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**English Title:** Platform Accountability in the European Union: The Cases of Data Protection and Digital Services Regulation

**French Title:** Responsabilité des plateformes dans l'Union européenne : les cas de protection des données et de réglementation des services numériques

**Short English abstract:** Big tech companies mimic competencies that have been the prerogative of nation-states. Many high-profile public scandals fuelled calls for more accountability. Although the EU has addressed the topic, we do not know yet how the accountability of platform companies increased. This article develops the concept of *platform accountability* as an analytical tool. An analysis of three influential regulations shows that data protection regulation increases democratic accountability but has problems with effective enforcement. Recent digital services regulations are mending this weakness and ultimately empowering the Commission. Yet, the Commission has to prove that it can act as a credible digital regulator.

**Short French abstract:** Les grandes entreprises technologiques imitent des compétences qui étaient la prérogative des États-nations. De nombreux scandales publics très médiatisés ont

alimenté les appels à davantage de responsabilité. Bien que l'UE ait abordé le sujet, nous ne savons pas encore comment la responsabilité des entreprises de plateforme a augmenté. Cet article développe le concept de responsabilité de plateforme en tant qu'outil analytique. Une analyse de trois réglementations influentes montre que la réglementation sur la protection des données accroît la responsabilité démocratique mais rencontre des problèmes d'application efficace. Les récentes réglementations sur les services numériques comblent cette faiblesse et, à terme, donnent du pouvoir à la Commission. Pourtant, la Commission doit prouver qu'elle peut agir en tant que régulateur numérique crédible.

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**Abstract:** Big tech companies have acquired immense powers and their practices mimic competencies that have traditionally been the prerogative of nation-states. In response to this dynamic, and being fuelled by many high-profile public scandals surrounding these companies and their managers, there have been increasing calls for more accountability of platform companies. In the European Union (EU), the Commission has issued several legislative initiatives to keep platform companies in line with EU values. This article develops the concept of *platform accountability* as an analytical tool and demonstrates that it can be used to assess how EU regulatory measures hold platform companies accountable. Distinguishing between more democratic and more constitutional dimensions of platform accountability, my discussion of three influential regulations in the areas of data protection and digital services reveals strengths and weaknesses. In particular, I show that while the data protection regulation increases democratic accountability, it has problems with effective enforcement. Two recent digital services regulations are mending this weakness by strengthening both dimensions, ultimately empowering the European Commission. Together, the three regulations have the potential to form a coherent and robust framework for platform accountability. However, I also outline reasons why the Commission has yet to prove that it can act as a credible regulator to hold platform companies accountable.

# **Platform Accountability in the European Union: The Cases of Data Protection and Digital Services Regulation**

## **1. Introduction**

Digital services are dominated by a few very large, predominantly North-American, platform companies. Enterprises like Meta (Facebook), Apple, Alphabet (Google), Microsoft, and Amazon benefit from economies of scale, high switching, and low marginal costs, which allows them not only to become the world's most valuable companies but also to transform into all-encompassing service providers, offering clients all sorts of products that range from finance to insurance to health care. Originally, platform business models and respective developments in the digital economy promoted overcoming European Union (EU) market fragmentation in the digital sphere. With the commercialization of the internet in the 1990s came the rise of these big technology companies. Customers across the single market, previously fragmented along national borders, could for example buy products on Amazon's marketplace, use the services linked to Google's search engine, and exchange and connect through Facebook's social media.

But, as it turns out, the market power of these companies has also a downside. Public scandals like the revelations of Edward Snowden in 2013 and Frances Haugen in 2021 appear only as the tip of the iceberg of many problematic practices of large platform companies and their managers. Many customers and policymakers alike became aware of the significant powers of, and risk of misconduct by big technology companies. This added to a shift in the public discourse about big technology companies which no longer focuses on the liberalising potential of free internet, but points to the negative effects that are associated with large platform business models, thereby evoking a "darker narrative of platform capitalism" (Pasquale, 2016, p. 314). In parallel, demands for more platform accountability have become louder over the last few years (e.g. Helberger, Pierson, & Poell, 2018; Lehdonvirta, 2022; Suzor, 2019). In the EU, policymakers aim to ensure a safe and accountable online environment (European Commission, 2022) and to rebalance the responsibilities of users, platforms, and public

authorities according to European values (European Commission, 2022). Furthermore, even before the Russian invasion to Ukraine, the EU has aimed to increase control over the digital sphere and to build digital sovereignty (Floridi, 2020; Obendiek, 2021).

This article is about the EU's attempt to hold large platform companies accountable. This issue is important because of the big technology companies' size, power and business models. In many ways, large online platforms have emerged as dominant private monopolies, more akin to the provision of public infrastructure than competitive markets (Rahman, 2017; van Dijck, Nieborg, & Poell, 2019). Customers often no longer have a fair opportunity to choose another option. Furthermore, their concentrated economic power leads to significant political power over entire economic sectors and public opinion (Helberger, 2020), so large online platforms are portrayed overtaking the state (Lehdonvirta, 2022) and deemed to be governors of online speech (Kate Klonick, 2018). The threats that emanate from Big Tech using big data is not just market dominance but the power to give advantages to one group, such as sellers, over others, such as buyers. When the problem is not only market dominance but power, the response should be found in accountability, not just competition policy (Pistor, 2020).

In this article, I demonstrate the added value of adjusting an acknowledged assessment tool developed by Mark Bovens, Thomas Schillemans and Paul t'Hart which – broadly speaking – identifies evaluative questions that can be used to assess platform accountability (e.g. Bovens, Schillemans, & Hart, 2008; Schmidt, 2013; Schmitter, 2004). On a conceptual level, the article contributes to the more general debate about understanding platform governance (Gorwa, 2019). It develops the concept of platform accountability that is distinct from other but related concepts such as platform's transparency and legitimacy. For example, transparency mostly refers to manifold ways of accessing information and legitimacy refers to a more normative assessment of platform decisions. By contrast, platform accountability refers to a specific set of institutionalised practices, mostly in the form of laws, to hold platforms to account. There are different proposals for which set of actors should hold platforms accountable, like users, stakeholders or citizens more generally (Haggart & Keller, 2021; Pistor, 2020; van Dijck et al.,

2019). My concept of platform accountability centres on a specific understanding of public accountability and thus on the legal arrangements that are implemented in the EU.

By assessing platform accountability in three influential EU regulations (the General Data Protection Regulation, the Digital Services Act and the Digital Markets Act), my article contributes to the emerging debate about developments in EU digital policy more generally (e.g. Falkner, Heidebrecht, Obendiek, & Seidl, 2022; Heidebrecht, 2023; Obendiek, 2021). I distinguish between more democratic and more constitutional features of platform accountability and show that the EU's more recent attempts in digital services regulations are informed by previous weaknesses in the constitutional dimension of platform accountability, notably in the area of data protection. However, the three regulations together have the potential to form a coherent and more robust framework for platform accountability. Because this rests ultimately on an empowered European Commission, I also outline reasons why the Commission has yet to prove that it can act as a credible regulator to hold platform companies to account.

The question of how the EU holds large online platforms to account is of immense importance for democracies, economies, and societies in the 21st century. Given the EU's attempt to be both, a market and also a normative power in world politics (Damro, 2012; Manners, 2002) and in digital regulation alike (Bradford, 2020), knowing how it is designing platform accountability is important for understanding the politics of shaping the global digital sphere. Before I present my findings on the EU's attempt to ensure platform accountability in three case studies, I provide a discussion of both the need for platform accountability and the EU's history of creating it in the light of the existing literature, detail my theoretical approach and elaborate on my empirical strategy. The last section concludes.

## 2. Platform Power and the Need for Accountability

To address the issue of platform accountability, I briefly discuss what platforms are and why accountability is necessary. Platform companies are companies that operate a variety of platforms, ranging from social media platforms like Facebook to video platforms like YouTube, to other services or marketplaces and search engines, which are operated typically by big companies. Some of these platforms are entangled in virtually every aspect of contemporary life, from politics and industrial relations to cultural production and consumption (Gillespie, 2018; Nieborg & Poell, 2018; van Doorn, 2017). Although many of the services platforms offer have been praised as ‘liberalisation technologies’ (Tucker, Theodoridis, Roberts, & Barberá 2017), the sector is dominated by a handful of large, predominantly American technology firms. Because of the dominance of this handful of American companies, many concerns have been raised in scholarly discourse, not least in the aftermath of many high-profile public scandals (Vaidhyathan, 2018), such as the revelations by Edward Snowden in 2013 (Mazzetti & Schmidt, 2013), highlighting the problematic practices of many big US technology companies and intelligence services.

Against this backdrop, scholarly discourse addressed many of the negative consequences that are associated with an unregulated digital economy. John W. Cioffi, Martin F. Kenney and John Zysman (2022) point out that the minimalist regulatory regime led to economic, political and social challenges. In the economic dimension, scholars emphasize that platform companies constraint competitive markets through multiple forms of anti-competitive behaviour (Khan, 2017), so that some have argued for breaking up these companies or preventing them from making future acquisitions (Pasquale, 2018; Wu, 2018). The involvement of the private US company Cambridge Analytica in the 2016 US election campaign (Chen, 2018), and Russian interference in the 2016 US election (Abrams, 2019) shone a light on political challenges, that were seen as examples of potential political threats to the European elections in 2019 (Plucinska, 2018). Because today many people derive their political information from online sources, platform companies in many respects constitute the infrastructure of public discourse and free speech (Kate Klonick, 2018). As private companies that are profit-driven rather than focussed on ensuring democracy, their business models endanger democratic

discourse through the spread of disinformation and hate speech (Howard, 2020) and harm the privacy and fundamental rights of citizens (Zuboff, 2019).

Given their monopolistic position, very large online platforms are frequently compared to public infrastructure for economic, political and social life (van Dijck et al., 2019) and the private companies that create and control that infrastructure are described in terms of the “new governors in the digital era” (Kate Klonick, 2018, p. 1663). This leads to a form of “opinion power” (Helberger, 2020, p. 842) or, in the words of Manuel Castells, “the capacity to influence people’s minds” (cited in Helberger, 2020, p. 845). They can do so by controlling access to goods that comprise a backbone of much of modern social and economic activity, upon which many communities and constituencies depend (Rahman, 2017, p. 1622). Large online platforms possess important qualities because they control the digital ecosystem. This amounts to important infrastructural power (Valdez, 2023; van Dijck et al., 2019).

Against this backdrop, it is important to note that the choice between alternative institutional frameworks is not an individual choice that can be resolved on a market, but a collective choice, which is precisely why political institutions matter in this debate. It is important to understand that in exercising their powers, very large online platforms frequently evoke competences that were previously considered to be the prerogative of the nation state. One reason is their size. Amazon, for example, had an estimated USD 490 billion’s worth of goods passing through its platform, more than many countries’ gross domestic product. The company earned almost USD 75 billion in fees from merchants who used its marketplace and logistics infrastructure – more than most governments collect in taxes (Lehdonvirta, 2022, p. 3). Another example of how large platform companies are emulating the nation state is the issuing and enforcing of laws. They define the terms and conditions of economic exchange on their platforms as well as settle conflict between opposing parties. For example, eBay (an US company) alone claimed that it resolved more than 60 million disputes in a single year, which is not very far away from the 90 million cases in US courts (Lehdonvirta, 2022, p. 2).

According to liberal reasoning as well as democratic theory, large power requires checks and balances. In the case of large online platforms, they have to be found in the area of accountability because of the digital market structure, large platform companies' business models, and the infrastructural quality of their services. Checks and balances of corporate digital power will not come from competition, laissez-faire regulation, and market-based equilibria as the emergence of hegemonic positions and de facto monopolies demonstrate (Floridi, 2020, p. 372). Furthermore, the business models of large online platforms do not just rely on market dominance but on the power to bestow advantages upon one group, such as sellers, at the expense of other groups, such as buyers (Pistor, 2020). Thus, we leave the area of markets and enter the area of power, which is why we need the toolkit of accountability rather than for example competition law. Of course, platform companies are already in some respect responsive to the demands of the customers, but they are so, as Blayne Haggart and Clara Iglesias Keller (2021, p. 6) put it nicely, "in the same way that a monarch [is] responding to the pleas of his subjects, [which should ...] not be confused with a form of democracy".

### 3. How the European Union Holds Platforms to Account

In the early days of the commercial Internet, EU policymakers adopted a pronounced market liberal regulative approach to the emerging digital sphere. Private technology companies on liberal markets were considered as promoting a "market-driven revolution" (European Council, 1994) to achieve European competitiveness in a global information society. Of course, the EU was from early on concerned with questions of data protection as the Data Protection Directive from 1995 demonstrates (Directive 95/46/EC, see also Newman, 2008). Other areas such as digital services legislation in form of the 2000 e-commerce directive (Directive 2000/31/EC) ensured light touch regulation (e.g. Farrand, 2023) and established important principles like limited liability of digital service providers for online content (Heidebrecht, 2023). While the EU took in some respects a dual-approach that combines aspects such as consumer protection

with policies that were geared to promote market activity (Newman, 2020), public accountability of large technology companies and platform operators was very limited.

Approximately over the last decade, the EU developed a relatively comprehensive update of key legislations that affect the digital sphere. The Juncker Commission promised with its 2015 Digital Single Market Strategy (European Commission, 2015) to assess the role of large online platforms. The respective 2016 report (European Commission, 2016) on the issue identified in particular challenges in the areas of transparency, competition and content moderation. The 1995 Data Protection Directive was updated with the 2016 General Data Protection Regulation (Regulation (EU) 2016/679, or GDPR), frequently referred to as the global gold standard (Schünemann & Windwehr, 2021). The issue of transparency of large online platforms was addressed by a 2019 Platform to Business Regulation (Regulation (EU) 2019/1150), and the 2022 digital services package addresses the issues of competition and content moderation. The package was welcomed by the Commission's Executive Vice-President, Margrethe Vestager, for its "help [to] create a safe and accountable online environment [...] and ensure that platforms are held accountable for the risks their services can pose to society and citizens" (Vestager, 2022). The responsible minister of the Czech Council Presidency, Ivan Bartoš, in charge of the agreement on the Digital Markets Act, argued that it "will finally make large online platforms responsible for their actions" (Bartoš, 2022). Public media addressed the digital services package in terms of "a constitution of the internet" (Bertuzzi, 2021).

In academic discourse, the provisions of the Digital Services Package were seen as a comprehensive move towards encompassing socio-economic regulation and market intervention (Cioffi et al., 2022). They further move digital competition policy towards a stronger approach that does no longer address ex-post competition infringements but includes ex-ante provisions that also address market structure, thus implying provisions of broader economic regulation to ensure fair competition online (Cini & Czulno, 2022; Heidebrecht, 2022; Meunier & Mickus, 2020). In this regard, scholars noted a move away from the EU's alleged "neoliberal bias" (Laurer & Seidl, 2021, p. 257), in parallel with the more geopolitical rhetoric as it is

expressed in the frequent usage of concepts such as open strategic autonomy and digital sovereignty (Falkner et al., 2022; Heidebrecht, 2023; Schmitz & Seidl, 2022). Against this backdrop, I develop the assessment tools for a potentially strengthened public form of platform accountability in the next section.

#### 4. Defining Platform Accountability

In the political science literature, there is an established debate about accountability which can help us understand the importance of the concept and its distinctness from others. It is important to note that accountability concerns those who exercise power, not those who are subordinate to it (Schedler, 1999, p. 20). Andreas Schedler (1999) describes accountability as a two-dimensional concept that implies answerability and enforcement. For him, there are three different ways of redressing the abuse of political power: threats of sanctions (enforcement), transparency (answerability) and justification (answerability). Thus, to be effective and perceived as such, accountability has to demonstrate that it can achieve its aim of curbing power. In this regard, accountability agencies must have not only legal authority but also sufficient and de facto autonomy to pursue their tasks (O'Donnell, 1998, p. 119). Effective accountability is considered important because it ensures participation of citizens and responsiveness of rulers. Failed accountability is considered leading to the unresponsive imposition of rules and the resentment of citizens (Schmitter, 2004).

In the debate about platform governance, regulation and accountability, Robert Gorwa (2019) distinguishes between three different approaches: platform self-governance, external governance exercised by public supervisors and the like, and platform co-governance by empowering users to participate in platform decision-making. In this terminology, the EU's early approach relied mostly on platform self-governance (Farrand, 2023) and a "laissez-faire" (Gorwa, 2019, p. 862) relationship between supervisors and platform companies. By contrast, more recent policy initiatives of the Commission aim to "rebalance [t]he responsibilities of users, platforms, and public authorities [...] according to European values, placing citizens at

the centre” (European Commission, 2022). This aim indicates, using Gorwa’s (2019) terminology, a shift from self- to external platform governance and has been described in terms of a change from a market-liberal towards a public-interventionist regulatory approach (Heidebrecht, 2023). It requires, in the words of the EU Commission, the establishment of “a common set of rules on intermediaries’ obligations and accountability” (European Commission, 2022).

To assess the accountability mechanisms of external platform governance, this article develops the concept of a public form of *platform accountability* as an assessment tool. Haggart and Keller (2021) have demonstrated that the conceptual tools of the wider EU legitimacy and accountability literature (notably Scharpf, 1999; Schmidt, 2013) can be used to gain insights into the evolving debate about EU platform regulation. Different from their work, my empirical focus is on the legal mechanisms that are established to hold large online platforms to account and not on the democratic input or the results of the arrangements (basically what Schmidt 2013 and Haggart/Keller 2021 call throughput legitimacy).

Mark Bovens (2005, p. 184) defines accountability as “a social relationship in which an actor feels an obligation to explain his or her conduct to some significant other”. However, differences in the interpretation of accountability exist within different countries or regions. For example, in the Anglo-American discourse, accountability is often used as a conceptual umbrella that refers to more normative goods like transparency and trustworthiness. In this context, accountability has a more substantive dimension, that often refers to the quality of accountability arrangements assessed against the benchmark of normative goods. Bovens (2010, p. 948) calls such more evaluative analysis that asks if the actor’s behaviour is in line with substantive standards “accountability as a virtue”. By contrast, on the other side of the Atlantic, in British and continental European scholarly discourse, accountability is often used in more descriptive terms. In this context, accountability is presented in its procedural dimension as an institutional relation or arrangement in which an actor can be held to account by a forum (Bovens et al., 2008). Related and often more descriptive analysis often assesses

the structure of the accountability arrangements. Bovens (2010, p. 950) calls this second perspective “accountability as a mechanism”.

While accountability is related to legitimacy, it is also closely linked to, but should not be confused with, the concept of transparency. Transparency refers to principles of openness which are typically linked to and a prerequisite for responsiveness. This can be illustrated by the decision of Facebook to set-up an Oversight Board on questions of content moderation in 2020. While the board can overrule decisions on single content moderation cases (Wong & Floridi, 2022), Facebook is not under a mandate to take up the board’s broader recommendations. Thus, it creates transparency and leads to sort of an indirect accountability (Kate Klonick, 2019) exercised through public pressure which requires Facebook to furnish reasons and explain its conduct. By contrast, more direct accountability by external governance bodies “demands some form of scrutiny by a specific forum” (Schmidt, 2013, p. 6). Different from transparency and platform self-governance, effective platform accountability would require demonstrating that decisions can be taken and enforced that are against the company’s immediate best interests.

In the following, I approach big platform companies from a perspective that reflects their power, business model and kind of infrastructure-like services. Therefore, I apply a concept of accountability that covers the relationship of platforms to external actors and which is in the scholarly debate often referred to as “public accountability”. Public accountability has two components. First, *public* accountability relates to openness. Explanations and justifications are given publicly, for example in the sense that they are open or at least accessible to citizens. The second element is *accountability*. As a concept, it is used in different areas, and in different settings like listed companies, in which shareholders implement mechanisms to hold the management to account, or in public policy, in which for example the executive branch of government is typically held accountable by parliaments as the representation of citizens (for an overview, see Bovens, Schillemans, & Goodin, 2014). In this regard, my concept of a public form of platform accountability can be defined as follows: *Platform accountability refers to the*

*legal mechanisms and institutional structures that shall ensure that public actors hold private platform companies to account.*

## 5. Assessing Platform Accountability and Empirical Strategy

Because of the many powers large online platforms have in markets, societies and democracy, an analysis of platform accountability should cover both more substantive and more procedural dimensions. For this endeavour, I draw on the work of Bovens et al. (2008) who develop an assessment tool. They identify evaluative questions that can be used to assess if the accountability arrangements reflect different important qualities. In methodological terms, defining and using evaluative questions for different dimensions of public platform accountability will allow me to assess if EU regulations comply with these criteria and thus to describe the quality and processes of platform accountability in the EU.

To develop an assessment tool for public platform accountability, I adjust the assessment tool of Bovens et al's (2008). They distinguish between three perspectives on accountability of which I use the first two, namely: a democratic and a constitutional perspective (the third perspective requires analysing feedback-loops, and is less suitable for regulations that still need to be implemented). The perspective of democratic accountability is concerned with issues of popular control and the democratic chain of delegation and centres on democratically legitimized standards and preferences. To reflect the democratic accountability perspective, my evaluative question asks: Do accountability mechanisms accord with substantive standards and democratically legitimized preferences? The constitutional accountability perspective is primarily concerned with the issue of preventing power concentration and abuse and ensuring effective political and social control. To evaluate this constitutional perspective, I use two evaluative questions. First: Do accountability mechanisms allow monitoring and curtailing the abuse of powers and privilege? Second: Do public institutions possess credible enforcement mechanisms? See Table 1 for an overview.

Table 1: Accountability Dimensions and Evaluative Questions

Dimension	Central Idea	Evaluative Questions
Democratic	<i>The accountability framework should reflect legitimised standards and preferences.</i>	<i>Do accountability mechanisms accord with substantive standards and democratically legitimized preferences?</i>
Constitutional	<i>The accountability framework should establish mechanisms to withstand power concentration and abuse and ensure effective political and social control.</i>	<i>Do accountability mechanisms allow monitoring and curtailing the abuse of powers and privilege? Do public institutions possess credible enforcement mechanisms?</i>

In order to assess platform accountability in the EU, I conduct a theory-guided analysis of three cases where I explore the democratic and constitutional dimensions of platform accountability. In my case studies, I examine the legal characteristics of three important horizontal regulations that are set to shape how the EU regulates the digital sphere in important issue areas, namely data protection, digital services and digital markets. My study is primarily based on extensive document analysis of three EU regulations (see below). To assess platform accountability through these regulations, I used the three evaluative questions in a two-tier qualitative analysis. First, I checked the objectives of the regulations in the recitals of the regulations (and compared this to selected press releases and media statements from the European Commission that accompanied the publication of the legislative proposals). Second, I used my evaluation questions as a guide for analysing the more substantive articles of the regulations, focusing on their more democratic and constitutional provisions that relate to the categories defined in my concept of platform accountability, such as enforcement articles and those codifying the more democratic or constitutional claims identified in the first step.

For these theory-guided qualitative case studies, I selected influential cases of EU legislation, which substantially affect platform companies in the EU' single market, by establishing horizontal and directly applicable rules across sectors of the digital economy. Choosing influential cases has typically the goal to explore their significance on some larger cross-case

theory (Seawright & Gerring, 2008, p. 303). In my case, choosing influential cases allows me to demonstrate important patterns of regulatory reforms. While influential cases are typically not representative of a larger sample of EU digital regulation, my cases comprise the most far-reaching legislative initiatives in the area and thus allow me to draw conclusions on the development of EU platform accountability more generally.

In particular, I choose the most recent and most influential regulations in data protection, digital services and digital markets. The first case is the General Data Protection Regulation (GDPR), adopted in 2016. It creates strict data protection rules that are frequently referred to as the “gold standard of data protection” (Schünemann & Windwehr, 2021, p. 859). The second and third cases are the two regulations of the Digital Services Package, the Digital Services Act (DSA, Regulation (EU) 2022/2065) and the Digital Markets Act (DMA, Regulation (EU) 2022/1925). Substantive steps on both files between the EP and the Council were negotiated during the French Council Presidency from January to June 2022 and the digital services package was adopted in the first reading by the European Parliament in July 2022.

## 6. Assessing Platform Accountability

### 6.1 Platform Accountability in the General Data Protection Regulation

#### 6.1.1 *Democratic Public Accountability through the GDPR*

The GDPR, adopted in 2016, builds up on the Data Protection Directive of 1995 and is intended to strengthen individuals' fundamental rights in the digital age. Concerning the purpose of the GDPR, and to reflect on its *democratic accountability* dimension, I ask whether accountability mechanisms accord with substantive standards and democratically legitimized preferences. It is possible to identify two distinct aims of the GDPR. On the one hand, when tabling the proposal for the GDPR in 2012, the Commission stated that an important aim of the regulation is to support its digital single market (e.g. Recitals 2, 7 and 13, GDPR). It argued that “building trust in the online environment is key to economic development” (European Commission,

2012). In this regard, the GDPR was a continuation of the necessity to create consumers' trust in the digital economy for facilitating the development of the EU digital single market. Transforming the 1995 Directive into a regulation was meant to facilitate business development by clarifying rules for companies and public bodies in the digital single market, thereby addressing also the problem of fragmentation along national borders and unnecessary administrative burdens. The creation of a single market, and the role of the GDPR in facilitating this project, can be regarded as one of the values underlying the European integration project because market integration (Article 3(3) TEU) has always been meant to promote European integration thereby serving such goals as ultimately the prevention of war.

On the other hand, the GDPR is set to be designed to strengthen individuals' fundamental rights in the digital age, in accord with core European democratic values. Building upon the 1995 data protection directive, data protection has also become part of the EU's Charter of Fundamental Rights (CFR) proclaimed in 2000, which is legally binding since the entry into force of the Lisbon Treaty in 2009 and laid out a strong Treaty basis for a firm EU data protection regulation in form of the GDPR. In accordance with its Recital 1, the GDPR stresses that the protection of natural persons in relation to the processing of personal data is a fundamental right. This is laid out, inter alia, in Article 8(1) of the Charter of Fundamental Rights of the European Union and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU), which provide that everyone has the right to the protection of personal data concerning them. One example of its application is the so called "right to be forgotten". Article 17 of the GDPR enshrines that citizens have the right to request the erasure or removal of inaccurate data. In this regard, the GDPR accords with one of the EU's core substantive standards as they are codified in the CFR.

#### *6.1.2 Constitutional Accountability of the GDPR*

Regarding the constitutional accountability dimension, I first ask if the accountability mechanisms of the GDPR allow monitoring and curtailing the abuse of powers and privilege. In this regard, it is noteworthy that the GDPR relies less on private authority, as it was practised

in many areas concerning digital market integration (Farrand, 2023), exercised for example through business trust marks. Already the 1995 Data Protection Directive required member states to set up independent national Data Protection Authorities (DPAs), which are also responsible for monitoring the application and enforcing the GDPR (Article 51 – 59). DPAs are given complete independence in performing their tasks and exercising their powers (Article 52(1) GDPR). This applies also to the members of the supervisory authority, who the text, among other things, designs to be appointed in a transparent procedure by democratically legitimate bodies (such as national governments or parliaments, Article 53 GDPR). They may be dismissed only in cases of serious misconduct, which is meant to also secure personal independence of the supervisory authority. These national data protection authorities cooperate in the European Data Protection Board (EDPB, Article 60 – 76 GDPR). The EDPB is a body of the EU with own legal personality. Other EU institutions, notably the Commission, have the right to participate in the activities and meetings of the Board, but without voting rights. In this regard, the GDPR sets up a member state level structure with cooperative elements on the supranational level to ensure coherent application.

Constitutional accountability requires further to assess if public institutions possess credible enforcement mechanisms. Enforcement of the GDPR lies with the national DPAs (Article 57 GDPR). They possess relatively comprehensive investigative and corrective powers (Article 58 GDPR). Among other things, the national DPAs can carry out investigations, order the rectification or erasure of personal data, and impose administrative fines. For severe violations, the fine framework can be up to 20 million euros, or up to 4 percent of total company global turnover, whichever is higher. Also, the catalogue of less severe violations provides for fines of up to EUR 10 million, or 2 percent of global turnover (Article 83(4-6) GDPR). While these amounts appear to be relatively comprehensive, enforcement lies with the national DPAs, which have relatively high discretion in this area and whose enforcement practices differ substantially (Sivan-Sevilla, 2022).

The enforcement structure of the GDPR relies exclusively on member state authorities. Supranational bodies, like for example the Commission, have no formal role in the enforcement of the GDPR. Also, the newly created EDPB has a “mere” coordinative role and issues for example guidelines and recommendations (Article 68-76, GDPR). This exclusive reliance on member state authority continues the country of origin principle which was often used in the context of legislation of the EU single market. The argument is that when companies are supervised by the authorities in the country in which they are established and other member states mutually recognise the authority of each other’s DPAs, legal fragmentation can be prevented and companies and citizens can benefit from a frictionless internal market.

However, the used country of origin principle creates supervisory bottlenecks. It is the Irish data protection authority that is in charge of supervising most Big Tech companies because Facebook, Twitter, Google, and Apple have their headquarters in Ireland. This is problematic because, according to a report published by the Irish Council for Civil Liberties (Ryan & Toner, 2021), an NGO, the Irish authority, given a lack of resources or of political will, has proven unable to police Big Tech firms’ use of personal data and is accused of paralysing the regulation. In this regard, the GDPR shows weaknesses in the constitutional dimension of platform accountability.

## 6.2 Platform Accountability in the Digital Services Act

### 6.2.1 *Strengthening Democratic Accountability through the DSA*

The DSA is one of two regulations of the EU’s Digital Services Package that has been drafted by the Commission in late 2020 and adopted in first reading by the EP in July 2022. According to the Commission, the DSA is intended to rebalance “the responsibilities of users, platforms, and public authorities [...] according to European values, placing citizens at the centre” (European Commission, 2022). According to the Act, this is important because the “digital transformation [...] resulted in new risks and challenges for individual recipients [...],

companies and society as a whole” (Recital 1, DSA). Its key aims are better protection of consumers and their fundamental rights online, more powerful transparency and an accountability framework for online platforms, as well as fostering innovation, growth, and competitiveness within the single market (European Commission, 2022). In this regard, the aims set out in the DSA do reflect core EU democratic standards. It reflects the EU’s dual commitment to the establishment of a competitive internal market (Article 3(3) TEU) and the aim to protect core democratic values such as the freedom of expression online (Article 11, CFR).

To achieve these goals, the DSA continues more market-liberal principles like the avoidance of general monitoring of users’ online activities on platforms (Article 8, DSA) and a reliance on platform self-regulation in the form of codes of conduct and standards of best practice (Farrand, 2023). On the other hand, new measures are designed to counter illegal goods, services, or content online, by establishing a mechanism for users to flag such content. Furthermore, a ban on certain types of targeted advertisements on online platforms was adopted, specifically when they target children (Article 28 DSA) or when they use special categories of personal data (Article 26(3) DSA), like racial or ethnic origin, religion or sexual orientation, in accordance with the GDPR (Article 9(1)).

#### *6.2.2 Strengthening Constitutional Accountability through the DSA*

It is important to note that some aspects of the DSA continue the previously used reliance on “regulated self-regulation” (Farrand, 2023) and stakeholder involvement, rather than in form of external public supervision. One example is the fight against illegal content. Inter alia, platforms will continue using so called trusted flaggers, which are entities with certain expertise in a field that are aptly targeting illegal content. Platforms are obliged to ensure that notices submitted by trusted flaggers are given priority and are processed and decided upon without undue delay (Article 22 DSA). Another example are risk assessments and the mitigation of risks. In these areas, very large online platforms are expected to assess systemic risks stemming from the

design or functioning of their services (Article 34 DSA) and they are obliged put in place mitigation measures, tailored to the specific systemic risks identified (Article 35 DSA).

It is important to note that these measures are designed, implemented and reported by the platforms themselves. However, the DSA also strengthens public accountability by implementing tougher oversight through a new system of Digital Services Coordinators. These are institutions at member state level and tasked with applying and enforcing the DSA (Article 49 DSA). Here the DSA departs from the principle of regulated self-regulation, and Digital Services Coordinators receive powers in that they award the status of trusted flaggers. Furthermore, self-regulation regarding systemic risks of very large online platforms requires external audits (Article 37 DSA), conducted by independent audit organisations without connections to the platform company. Platforms choose and pay for audit organizations which may lead to audit capture (Laux, Wachter, & Mittelstadt, 2021), that is unjustified positive reviews based on close business relationships and not on objective evaluations. However, Digital Services Coordinators receive the power to require auditors to provide information that relates to suspected infringement of the DSA. In this regard, the DSA improves public monitoring and curtailing the abuse of powers and privilege.

The design of the supervisory structure of the DSA shows that the regulation learns lessons from weaknesses of the GDPR and improves both aspects of constitutional accountability, monitoring and enforcement. In particular, the DSA improves the enforcement problem known from the GDPR (see above) by distinguishing between different categories of online intermediaries regarding their role, size and impact. The more important and bigger platforms are, the more obligations apply. The most obligations apply for very large online platforms, defined as those with 45 million or more monthly users (Article 33 DSA). These very large online platforms are supervised directly by the Commission (Article 65 DSA), thereby preventing member state level enforcement bottlenecks known from the GDPR and ensuring the level playing field of the EU digital single market. Both, Digital Services Coordinators and the Commission can impose fines for misconduct, which can amount to up to six percent of

the company's total worldwide annual turnover, which is two percent higher than in severe cases defined in the GDPR. However, as regards implementation and enforcement, the Commission has to prove that it can make difficult choices that require balancing competing goods such as the freedom of expression and the prevention of online harms.

### 6.3 Platform Accountability in the Digital Markets Act

#### *6.3.1 Democratic Accountability through the DMA*

The DMA is the second regulation of the EU's Digital Services Package. In the context of the DMA, the first evaluative question, is mostly answered in terms of ensuring fair competition and a level playing field for platforms, businesses and users. According to Recital 2, adjusted competition rules are necessary because platform companies' characteristics can be exploited, for example because of their extreme scale economies that lead to nearly zero marginal costs to add business users or end users. This can create lock-in effects and lead to a concentration of power.

The DMA particularly addresses so called gatekeepers (see below). For these gatekeepers, the DMA defines a full set of do's and don'ts. For example, gatekeepers must allow third parties to inter-operate with the gatekeeper's own services (Article 7, DMA) and are prohibited from treating services and products offered by the gatekeeper itself more favourably in ranking than similar services or products offered by third parties (Article 6(5), DMA). The approach of defining a clear set of do's and don'ts changes the EU's traditional competition policy approach. Previously, competition policy worked ex-post, meaning that intervention occurred after an infringement happened, which was typically proofed by higher prices at the expense of users. The DMA's ex-ante approach promotes democratic accountability predominantly in its economic dimension. It addresses the market structure of the digital economy, allows regulators to act before one of the EU's goals, namely the establishment of a competitive internal market (Article 3(3) TEU), is levered.

### *6.3.2 Strengthened Constitutional Accountability through the DMA*

From a perspective of constitutional accountability, in line with my first evaluative question, it is important to note that the DMA deals with so-called gatekeepers only. They are defined according to a number of qualitative and quantitative criteria and their designation allows further discretion of the Commission. In particular, gatekeepers are defined as those companies with a significant impact on the internal market, those providers of important gateway for business users to reach end users, and those that hold this with an entrenched and durable position (Article 3(1) DMA). More quantitative criteria include inter alia whether companies achieve an annual turnover of more than EUR 7,5 billion and if the platform has 45 million or more monthly users (Article 3 (2), DMA). In addition to this set of criteria, the Commission has the power to designate gatekeepers based upon a comprehensive catalogue of additional criteria (Article 3(8), DMA). These criteria promote constitutional platform accountability by allowing for focussed monitoring, and shall prevent overburdening supervisors.

To ensure effective enforcement, the DMA delegates this task to the Commission, which corresponds with its tasks in competition policy more generally. The Commission receives relatively far-reaching powers, like requesting all necessary information (Article 21, DMA), conducting inspections (Article 23, DMA) and issuing fines (Article 30, DMA). To ensure credibility, the DMA foresees sanctions of up to 10 percent of the company's total worldwide annual turnover (Article 30(1), DMA) or even 20 percent in the event of repeated infringements (Article 30(2), DMA). For enforcing the DMA, the responsible Directorate General (DG) will not be the experienced DG Competition, dealing with the enforcement of competition policy, but the DG for Communications Networks, Content and Technology (Martins & Carugati 2022). The Commission aims to establish structures for effective cooperation between the two DGs. By time of writing in the summer 2023, the effective implementation of the DMA remains to be seen. The regulation clearly intends strengthened platform accountability, particular in its constitutional dimension.

## 7. Conclusions

Given their apparently ever-increasing powers, Big Tech companies have developed functions and acquired competences that were previously the prerogative of the nation state. In response, the European Commission issued a number of legislative proposals to curtail their powers and to align the responsibilities of platforms with European values, to strengthen the competences of public authorities and thereby increasing the framework through which the public holds large platform companies accountable. By analysing three far-reaching regulations, the GDPR, the DSA and the DMA, this article has shown what the Commission's attempts mean in actual regulation. For this purpose, I distinguished between a more democratic and more constitutional dimension of what I call a public form of platform accountability. This allowed me to show through which instruments the Commission aims to hold platform companies to account, and to assess different qualities of the platform accountability framework that is emerging in the EU.

My analyses contributed to the literature on platform accountability by revealing strengths and weaknesses in the more democratic and the more constitutional dimensions of accountability of the three regulations. In particular, the GDPR has improved the dimension of democratic accountability by aligning the practices of digital service providers with EU fundamental rights. However, my analysis has also revealed weaknesses in the more constitutional dimensions of accountability, particularly with regard to the enforcement of the GDPR. By setting rules for content moderation in line with European values, the DSA enhances the democratic accountability of platform companies in the EU. It further reflects lessons from the weaknesses of the GDPR and improves the dimension of constitutional accountability by aiming for stronger enforcement through delegation of supervisory powers over very large online platforms to the Commission. \_Similar to classical competition law, the DMA enhances mostly the prevention of abuse of power and privilege by very large online platforms, and it establishes new ex ante instruments to ensure competitive markets.

It is important to highlight that by controlling the digital sphere, a few Big Tech companies have acquired substantial socio-political power over ever-increasing parts of life in the 21<sup>st</sup> century. To exercise what many in the EU now call digital sovereignty (Falkner et al., 2022), it is important to establish platform public accountability, which shall ultimately allow cooperation for tackling pressing global problems like making societies fairer and developing more sustainable (see also Floridi, 2020, p. 374). Analysing the three influential regulations separately has enabled me to identify strengths and weaknesses in their accountability dimensions. Together, they can provide a robust and synergistic framework for platform accountability in the EU. In particular, mostly the GDPR and DSA reinforce the democratic dimension of platform accountability in the EU, while the DMA targets the more constitutional dimension by addressing concentration and abuse of power. On the constitutional dimension, I have also found that the DSA has been improved based on the GDPR experience by delegating platform oversight to the EU Commission to ensure effective and coherent enforcement of the regulation, similar to the powers it has in competition policy and the DMA.

By demonstrating that the EU aims at strengthening mechanisms of platform accountability, I have also identified weak spots. While the approach to empower the Commission is in principle sensible, given its supranational position that can ensure coherent application across the single market, the approach brings potential challenges. For example, the DSA is a legislation dealing with politically sensitive issues in terms of content moderation and might have to balance partly contradictory goals like ensuring the freedom of expression and preventing online harm through the spread of disinformation and hate speech. The Commission is, however, not an apolitical body, so that its decisions could be regarded as biased. The Commission will have to prove its political sensitivity when enforcing the DSA to remain a credible platform supervisor. Furthermore, the new powers will require sufficient resources, which are currently mainly available to national authorities. Thus, the Commission will also have to ensure cooperation without loss of efficiency.

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