Enforcing Private Regulation in the Platform Economy

Edited by
FEDERICA CASAROSA and
MATEUSZ GROCHOWSKI

Max-Planck-Institut für ausländisches und internationales Privatrecht

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A Bianca, sensibile e volitiva
Federica Casarosa

To my Parents
Mateusz Grochowski

Preface

In recent years, online platforms have become some of the most powerful players in the global economy and have created entirely new models for organizing business activity and generating profit. These developments have had numerous social, economic, and legal ramifications. One of the most vivid and contentious among them is the inherent tendency of platform economies to produce self-regulatory schemes of varying nature, scope, and complexity.

This book considers these issues from three complementary perspectives. It begins with a general theoretical framework for private regulation in the platform economy; it then proceeds toward more specific aspects of platform-made private regulation; finally it offers insights on the interaction of platform- and state-produced rules in selected EU Member States. The book combines two key regulatory issues: rulemaking and enforcement, viewing them as inseparably linked aspects of the same phenomenon, their reflecting the shifting boundary between states and private entities as governors of the digital market and society.

This volume was made possible with the support of a grant from Villa Vigoni – the Italian-German Center for European Dialogue – which hosted the book's contributors at a meeting in the breathtaking setting of Lake Como. The event was the occasion for an in-depth discussion of the chapters and helped ensure coherence between them. The book project was co-sponsored by the Max Planck Institute for Comparative and International Private Law in Hamburg and the Robert Schuman Center for Advanced Studies at the European University Institute in Florence. The support of these three institutions was indispensable in bringing this book and the entire project to fruition.

We are also profoundly grateful to Professor Hans-Wolfgang Micklitz, who provided the introduction to this volume and who shared invaluable advice on the project's merits. And of course, no book would exist without its authors. We sincerely thank our colleagues who contributed to this project and submitted chapters for the volume. This includes Judge Dianora Poletti, whose premature passing cast a shadow over the final stages of our work. Last but certainly not least, we would like to express our heartfelt thanks to Professor Ralf Michaels for his generosity towards this project, as well as to Dr. Christian Eckl, Michael Friedman, and Janina Jentz of the Max Planck Institute for Comparative and International Private Law in Hamburg for their invaluable support in editing this volume and helping bring it to its final form.

Florence/New Orleans
February 2025

Federica Casarosa/
Mateusz Grochowski

Contents

Abbreviations

AcP	Archiv für die civilistische Praxis
ADR	alternative dispute resolution
AGCM	Autorità Garante per la concorrenza e il mercato – National Competition and Market Authority
AI Act	Artificial Intelligence Act
AJEE	Access to Justice in Eastern Europe
ALER	American Law and Economics Review
Am J Comp L	American Journal of Comparative Law
Am Bus LJ	American Business Law Journal
Am Pol Sci Rev	American Political Science Review
AmU LRev	American University Law Review
AmU Intl LRev	American University International Law Review
AP	Arbeitsrechtliche Praxis
API	Application Programming Interface
Ariz LRev	Arizona Law Review
AuR	Arbeit und Recht
AVMSD	Audiovisual Media Services Directive (Directive (EU) 2018/1808)
BAG	Bundesarbeitsgericht [Federal Labour Court, Germany]
Berkeley Tech LJ	Berkeley Technology Law Journal
BGH	Bundesgerichtshof [Federal Court of Justice, Germany]
BJS	Berliner Journal für Soziologie
BKartA	Bundeskartellamt [Federal Cartel Office, Germany]
CDA	Communications Decency Act
CJEU	Court of Justice of the European Union
CLLPJ	Comparative Labor Law & Policy Journal
CLS Rev	Computer Law & Security Review
CMLRev	Common Market Law Review
Colum LRev	Columbia Law Review
Comp Pol Stud	Comparative Political Studies
CPC	Consumer Protection Cooperation
CPC Regulation	Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws
CPI	Competition Policy International
CSAM	child sexual abuse material
CT	Constitutional Tribunal
CUP	Cambridge University Press
CYELS	Cambridge Yearbook of European Legal Studies
DCC	Dutch Civil Code
DL	Decree-Law

DMA	Digital Markets Act
DMCA	Digital Millennium Copyright Act
DovenschmidtQ	The Dovenschmidt Quarterly
DPA	data protection authority
DPC	Data Protection Commission
DSA	Digital Services Act
DSC	digital services coordinator
DSM Copyright Directive	Directive (EU) 2019/790 on Copyright and Related Rights in the Digital Single Market
EBDS	European Board for Digital Services
ECD	E-Commerce Directive
ECJ	European Competition Journal
EDPL	European Data Protection Law Review
EJLS	European Journal of Legal Studies
EJLT	European Journal of Law and Technology
EJPLT	European Journal of Privacy Law & Technologies
EJRR	European Journal of Risk Regulation
ELJ	European Law Journal
ELLJ	European Labour Law Journal
ELRev	European Law Review
Environ Res	Environmental Research
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
EuCML	Journal of European Consumer and Market Law
Eur JL Econ	European Journal of Law and Economics
Eur LJ	European Law Journal
EuZA	Europäische Zeitschrift für Arbeitsrecht
FCO	Federal Cartel Office (Germany)
GDPR	General Data Protection Regulation (Regulation (EU) 2016/679)
Geo LJ	Georgetown Law Journal
Geo Wash LRev	George Washington Law Review
Giur. comm.	Gurisprudenza commerciale
GLJ	German Law Journal
GLTR	Georgetown Law Technology Review
GTC	general terms and conditions
Harv ILJ	Harvard International Law Journal
Harv LRev	Harvard Law Review
HarvJoLT	Harvard Journal of Law & Technology
IDPL	International Data Privacy Law
IJ Media Cult Pol	International Journal of Media & Cultural Politics
IJC	International Journal of Communication
IJCL	International Journal of Constitutional Law
IJEC	International Journal of Electronic Commerce
IJGLS	Indiana Journal of Global Legal Studies

IJLIT	International Journal of Law and Information Technology
IJODR	International Journal of Online Dispute Resolution
ILJ	Industrial Law Journal
ILLeJ	Italian Labour Law e-Journal
IndBez	Industrielle Beziehungen
Intl Econ & Econ Pol	International Economics and Economic Policy
IPR	Internet Policy Review
IRLCT	International Review of Law, Computers & Technology
J Bus Ethics	Journal of Business Ethics
J BusRes	Journal of Business Research
J Eur Pub Pol	Journal of European Public Policy
J Serv Manag	Journal of Service Management
JCL&E	Journal of Competition Law & Economics
JCorpL	Journal of Corporation Law
JCP	Journal of Consumer Policy
JEBL	Journal of Business, Entrepreneurship & Law
JEEA	Journal of the European Economic Association
JIPITEC	Journal of Intellectual Property, Information Technology and E-Commerce Law
JITP	Journal of Information Technology & Politics
JLA	Journal of Legal Analysis
JLE	Journal of Law & Economic Regulation
JLS	Journal of Law and Society
JOR	Jurisprudentie Onderneming & Recht
JUS-online	JUS-online Rivista di Scienze Giuridiche
JZ	Juristenzeitung
KZfSS	Kölner Zeitschrift für Soziologie und Sozialpsychologie
Law Prac	Law Practice
LRev	Law Review
Md LRev	Maryland Law Review
Media L&Poly	Media Law & Policy
Mich LRev	Michigan Law Review
Minn LRev	Minnesota Law Review
MMR	Multimedia und Recht
Mod LRev	Modern Law Review
NCMEC	National Center for Missing & Exploited Children
NJ	Nederlandse Jurisprudentie
NJCL	Nordic Journal of Commercial Law
NJW	Neue Juristische Wochenschrift
NwU LRev	Northwestern University Law Review
NYU JLB	New York University Journal of Law & Business
NZA	Neue Zeitschrift für Arbeitsrecht
NZKart	Neue Zeitschrift für Kartellrecht

ODR	online dispute resolution
OECD	Organisation for Economic Cooperation and Development
Ohio St LJ	Ohio State Law Journal
OLG	Oberlandesgericht [Higher Regional Court, Germany]
OSJDR	Ohio State Journal on Dispute Resolution
OTK	Orzecznictwo Trybunału Konstytucyjnego [Case Law of the Constitutional Court, Poland]
OUP	Oxford University Press
ÖZS	Österreichische Zeitschrift für Soziologie
P2B	Platform to Business
P2B Regulation	Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services
PDD	Personal Data Directive (Directive 95/46/EC)
Pol&Soc	Policy and Society
PPR	platform private regulation
PUP	Princeton University Press
QIL	Questions of International Law
RdA	Recht der Arbeit
Riv. Dir. Ind.	Rivista di Diritto Industriale
RJE	The RAND Journal of Economics
SCal Interdisc LJ	Southern California Interdisciplinary Law Journal
Secur J	Security Journal
SMU LRev	SMU Law Review/ Southern Methodist University Dedman School of Law
SoR	statement of reasons
SR	Soziales Recht
TEU	Treaty on European Union
Tex LRev	Texas Law Review
TFEU	Treaty on the Functioning of the European Union
TGI	Tribunal de Grande Instance de Paris
Theo Inq L	Theoretical Inquiries in Law
Theo Soc	Theory and Society
ToS	Terms of Service
TPR	transnational private regulation
TvC	Tijdschrift voor Consumentenrecht en handelspraktijken
UCDavis LRev	University of California Davis Law Review
UChi LRev	University of Chicago Law Review
UColo LRev	University of Colorado Law Review
UCPD	Unfair Commercial Practices Directive (Directive 2005/29/EC)
UCTD	Unfair Contract Terms Directive (Directive 93/13/EEC)
UIll LRev	University of Illinois Law Review
UNESCO	United Nations Educational, Scientific and Cultural Organization
UP	University Press

UPa LRev	University of Pennsylvania Law Review
UStThomas LJ	University of St. Thomas Law Journal
UTol LRev	University of Toledo Law Review
Vand LRev	Vanderbilt Law Review
VLOP	very large online platform
VLOSE	very large online search engine
VSP	video-sharing platform
VSSAR	Vierteljahresschrift für Sozial- und Arbeitsrecht
VuR	Verbraucher und Recht
Wash JL Tech & Arts	Washington Journal of Law, Technology & Arts
WashU LRev	Washington University Law Review
Wm&Mary LRev	William & Mary Law Review
Yale JLT	Yale Journal of Law & Technology
Yale LJ	Yale Law Journal
YEL	Yearbook of European Law
YLP Rev	Yale Law & Policy Review
YUP	Yale University Press
ZEuP	Zeitschrift für Europäisches Privatrecht
ZfA	Zeitschrift für Arbeitsrecht
ZfS	Zeitschrift für Soziologie
ZIAS	Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft

Prologue

Enforcing Digital Private Regulation Through Digital Private Regulation

Hans-W Micklitz

It all started in December 2020, when the European Commission published the Draft Digital Markets Act and the Draft Digital Services Act. The Draft Artificial Intelligence Act followed in April 2021. Since then, the EU legislative machinery has not stopped. Shortly before the end of the mandate in September 2024, the European Parliament, the Council, and the European Commission managed to adopt a whole series of regulations and directives, which I will call the EU Digital Policy Legislation. Depending on the counting criteria, one might quickly end up with more than 12 EU directives and regulations. Many, if not most, are not mere directives and regulations; they are comprehensive and detailed framework documents with extremely comprehensive recitals, detailed articles, and lengthy annexes, often reaching 100 pages or more in the Official Journal. Such an account is still incomplete, as the EU legislation requires the adoption of delegated and implementing acts, guidelines and recommendations, model contracts, codes of conduct and codes of practice, and last but not least a considerable amount of harmonized and non-harmonized technical standards, which still have to be elaborated by the European Standardisation Organisations (the ESOs) under participation of the four stakeholder organizations, SMEs, trade unions, and environmental and consumer organizations. It seems fair to assume that the binding laws, soft law rules, and technical standards arise from thousands of pages of documents.

The EU relies on co-regulation, on due diligence established in financial regulation, and on technical standards successfully promoted through the 1985 New Approach on Technical Standards and Specifications,[1] which combines public law – the adopted EU legislation – with private regulation, not to be equated with private law. Ex ante, the EU defines access rules that require private actors to respect binding EU law through private regulation. Post-market control, the monitoring and surveillance of many regulations and directives, is in the hands of the public national authorities and, to a limited

[1] Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards [1985] OJ C136/1.

extent, those of the European Commission. More strongly than ever before, EU law obliges the Member States to provide their authorities with appropriate resources. The structure of the interaction between the European Commission, the European and national agencies and authorities, and the designated authorities – which for their part have to coordinate the national responsible bodies, not to mention the certification bodies and the auditing companies – is overtly complex. Post-market control is accomplished through the obligation imposed on economic operators – as they are now called – to develop and establish in-house complaint handling and online dispute resolution. The affected – another new term in the digital policy legislation – are now entitled to launch complaints to the public authorities. However, they do not have the right to put the public authorities into motion. Like the 1985 New Approach, the EU believes that a slightly amended Product Liability Directive[2] and national tort law are sufficient to protect end users against potential risks to their health and safety, and that no new rules on the contractual relationship are needed. This is the grand scenario.

With a few exceptions, most prominently in the Data Act, which defines requirements on standard terms in B2B relations, the EU digital policy legislation does not deal with private relations. The regulations and directives define binding legal requirements for the different economic operators in the form of due diligence obligations that the addressees must comply with and/or harmonized technical standards they may want to respect due to the presumption of conformity which grants them access to the Internal Market in the event of compliance. The EU digital policy legislation understands terms and conditions – contracting – as a tool through which the economic operators concretize their due diligence obligations. Here and there, the EU digital policy legislation limits commercial practices and advertising. This does not mean the EU digital policy legislation leaves private law relations untouched, nor that it does not affect contract or tort or the European private law acquis. The intense legislative debates within the European Parliament, within the European Commission and the Member States – inclusive of their ministries and Parliaments – and even within civil societies and among lobbyists focused on an appropriate regulatory regime to exercise and maintain control over potential risks to the economy and society. The risk-based approach, constituting the overall rationale behind the EU digital policy legislation, cuts across the different regulations and directives. The risks take various forms and require different safeguards depending on the type of economic operator and the potential use of the technology. Fundamental rights rhetoric played a prominent role during the law-making process and does so now, as well, in

[2] Philipp Hacker, 'The European AI Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future' (2023) 51 CLS Rev <https://www.sciencedirect.com/science/article/pii/S026736492300081X>.

the implementation process. The high-flying political debate on ethics, trustworthiness, and security might explain why private relations between different economic actors and between economic actors, citizens, and consumers largely fell by the wayside. There are exceptions, but the voices did not reach the European Parliament, the European Commission, or the Member States.

Private law scholarship has to fill the gap. True, the newly approved European Commission announced the elaboration of a 'digital fairness act',[3] which should address data privacy, consumer rights, and maybe more. In light of the Draghi report[4] and the already announced backpedaling not only, but also under the EU digital policy legislation,[5] one might wonder whether the envisaged digital fairness act will ever gain ground or whether minor revisions of the EU consumer law acquis are being sold to the public as digital fairness. The history behind the so-called 'Consumer Rights Directive' might be an uncomfortable precedent for a mismatch between a demanding title and poor content. The Directive does not deal with many rights, certainly not with the originally envisaged right to fair dealing, and the debates ended with a right to information and detailed rules on direct and distant selling.[6] The list of scholarly private law publications dealing with the potential impact of EU digital policy legislation is quickly growing. Single acts of the EU digital policy legislation are prominently dealt with through commentaries in the German legal tradition;[7] written in English by scholars from EU Member States, they address cross-cutting concepts

[3] 7 September 2024 – In the mission letter addressed to the Commissioner-designate for Democracy, Justice and the Rule of Law, President von der Leyen refers to the need to develop 'a Digital Fairness Act to tackle unethical techniques and commercial practices related to dark patterns, marketing by social media influencers, the addictive design of digital products and online profiling especially when consumer vulnerabilities are exploited for commercial purposes', <https://www.digital-fairness-act.com/>.

[4] The future of European competitiveness: Report by Mario Draghi <https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en>.

[5] Initiatives on e-privacy and AI liability have already been withdrawn; see, more generally, Commission 2025 work programme <https://commission.europa.eu/strategy-and-policy/strategy-documents/commission-work-programme/commission-work-programme-2025_en>.

[6] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L304/64 in comparison to the Brussels, 8 February 2007 COM/2006/744 final GREEN PAPER on the Review of the Consumer Acquis <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0744:FIN:en:PDF>.

[7] Reiner Schulze and Dirk Staudenmayer (eds), *EU Digital Law, Article-by-Article Commentary* (2nd edn, Beck, Hart, Nomos 2025); Tobias Mast and others (eds), *Digital Services Act/Digital Markets Act (DSA/DMA), Kommentar* (CH Beck 2024); Mario Martini and Christiane Wendehorst (eds), *Artificial Intelligence Act: AI Act, Brussels Commentary* (CH Beck 2026).

such as vulnerability[8] and occasionally the overall impact of digital concepts on private law relations and the emerging digital private law.[9]

Casarosa and Grochowski's edited book, Enforcing Private Regulation in the Platform Economy, puts *private regulation*, *enforcement*, and *online platforms* center stage. Each of the three pillars, but particularly in their combination, fills an essential gap in scholarly research, paving the way for rethinking the private law acquis, for strategic litigation, and for political action. The title of the book announces the message. Enforcement does not address the power and legitimacy of public authorities to monitor and survey private regulation in whatever form and design, or the appropriateness of collective private enforcement through consumer organizations. Instead, the editors' purpose is to deconstruct and concretize the meaning and relevance of private regulation in two key private law dimensions – in terms of their contractual and enforcement functions and, perhaps sharper and more concisely, in terms of the *enforcement of private regulation through private regulation*.

Private regulation in the EU digital policy legislation, this cannot be repeated often enough, is co-regulation. The online platforms, as the primary addressees of the book, are not entirely free to shape their business relationships. The EU digital policy legislation binds them and sets a compulsory framework. Private regulation is co-regulation in action. Co-regulation as governance allows us to rely on the established distinction between institutional, procedural, and substantive governance. The EU digital policy legislation interferes with all three levels of private regulation, at least if one adopts a broad understanding that includes outside terms and conditions and due diligence obligations, model codes, codes of conduct, codes of practices, and technical standards. Therefore, co-regulation reaches beyond bilateral relationships between two contract parties. The actors can be a single platform, a single business, or a single consumer, but they can also be business and consumer organizations that elaborate codes and technical standards. Conceptually, one might distinguish between private regulation as the result of collectivized private regulation (the actions or interactions of one or, respectively, multiple organizations) or as individualized private regulation between two parties. The EU digital policy legislation actively promotes the development of collectivized codes of conduct and practice. Still, EU law is much less outspoken on elaborating collectivized due diligence obligations or terms and conditions (except in respect of technical standards) where stakeholder organ-

[8] Camilla Crea and Alberto De Franceschi (eds), *The New Shapes of Digital Vulnerability in European Private Law* (Nomos 2024).

[9] Sebastian Lohsse, Reiner Schulze and Dirk Staudenmayer (eds), *Private Law and the Data Act. Münster Colloquia on EU Law and the Digital Economy VIII* (Nomos 2024); Irina Domurath and Hans-W Micklitz, 'EU Digital Private Law: Tattering or New Beginning?' (2024) 20 ERCL 263 <https://doi.org/10.1515/ercl-2024-2014>.

izations are involved. In the more theoretical analysis, institutional and procedural governance are dealt with under the catchword of process regulation, stressing the EU's incomplete open-ended approach.[10]

The other level of governance relates to substance, which is the prominent domain of private law and private law legal scholarship. Platforms provide all sorts of services. They may bring contracting parties together through mediation or by selling products themselves; through marketing mediation or purchase; and through monitoring and surveying their business strategies as well as the customers, businesses, or consumers. The E-Commerce Directive, adopted in 2000,[11] freed the platforms from the risk of being treated as contracting partners immediately and had far-reaching consequences regarding their liability towards the customers. Setting the exceptions aside, the platforms are mere intermediaries in business relations. The DSA, however, requires Very Large Online Platforms and Very Large Search Engines to moderate the content and to report to the European Commission properly. One may easily understand content moderation as a particular variant of private regulation. On the other hand, content moderation is the most far-reaching responsibility of the platforms, and it should not be confused with liability. Whether platforms are intermediaries or contracting partners, they use private regulation in data privacy policies, marketing and sales promotion, and contract terms. These three different formats – data privacy, advertising, and contract terms – follow different rules: the GDPR regulates data privacy; the various directives on advertising deal with unfair and misleading marketing practices; the Unfair Contract Terms Directive (Directive 93/13/EEC, UCTD) addresses standard terms in B2C relations and sector-specific or problem-specific directives address unfair terms imposed by tech companies on small and mediums-sized companies.[12]

The three levels of governance managed and implemented through private regulation are undoubtedly helpful for understanding the complexity of private regulation and identifying the mismatch between the various legal boxes – data privacy, advertising, and standard terms – which are all aimed at the substance of the three formats, setting aside the institutional and the procedural dimension of private regulation. The Court of Justice of the European Union seems ready to stretch the scope of application of standard terms to include the procedural and the institutional dimension of private regulation.[13]

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[10] The EU is a constitution in constant making, and it is constantly evolving as a result of procedural change. There is a bulk of publications on the EU as a quasi-state.

[11] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1.

[12] There is not yet a paper which has pulled the bits and pieces together.

[13] In particular through the ex officio doctrine; Anthi Beka, *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts' Own Motion* (Intersentia 2018).

Perhaps the most important move forward in Casarosa and Grochowski's book is the focus on pointing to enforcement through private regulation, contracting, and online dispute resolution. One of the merits of EU law is the legacy of the common law, in which rights and remedies go hand in hand, quite differently from continental law, where substantive and procedural law are kept distinct from each other, particularly in private law.

Again, dispute settlement forms part of co-regulation. The EU digital policy legislation emphasizes in-house complaint handling and online dispute resolution, as is done prominently in the DSA. The binding legal requirements are at best understood as a framework. ISO, the International Standardisation Organisation, developed a set of standards dealing with customer satisfaction in ISO 10002[14] and dealing with complaint handling ISO 9000 and 9001.[15] These standards incorporate complaint handling into quality management. They were elaborated initially in 1987, but they gained pace through the globalization of the economy and the growing interest in transnational (private) law. The ISO standards entered the ESOs as European and national technical norms.[16] Technical norms are not binding; they provide guidance and leave space for developing an in-house business culture. Dispute settlement is firmly anchored in the European private (consumer) law acquis. The EU introduced harmonized requirements through the legislative procedure, defining a level playing field in dispute settlement outside courts despite the Member States' different legal cultures and traditions.[17] EU regulation is most developed in B2C relations, distinguishing between offline and online dispute settlement. The previous Commission had proposed to withdraw and replace the unsuccessful ODR regulation through mere recommendations.[18] The new Commission will likely bring this project to an end as it fits nicely with the rationality of the Draghi report. Emphasizing ADR, or even more strikingly, understanding contracting and ADR as pillars of private regulation opens vast space for reinvigorating the role and function of private law tools. It requires the combination of the two levels to fully understand the depth and reach of the privatization of the law through EU co-regulation, through the combination of broadly worded legal requirements in the EU

[14] ISO 10002 <https://www.iso.org/standard/71580.html>.

[15] ISO 9001 <https://www.iso.org/standard/62085.html>.

[16] CEN-CENELEC GUIDE 22 Guide on the organizational structure and processes for the assessment of the membership criteria of CEN and CENELEC Edition 5, 2021-12 (Supersedes CEN-CENELEC Guide 22:2018), <https://www.cencenelec.eu/media/Guides/CEN-CLC/cenclcguide22.pdf>.

[17] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63.

[18] <https://ec.europa.eu/consumers/odr/main/?event=main.home2.show>.

digital policy legislation, and through the massive relevance of private regulation in all its various forms to concretize these requirements.

Casarosa and Grochowski's book wonderfully combines three distinct sets of issues – the more theoretical and conceptual one ('the privatization of the law'), the highlighting and elaboration of the two forms of enforcement through contracting and alternative dispute resolution, and last but not least the key role national private law orders will have to play in order to subject private regulation to judicial review. The book sets a new agenda for research, maybe even a new field of 'law'. It should be understood not as closing the regulatory gap but as opening space for rethinking. In that sense, the book is just the beginning of a new era. Co-regulation – the combination of the public and the private, no longer in one business sector or as regards particular products like in the industrial age, but as a cross-cutting means tied to the use of the new technology alone – certainly deserves deeper thinking as to whether the public and the private is gradually vanishing and as to whether private administrative law[19] should be established as a third field of law between the public and the private, where the traditional distinction fails to do justice to the novelties and where well-established boundaries must be rethought. The same applies to the conceptualizing of private regulation. Natali Helberger, Michael Veale, and others[20] identified eight stacks or layers in the design of recommender systems, highlighting the immense complexity of the type of rules, the actors involved, and the interconnection between the eight layers. One wonders whether their findings could be transferred to the analysis of private regulation as such. If so, what does it mean for national private law orders, for our thinking in legal boxes, even beyond the three established levels of the governance discussion?

I belong to the growing group of scholars who are somewhat skeptical about the potential effectiveness of the EU pre-market control approach, which is to be realized through due diligence and technical standards and more broadly through private regulation. The reasons are manifold: the highly bureaucratic nature of the approach, which is manageable for the VLOPs and the VLSEs, but unbearable for SMEs; the overtly complex structure of public enforcement enshrined in the EU digital policy legislation; the lack of explicit coordination between EU and national authorities inbuilt through the Treaty of Rome; the many hundreds of public authorities competent in the 27 Mem-

[19] Rodrigo Vallejo Garretón, The Idea of Private Administrative Law, phd EUI 2021 <https://cadmus.eui.eu/handle/1814/71519>.

[20] Laurens Naudts and others, 'Toward Constructive Optimisation: A New Perspective on the Regulation of Recommender Systems and the Rights of Users and Society', in Natali Helberger and others, *Digital Fairness for Consumers* (BEUC Report 2024) <https://www.beuc.eu/sites/default/files/publications/BEUC-X-2024-032_Digital_fairness_for_consumers_Report.pdf>.

ber States.[21] The foreseeable difficulties will bring private law and national courts competent for adjudicating data privacy, commercial practices, and standard terms into a prominent position, similar to the rise of product liability cases in the 1960s. The CJEU has the last word if national courts interpret the private law acquis. Still, private regulation reaches beyond the acquis and leaves crucial questions open, thus calling for legal scholarship and calling upon courts to seek new avenues. Casarosa and Grochowski's book should be seen and read in that context, underpinning the key role of private law and national courts in filling the gap left by the EU digital policy legislation, a gap resulting from this legislation's disregard and neglect of its impact on private economic and social relations. As with the Treaty of Rome, the EU legislature, the EU organs, and the Member States seem to be convinced that national private law orders, complemented through the EU private law acquis, suffice to deal with all the loose ends, the uncertainties, and the potential risks to the health, safety, and economic interest of European citizens. The EU might be proven wrong unless national courts, with or without the participation of CJEU, take the leading role in this process.

[21] Hans-W Micklitz and Giovanni Sartor, 'Compliance and Enforcement of the AIA through the AI' [2025] YEL <https://doi.org/10.1093/yel/yeae014>.

Beyond the State or in Its Proximity?

Private Regulation in the Platform Economy and Its Enforcement

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I. Private Regulation – The Backbone of the Platform Economy

Online platforms not only form the pillar of the present-day economy but also involve themselves intensively in regulating the communities of users participating in them. This pertains to the entire spectrum of platforms in the present-day economy, such as those that intermediate in the provision of goods (eg Amazon and eBay)[1] or other services (eg Airbnb, Uber),[2] peer-to-peer lending sites (eg Kickstarter, Indiegogo), and social media platforms (eg Facebook, Twitter). Besides other similarities in their business models,[3] the

[1] Christine Riefa, *Consumer Protection and Online Auction Platforms. Towards a Safer Legal Framework* (Ashgate 2015).

[2] Nestor M Davidson and others (eds.), *The Cambridge Handbook on the Law of the Sharing Economy* (CUP 2018); Vassilis Hatzopoulos, *The Collaborative Economy and EU Law* (Bloomsbury 2018).

[3] See eg (among a plethora of literature) Nick Srnicek, *Platform Capitalism* (Polity 2016); Philipp Staab, *Digitaler Kapitalismus. Markt und Herrschaft in der Ökonomie der Unknappheit* (Suhrkamp 2021).

platforms in question involve themselves intensively in private regulation.[4] This activity takes place primarily through two main regulatory toolbox elements: (a) the contractual clauses imposed on platform users through terms of service (ToS)[5] and (b) the internal dispute resolution schemes adopted.[6] Acting through these channels, platforms address internal interactions happening not only between the platform and its users but also between the users themselves. The content and scope of rules and standards set in this way depend on multiple factors, including the market sector,[7] the geographic location and its regulatory environment,[8] and even surprising causes such as habits and inertia in the legal services accompanying the platform economy.[9]

In all instances, platforms attempt to draft rules capable of providing a smooth and seamless operation of the services offered to users. This draws platforms' attention to a broad range of issues of a mostly technical nature, eg how user accounts can be created, altered, and deleted; to what extent the seller of a good on an intermediary platform bears liability for the product; how hate speech in the social media sector is defined; and the like. The regulatory schemes developed by platforms are relevant not only for vertical user-platform relations but also for horizontal links between individual users. In this way, platforms determine, for instance, the conclusion of supplier-customer contracts, the basic elements of customer protection, and the mechanisms of mutual evaluation (reviewing) and reputation building.[10] In many

[4] Tarleton Gillespie, 'Governance of and by Platforms' in Jean Burgess and others (eds), *The Sage Handbook of Social Media* (Sage 2017) 254.

[5] In practice, this document takes a variety of forms and names – 'user agreements', 'general terms and conditions', 'policies', etc; see eg Mateusz Grochowski, 'Default Rules Beyond a State. Special-Purpose Lawmakers in the Platform Economy' in Stefan Grundmann and Mateusz Grochowski (eds), *European Contract Law and the Creation of Norms* (Intersentia 2021) 235–236.

[6] Colin Rule, 'Designing a Global Online Dispute Resolution System: Lessons Learned from eBay' (Winter 2017) 13(2) UStThomas LJ 354; and even earlier, Ethan Katsh, Janet Rifkin and Alan Gaitenby, 'E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law"' (2000) 15(3) OSJDR 705.

[7] See, for instance, Molly Cohen and Arun Sundararajan, 'Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy' (2015–2016) 82 UChi LRev Dialogue 116, 129-132.

[8] See Catalina Goanta, Giovanni De Gregorio and Mateusz Grochowski, 'One Rule of Law to Rule them All? Geography of the Terms of Service on Social Media Platforms' (manuscript on file with authors).

[9] On general deviations from the rationality paradigm in standard terms drafting, see Mitu Gulati and Robert E Scott, *The Three and a Half Minute Transaction Boilerplate and the Limits of Contract Design* (Chicago UP 2012); Stephen J Choi, Mitu Gulati and Robert E Scott. 'Variation in Boilerplate: Rational Design or Random Mutation?' (2018) 20(1) ALER 1.

[10] Robert Gorwa, 'The Platform Governance Triangle: Conceptualising the Informal Regulation of Online Content' (2019) 8 Internet Policy Review <https://doi.org/10.14763/2019.2.1407>.