively satisfying. The evolutionary nature of this approach lies in further granularizing consumer law in cases where an exploitative advert meets a concentrated market for ad-intermediary services.

A Conservative Approach

What could a conservative approach look like? Elsewhere, I have argued for adding noise to targeted ads, that is, randomly exposing consumers to non-targeted, hence noisy, adverts.[21] This approach is conservative, as noisy environments re-establish the preconditions for reasonable consumer choice. However, they do not guarantee reasonable outcomes. Even within non- or less-personalised choice sets people will act irrationally.

The addition of noise to targeting would instead counter the economic engineering done by digital platforms with a regulatory metric. In our study, we developed an index – the

Concentration-after-Personalisation Index (CAPI) – which allows the detection of concentration in the exposure of consumers to targeted adverts.[22] Going beyond the assumptions in the evolutionary approach mentioned above, we showed how easily consumers can be exclusively targeted by exploitative advertisers, even without market power. Adding noise requires, however, a normative choice as to how much noise should be added to balance advertisers' and consumers' interests. In the paper, we show that the optimal degree of noise can be calculated by using the CAPI.

In both approaches, personalisation is still done in the interest of platforms, advertisers, and traders. The law would merely react and either incorporate (the evolutionary approach) or dilute (the conservative approach) the personalised prediction or choice set. In both cases, consumer law enforcement would be dependent on information about targeting metrics and ad distribution which is largely held by ad intermediaries. With a view on the infrastructure of online advertising, the addition of noise would have to be done by ad intermediaries. The suggested reforms of the consumer law status quo would thus not perfectly guide through current problems with the (market) power of platforms. The question is thus whether personalised law – depicted by some as the " future of law" – would fare better.[23]

Choosing a New Paradigm (Revolution)

The revolutionary paradigm shift of personalised law would implement the behavioural insights unearthed by big data technology,[24] only now with the interest of the consumer in mind. Information disclosed to consumers could be tailored to their behavioural needs, thus personalising the content of the law itself.[25] This would mean giving up on the average reasonable consumer and overcoming its criticism from behavioural researchers. Personalised law would, however, allow us to keep the information paradigm alive. Consumers could receive personalised qualities and quantities of information, enabling them to take more rational decisions.

There is a difference in design between the reformative suggestions above and the idea of personalised law considered here. The former mitigate personalisation done in the interest of advertisers and traders. Above, I called this a negative approach. Personalised law, however, would mean personalisation is done in the interest of consumers. It would change the benchmark of consumer law and I may thus call this a positive approach.

If personalisation was to be done with the legal interests of both consumers and traders/advertisers in mind, the complexity of the law would inevitably increase, as Grigoleit has pointed out.[26] The need for new legal tools to quantitatively calibrate interests would rise. With the CAPI mentioned above, we showed how a quantitative index can indeed be used to determine an optimal degree of noise, considering the competing

interests of consumers and advertisers.[27]

This essay does not aim at taking a decisive stance either for or against personalised law. Instead, it concludes by considering how well-personalised law would guide through future problems, hence applying the test of scientific history for sticking with a paradigm or adopting a new one. This obviously involves some future gazing, as truly personalised law is yet to come. The problems to consider are thus really the future's future problems.

The Future's Future Problems

Some of the future's future problems will likely be created by personalised law itself. For example, it could give away information about the decision-making profile of a consumer and become an additional data source for inferential analytics. Assume that you have four, and I have two weeks to withdraw from a contract. In aggregation with the withdrawal rights from the population, this difference may give away insights to advertisers and traders about our respective ability to make economically sound decisions.

We should be careful to assume that personalisation will work equally well for all consumers. Personalised laws may misfire just like personalised ads. If we fail to accurately target the law and such failure creates vulnerabilities in consumers, then we find consumers being made vulnerable by law. Should this happen, it may lower the acceptance of personalised law amongst consumers. Some may not be able to understand why

the law treats them differently from the people they know while suffering from disadvantages through personalisation.

Some of the future's problems, however, will likely look very much like the problems we are facing today. Adding to the point just made about misfiring, just like the inferential analytics done in the interest of platforms, advertisers, and traders, tailoring laws based on behavioural data could suffer from bias. In a recent study, Agan et al. shows that data from people's past choices does not necessarily reflect their preferences and thus produces a biased data set.[28] They demonstrate the large-scale, negative effects of training a recommender algorithm on such biased data. Drawing on the difference between "thinking fast and thinking slow",[29] the study shows that a set of past snap choices contains a higher degree of bias than a set of deliberative choices. Personalising laws would therefore require careful consideration as regards the circumstances of those past consumer decisions that are supposed to form the database of personalisation.

It is, however, challenging to assume that unbiased data is readily available for consumer law issues. For example, to generate insights about consumers' decision-making processes when shopping online, personalised law would have to draw on data from their past purchases. This data will most widely be generated on private platforms.[30] As mentioned above, platforms are designed to optimise revenue and informational control. They infer preferences and future behaviour in their own interest. For social media platforms, it may very well be more important to discover what makes users click on an ad or engage

with content than to find out what users' "true" preferences are.

Whichever interests will shape the future of personalisation – those of consumers or those of platforms, advertisers, and traders – as long as the necessary data will be generated on digital platforms, several core problems of platform governance remain salient: informational imbalances, concentration, and the economic engineering of choice sets.

These problems cannot all be addressed by consumer law. With its Digital Services Act (DSA), the European Union (EU) recently chose to regulate platforms somewhat more tightly but left the state of consumer law largely untouched[51]. At the same time, the DSA frequently refers to consumer protection. The remit of its liability regime for hosting services draws upon the average consumer paradigm (Article 6(3) DSA). Changing consumer law by giving up on the average consumer could thus granularise platforms' liabilities. While Article 25 DSA protects users' "informed decisions" from manipulative or distorting interface design, it excludes practices which are covered by consumer law. Even a conservative reform measure such as adding noise to targeting may thus have to be implemented via consumer law, although it merely reinstates the preconditions of reasonable consumer choice through platform governance.

It appears that personalising consumer law properly would require conditions of data generation on platforms that consumer law alone cannot guarantee. At the same time, the DSA as a centrepiece of EU platform governance demarcates its remit by reference to the old paradigms of consumer law. Whether we will see reform or revolution in the law may thus

depend on where the current legal paradigms will first cease to guide well through problems of personalisation: consumer law or platform governance law. With the changing monetisation strategies on social media platforms, many of its users will be consumers in one context and advertisers in another. In trying to address this complexity well, the pressure to granularise or even revolutionise legal benchmarks of reasonable consumer behaviour may rise further.

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Giovanni De Gregorio

Monetising Harmful Content on Social Media

The debate about social media contracts has been emphasising the power of Big Tech giants to set their own standards and rules to govern[1] their digital spaces. It is not surprising, indeed, that social media contracts have primarily been discussed from the perspectives of the processing of personal data for the purposes of targeted advertising[2], or as instruments to set standards[3] of content moderation. Despite the relevance of these points, this focus detracts attention from the users, particularly those who are capable of monetising content within their communities, such as influencers, also by spreading harmful content.

The possibility to profit from the creation and sharing of online content has pushed the growth of content monetisation practices, which are increasingly driven by influencers[4], cultural entrepreneurs or, more generally, professional content creators. Similar to corporations and governments as users, and unlike average users, influencers do not exclusively enter platforms with the spirit and expectation of finding a community to share opinions or ideas with. Rather, influencers spend most of their time in these digital spaces monetising their online presence, often learning how to exploit the logic of social media to increase their own profit. From traditional monetisation schemes, such as sponsored ads, to new sources of income coming from social media, influencers aim to capture users' attention and engagement through their content. Towards this end, harmful content, such as disinformation, can be instrumentalised to maximise views and engagement, and, therefore, monetisation, as underlined by the case of disinformation for

hire[5] about the Covid-19 vaccinations.

The possibility to profit from the dissemination of harmful content triggering views, engagement, and ultimately monetisation does not only concern the contractual relationship between social media and influencers but also affects how other users enjoy digital spaces and expect to be protected based on the commitments of social media to tackle the spread of harmful content, for instance, by demoting or removing content. The monetisation of harmful content by influencers should be a trigger, first, to expand the role of consumer law as a form of content regulation fostering transparency and, second, to propose a new regulatory approach to mitigate the imbalance of powers between influencers and users in social media spaces.

Harmful But Not Illegal

The answer to the challenges raised by the spread of harmful content is not straightforward. The monetisation of content is not only about making profits from creating and sharing it but also concerns the exercise of constitutional rights[6], primarily freedom of expression. Even when sharing disinformation, users are still exercising their right to freedom of expression without necessarily violating legal norms. Likewise, the spreading of hateful statements against unprotected groups may be unpleasant but not necessarily illegal. More generally, what is morally wrong is not necessarily illegal, thus supporting "a right to do wrong".[7] This constitutional approach leads to tolerating even unpleasant or unkind statements as underlined

in the case *Handyside v. The United Kingdom*[8], and this approach would also extend to influencers[9]. As a result, harmful content does not always qualify as illegal content.

Still, these considerations do not mean that legal content cannot be harmful. The exploitation of free speech for the purposes of content monetisation challenges the protection and limits of the same constitutional right. Relying on harsh statements to stimulate more engagement, and, therefore, more revenue, need not always qualify as criminal conduct, but may still make social media spaces less safe for users. Likewise, proposing a certain diet or lifestyle is not illegal per se but it could lead to users' distress[10] and addiction[11]. Even influencing public opinion by relying on political speech to hide strategies of content monetisation does not qualify as illegal conduct, but it can be harmful to democracy.

These examples underline the critical question raised by the monetisation of harmful content on social media: should constitutional democracies, and social media contracts, tolerate content monetisation strategies based on the sharing of harmful content? Generally, constitutional democracies reject the idea of profiting from illegal conduct, such as in the case of selling weapons or drugs, and social media have indeed introduced policies on content monetisation of illegal/harmful content, as underlined by the case of YouTube.

This challenge has captured the attention of policymakers. At least from a European perspective, the approaches to tackle illegal content have been complemented by an increasing responsibilisation of social media to also address harm-

ful content. The Digital Services Act,[12] for example, expressly refers to harmful content when it comes to online advertising as a source of "significant risks, ranging from advertisements that are themselves illegal content, to contributing to financial incentives for the publication or amplification of illegal or otherwise harmful content and activities online, or the discriminatory presentation of advertisements with an impact on the equal treatment and opportunities of citizens" (Recital 68). Likewise, the amendments to the Audiovisual Media Service Directive[13] require video-sharing platforms to take appropriate measures for addressing content that could impair minors and the general public (Article 28b).

Commercial But Not Political

The challenges of content monetisation are not exhausted by whether social media contracts should reject the economic exploitation of harmful (but legal) content, but also by whether the exploitation of harmful political speech for (hidden) commercial purposes should be tolerated. The spread of harmful content by influencers requires looking at these actors as not neutral or, at least, not equal to other users. When opinions, or more generally speech, are potentially polluted by economic interests, the primary challenge is not only to ensure that incentives are disclosed but also to avoid the exploitation of harmful content for the purposes of content monetisation.

Not all users are equal in social media spaces, as they are not in the offline world. Corporations and governments can

exercise broader influence than a single individual user. Likewise, political figures enjoy a broader protection of their speech and a lower expectation of privacy. Media outlets participate in social media spaces as users, even if they are different from other users who are active in reporting events. This framework also applies to influencers who, for instance, pursue climate change activism (i.e. eco-influencers), thus engaging with political speech and addressing topics in the public interest. These users, nevertheless, play a different role when compared to states, corporations or media outlets in democratic societies. For instance, media outlets create content to pursue a public interest function that is often regulated and driven by professional standards. Influencers are also content creators, but their (political) speech, and monetisation schemes, can be driven by purposes defined by their sponsors or plain economic interests.

Such a lack of distinction is particularly relevant when looking at the increasing engagement of influencers in public interest subject areas. Users need not always be aware of the commercial nature driving certain political speech by influencers. For instance, sponsoring a certain product could be hidden by a discussion on the sustainability of the same product. Likewise, the same approach could be driven by engaging with unfair commercial practices[14], when, for example, businesses pay influencers to negatively compare the quality of competitors' products and services. The blurring lines between commercial speech and political speech is not a novelty, but it is potentially harmful to democracy. Indeed, constitutional democra-

cies struggle with regulating commercial speech when it is attracted in the scope of political speech, i.e., the magnetic effect[15], as underlined by the European proposal for a Regulation on the transparency[16] of political advertising and the European Media Freedom Act[17].

European institutions have partially considered different roles and positions of users in social media spaces. The Digital Services Act introduces a new approach[18] to content moderation. Particularly, it shapes contractual relationships, for instance, by introducing the new mechanism of trusted flaggers as users with recognised expertise in a certain area. According to Article 22, online platforms shall take the necessary steps to ensure that notices submitted by trusted flaggers are prioritised. In this way, the Digital Services Act recognises that some actors are different from other users, thus giving priority to some complaints over others. Even though the case of trusted flaggers is not significant for limiting the monetisation of harmful content, it defines a potential way to distinguish users in social media spaces.

Free But Not Fair

The challenges raised by the monetisation in social media spaces lead to wondering whether contract law can provide a solution to limit the spread of harmful content. It is about reflecting on the relationship between contractual freedom and fairness which goes beyond the single vertical relationship between the user and the platform. Indeed, the monetisation of

harmful content touches on how, from a horizontal perspective,[19] social media can ensure the possibility of the safe use of their services. In other words, the perspective moves from an individual to the collective dimension of social media spaces. Contractual obligations between users and social media are not only related to the bilateral relationship user-platform but also connected to the other contracts of social media users who expect these platforms to provide a safe environment.

Social media contracts are expressions of contractual freedom between social media when designing their standards and users when deciding to participate in social media spaces. The monetisation of harmful content moves the perspective from freedom to fairness, highlighting social media contracts' potential role in protecting users, exposed to online harms driven by content monetisation practices. It would indeed be unfair if users would be subject to harmful content on social media spaces while other users, primarily influencers, can profit from that through content monetisation practices.

This unfairness in social media contracts can be considered a trigger for the Union to protect users' rights in social media spaces, also considering the role of consumers in the European Charter of Fundamental Rights. Consumer law can also be considered a form of content regulation[20]. By setting standards and obligations, it shapes how content and procedures should look like to consumers in social media spaces. This approach can also be extended to social media contracts and their relationship with influencers. For instance, mandatory rules on transparency can also lead social media contracts to provide more

information about the moderation and monetisation of influencers' content. This approach could also limit the imbalances between social media and influencers. Therefore, consumer law can provide critical guidance for social media to design tailored contracts which reflect fairness in the multi-layered relationship of governance of their digital spaces.

Nonetheless, consumer law also faces challenges when dealing with the relationship between users and influencers. For instance, one of the primary points is whether users should be considered as consumers not only in relation to social media but also in relation to influencers. The relationship between influencers and users is not always a matter of consumer law, considering that influencers do not always fall within its scope. As a result, a solution could be based on the introduction of a different approach. For instance, the platform-to-business[21] regulation can provide a regulatory model to consider how to adjust imbalances of powers in social media spaces, particularly looking not only at the vertical relationship between social media and users but also between influencers and users.

This framework defines a trajectory to limit the monetisation of harmful content in social media spaces by expanding the role of consumer law as an instrument to mitigate contractual unfairness between influencers and users. It can designate a new regulatory approach to horizontal contractual relationships on social media, leading services to consider the spread of harmful content not only between influencers and average users but also in the user contracts of privileged influencer users.

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Felix Pflücke

Rethinking the Regulation of Financial Influencers

The growth of social media has led to an unprecedented rise in financial influencers, so-called finfluencers, who share investment ideas and opinions with a global audience. Finfluencers have various business models, from endorsing products to advertising their mutual funds. Retail investors are particularly vulnerable to the risks posed by financial influencers because most lack financial literacy, according to a UK Financial Conduct Authority study from 2021.[1] Additionally, the power dynamic inherent in the influencer-follower relationship can also increase consumers' susceptibility, particularly through one-sided parasocial relationships[2]. Parasocial relationships are one-sided relationships where one person extends emotional energy and interest towards the financial influencer, who may be completely unaware of the follower's existence. Such relationships can lead to a higher level of trust, credibility, and reliance on the advice and recommendations of financial influencers, even if they are not qualified or licensed to provide financial advice. This can be particularly dangerous for retail investors with low levels of financial literacy, who may be more vulnerable to the risks posed by finfluencers. Thus, the current regulatory framework may not be adequate to protect consumers from the potential harms of financial influencers.

This Article starts by briefly examining the current regulatory framework for financial influencers (based on Pflücke 2020[3] and 2022[4]), including how the EU and five platforms govern it. It then proceeds by critically analysing and proposing targeted and actionable policy considerations to increase fairness and transparency on social media platforms. The Article

argues that the current approach is neither evidence-based nor tailored to the activities and potential harms of financial influencers, requiring radical reforms to protect consumers and capital markets.

The Current Regulatory Framework

Influencers operate in regulatory grey zones where there may be confusion around what constitutes advertising and what requires disclosure. Financial influencers are additionally regulated because they promote regulated financial products to their audience, including marketing investment funds or giving (general) financial advice, which can significantly impact people's financial decisions. Financial influencers are thus not only regulated by rules on unfair commercial practices like regular influencers but also by financial advertising law.

The Unfair Commercial Practices Directive[5] encompasses all aspects of finfluencer activities related to so-called "hidden marketing". Under the Directive's exhaustive "black list" (Annex I), finfluencers are prohibited from falsely representing themselves as consumers (Section 22) and must label sponsored content (Section 11). As seen before the German Federal Court[6] (BGH) or UK Advertising Standards Authority[7] (ASA), the national rules implementing the Directive also dictate how financial influencers must disclose sponsored content to their audience. Failure to correctly disclose commercial activities can result in both civil and administrative sanctions.

Financial influencers' activities are also subject to several

rules from financial law, including the Market Abuse Regulation 596/2014[8], the Markets in Financial Instruments Directive 2014/65[9] (MiFID II), and the Commission Delegated Regulation 2016/958[10]. Under the Market Abuse Regulation, producing or disseminating investment recommendations or other investment-related information must be presented objectively and disclose any interests or conflicts of interest (Article 20). Moreover, finfluencers that hold assets and try to manipulate the market in their favour breach the Market Abuse Regulation and commit securities fraud (Article 10(1)). The national rules implementing the MiFID II Directive provide further legal requirements for finfluencers. The Directive sets out criteria for investment advice (Article 24(4)), which is subject to authorisation by national regulators (Article 70(4)). Individual advice to retail investors, such as one-on-one coaching, is exclusively reserved for registered financial advertisers who comply with local laws. Furthermore, the Commission Delegated Regulation requires that "facts are clearly distinguished from interpretations, estimates, opinions and other types of non-factual information" (Article 3(1)(a)). The instrument also specifies formal requirements such as the date and time of the production of the recommendation and provides specific requirements for experts and certain financial products (Article 3(1)(e)). Financial influencers who fail to comply with these regulations may face hefty sanctions. However, as highlighted in my previous paper,[11] the above-outlined rules are unsatisfactory because they distinguish between professionals and non-professionals. Lower standards apply to non-professionals which is, in my

view, controversial: consumers cannot draw this distinction unless they conduct a thorough review of the background of a finfluencer.

Content Moderation Rules on Finance Advice on Social Media

Financial influencers are also subject to contractual regulation by social media platforms through their terms of service. These terms of service may include guidelines and restrictions on promoting certain financial products or engaging in deceptive practices, with penalties ranging from account suspension to legal action. Compliance with these contractual obligations is crucial for financial influencers to maintain their social media presence and avoid legal and reputational risks.

All social media platforms have content moderation practices in place because they have a legal responsibility to remove illegal content. The e-Commerce Directive 2000/31[12] and now the Digital Service Act 2022/2065[13] generally protect platforms from being held liable for user-generated content, but it is encouraged for them to implement stricter content moderation rules and supervision to prevent the spread of fraudulent or misleading information. These rules can involve the use of algorithms and human moderators to quickly identify and remove inappropriate content.

Under Article 14 of the e-Commerce Directive, service providers are not liable for the information stored and displayed as long as they do not have actual knowledge of illegal activity or information. The Court of Justice set an important

precedent in *Glawischnig-Piesczek*[14] for online content moderation, establishing that while platforms do not have a general obligation to monitor content, they must take down equivalent content globally, even beyond the jurisdiction of the court that issued the order. The Digital Service Act has confirmed and codified these existing rules (Article 8). It further states that platforms do not have to engage in fact-finding (Article 8), and they will not lose their legal defences if they undertake further investigations to identify and remove illegal content, known as the "Good Samaritan provision" (Recital 26).

In another paper[15], I examined the content moderation rules of Facebook, Instagram, YouTube, TikTok, and Twitter. It revealed that platforms actively and significantly regulate financial influencer activities. Some platforms have gone as far as to not only enforce the applicable rules, outlined in the previous section, but also to gold-plate them by banning certain products, services, or practices that are deemed to be particularly risky or misleading. Twitter[16] has taken an unconventional approach by imposing a ban on finance-related content in several countries, including Luxembourg, altogether. The reasons behind this decision remain unclear, and it is difficult to ascertain the rationale behind the platform's actions. Nonetheless, this incident highlights the need for more transparency and accountability in the content moderation practices of social media platforms, particularly with regard to their regulation of financial influencers.

Policy Considerations

In recent years, the rise of financial influencers has created challenges for regulators, as finfluencers often provide advice and recommendations on financial matters to their followers. As depicted above, the current regulatory regime is not tailored to the activities and harms posed by finfluencers. In particular, the influencer-follower dynamic can also increase consumers' susceptibility and create parasocial relationships, making consumers particularly vulnerable.

One proposal to address this issue is to introduce a positive duty to trade fairly, which could extend to platforms and advertisers. For instance, this proposal was generally suggested in *Consumer Theories of Harm* by Paolo Siciliani, Christine Riefa, and Harriet Gamper.[17] The current duty not to trade unfairly can lead to ambiguity and confusion for regulators, financial influencers, and consumers. It suggests that anything that is not explicitly forbidden is allowed, which may not adequately protect consumers from harm. A positive duty to trade fairly would place financial influencers under an obligation to respect the legitimate interests of consumers, which could improve the overall quality of financial advice provided by influencers. The idea of introducing a positive duty to trade fairly could lead to more effective regulation of financial influencers and provide better protection for consumers. Therefore, it is worth exploring this proposal further to determine whether it is a viable option for addressing the challenges posed by financial influencers. However, introducing general fair dealing provisions has faced criti-

cism from scholars who argue that it is too vague and could potentially harm businesses. For example, Michael Bridge compared it to "letting a bull loose in a China shop"[18]. Critics suggest that defining what constitutes "fair" trading practices may be challenging and result in excessive regulation that stifles innovation. Before proposing such drastic measures, we need further evidence to address these concerns, for example, by conducting impact assessments.

Secondly, transparency should be further increased. Transparency is crucial when it comes to financial influencers. Consumers must be able to distinguish between professionals and non-professionals and understand the risks associated with different financial products. In order to enhance transparency, new disclosure requirements should be established for financial influencers, including specific risk disclosures for new and particularly risky products such as Peer-to-Peer (P2P) lending. Furthermore, platforms should provide country-specific guidance on hidden marketing practices because the rules on how to disclose it differ by jurisdiction, and the commission-based system for advertising financial products should be banned considering the special influencer-following relationship. Regulators should also step up their supervision and enforcement to increase transparency considering the potential harms to consumers. Even qualified financial influencers who offer investment courses or one-on-one coaching should be subject to active supervision by regulators, as this will help to ensure that they are providing accurate and honest information to their followers. It is important that regulators have the resources and

expertise to effectively monitor the activities of financial influencers and take action against those who engage in fraudulent or deceptive practices.

Finally, regulators should review the impact of financial influencers on financial stability, particularly in terms of their influence on capital markets and the potential for fraud. This could involve examining the impact of meme stocks and other investment trends promoted by financial influencers and taking action to prevent harmful practices. The US Board of Governors of the Federal Reserve System (FED) and the European Securities and Markets Authority (ESMA) have already warned about the potential harm to capital markets stability in 2021[19] and 2022[20]. For example, the US Securities and Exchange Commission (SEC) charged eight financial influencers for their roles in promoting a stock manipulation scheme, so-called "pump-and-dump" schemes, on social media platforms. According to the SEC's allegations,[21] the finfluencers misled their followers by advising their audience to acquire the securities while the finfluencers sold them as soon as the trading volume increased. The eight finfluencers ultimately earned fraudulent profits of approximately USD 100 million from this market manipulation tactic. This shocking incident serves as a stark reminder of the potential dangers posed by unscrupulous financial influencers and the need for greater regulatory oversight.

Rethinking the Regulation of Financial Influencers

The regulation of financial influencers is a complex and multifaceted issue that demands a comprehensive approach. Policymakers and regulators should thus rethink the regulation of financial influencers to effectively address the challenges posed by them. Policymakers and regulators must gather further evidence by conducting impact assessments and tailor the existing or new rules to the harms and risks of finfluencing. They should consider a range of measures and radical reforms, including introducing a positive duty to trade fairly, increasing transparency by implementing new rules and actively supervising financial influencers, and reviewing the impact of financial influencers on financial stability. Additionally, it may be necessary to ban commission-based advertising because financial influencing is distinct from other types of hidden marketing. By taking these steps, we can create a more fair and transparent environment that benefits consumers and protect the global capital markets. Rethinking the regulation of financial influencers is essential to ensure that our social media and financial systems remain robust and trustworthy in the years to come.

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The social media landscape is changing. The "public forum" is now filled with citizens selling products, promoting services, charging for subscriptions, and sometimes seeking attention in ways which may not be socially desirable. We ask: How can a space that is becoming increasingly commercialised, monetised, and is a source of income for many nevertheless be fair? Departing from this foundational question, this symposium pursues many more granular ones, each anchored in whether and how the rights of users in social media spaces can be strengthened vis-à-vis dominant platforms via social media contracts.