CURB YOUR ENTHUSIASM: WHY EUROPE'S DIGITAL REFORMS MAY NOT BECOME A GLOBAL STANDARD

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The European Union is widely perceived and presents itself as the global vanguard in the struggle to regulate digital corporations. The Union's regulatory schemes, especially the Digital Services Act, are widely hailed as the continent's – and from the EU's perspective, the world's – best shot at taming digital capitalism. The EU designed many of those measures to become a 'global standard'. Yet, drawing from organization theory and a legal realist analysis of several of the key provisions of the DSA and their potential implementation, I claim that crucial parts of Europe's reforms will not become a global normative standard – or, if they do, in ways fundamentally different to what many would expect. That is for two reasons. First, while the DSA does establish a few concise and objective substantive standards, it also grants extensive discretion to private organizations. Second, if private actors will, as we must assume, exercise this discretion in an autonomous (some might say self-serving manner), many publicly acclaimed provisions of Europe's digital governance reforms may yield globalized private ordering carrying the legitimizing label of EU supervision. Consequently, some current European reforms may stabilize rather than constrain private power and diffuse, if at all, only European ceremonies and labels but not necessarily the full substance of EU law.

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TABLE OF CONTENTS

I. INTRODUCTION

In recent years, we saw a frenzy of regulatory and "self"-regulatory experiments to advance accountability in digital governance. In general discourse, the European Union emerged as a global vanguard in that struggle. The Union's regulatory schemes in the field of privacy and, especially, its recently enacted Regulation (EU) 2022/2065, commonly known as the Digital Services Act (DSA), and Regulation (EU) 2024/1689, commonly known as the Artificial Intelligence Act (AIA), are widely hailed as our best shot at making data-intense social media platforms, search engines, and other remnants of the information economy more transparent, accountable, fundamental rights-oriented, and, of course, 'fairer'.[1] The European Union (EU) explicitly designed many of those measures, most notably the DSA, to become a 'global standard'. In that context, commentators, and EU officials alike reference Anu Bradford's hugely influential 'Brussels Effect'.[2] The Brussels Effect describes how the EU leverages its formidable market size and regulatory capability to exert global normative force over some products and industries.

[1] See Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) and Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

[2] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020); see already Anu Bradford, 'The Brussels Effect' (2012) 107 Northwestern University Law Review 1.

Yet, drawing from organization theory and a legal realist analysis of several of the DSA's key norms, I claim that crucial parts of Europe's reforms will *not* become a global normative standard – or, if they do, in ways fundamentally different to what many would expect. Rather than look at the economics and politics of policy diffusion, my argument focuses on how norms of the DSA will be implemented in practice. Here, I focus on the Digital Services Act (DSA), as its application of public law principles to private governance is particularly striking. However, similar observations can arguably be made about other EU tech regulations, especially in the areas of data protection and artificial intelligence.

Beyond the European Commission, national institutions, and eventually the European Court of Justice, a pivotal actor in the implementation of EU tech regulations is, somewhat ironically, the tech companies themselves. Their role is ensnared in a familiar yet intricate double bind. On the one hand, regulatory expectations like proportionality and respect for fundamental rights are lofty and steeped in the ethos of public law. On the other, these ideals must navigate the terrain of organizations governed not by civil servants but by executives, subject to the often-conflicting imperatives of corporate governance and securities law.

In this setting, the EU's high-minded demands might struggle to fully bloom. Managerial constraints, legally enshrined corporate autonomy, and the inevitable self-interest of for-profit enterprises can subtly reshape these public-law-inspired requirements. This dynamic could lead to a gradual reinterpretation of Europe's normative aspirations as they are filtered through the machinery of corporate implementation. Put differently, the downstream application of Europe's digital reforms—values such as due process, review, proportionality, and fundamental rights—will inevitably be influenced by the private, profit-driven nature of the organizations now tasked with upholding these principles. To their credit, these companies possess formidable bureaucratic and infrastructural capacities (after all, Meta

essentially pioneered large-scale content moderation). Yet, their overriding goal remains what it has always been: to function as profitable enterprises rather than as stewards of public law ideals.

This tension is neither shocking nor inherently problematic. Indeed, corporate autonomy and the right to conduct business are explicitly protected under the EU's Charter of Fundamental Rights. But for those invested in seeing European normative ideals resonate globally, it would be unwise to assume that corporate reinterpretations of Brussels' regulatory aspirations will automatically translate into a worldwide embrace of public-law classics within corporate frameworks.[3] In other words, this piece explores the challenges of implementing regulation—or, to borrow from Bradford, how the reality of the '*de facto* Brussels Effect' proves far more complex than the initial euphoria surrounding Europe's so-called 'digital constitution' might have anticipated.[4]

When we look closely at the norms stipulated in the DSA, two arguments undermine – or complicate – the widely held perception that the DSA becomes a 'global standard'.

[3] For another sceptical perspective on the DSA's global reach see Martin Husovec and Jennifer Urban, 'Will the DSA Have the Brussels Effect?' (*Verfassungsblog*, 21 February 2024) <https://perma.cc/DCX4-6FYK>. For alternative (and, at times, competing) analyses of global policy diffusion in general see esp. Eleanor Westney, *Imitation and Innovation - The Transfer of Western Organizational Patterns to Meiji Japan* (Harvard University Press 1987); Beth A Simmons, Frank Dobbin and Geoffrey Garrett (eds), *The Global Diffusion of Markets and Democracy* (Cambridge University Press 2008); Charles R Shipan and Craig Volden, 'The Mechanisms of Policy Diffusion' (2008) 52 American Journal of Political Science 840; Mark Lawrence Schrad, *The Power of Bad Ideas: Networks, Institutions, and the Global Prohibition Wave* (Oxford University Press 2010); Fabrizio Gilardi and Fabio Wasserfallen, 'The Politics of Policy Diffusion' (2019) 58 European Journal of Political Research 1245; critical of the Brussels Effect: Abraham L Newman and Elliot Posner, 'Putting the EU in Its Place: Policy Strategies and the Global Regulatory Context' (2015) 22 Journal of European Public Policy 1316.

[4] De facto Brussels Effect refers to companies adopting EU norms, de jure Brussels Effect refers to third states emulating EU legislation like the GDPR, see in detail regarding the former Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press 2023) 324 et seq; see in general already Bradford, *The Brussels Effect* (n 2) 142 et seq.

First, upon closer inspection, the DSA only establishes a handful of concise and substantive standards.[5] Mostly, the Union's regulatory technique seems to be to formulate legitimacy-carrying but broad and context-dependent normative goals like 'fairness', 'transparency', 'due regard for relevant interests such as fundamental rights', and 'proportionality'.[6] What these terms mean concretely remains unclear. Responsible for breathing life into those broad goals are the same actors whose practices triggered the regulation in the first place. We know that such 'supervised self-regulation' can lead to superficially rather than substantively satisfying results.[7] However, the DSA's overall thrust to pressure digital corporations into explaining and justifying their actions is in itself a big achievement that may very well positively shape corporate practices around the globe.[8] Second, private actors, as is natural given their corporate autonomy, will presumably exercise the discretion granted to them by the EU in ways aligned with their organizational priorities. This structural difference from public law idealism means that many of the publicly celebrated provisions of Europe's digital governance reforms might, in practice, function as a form of public

[5] Terms like standard, norm, rule, or regulation are understood broadly. Unless otherwise indicated I do not attach distinct meaning to them but use them interchangeably. That is because many legal theoretical distinctions like that between rules and standards in US American jurisprudence collapse once one takes the actual normative practice into account, which is necessarily individualized yet general. Therefore, the overarching term may be 'norm', which Christoph Möllers describes as a combination of a possibility and a 'realization marker'. In our case, most norms would further be explicit and stipulated through a pre-defined procedure by an organized authority (e.g., the EU). For the underlying praxeological conception of norms see Christoph Möllers, *The Possibility of Norms: Social Practice beyond Morals and Causes* (Oxford University Press 2020) 71 et seq.

[6] For example, the term 'fundamental right(s)' appears 39 times in the recitals and articles of the DSA as published in the official journal of the European Union, cf OJ L 277, 27.10.2022, p. 1–102.

[7] Perhaps the most interesting case study of the vices and virtues of self-regulation are financial services. For an overview (which rightly points out the informational advantage of self-regulatory regimes over classic top-down regulation) see Saule T Omarova, 'Rethinking the Future of Self-Regulation in the Financial Industry' (2010) 35 Brooklyn Journal of International Law 665. For a more recent yet particularly vivid example see Joanna R Schacter, 'Delegating Safety: Boeing and the Problem of Self-Regulation' (2021) 30 Cornell Journal of Law and Public Policy 637.

[8] See in that sense Bradford, *Digital Empires* (n 4) 337 et seq.

legitimization – serving as ceremonial 'certifications' that leave core corporate practices largely untouched.

These shortcomings may undermine the efficacy of many regulatory projects, especially in the field of private power and technology. Regulators and scholars must invest more effort to translate normative demands into organizationally and technologically feasible solutions. But how? The article concludes with two recommendations. On the one hand, when implementing the DSA, the Commission should strive for a better balance of normative specificity and normative broadness. This would significantly narrow companies' leeway when implementing regulatory demands. Only clearly defined and empirically testable norms enable meaningful reforms of technology companies. On the other hand, translating legislative ideas into (privately owned) technological structures is phenomenally difficult. To at least improve that translation, the EU should further include engineering perspectives into its lawmaking process. So far, the legislative discourse about the DSA and, to a lesser degree, even the AIA seem to be dominated by actors – lawyers, political scientists, etc. – who focus on how a specific technology or service *should* function (normative dimension) but less how to *achieve* this (sociological and technological dimension).

This article progresses as follows. It briefly outlines, first, the Brussels Effect's political saliency for the EU and, second, the key elements of the Brussels Effect as described in the literature. Third, the article discusses the regulatory approach permeating many current EU digital regulations: formulating broad normative goals and some outer procedural bounds to then let tech companies devise the specifics. Fourth, the article questions whether that approach undercuts at least one of the Brussels Effect's premises, namely that the EU enacts stringent standards which then reverberate around the globe. Fifth, in examining the DSA, the article draws on organization theory and prior – currently unpublished – empirical research to explore the complexities and ambivalence of organizational compliance efforts. These efforts may serve to enhance platforms' public legitimacy while leaving core

practices largely intact.[9] Sixth, the article looks at possible solutions, namely increased regulatory specificity and heightened independent technological expertise in lawmaking and enforcement.

II. WHY IS THE BRUSSELS EFFECT IMPORTANT?

In the past couple of years, the EU championed – or rather branded – a new way of thinking about its politics.[10] Even though the EU is a sprawling organization, yearslong political drag and media onslaught on its public legitimacy left Brussels craving for a new, fresh narrative. For more than ten years, there have been ongoing problems with stalled reforms, the Euro crisis, populism, and Brexit.[11] Many EU officials started thinking that the Union needed to reinvent itself. This time, however, it was not the Court of

[9] This unpublished empirical work refers to qualitative interviews conducted with EU officials, civil society activists, and executives of digital platforms as well as staffers and members of Meta's Oversight Board. That work was conducted for the monograph *Governance by Emulation: Platform Adjudication, the Oversight Board, and the Digital Services Act* (Cambridge University Press forthcoming 2025).

[10] Two disclaimers are warranted. Firstly, many criticisms directed at 'the EU' are exaggerated. The Council stands as the Union's primary political entity, with 'the EU' in the Council effectively representing the Member States. Consequently, Member States bear the primary responsibility for contentious policies, such as managing the Euro crisis, the dysfunctional migration regime, NextGenerationEU, or addressing authoritarian tendencies within Member States. Thus, a deeper understanding reveals that the situation may not be as dire as portrayed. However, secondly, this disclaimer underscores a fundamental issue in EU politics. If grasping the nuances of EU law is necessary to discern that much of the criticism aimed at the EU, and particularly most anti-EU rhetoric, is unfounded, it indicates a significant political challenge. The EU may struggle to garner (further) public legitimacy if it lacks, whether justifiably or not, the political capacity to attract broader public support.

[11] In chronological order: David Vogel, 'The New Politics of Risk Regulation in Europe' [2001] Centre for Analysis of Risk and Regulation, London School of Economics and Political Science; André Sapir, *Fragmented Power: Europe and the Global Economy* (Bruegel 2007); Elliot Posner, 'Making Rules for Global Finance: Transatlantic Regulatory Cooperation at the Turn of the Millennium' (2009) 63 International Organization 665; David Vogel, *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States* (Princeton University Press 2012); Bradford, 'The Brussels Effect' (n 2); Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 63 American Journal of Comparative Law 87; Alasdair R Young, 'The European Union as a Global Regulator? Context and Comparison' (2015) 22 Journal of European Public Policy 1233; Newman and Posner (n 4).

Justice calling the shots, but the Union's regulatory machinery, combining lawmakers and agencies. Over time, these regulatory bodies have become powerful globally. The EU, in turn, incrementally became perhaps the most influential regulator on matters of global commerce. This potent regulatory posture is by now widely known as the Brussels Effect, as Anu Bradford coined it, nodding to the well-established California Effect in US literature on regulation and policy diffusion.[12] The Brussels Effect, Bradford argues, manifests either when non-member-states adopt the EU's regulatory *acquis* (usually for economic reasons) or when companies abide by that *acquis* globally, simply because it is more efficient to produce one globally sellable product than an extra product for the huge European market (or miss out on that market entirely). According to this idea, the EU has become important in setting rules about things like food safety, privacy, and now, free speech.[13] This phenomenon, especially the presumed moral high ground attached to fighting for online rights and against private, seemingly uncontrollable companies, provided a renewed sense of purpose to a Union grappling with uncertainty and introspection.[14] Recently, Bradford doubled down and argued that the DSA 'which was adopted in 2022, may further increase the EU's ability to shape tech companies' global business practices, and regulate the global digital economy in ways that the US and China are not able to do'.[15] Evidently, this is music to the ears of many working either for or on the European Union.

Bradford suggests that the Brussels Effect evolved gradually, initially arising as a consequence of internal market regulations before expanding into a broader external agenda.[16] Once again, news broke from across the

[12] Bradford, 'The Brussels Effect' (n 2); Bradford, *The Brussels Effect* (n 2).
[13] For the latter see esp. recently Bradford, *Digital Empires* (n 4).
[14] Bradford, 'The Brussels Effect' (n 2); Bradford, *The Brussels Effect* (n 2).
[15] Bradford, *Digital Empires* (n 4) 340.
[16] Cf Bradford, *The Brussels Effect* (n 2) 7 et seq, 25 et seq.

Atlantic.[17] Discussions surrounding the Brussels Effect appeared to instill in the EU a renewed sense of confidence, providing yet another source of output legitimacy through its (alleged) global regulatory reach.[18] Who needs, one might think, the sword or the purse if one can regulate worldwide commerce? EU institutions demonstrated adeptness in navigating intricate normative frameworks and political maneuvers to promote and protect 'European values'.[19]

Despite the theorem's discursive prevalence, scepticism prevailed. Numerous scholars cast doubt on the Union's capacity to wield normative influence across the globe, with critiques of the Brussels Effect becoming more pronounced as its underlying assumptions, empirically derived claims, and extrapolations from specific instances faced growing scrutiny.[20] Nonetheless,

[17] As it already was, famously, with Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1. Not all authors on the Brussels Effect are Americans or work in the US (e.g. Scott), but many (e.g. Vogel, Posner, Bradford) are/do.

[18] Many EU officials seem to have widely embraced the Brussels Effect. The Union's highest echelons – including the Commission President, the President of the Council, and the High Representative for Foreign Affairs – reference their global ambitions in speeches, talks, and press releases.

[19] Cf Fritz W Scharpf, *Demokratietheorie Zwischen Utopie Und Anpassung* (Universitätsverlag Konstanz 1970) 21 et seq, 66 et seq. For reflections on the EU's sometimes shaky 'social legitimacy' see Ulrich Haltern, 'Finalität' in Armin von Bogdandy and Jürgen Bast (eds), *Europäisches Verfassungsrecht* (Springer 2003) 283–285; pointing especially to the ECJ and the Union's growing executive power Dieter Grimm, 'Auf der Suche nach Akzeptanz - Über Legitimationsdefizite und Legitimationsressourcen der Europäischen Union' (2015) 43 Leviathan 325, 328 et seq; critical in that respect Christoph Möllers, 'Krisenzurechnung und Legitimationsproblematik Der Europäischen Union' (2015) 43 Leviathan 339, 341 et seq, 343 et seq, 356 et seq; highlighting the legitimizing potential of the EU's bureaucratic expertise Enrico Peuker, *Bürokratie und Demokratie in Europa: Legitimität im europäischen Verwaltungsverbund* (Mohr Siebeck 2011) 218–224.

[20] Insightful and comprehensive: Alasdair R Young, 'The European Union as a Global Regulator? Context and Comparison' (2015) 22 Journal of European Public Policy 1233, 1236–1343; criticizing the 'reductionist and monocausal' brushstrokes of the Brussels Effect: Abraham L Newman and Elliot Posner, 'Putting the EU in Its Place: Policy Strategies and the Global Regulatory Context' (2015) 22 Journal of European Public Policy 1316, 1321. Arguing that the EU is a global actor 'past its peak' Charlotte Bretherton and John Vogler, 'A Global Actor Past Its Peak?' (2013) 27 International Relations 375, 386. See already much earlier assessments of the EU's lacking ability (or willingness) to 'export' human rights norms

EU policymakers pressed forward, undeterred by the sceptics, initiating several political projects, mostly in the digital realm, using the language of and aiming for the results described in Bradford's Brussels Effect.[21] The prime example is the DSA. Another one would be the AIA.

This article focuses mainly on the DSA, as it has already entered into force, but will make sidenotes where necessary on the AIA and Regulation (EU) 2022/1925, commonly known as the Digital Markets Act (DMA).[22] As Ursula von der Leyen said in her State of the Union address in 2020, the Commission 'envisages the Digital Services Act as a standard-setter at global level'.[23]

III. HOW DOES THE BRUSSELS EFFECT WORK?

But how does the Brussels Effect work in practice? According to Bradford, not every large jurisdiction or big market exerts the type of global regulatory force the EU does.[24] It is the interplay of five elements that enables the Brussels Effect: 'market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility'.[25]

1. Market and Product

Two elements, market size and regulatory capacity, are self-explanatory. Inelastic target means that the Brussels Effect only transpires if regulated products or actors cannot escape the regulation through forum shopping.[26]

via trade agreements Frank Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (Springer 1998).

[21] See above n 18.

[22] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[23] European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/32/EC 2020 [COM(2020) 825 final] explanatory memorandum at 2.

[24] Bradford, *The Brussels Effect* (n 2) 37 et seq.

[25] Ibid 25.

[26] Ibid 48 et seq.

This can be relatively easily achieved through tying regulatory jurisdiction to engagement with EU customers. If goods or services are sold to EU consumers, EU regulations apply, irrespective of where those goods and services come from. Non-divisibility, in turn, means that the regulated product, service, or actor cannot easily be divided into one version for the EU market and another for the rest of the world.[27] That is often the case for economies of scale and services relying on network effects like social media. The bumpy start of Meta's new network Threads – which did not launch in the EU, as it did not comply with EU data protection and antitrust law – highlights this.[28] We can assume that all these four elements will play out in favour of globalizing the regulatory effects of recent EU regulations, especially the DSA.

2. Stringent Standards

One last element, the 'stringent standards', may be trickier. As Bradford writes,

> even significant regulatory capacity by a large market does not guarantee regulatory influence unless such regulatory capacity is supplemented by the political will to deploy it. Thus, the Brussels Effect requires that the jurisdiction also has the propensity to promulgate stringent regulatory standards.[29]

However, the exact contours of each element emerge only reflexive to the other elements. Simply put, a stringent standard in food safety law is, in practice, not the same thing as a stringent standard in data protection law or, as in our example, platform governance and content moderation. The permissible amount of certain ingredients in food may be defined in clear units (e.g., only amount x of bisphenol, which leads to menstrual and even fertility problems, per unit food). In contrast, moderating speech and

[27] Ibid 53 et seq.

[28] Anu Bradford, 'Meta vs the EU: Who Governs the Digital Economy?' (*ukandeu.ac.uk*, 30 August 2023) <https://perma.cc/TWL2-86HX>.

[29] Bradford, *The Brussels Effect* (n 2) 37.

designing the organizational safeguards of a social media platform escapes such clearly specified units. Whether communication acts are offensive or illegal, hate speech or mockery, ironical or appalling cannot be defined easily through stringent substantive standards. Instead, it requires organizational reform and a cultural shift within those companies.

3. Global Diffusion of Private Ordering?

Therefore, the DSA – and other technology-focused regulations – only outlines (broad) normative demands for private ordering. The DSA formulates abstract goalposts like 'fair procedures' or 'due regard' for fundamental rights while companies may figure out the normative, procedural, and organizational path towards reaching these goalposts. This is something fundamentally different from the Brussels Effect's earliest occurrences in areas like food safety, which often come with much more granular and concise – and in that sense 'stringent' – standards.[30] Because coming up with a stringent substantive standard is increasingly complicated in digital governance, the EU devised the DSA as a 'turn to process'.[31] Mandating platforms to establish fair and transparent procedures is thought to assure 'good' behaviour of platforms.

Crucially, in this model, the norms applied vis-à-vis users are usually not laws enacted by the EU or its Member States but private ordering like social media companies' so-called community standards. These are the rules that govern what can be uttered on social media websites. Those private norms are stipulated by the companies themselves, largely as they please.[32] These

[30] See in that regard ibid 171 et seq.

[31] See e.g. Martin Husovec and Irene Roche-Laguna, 'Digital Services Act: A Short Primer' (SSRN, 5 July 2022) <https://perma.cc/JE3Q-55XA>; Martin Husovec, *Principles of the Digital Services Act* (Oxford University Press 2024).

[32] See e.g. Nicolas P Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge University Press 2019); Luca Belli, Pedro Augusto Francisco and Nicolo Zingales, 'Law of the Land or Law of the Platform? Beware of the Privatisation of Regulation and Police' in Luca Belli and Nicolo Zingales (eds), *Platform Regulations - How Platforms are Regulated and How they Regulate Us [Official Outcome of the UN IGF Dynamic Coalition on Platform*

are numerous layers of explicit or even technical norms regulating user behaviour, some labelled as terms of service or community standards, others unnamed. Also of paramount importance are infrastructures and technological set-ups.[33] The EU does not regulate these norms directly. Those terms of service must not fully reflect the EU *acquis* of fundamental rights (the abstract definition of which would be another formidable challenge). Instead, platforms must only pay 'due regard' to EU fundamental rights when enforcing and applying platform-made rules. I will discuss this in detail in the following section. For the moment, we may nonetheless anticipate that such mediation shifts the authority from the EU to other actors, especially tech companies. As Jennifer Daskal put it:

> forms of unilateral, global rulemaking are mediated through private sector actors rather than states or international institutions, making the private sector a central player in deciding whose rules apply and thus the scope of privacy and speech rights on a global scale.[34]

This shift may have far-reaching implications on the quality of the EU's global regulatory influence.[35] There are not one but two sets of standards that globally diffuse. Only one is formulated by the EU, the other remains within the remit of transnational corporations. The latter standard may differ

Responsibility] (2017); from an American perspective Kate Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (2018) 131 Harvard Law Review 1598.

[33] See in general Paul N Edwards, 'Infrastructure and Modernity: Force, Time, and Social Organization in the History of Sociotechnical Systems' in Thomas J Misa, Philip Brey and Andrew Feenberg (eds), *Modernity and Technology* (MIT Press 2002); Benedict Kingsbury and Nahuel Maisley, 'Infrastructures and Laws: Publics and Publicness' (2021) 17 Annual Review of Law and Social Science 353. For specific case studies see especially Eerie's and Streinz's analysis of how the People's Republic of China leverages such technical infrastructures to expand its (normative) influence outside of the arena of formal law, Mathew S Erie and Thomas Streinz, 'The Beijing Effect: China's "Digital Silk Road" as Transnational Data Governance' (2021) 54 New York University Journal of International Law and Politics 1. See further Evelyn Douek, 'Content Moderation as Systems Thinking' (2022) 136 Harvard Law Review 526.

[34] Jennifer Daskal, 'Borders and Bits' (2018) 71 Vanderbilt Law Review 179, 235.

[35] See further from the perspective of political philosophy Linnet Taylor, 'Public Actors Without Public Values: Legitimacy, Domination and the Regulation of the Technology Sector' (2021) 34 Philosophy & Technology 897.

substantially from the former. Unfortunately, as the next section shows, the standards set by the DSA are not as stringent as we might want. As a consequence, the DSA only rather loosely confines the private ordering of platform companies.

Thus, in a scenario many might find more dire, the actually 'stringent' standards are devised by transnational corporations. Those private standards might very well be global in reach – whether they are indeed European in substance (whatever that means) remains to be seen. In conclusion, the one thing from the DSA that might reverberate globally are some structural governance decisions as to how platforms moderate content – not which content is substantively legitimate. From a critical perspective, even the DSA's purported focus on process appears exaggerated, as the DSA mostly only outlines what processes shall achieve – not what they shall look like. Such mission control tactics require agents who share the regulators' intentions, which is not necessarily the case here.

This might be no news to everyone who read the DSA's fine print. The Commission never claimed that it would substantively regulate what can be said online. Yet, one cannot help but notice a stark difference between the grandiose expectations towards the DSA's normative influence and the leeway it grants to platforms.

IV. WHAT DOES THE EU WANT?

The previous section highlighted that the Brussels Effect requires regulations to be 'stringent'. But what would be a 'stringent' standard in the context of Brussels' reforms of the digital single market? Or, more abstractly spoken, what is the overall regulatory aim of acts like the DSA?

1. *Make Platforms Better Administrators*

Simply put, the EU wants to tame the private power structures that control technology, infrastructure, data, and services in the digital single market.[36] Currently, among the most dominant *leitmotifs* structuring these company dealings are profit and scalability.[37] In principle, these are classic traits of any business. However, as in any other business, the pursuit of profit might yield externalities. In the case thoroughly entrenched products like social media and other digital infrastructure, those externalities can be particularly high. In some cases, journalists, activists, and politicians therefore highlighted problematic or outright illegal practices ranging from data breaches, impacts on societal and political discourse, to fundamental rights abuse.[38] Since platforms (and other tech companies) run infrastructures that govern societal discourse and the exercise of public rights, the EU (and other actors) want platforms to be more accountable, transparent, and 'fair'. In other words, platforms should become better administrators. The DSA seeks to inject certain administrative law principles – like non-discrimination, proportionality, and a duty to give reasons for individual decisions – into platforms' private governance structures.[39] In that sense, content

[36] See already Moritz Schramm, 'Platform Administrative Law: A Research Agenda' (SSRN, 24 July 2024) <https://perma.cc/JH2A-8ZW2> and idem, 'Administrification of the Digital Single Market: A New Role for the European Ombudsman in the DSA Framework?', in Deirdre Curtin, Tanja Ehnert, Anna Morandini, Sarah Tas (eds), *The Evolving Role of the European Ombudsman* (Hart forthcoming 2025).

[37] See further Adrian Daub, *What Tech Calls Thinking: An Inquiry into the Intellectual Bedrock of Silicon Valley* (Farrar, Straus and Giroux 2020).

[38] See e.g. Jeremy B Merril and Will Oremus, 'Five Points for Anger, One for a "Like": How Facebook's Formula Fostered Rage and Misinformation' *Washington Post* (26 October 2021) <https://perma.cc/7E55-RPZL>; Sheera Frenkel and Cecilia Kang, *An Ugly Truth: Inside Facebook's Battle for Domination* (Harper 2021); Rune Karlsen and others, 'Echo Chamber and Trench Warfare Dynamics in Online Debates' (2017) 32 European Journal of Communication 257.

[39] Public law metaphors of content moderation abound, with some highlighting constitutional perspectives as others more administrative and bureaucratic aspects. See further, Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022) 157 et seq. In the US, Jack Balkin referred to these phenomena as 'private bureaucracies', which strikes me as a fitting metaphor, see Jack M

moderation, platform governance, and many other digital reforms can be conceptualized as a new form of Global Administrative Law (GAL).[40] GAL – once conceptualized by Benedict Kingsbury, Richard Steward, and Nico Krisch in the 2000s – described administrative spaces beyond the state.[41] Potentially, it also includes private and profit-oriented administrators, but never really followed through on those.[42]

Because platforms deal with 'public goods' like public communication and fundamental rights at a massive scale, they are increasingly regulated to abide to public law norms. These norms regulate how platforms shall deal with their users. The normative model for many such rules – fundamental rights, due process, proportionality, non-discrimination, hearing rights, duties to give reasons etc. – is public law, or more precisely administrative law. The whole endeavour could be called the 'administrification' of content moderation.[43] Administrification of content moderation and platform governance is a relatively recent but not entirely new phenomenon.[44] In 2016, several social media platforms, including Facebook and X, agreed with

Balkin, 'Free Speech Is a Triangle' (2018) 118 Columbia Law Review 2011, 2021 et seq. See further Schramm, 'Platform Administrative Law' (n 36).

[40] See further Hannah Bloch-Wehba, 'Global Platform Governance: Private Power in the Shadow of the State' (2019) 72 SMU Law Review 27; Schramm, 'Platform Administrative Law' (n 36).

[41] For an introduction to GAL see Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15; Sabino Cassese, *Advanced Introduction to Global Administrative Law* (Edward Elgar Publishing 2021); Benedict Kingsbury, 'Frontiers of Global Administrative Law in the 2020s' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2020).

[42] However, see recently esp. Bloch-Wehba (n 41); Rodrigo Vallejo Garretón, 'After Governance?: The Idea of a Private Administrative Law' in Poul F Kjaer (ed), *The Law of Political Economy* (Cambridge University Press 2020); Douek analogizes content moderation to administration but then focuses on the (somewhat elusive) concept of 'systems thinking', Douek (n 33).

[43] See further Schramm, *Governance by Emulation* (n 9); idem, 'Administrification of the Digital Single Market: A New Role for the European Ombudsman in the DSA Framework?'(n 36); idem, 'Platform Administrative Law' (n 36).

[44] Comparisons between platforms and administrators emerged roughly since 2018, see speaking of 'privatized bureaucracies' Balkin (n 41); comparing content moderation to independent agencies Klonick (n 32); making a comparison to Global Administrative Law Bloch-Wehba (n 40); see further Douek (n 33).

the European Commission on a code of conduct when it came to countering illegal hate speech online.[45] The social media platforms agreed to 'have in place clear and effective processes to review notifications regarding illegal hate speech' and committed 'to review such requests against their rules and community guidelines'.[46] Since platforms operate at scale, their commitments towards EU authorities are likely to affect, and perhaps water down, their global standards. In this context, Anu Bradford argued that platforms' normative material (the so-called community standards) increasingly mirrors the normative *acquis* of EU law.[47]

2. *The Reality of Content Moderation*

However, it remains unclear whether platforms' terms of service indeed 'reflect *the* European standard of hate speech',[48] or merely echo the overall tone of EU law without reflecting the EU *acquis* in a substantively meaningful way. That is primarily because the Union's normative material remains much more coarse than the material implemented by platforms. For example, the Charter of Fundamental Rights establishes a right to free expression but does not detail what type of speech this right covers in practice. Certainly, doctrine and jurisprudence establish an overarching framework to refine more specific norms. However, platforms practically do not apply norms like 'everyone enjoys freedom of expression'. As Klonick convincingly argued, platforms cannot work (only) with coarse normative standards for the sheer scale of the task.[49] Rather, the norms employed by platforms are thickly layered, convoluted, adjective-laden descriptions of what content is concretely prohibited.[50] For example, at the time of writing Meta defined a 'tier 1 direct attack' within its standard on hate speech as

[45] EU Code of Conduct on countering illegal hate speech online 2016 <https://perma.cc/7ABV-TNCQ>.
[46] ibid 2.
[47] Bradford, *The Brussels Effect* (n 2) 161 et seq.
[48] ibid 158 (emphasis added).
[49] See illuminatingly Klonick (n 32) 1631.
[50] In that sense, Klonick differentiates between 'standards' and 'rules', ibid.

> [d]ehumanizing speech or imagery in the form of comparisons, generalizations, or unqualified behavioural statements […] to or about […] insects, animals that are culturally perceived as intellectually or physically inferior, […] sub-humanity.[51]

The practical complexity of such a definition is obvious. How to draw a line between 'direct' and 'indirect' attacks against people? How to handle necessarily subjective, value-laden, and context-dependent adjectives like 'violent', 'harmful', or 'dehumanizing'? Which diseases are 'serious'? Does only the content of a communication act make it 'hate speech' or also the attitudinal stances of the person who expresses it?[52] What about the temporal and territorial space in which an utterance was made? Are we even capable of identifying the past, current, and future social, political, and cultural contexts of an utterance with sufficient certainty? What about contexts that are culturally foreign to Meta's predominantly North American rulemakers? Practitioners I interviewed for earlier, currently unpublished work described content moderation as 'phenomenally difficult',[53] and scholars[54] and tech journalists[55] have even pronounced content moderation an impossible endeavour.[56] Platforms' increasing reliance on automated moderation

[51] See: <https://perma.cc/GGB3-XST8> (last accessed 4 October 2024).

[52] In essence, these questions point to one of the central aporias of the philosophy of language. See Judith Butler's critique of J.L. Austin's 'total situation' approach. In his foundational work *How to Do Things with Words*, Austin argued that context – meaning mostly spatial and temporal aspects – would, if 'totally comprehended' arguably allow for an absolute interpretation of certain speech acts. Butler disagrees. According to them, nothing can be 'totally' understood, cf *Judith Butler, Excitable Speech: A Politics of the Performative* (Routledge 1997) 2–13. See further John L Austin, *How to Do Things with Words* (Oxford University Press 1962); John R Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press 1969).

[53] This was phrasing used by a person working for Meta's Oversight Board who I interviewed for other work, see above in n 9.

[54] Douek (n 33) 533, 568.

[55] Mike Masnick, 'Masnick's Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well' (*TechDirt*, 20 November 2019) <https://perma.cc/Q97F-CFHB>.

[56] Cf Schramm, *Governance by Emulation* (n 9).

(despite the well-known shortcomings of natural-language processing[57]) only exacerbates these difficulties.

Thus, in short, the core problem of content moderation is not that platforms lack an overall commitment to freedom of speech or other fundamental rights. The problem is the large organizational and normative gap between committing to high-flying norms and effectively safeguarding them in thousands of specified norms, typified decisions, and implementation measures.

Bradford points out that we do not know how these commitments are put into practice; especially since platform rules consist of many sublayers, and platform lawyers 'ultimately use their own judgment on what constitutes illegal hate speech. The outcome is therefore less likely to be perfectly aligned with the Commission's regulatory approach […]'.[58] Building on and further cementing this *division du travail* between social media platforms and European regulators, the Commission proposed a major overhaul of the regulatory framework for social media platforms in Europe in December 2020.

3. The Digital Services Act

This overhaul resulted in the DSA. Contrary to the Union's political marketing and widespread belief, it reiterates the relative freedom of platforms to devise their own procedures, decision-making processes, and substantive rules if they only abide by overarching and normatively inspired criteria like 'objectivity', 'proportionality', and 'due regard for fundamental rights'.[59] To keep this article lean, I will focus mostly on one of the key

[57] Robert Gorwa, Reuben Binns and Christian Katzenbach, 'Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance' (2020) 7 Big Data & Society 1. See also Paul Friedl, 'Dis/Similarities in the Design and Development of Legal and Algorithmic Normative Systems: The Case of Perspective API' (2023) 15 Law, Innovation and Technology 25.

[58] Bradford, *The Brussels Effect* (n 2) 162.

[59] See in detail ibid.

provisions, Article 14, although others would warrant equally close attention (we will briefly get to them below). As mentioned above, the DSA imposed several administrative law-inspired duties on platforms. Yet, the concrete path to get there remains unclear. This is partly because these duties are, upon closer inspection, more an ill-defined region than a clear point on the map. Take the enthusiastically discussed Article 14(4) DSA as an example. It stipulates that platforms should act with

> due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom, and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter.

Some commentators consider Article 14 DSA as the gateway to directly bind platforms to EU fundamental rights.[60] However, from a more critical perspective, the standard only reaffirms private might. Paying 'due regard to the legitimate interests of all parties involved' is as wobbly a standard as it gets. Think of the snippet from Meta's hate speech standard presented above. Does that pay 'due regard' to fundamental rights? What would a specific rule that pays such 'due regard' look like? The DSA does not answer these questions. It also does not provide more normative specificity on how companies may reach such standards in any way that is different from what they are doing already.

Quite the contrary, in its impact assessment the Commission even argued that platforms would not have to change much in their internal procedures. In many respects the DSA does not explicate procedures platforms should implement but only the targets that should be reached through procedures, which are designed by the platforms themselves.

Consequently, Article 14 DSA never strikes a definitive equilibrium but requires case-by-case assessments. That is because the involved parties change from case to case and what interests are 'legitimate' and what 'regard'

[60] João Pedro Quintais, Naomi Appelman and Ronan Ó Fathaigh, 'Using Terms and Conditions to Apply Fundamental Rights to Content Moderation' (2023) 24 German Law Journal 881.

is 'due' evades stringent cognition.[61] Practically, it will be the platforms who rebrand (and perhaps improve) their already existing content moderation bureaucracies as doing exactly that: providing procedures that do a little better.

Strikingly, if one digs deep enough, the Commission itself does not assume that provisions like Article 14 will initiate meaningful reform in the platforms. Buried deep in the DSA's impact assessment, one finds hints that the Commission might have underestimated the costs of – and, therefore, platforms' hesitancy towards – making platforms better administrators. As discussed, one of the DSA's key goals is to make platforms more responsive to the fundamental rights of their users. One crucial mechanism to facilitate this is to introduce notice and action obligations, information duties vis-à-vis users, procedural balancing obligations, and redress mechanisms. This is why we have, among others, Article 14. These are key provisions of the DSA. Nonetheless, the Commission argues that compliance to such allegedly groundbreaking and new normative goals of fairness, due process, and fundamental rights protection would come at zero costs. Verbatim, the Commission states regarding potential costs for platforms implementing crucial DSA provisions on fundamental rights and content moderation:

> These are indicative costs and, for most companies, they do *not* represent an additional cost compared to current operations, but require a process *adaptation* in the receipt and processing of notices and streamline costs stemming from fragmented obligations currently applicable.[62]

[61] Ironically, these developments in EU regulatory law seem to run counter to the overall thrust of platforms' internal rules, which become ever more specific and detailed. Already in 2018, Kate Klonick argued that platforms modified their approach from establishing standards to enacting much more concise and detailed rules, cf Klonick (n 50) 1631–1635.

[62] European Commission, 'Commission Staff Working Document, Impact Assessment, Accompanying the Commission Proposal for the DSA, Part 1/2. SWD (2020) 348 Final' para 197, table 4 at row 2. Further, the EU's focus on 'streamline cost' omits that according to Articles 2 and 20, platforms are also required to delete content illegal under Member State law. This necessitates at least partially fragmented enforcement structures.

But why would a 'process adaptation' not incur costs? Especially, when processes shall transform from their prior largely unaccountable state to full alignment with EU law? Put reversely, if transforming content moderation takes so little effort that it is essentially free, what do we need the DSA for? Yet, as argued above, a deep-rooted reform of content moderation and platform governance would require a deep overhaul of procedures and overall considerable resource allocation.[63] The best things in life are free – good content moderation certainly is not.

Therefore, one may be reasonably doubtful whether the DSA in its current form brings strict enough rules to change content moderation in Europe and on a global scale. Eventually, the Commission and, ultimately, the European Court of Justice might fill some of these relational and vague provisions with concise meaning. Yet, as the next section explains in detail, platforms seem to remain in the driving seat at least for some of the DSA's key provisions.

V. Challenges of Platform Reform

The DSA's regulatory goal – making platforms better administrators – faces one big problem: presumably, platforms do not want to play along entirely. Acting like an administrator means, slightly exaggerated, to act cautiously rather than quick, proportionately rather than tough, and formalistic rather than efficient. To a degree, bureaucratization is an inevitable side-effect of growth, and furthermore well described for content moderation.[64] Having a degree of bureaucracy may align with platforms' profit interest, as globally uniform internal rules enable the company to further expound a business model that predominantly aims for scale. However, in contrast, many of the regulatory demands devised by European regulators – fairness, proportionality, due regard for fundamental rights, duty to give reasons,

[63] See e.g. Jack M Balkin, 'To Reform Social Media, Reform Informational Capitalism' in Lee C Bollinger and Geoffrey R Stone (eds), *Social Media, Freedom of Speech, and the Future of our Democracy* (Oxford University Press 2022).

[64] See especially Klonick (n 32). From a sociological perspective see already Philip Selznick, *Law, Society, and Industrial Justice* (Russel Sage Foundation 1969).

hearing rights, review, etc. – would, if implemented with fully-fledged public law idealism, likely jeopardize this business model. That is for two reasons: cost and vagueness.

1. Cost

On the one hand, a classic public-law-inspired understanding of core DSA ideas like proportionality, procedural fairness, and respect for fundamental rights would require an enormous expansion of the resources poured into making individual content decisions (not to speak of the systemic undercurrent of said decisions).[65] As we have just seen, Article 14(4) DSA could be understood, in its most ambitious interpretation, as requiring platforms to make individual balancing decisions with much greater care in every single case. Greater care requires more resources, which drives up costs and curbs profit. Balancing fundamental rights is intricate and, most importantly, extremely costly. Content moderation decisions are made under significant time and resource constraints. For instance, within a three-month period in 2022, YouTube removed over 737 million comments and more than five million videos globally, with human moderators, typically employed in South-East Asia under low-wage conditions, having only a few seconds per enforcement decision.[66] Similarly, internally handled appeals might be processed by different teams, potentially operating under slightly improved material and institutional circumstances.[67] In essence, the reality

[65] For the latter see Douek (n 33).

[66] See Google Transparency Report: YouTube Community Guideline Enforcement, accessible via: <https://perma.cc/67GV-R8HZ>. For updated numbers on Meta see the respective transparency center accessible via: <https://perma.cc/67GV-R8HZ>.

[67] Insightful: Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2019) 111-139 (esp. 120–124). See also, highlighting the often precarious working conditions for many outsourced human moderators Sarah T Roberts, *Behind the Screen: Content Moderation in the Shadows of Social Media* (Yale University Press 2019) 173, 176–183; MacKenzie F Common, 'Fear the Reaper: How Content Moderation Rules Are Enforced on Social Media' (2020) 34 International Review of Law, Computers & Technology 126, 127 et seq.

of content moderation diverges from the ideal envisioned in Article 14(4) DSA.

Further, the DSA seeks platforms to enforce a multitude of EU and Member State laws, which again requires setting up, in theory, 28 different enforcement schemes. One for the EU and 27 for the Member States. At least for smaller Member States, platforms may find this exceedingly costly and, perhaps even more important, contrary to their internal goal of unifying standards globally.

2. Vagueness

On the other hand, many of the DSA's normative goals are vague. Taking Article 14 as an illustration, Martin Eifert and his colleagues contend that the DSA grants platforms 'unfettered discretion' to engage in private regulation of public discourse.[68] It is worth noting that the due diligence obligations outlined in the DSA cover the individual application and enforcement of platform-made rules, rather than the making of these rules. But can any bureaucracy be legitimate if its rulemaking lacks any meaningful input legitimacy?[69] Similar criticism was voiced regarding the Digital Markets Act, whose provisions are, according to Anne Witt 'not as rigid as they may appear at first sight'.[70]

Viewed through the lens of public law, it seems logical to bind individual enforcement actions to fundamental rights. Requiring digital corporations to 'pay due regard' to fundamental rights when enforcing terms of service should, theoretically, resolve the problem that content moderation may

[68] Martin Eifert and others, 'Taming the Giants: The DMA/DSA Package' (2021) 58 Common Market Law Review 987, 1013.

[69] Speaking of 'authoritarian' structures at Facebook: Evelyn Douek, 'Facebook's "Oversight Board": Move Fast with Stable Infrastructure and Humility' (2019) Volume 21 North Carolina Journal of Law & Technology 1, 10.

[70] Overall, Witt's assessment of the DMA is however rather favourable, especially highlighting that lobbying efforts presumably did not manage to water down many core provisions, see Anne C Witt, 'The Digital Markets Act - Regulating the Wild West' (2023) 60 Common Market Law Review 625, 651 et seq, 665.

negatively impact fundamental rights.[71] In almost orthodox fashion, Article 14(4) DSA appears to mandate platforms to engage in ongoing balancing, aiming to prevent infringements of individual rights. However, public law orthodoxy cannot be easily transplanted to a for-profit, corporate context like content moderation. Doctrinal manoeuvres like 'horizontal effect', at the end of the day, deal only with a doctrinal understanding of the problem at hand. Additionally, the DSA's introductory 'recitals' fail to clarify how and to what extent platforms should consider fundamental rights when restricting communication. Consequently, the notion of individuals consciously balancing conflicting fundamental rights for each moderation decision appears impractical.

This undermines the EU's argument that the DSA establishes potentially globalizing 'stringent standards'. What exactly should that standard be? That platforms act 'nicely' vis-à-vis users? Unless pressed with concise demands of what platforms should actually *do* and not merely what they should seek to achieve, the DSA may trigger a global wave of sugarcoating – not one of deep-running reforms.

3. Another Example: The 'Compliance Function'

These resource constraints on behalf of platforms, paired with the vagueness of the goals, open a grey area in which platforms may comply with the letter of the law but are far from achieving its high-flying intention. The DSA provisions enabling such merely ceremonial adaptation are, especially, Articles 14 (terms and conditions), 20 (internal complaint handling system), 21 (out-of-court dispute settlement bodies), 25 (online interface design and organisation), 34 (risk assessment), 35 (mitigation of risks), and 41 (compliance function). These provisions oblige platforms to establish

[71] However, even this language allows for interpretation, as it does not straightforwardly mandate platforms to safeguard fundamental rights but only to pay 'due' respect to such rights. As any first-year law student understands, any additional word or modification appended to an otherwise robust obligation can be exploited to undermine an otherwise seemingly robust legal assurance. The precise meaning of 'due' in this context remains subject to interpretation and application.

procedures or formal structures to achieve a specific normative target. Examples of such targets are 'fair' and 'proportionate' procedures, a 'compliance function with sufficient authority, structure, and resources', or the wholly unspecified demand that platforms should design their infrastructure not to 'deceive, manipulate, or otherwise impair their users' ability to make free and informed decisions'. All these provisions focus on important and publicly discussed issues like fundamental rights and terms of service (Article 14), platforms' internal proceedings (Article 20), individual rights adjudication (Article 21), the 'infrastructure design' of platforms (Article 25), and arguably even pick up on scholarly demands for a 'separation of functions' within platforms (Article 41). For example, Article 41(1) of DSA asserts:

> Providers of very large online platforms […] shall establish a *compliance function*, which is independent from their operational functions and composed of one or more compliance officers, including the head of the compliance function. That compliance function shall have sufficient authority, stature and resources, as well as access to the management body of the provider of the very large online platform […] to monitor the compliance of that provider with this Regulation. (emphasis added)

Here again, the DSA ostensibly echoes public law principles like the separation of powers or, in a more contemporary reading, the separation of functions. Notably, Article 41(1) of the DSA does not refer to compliance officers or a compliance department but to a compliance *function*.[72] The provision was expanded very late on in the legislative procedure. The Commission proposal only referred to compliance officers, which remained the official language until at least December 2021. Arguably, the ultimately legislated 'compliance function' seeks to implement expert input, as it

[72] See again for a critique of such metaphorical allusions to constitutional law: Josh Cowls, Philipp Darius, Dominiquo Santistevan, Moritz Schramm, 'Constitutional Metaphors: Facebook's "Supreme Court" and the Legitimation of Platform Governance' (2024) 26 New Media & Society 2448. Also, regarding the discussions about the Oversight Board, Thomas Kadri, 'Juridical Discourse for Platforms' (2022) 136 Harvard Law Review (Forum) 163.

mirrors recent proposals for the reform of online platforms.[73] In general, it seems fair to assume that these problems are too complex and the organizations causing them too big to hope for sweeping one-size-fits-all solutions. Remedying, or at the very least softening, the harm caused by deeply embedded governance flaws tends to occur through step-by-step reforms. However, the DSA's regulatory design risks watering down public sway over platform governance because, in practice, it will be the platforms who determine whether their compliance function has 'sufficient authority, stature and resources'.

Further, a mere compliance function falls far short of the recommendations from the original expert theorization, which demanded that platforms separate their business function from their governance function.[74] Especially Evelyn Douek demanded severing rulemaking and rule enforcement from advertising and product design.[75] Except for its reference to an independent compliance function, the DSA does too little to deliver on the substance of that expert theorization. Currently, the Union's publicly advocated normative goals risk remaining constitutional metaphors that fail to foster internal change but instead publicly legitimize a mildly updated version of a structurally flawed status quo.[76] Thus, in its current form, the DSA might even stabilize problematic governance practices because platforms can now legitimately claim that they abide by a regulatory framework that imposes

[73] Infusing a separation of functions was one of Evelyn Douek's key reform ideas, cf Douek (n 33) 586 et seq.

[74] The term 'expert theorization' stems from organization theory and describes the role of experts in policy diffusion and emulative practices, especially in lawmaking and institution building, see further Beth A Simmons, Frank Dobbin and Geoffrey Garrett, 'Introduction: The Diffusion of Liberalization' in Beth A Simmons, Frank Dobbin and Geoffrey Garrett (eds), *The Global Diffusion of Markets and Democracy* (Cambridge University Press 2008) 34 et seq.

[75] Douek (n 33) 586 et seq. Note, however, that this distinction is a bit artificial because content moderation and product design are inherently intertwined (e.g., regarding amplification and demotion of content). See in that regard Jing Zeng and D Bondy Valdovinos Kaye, 'From Content Moderation to Visibility Moderation : A Case Study of Platform Governance on TikTok' (2022) 14 Policy & Internet 79.

[76] Cowls, Darius, Santistevan, Schramm (n 72); Kadri (n 72).

on them a variety of public-law principles. However, as sociological research tells us, formally conforming to these public-law principles is relatively easy – in contrast, substantively advancing them would entail a fundamental reshuffle of platform's structures, procedures, norms, and business models.

VI. Ambiguities of Compliance

These observations point to a tricky reality. Clearly, many dynamics of the Brussels Effect may still play out for Europe's digital reforms. Except for stringent standards, all elements seem to be there. Even with loose standards, at least good ideas and intentions might diffuse. Also, the Commission may further refine some DSA provisions through guidelines and delegated legislation. Yet, from its whole regulatory focus on broad goals and loosely-defined process, the DSA legally stabilizes rather than restricts platform authority. Simply put, platforms were doing all these things anyway. The DSA now says: keep going but improve your customer relations.

But what does this tacit but indeed massive shift in rulemaking authority mean for the global relevance of EU norms? Will it really be EU norms that globalize, or rather private ordering cloaked in the legitimizing guise of ceremonial compliance to EU law. As my earlier empirical work mentioned above and organization theory indicate, we may expect a form of ceremonial compliance on behalf of platforms but only limited substantive change. Platforms may devise several public-facing formal structures to interact with individual users. The lasting and structural effect of such ceremonial structures remains however unclear. This would be an ironic result of the Union's global ambitions. In such a scenario, largely unchanged private power structures can lay valid claim to comply with EU law and would be seen, thereby, as legitimate.

1. *What is Ceremonial Compliance?*

The term ceremonial compliance warrants further explanation. It derives from the use of the term 'ceremony' in organization theory, which describes

how large organizations – including, perhaps especially, corporations – orient their formal structures not only according to efficiency considerations, but also conforming to public expectations about what makes for a publicly legitimate company.[77] Formal structures in that sense can be many things: for example a new human rights officer, a new compliance function, or a council of free speech advisors. Aligning formal structures with public demands for accountability is most visible with Meta, which invested – with some success – considerable resources into establishing its Oversight Board.[78] In other words, responding, even if only incrementally, to public demands for better governance once again highlights that such powerful and socially relevant organizations are more than a business. They govern, and therefore quite naturally must navigate demands of governance that aligns with basic principles commonly known from public law.

However, as the organization theorists tell us, aligning formal structures with public expectations may remain de-coupled from the organizations' actual practice.[79] Sociologists call this 'ceremonial' compliance.[80] Such ceremonial reforms benefit their creators by appearing to effectuate functional, and thereby publicly legitimizing, accountability – even though, as many have pointed out, in reality that accountability remains fairly limited. From a public law perspective, ceremonial compliance with EU law, that is compliance with the law's letter rather than its intent, would disappoint. These questions, of course, defy binary answers. Actors that begin as largely ceremonial may gradually accrue stature over time, while mechanisms hailed as powerful at their inception may later reveal themselves to be toothless. These are inherently complex, context-dependent issues.

[77] Foundationally: John W Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83 American Journal of Sociology 340; see in general Walter W Powell and Paul DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (University of Chicago Press 1991).

[78] See also here Schramm, *Governance by Emulation* (n 9).

[79] See in detail Meyer and Rowan (n 77) 348 et seq.

[80] ibid *passim*.

However, in general, mere ceremonies cannot normatively legitimize the exercise of power, because they are constitutively unable to exercise control or demand accountability from the body they claim control over.

2. *Ceremonies in the Tech Sector*

Recent empirical scholarship brought to attention the complexities that large, regulated private organizations in the tech sector face when incorporating public law norms into managerial processes and mindsets.[81] Ari Ezra Waldman argued, based on extensive fieldwork regarding tech companies' struggle to make good on their public promises and protect their users' privacy:

> Tech companies […] routinize antiprivacy norms and practices in privacy discourse, compliance, and design. Those bureaucracies constrain workers directly by focusing their work on corporate-friendly approaches to privacy. As information industry workers perform these antiprivacy routines and practices, those practices become habituated, inuring employees to data extraction, even as they earnestly profess to be privacy advocates. The result is a system in which the rank and file have been conscripted into serving the information industry's surveillant interests, and in which the meaning of privacy has been subtly changed, often without them even realizing what's happened.[82]

Similar phenomena have been observed for decades in the field of antidiscrimination law. Lauren Edelman famously argued that companies all too easily devise 'visible symbols' of compliance but fail to vehemently further the legislated course. Scholarship suggests that such visible symbols rather than actual compliance emerge

[81] See seminally Meyer and Rowan (n 77); other 'ceremonial' structures could be, for example greenwashing or tokenism. See e.g. Magali Delmas and Vanessa Cuerel Burbano, 'The Drivers of Greenwashing' (2011) 54 California Management Review 64; Mariateresa Torchia, Andrea Calabrò and Morten Huse, 'Women Directors on Corporate Boards: From Tokenism to Critical Mass' (2011) 102 Journal of Business Ethics 299; Ari Ezra Waldman, *Industry Unbound: The Inside Story of Privacy, Data, and Corporate Power* (Cambridge University Press 2021).

[82] ibid 5.

> [w]here legal ambiguity, procedural constraints, and weak enforcement mechanisms leave the meaning of compliance open to organizational construction.[83]

As argued above, the DSA brings such ambiguity. Further, the whole 'procedure focused' regulatory approach 'leave[s] the meaning of compliance' to the construction of whatever the companies say it is. Hence, the 'procedures' are indeed not devised by the regulator but by the regulated entity itself.

Nonetheless, the DSA vests the Commission with the authority to impose hefty fines on non-compliant companies. However, from a rule of law perspective, such fines can hardly be based directly on vague provisions demanding only 'due regard' and fair procedures. Or, put reversely, it would be easy to comply with those vague provisions by establishing formal structures. Therefore, a serious enforcement of all the institution-building foreseen by the DSA will require the Commission to specify the content and scope of many DSA provisions through guidelines, delegated legislation, and the like.[84] Further, crucially, the Commission must remain vigilant and well-staffed vis-à-vis platforms to then incrementally developed 'stringent standards'. However, for the short to medium term, it might not be the DSA or the yet to be crafted specification thereof but the tech companies' shiny but ceremonial compliance efforts that will reverberate globally.

If that were to happen, we might have reached a dead end. To harvest the legitimizing fruits of its political labour, the EU will presumably trumpet how the DSA now forces platforms to 'fly by our […] rules' as Thierry Breton put it.[85] Consequentially, and rightly so, industry actors might pick up that narrative and argue vis-à-vis other regulators and the public that they

[83] Lauren B Edelman, 'Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law' (1992) 97 American Journal of Sociology 1567 (emphasis added).

[84] See in that sense for the DMA also Witt (n 70) 651 et seq.

[85] The full tweet was: '[waving hand emoji] @elonmusk In Europe, the bird will fly by our [EU flag emoji] rules. #DSA', Thierry Breton, 29 October 2022, see via: <https://perma.cc/CPH9-LZL5>. At the time, Breton was the Commissioner for Internal Market.

indeed already comply (globally) with the new, purportedly strict rules from Brussels. As described above, when it comes to the (wobbly) letter of the law that may very well even be accurate in most cases. This effectively places an EU seal of approval on the very structural dynamics of digital power relations that the EU aimed to reform. Whether this is a desirable outcome for the EU, or indeed for anyone, remains to be seen.

VII. Possible Solutions

To end this article on an optimistic note, I now briefly present two potential solutions to the problems described above. These solutions are well-balanced regulatory specificity and a stronger focus on technological rather than legal expertise in the legislative process. Clearly, neither solution is a silver bullet. Yet, they might be a start. Effectively devising them warrants its own article and can only be addressed briefly in the remaining paragraphs.[86]

1. Balance Specificity and Broadness through Supervision

The most potent but also most complicated device against ceremonial compliance may be to better balance specificity and broadness in the normative material applied to tech companies. Or, to use American terminology, effective regulation thrives on the interplay of broad standards and specific rules.[87] The clearer the normative demands of a regulation are, the easier it is to part actual compliance from window dressing. However, in highly complex and constantly changing fields like technology

[86] Ironically, demanding the EU to balance specificity and broadness could also be considered a rather vague goal as the actual means to achieve it are organizational rather than substantive.

[87] For the distinction between standards and rules see Pierre Schlag, 'Rules and Standards' (1985) 33 University of California Los Angeles Law Review 379. Kate Klonick used the distinction also to emphasize the increasing specificity the normative material platforms enforce vis-à-vis their users, cf Klonick (n 32) 1631 et seq.

regulation, such specificity is elusive.[88] To remain adaptive towards the subject they regulate, norms must strike a delicate balance between broadness and specificity, shall neither be overinclusive (as this waters down their normative guidance) nor underinclusive (which would limit their applicability).[89] Being overly specific may lock in antiquated understandings of the regulated phenomenon.[90] Further, too specific rules also invite evasion as regulated entities may claim that a specific rule does not fit their specific phenomenon.

Especially the latter phenomenon can be theorized as a form of 'regulatory arbitrage'.[91] Regulatory arbitrage describes how financially potent actors evade the spirit of, for example, tax laws by 'exploiting the gap between the economic substance of a transaction and its legal and regulatory treatment'.[92] Entirely eradicating such avoidances appears impossible. Nonetheless, we

[88] For a theoretical overview of regulation (not only regulatory law) see generally Peter Drahos, *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017); and famously, Lessig who emphasizes that other norms (social, technological) and infrastructures 'regulate' human behaviour Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999).

[89] The predominantly US-American distinction between 'overinclusive' and 'underinclusive' is here understood as describing only whether a norm manages to regulate the phenomena it intends to regulate. This narrow understanding does not concern whether a norm's particularly broad or narrow approach appears justified regarding other (higher ranking) norms. In the US, these two issues of, on the one hand, the functionality of the norm itself, and on the other hand, the justification thereof are often discussed interchangeably. However, from a European and – admittedly– predominantly German perspective, the latter issue would be addressed in terms of proportionality. For the US American perspective see Kenneth Simmons, 'Overinclusion and Underinclusion: A New Model' (1989) 36 University of California Los Angeles Law Review 447.

[90] Such 'locking in' is Douek's criticism of reforms like the DSA. Whether any large regulation would escape the problem as Douek describes it is unclear. The experimentalist 'systems thinking' approach proposed by Douek seems not to lock in any strict regulatory guidelines – and may therefore be equally criticized as too lenient with actors that, in the words of Meta whistleblower Frances Haugen, known to 'pick profit over safety every time', cf Douek (n 33) 564 et seq; 'Statement of Frances Haugen' <https://perma.cc/3QN6-JMY4>.

[91] Viktor Fleischer, 'Regulatory Arbitrage' (2010) 89 Texas Law Review 227.

[92] ibid 229.

can learn from tax law that it makes sense to establish – ex post if necessary – legal constraints on specific circumventions if detected.[93]

Regulatory norms must be broad enough to cover all relevant practices yet specific enough to clearly outlaw unwanted practices. For example, legal norms criminalizing theft do not differentiate whether the thief steals an item by putting it into their backpack or back pocket but define and criminalize theft as such, which may come in many forms. Yet, rules covering complex phenomena like content moderation, artificial intelligence, or privacy cannot be easily distilled into crisp, one-size-fits-all norms. Lastly, supervisors must enforce regulatory norms with a realistic picture of the willingness and ability of tech companies to meaningfully reform their practices.[94] As Viktor Fleischer quipped:

> policy makers [and supervisors] should not rely on moral suasion or ethical or professional constraints on [regulatory] arbitrage. Lawyers have a professional obligation to help their clients manage regulatory costs, and the idea that lawyers would discourage their clients from engaging in behaviour that is legal and profitable would not likely be effective, even if all lawyers were saints, which we are not.[95]

Therefore, balancing specificity and comprehensiveness requires ongoing revisions, implementations, interpretations, reviews, and guidelines.[96] In that sense, maintaining the balance between specificity and comprehensiveness is a process rather than a state. Giving platforms leeway to design procedures and institutions to ensure effective compliance within such a framework may be sensible. Especially from an informational perspective, industry self-regulation can be simply inevitable as regulators often lack the capacity to

[93] Fleischer (n 91).

[94] See in that regard rather pessimistically Waldman (n 81).

[95] Fleischer (n 91) 289.

[96] Such practices can be theorized as 'experimentalism', see Charles F Sabel and William H Simon, 'Minimalism and Experimentalism in the Administrative State' (2011) 100 Georgetown Law Journal 53. For an illuminating perspective regarding financial services supervision see Niamh Moloney, *EU Securities and Financial Markets Regulation* (Fourth, Oxford University Press 2023) 944 et seq.

keep up with all the data, business models, innovation, and so on.[97] However, for the reasons mentioned above, we must assume that companies will utilize this leeway to their own benefit. And unsurprisingly so, since their 'freedom to conduct a business' is protected by the charter of fundamental rights.

The ensuing predicament of, on the one hand, lofty goals for fair procedures and, on the other hand, internalized motivations and practices hampering the fulfilment of said goals warrants a specific normative corridor to guide implementation and enforcement.

The DSA's current broad normative goals are not enough. Yet, hope is certainly not lost. Immediately after the ink of the DSA dried, the Union and the Member States entered the implementation phase. For the Commission, this means to supervise very large online platforms.

Thus, we are now – halfway through the 2020s – at a crucial crossroads. The Commission assumes its supervisory posture vis-à-vis very large online platforms and has hired new staffers to that end.[98] Member States establish Digital Services Coordinators that shall police all the other platforms. The DSA's broadness allows these actors to further specify and adapt the act's normative framework. To an extent, we know this from other regulatory fields like financial services, which fruitfully combine very specific obligations (e.g., capital requirements in absolute or relative numerical terms) with broad and comprehensive normative goals (e.g., preserving the stability of the financial system).[99] It is this practical, incremental balancing of specificity and broadness in the process of supervision that makes regulation effective. As Niamh Moloney noted,

[97] See instructively Omarova (n 7).

[98] See further Suzanne Vergnolle, 'Putting Collective Intelligence to the Enforcement of the Digital Services Act: Report on Possible Collaborations between the European Commission and Civil Society' Conservatoire National des Arts et Métiers (CNAM) Paper Series, 2023.

[99] See e.g. Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (Credit Requirement Regulation).

> [r]egulation does not operate in a vacuum; it must be operationalized through supervision, which is a 'hands on' business. Supervision requires granular engagement with firms and the taking of decisions which carry risk to the markets, the supervisor, and the tax-payer.[100]

Naturally, such skills are not learned over night and the required institutions to effectuate such supervision need time to grow. Thus, in conclusion, the Commission and the Digital Services Coordinators are in a good position to increase the DSA's specificity wherever needed.

2. Hire Engineers!

To guarantee such normative specificity, it is furthermore decisive to formulate – or clarify through subsequent guidelines and more – norms that can be implemented *through* technology. Currently, many rules imposed by the EU on technology companies originate predominantly from debates among lawyers and political scientists in the Commission, the Council, and the Parliament.[101] Doubtless, those norms drew on various hearings and consultations. Nonetheless, the lawmaking process remains dominated by lawyers.[102] To a large extent, lawyers, political scientists and, most importantly, elected politicians are necessary craftspeople moulding political will into legislative material. However, judging from the impact assessment and the legislative material of the DSA, many legislative discussions focus(ed) perhaps too much on wishful thinking rather than their 'technological

[100] Moloney made this remark regarding the EU's financial markets supervision. Although that is a distinctly different field to that covered by the DSA, the former may hold valuable lessons. After all, financial markets and its institutions were the big topic in the decade following the 2008 financial crisis. There, the EU apparently managed to establish a potent regulatory and supervisory regime, see further Niamh Moloney, *EU Securities and Financial Markets Regulation* (Oxford University Press 2023) 944.

[101] The EU lawmaking process is not exactly known for its transparency, so it is hard to assess which voices were indeed decisive, but the dominance of lawyers in the Commission and the Council directorate – especially the powerful legal services – arguably plays a large role. See in general Päivi Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making* (Cambridge University Press 2021).

[102] ibid.

substance', to borrow Fleischer's terminology.[103] By now European lawmakers produced hundreds of pages of text, speeches, policy briefs and legislation, detailing how technology, platforms, and content moderation should function. However, we still know relatively little about if and how the proposed regulations are supposed to be implemented. As shown above, the Commission itself thinks implementation of many provisions will come at zero costs – which begs the question either, whether the provisions are indeed ambitious enough or, why platforms are not already compliant if abiding by allegedly 'strict' European standards comes so cheap.

To ensure the DSA functions effectively, regulators and supervisors may need to adopt a more pragmatic approach to faithfully implementing its regulatory demands. If the legal language proves overly convoluted, they should instead focus on aligning implementation with the publicly stated objectives and purposes of the legislation. Achieving this, however, may require a greater reliance on independent technological expertise. Ideally, independent technological expertise already informs the legislative process and yields norms that are technically easily to implement and whose implementation is easily verifiable.

At this point I shall note what I mean by expertise and how its expansion would improve regulation and implementation. That is because expertise itself is not an objective given but emerges continually through processes and is subject to constant reconfiguration. These reconfigurations may be intentionally captured, e.g. through concerted industry efforts, or unintentionally shaped through normative predispositions, e.g. value-judgments about which population groups count as vulnerable. Bluntly put, knowledge is not simply there but emerges through means of production, it is, therefore, never independent, neutral or objective.[104] That is particularly

[103] Fleischer speaks of 'economic substance' in the context of regulatory arbitrage, see idem (n 91) 229.

[104] Michel Foucault, *The Archaeology of Knowledge* (Pantheon Books 1972); Robert Proctor, *Value-Free Science?: Purity and Power in Modern Knowledge* (Harvard University Press 1991);

relevant whenever knowledge is concentrated in, or perhaps even monopolized by the very organization one intends to regulate. Therefore, calling for more and better 'independent' expertise in regulating digital corporations is a simplified way of calling for a more reflexive and continuous engagement with the type of experts and expertise we want in our regulatory actors.[105] Exploring this deeper, however, goes beyond the scope of this article.

Also, later implementation may further specify some unclear normative goals. Therefore, the Commission is in a crucial position to ramp up its own technical expertise and critically scrutinize whatever platforms sell as DSA compliant. In that sense, the somewhat unassuming Article 40 DSA, which obliges platforms to grant 'vetted' researchers access to internal data, may end up being one the most consequential provisions of the whole regulation.

VIII. Conclusion

This article scrutinized whether a prevalent European regulatory trend – formulating lofty, public-law inspired normative goals and procedural demands and leaving regulated actors do the rest – formulates strict enough standards to reverberate globally or, to use Anu Bradford's term, manifest the 'Brussels Effect'. Focusing on the DSA and using one of its key provisions, Article 14, as an example, the article argues that many standards are indeed anything but strict. Instead, they leave the decisive norm-making and institution building to the regulated entities themselves. While understandable for practical reasons, the norms and institutions that diffuse globally through such a procedure are not really those of the EU but rather whatever platforms construe as their compliance to those rules. Potentially,

Sheila Jasanoff, 'Beyond Epistemology: Relativism and Engagement in the Politics of Science' (1996) 26 Social Studies of Science 393.

[105] See especially the work of Slayton and Clark-Ginsberg who argue that better regulation requires 'negotiation and creation of new forms of expertise, which must balance several distinct public goods, including economy, reliability, and security', Rebecca Slayton and Aaron Clark-Ginsberg, 'Beyond Regulatory Capture: Coproducing Expertise for Critical Infrastructure Protection' (2018) 12 Regulation & Governance 115, 116.

some of said compliance practices may be superficial or, in the terminology adopted here, 'ceremonial'.

Currently, the Commission builds up its enforcement infrastructure vis-à-vis very large online platforms. It hires people, who will write frameworks, guidelines, and delegated norms. If those enforcers tap into technological and organizational expertise and increase the granularity and specificity of the DSA's regulatory demands, we may eventually see stringent standards that may, over time, reverberate globally.