IS THE DIGITAL SERVICES ACT HERE TO PROTECT USERS? PLATFORM REGULATION AND EUROPEAN SINGLE MARKET INTEGRATION

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The regulation of social media platforms continues to be a hotly debated issue in policy and academic circles. In these discussions, the Digital Services Act (DSA) is widely seen as a major piece of an architecture under construction. However, much of the current academic discussion focuses on the content of its new rules and their implementation, with very little work examining the context in which the DSA was passed. This paper explores this context by focusing on the strategic litigation by social media platforms against the Austrian Communication Platforms Act, a member state law adopted during the transition period from the E-Commerce Directive (ECD) to the DSA. The paper's case study shows how social media platforms successfully used EU internal market principles to challenge the Austrian law, paradoxically aligning their interests with the European Commission's goal of preventing legal fragmentation within the EU. This highlights an alliance between corporate interests and the EU regulatory framework and raises questions about the objectives of the DSA. The paper argues that it is important to challenge the narrative that the DSA represents a radical shift towards user protection in the digital sphere. Indeed, the Austrian case study shows how the ECD has been constructed in a way that is very favourable to companies. It is therefore doubtful whether the new compliance-based regulatory tools of the DSA, which are supposed to ensure user protection, can be effective forms of counter-power, given that the dominant paradigm of the ECD, which favours corporate interests, has largely been retained in the DSA.

1 INTRODUCTION

In October 2022, when the European Union (EU) adopted the DSA, Thierry Breton, the then European Commissioner,[1] expressed his delight and looked back at the history of the adoption of this law, highlighting that it was a special piece of legislation that included 'unprecedented responsibilities to protect European citizens' in the face of the big social media platforms. He also highlighted how the EU stood firm in the face of pressure and lobbying from these companies and managed to avoid being pushed back.[2] The EU's press release on the adoption of the law describes how the text 'creates comprehensive new

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[1] Thierry Breton resigned from this position on 16 September 2024 when the second von der Leyen Commission was formed.

[2] Thierry Breton, *Tweet of 27 October 2022* <https://x.com/ThierryBreton/status/1585544868402794496> accessed 20 December 2024.

obligations for online platforms to reduce harm and tackle risks online, introduces strong protections for users' rights online, and places digital platforms under a unique new transparency and accountability framework'.[3] The DSA is thus presented as part of a narrative of contestation of the power of big platforms, which are said to be out of control and should be 'tamed' by regulation.[4] Accordingly, some academics describe the law as a piece of legislation aimed at protecting fundamental rights and democratic values. De Gregorio sees it as 'a paradigmatic example of European digital constitutionalism'.[5] Frosio says that the DSA 'constitutionalises private ordering practices', and represents a 'shift from intermediary liability to platform liability'.[6] Chander emphasises that the DSA offers 'to balance private technological power with democratic oversight'.[7]

This paper is part of an effort to challenge the narrative that the DSA's primary aim is user protection. To do so, the paper proposes to look more closely at the context in which the DSA was adopted. Indeed, the DSA did not emerge in a vacuum. Prior to its adoption, several Member States had attempted at their own level to adopt legislation imposing new obligations on social media companies. Among these attempts, the paper focuses on a unique case study, that of Austria. At the same time as the parliamentary discussions leading to the adoption of the DSA were taking place, i.e. in 2021 and 2022, Austria decided to adopt its own national law regulating online platforms, the Communication Platform Act (KoPl-G).[8] As soon as it came into force, this law was challenged by the companies that were subject to it. This challenge was not resolved until November 2023, when the Court of Justice of the European Union (CJEU) answered a preliminary question in favour of the companies. From the point of view of this paper, the victory of the social media companies over the Austrian state represents a significant event in the discussion on European regulation of platforms. However, to our knowledge, the academic debate has hardly discussed this issue and has quickly forgotten these developments in order to focus on the new legal framework proposed by the DSA. However, the Austrian case is particularly interesting to analyse in more detail because the companies' victory resolved the thorny issue of the interplay between the legal framework of national legislation regulating social media and the entry into force of the DSA before it had time to become a problem. By acting as they did, the companies that sued Austria paradoxically played into the hands of the European Commission. This situation

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[3] European Commission, 'Digital Services Act: EU's landmark rules for online platforms enter into force' (Press Release, 16 November 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6906> accessed 20 December 2024.

[4] Gerald F Davis, *Taming Corporate Power in the 21st Century* (Cambridge University Press 2022).

[5] Giovanni De Gregorio, 'The Digital Services Act: A paradigmatic example of European digital constitutionalism' (*Diritti Comparati*, 17 May 2021) <https://www.dirittocomparati.it/the-digital-services-act-a-paradigmatic-example-of-european-digital-constitutionalism/> accessed 20 December 2024; see also Francisco de Abreu Duarte, Giovanni De Gregorio, and Angelo Jr Golia, 'Perspectives on digital constitutionalism' in Bartosz Brożek, Olia Kanevskaia, and Przemysław Pałka (eds), *Research Handbook on Law and Technology* (Edward Elgar Publishing 2023).

[6] Giancarlo Frosio, 'Platform responsibility in the Digital Services Act: constitutionalising, regulating and governing private ordering' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on the EU and Internet Law* (Edward Elgard Publishing 2023); see also Giancarlo Frosio and Christophe Geiger, 'Towards a Digital Constitution – How the Digital Services Act Shapes the Future of Online Governance' in João Pedro Quintais (ed), *From the DMCA to the DSA – A Transatlantic Dialogue on Online Platform Regulation and Copyright* (Verfassungsbooks 2024).

[7] Anupam Chander, 'When the Digital Services Act Goes Global' (2023) 38(3) Berkeley Technology Law Journal 1067.

[8] In German: *Kommunikationsplattformengesetz*.

contrasts with the narrative of the European Commission and Thierry Breton, who present the DSA as a form of strong opposition to big tech companies. This discrepancy is the starting point of this paper.

In order to examine this discrepancy in more detail, the paper proposes to follow the course of the legal proceedings brought by the companies against the Austrian State before the Austrian authorities and then before the CJEU in the context of a preliminary question. The decision to focus on a single case study stems from the lack of comparable cases. Within the EU, there have only been two other national initiatives to regulate social media companies, in France and Germany. In France, the proposed legislation never materialised as its main provisions were annulled by the French Constitutional Council prior to implementation. In Germany, the law was passed, but no case was ever brought before the CJEU, making it impossible to know the position of the European institutions on the issue. Consequently, the Austrian case is the only one that can shed light on the power relations between the EU, the Member States and the companies in the context of the regulation of social media platforms. From this point of view, the paper is based on a single case study and therefore takes a more exploratory dimension.

The paper describes how, in the Austrian case, the interests of social media companies and those of the European Commission were aligned. On this basis, the paper argues that a body of evidence should lead to question the European Commission's narrative when it presents the DSA as a law aimed at reversing the balance of power between the public interest in protecting citizens and the private interests of corporations in favour of the former. Indeed, such a narrative overlooks the fact that although the DSA was adopted as a reform of its predecessor, the E-Commerce Directive (ECD), it does not change the dominant paradigm for platform regulation in the EU, as the liability exemption framework, which has been very favourable to corporate interests, remains unchanged. On this basis, the paper argues that the Austrian case is an invitation to read European developments in platform regulation from a law and political economy perspective, i.e. aimed at questioning the new power relations made possible by the DSA from the point of view of the tension between corporate interests and the protection of individual rights. This is all the more justified in the context of the current realisation of the Digital Single Market and the simultaneous revival of a strong industrial policy within the EU. These developments can be seen as part of a wider historical context in which a neoliberal view of what the law should be has prevailed, in which the law is seen above all as apolitical, with no questioning of how it privileges certain interests over others – beyond the official narratives of what it does, as the case of the European Commission's narrative on the DSA shows. Such a view is largely reflected in the (nascent but already flourishing) academic literature on the DSA, which focuses on the content of the new rules and their implementation, without addressing the broader issues of power relations between unequal public and private interests. From this point of view, the paper contributes theoretically to underlining the relevance of adopting new reading grids to interrogate the regulation of social media platforms in the EU, in particular by situating it in the broader framework of the tension between the achievement of economic and social objectives and by examining power relations. At the same time, the paper underlines the need to challenge the dominant institutional narratives. From an empirical point of view, the paper contributes to a better understanding of the context in which the DSA was adopted by providing in-depth knowledge of a specific case, that of the

KoPl-G, and the way in which companies have skilfully mobilised European law to litigate against Austria.

To do this, the paper begins with a brief history of the regulation of social media platforms, i.e. companies that provide services that enable the sharing and exchange of content among third parties. This brief history highlights the adoption of liability exemption frameworks for these companies at the turn of the millennium in the United States and then in the EU. The history continues by focusing on how Germany, France and Austria, dissatisfied with how companies were dealing with harmful and illegal content on their platforms, enacted legislation imposing new obligations on these companies. The paper then places the adoption of the DSA in the context of the EU's Digital Single Market strategy, recalling that the history of the Single Market has been marked by a tension between economic rationality and more socially oriented conceptions. The paper also briefly introduces law and political economy studies that form the analytical framework of the paper. Then, in the context of the case study, it provides a detailed description of the legal proceedings that pitted the Austrian state against three large social media companies. The paper then discusses the results of the analysis, notably by contrasting the case study results with the preparatory work for the DSA, showing how the interests of the European Commission and the social media companies converged. The paper concludes with an invitation to conduct future research on platform regulation considering issues of justice, power, and the conflict between public and private interests.

2 A BRIEF HISTORY OF SOCIAL MEDIA REGULATION IN EUROPE

In 2000, the European Union adopted the ECD, inspired by the United States and their model of liability exemption. The Internet, in its broadest sense, was developed slowly throughout the 1970s and 1980s, funded primarily by the United States Department of Defence, then under the stewardship of the National Science Foundation.[9] It wasn't until just before the turn of the century, in the mid-1990s, that the infrastructures that make up the Internet were put into private hands.[10] This created a new market whose rules had to be defined. In this context, the United States adopted the Communications Decency Act, including Section 230, as part of the Telecommunications Act of 1996. Section 230 introduces a principle of immunity from liability for third party content. This means that companies that operate services that enable the exchange of information between third parties cannot be held liable for illegal content posted or published by those third parties on their platforms.[11] The choice of such a light regulatory framework, which does not impose binding obligations on companies, is in line with the prevailing attitude towards the Internet and new technologies in general at the time. In particular, this attitude was characterized by a profoundly positive view of the Internet, which was seen as promising greater freedom

[9] Shane Greenstein, *How the Internet Became Commercial – Innovation, Privatization and the Birth of a New Network* (Princeton University Press, 2015) 22-30.
[10] ibid Chapters 4, 5 & 6.
[11] ibid.

from government control, which was denounced as censorship.[12] Section 230 is thus a concrete manifestation of the libertarian spirit of the time, where government legislation was seen as an obstacle to online freedom and the economic development of emerging companies in the Internet space.[13] In the EU, the logic behind the ECD was similar to that of Section 230. Under the ECD, 'Internet service providers' operating in the EU are also immune from liability when third parties use their services to publish illegal content.[14] However, this immunity is less flexible than in the US, as the ECD introduces a 'notice and takedown' system. In other words, Internet service providers are not liable for illegal content as long as they are unaware of its presence. However, once a company has been notified of such content, it is obliged to take steps to make it inaccessible.[15] Failure to do so may expose the company to liability.[16] The adoption of the ECD was intended to achieve two objectives. First, similar to the US approach, it aimed to create a regulatory regime that would be conducive to innovation and the economic development of companies in the emerging Internet sector. At the same time, the ECD was a step towards a single European market for information society services, removing barriers to cross-border service provision.[17]

Companies involved in services that enable communication between third parties have grown rapidly within the liability exemption framework, and with this growth has come a host of issues that extend beyond the digital space. The creation of a regulatory framework that encouraged innovation and economic growth in the nascent internet market was a success, as new companies emerged, particularly in the US. These companies, now commonly referred to as social media platforms, are an integral part of our societies and an essential element of citizen information and communication.[18] For some scholars, they constitute the new online public sphere, where ideas are debated and democratic life and culture take place.[19] The services of companies like Meta have the ability to bring together billions of citizens: almost half of the world's population has a Facebook or an Instagram account. This success has been reflected in the growing power of these companies,[20] leading to a public realization that they hold in their hands the ability to influence how information

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[12] John Perry Barlow, 'A declaration of the Independence of Cyberspace' (*Electronic Frontier Foundation*) <https://www.eff.org/fr/cyberspace-independence> accessed 20 December 2024.

[13] Julie E Cohen, *Between Truth and Power – The Legal Constructions of Informational Capitalism* (Oxford University Press 2019) 97-101.

[14] Rosa Julià-Barceló and Kamiel J Koelman, 'Intermediary liability in the E-Commerce Directive: so far so good, but it's not enough' (2000) 16(4) Computer Law & Security Review 231.

[15] Aleksandra Kuczerawy, 'Intermediary liability & freedom of expression: Recent developments in the EU notice & action initiative' (2015) 31(1) Computer Law & Security Review 46.

[16] Victoria McEvedy, 'The DMCA and the E-Commerce Directive' (2002) 24(2) European Intellectual Property Review 65.

[17] Alexandre de Streel, Martin Husovec, 'The e-commerce Directive as the cornerstone of the Internal Market – Assessment and options for reform' (Study Requested by the IMCO committee, 2020) 14-18. <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648797/IPOL_STU(2020)648797_EN.pdf> accessed 20 December 2024.

[18] Renate Fischer and Otfried Jarren, 'The platformization of the public sphere and its challenge to democracy' (2024) 50(1) Philosophy & Social Criticism 200.

[19] Rebecca J Hamilton, 'Governing the Global Public Square' (2021) 62(1) Harvard International Law Journal 117; Mike S Schäfer, 'Digital Public Sphere' in Gianpietro Mazzoleni (ed), *The International Encyclopaedia of Political Communication* (John Wiley & Sons 2016); Lincoln Dahlberg, 'The Internet and Democratic Discourse: Exploring the Prospects of Online Deliberative Forums Extending the Public Sphere' (2010) 4(4) Information, Communication & Society 615.

[20] Linnet Taylor, 'Public actors without public values: Legitimacy, domination and the regulation of the technology sector' (2021) 34 Philosophy & Technology 897.

is perceived around the world.[21] This has led many scholars to focus on the content moderation practices of these companies[22] and on the tools that they use, particularly artificial intelligence systems.[23] Numerous events, particularly since 2015, have contributed to the realization that the influential power of social media can have potentially harmful consequences in the real world. For example, Cambridge Analytica in 2016[24] or the lack of moderators to tame the spread of hate speech in Myanmar, which resulted in real-world harm to the Rohingya population,[25] were particularly striking. These incidents, among others, contributed to putting the regulation of social media companies at the top of many governments' agendas.

The spread of illegal content on social media platforms has prompted a reaction in the EU, where some Member States have passed laws imposing stricter obligations on social media companies. Germany, France, and Austria felt that the light regulatory framework based on exemption from liability was no longer adequate and that the lack of stronger rules had led to too many public problems related to the spread of harmful content or disinformation.[26] In response, Germany adopted the Network Enforcement Act (NetzDG)[27] in 2017. This law required social media companies operating in Germany to remove content on their platforms that violated specific provisions of the German Criminal Code. Companies were given 24 hours to remove 'manifestly unlawful' content and seven days for content that required further investigation.[28] In addition, social media companies were required to give users whose content had been removed the opportunity to submit 'counter-proposals'[29] and to set up mediation bodies for out-of-court dispute resolution.[30] In 2018, France attempted to pass a similar law, the *proposition de loi visant à lutter contre les contenus haineux en ligne*[31] (law proposal to combat online hate speech). This law also required social media companies to remove content that violates certain provisions of the French Criminal Code and the Press Act.[32] Unlike the German law, the French law did not set a

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[21] Mikkel Flyverbom, *The Digital Prism: Transparency and Managed Visibilities in a Datafied World* (Cambridge University Press 2019).
[22] Hannah Bloch-Wehba, 'Content moderation as surveillance' (2021) 36(4) Berkeley Technology Law Journal 1297; Kyle Langvardt, 'Regulating Online Content Moderation' (2018) 106 Georgetown Law Journal 1353; Tarleton Gillespie, *Custodians of the Internet: Platforms, content moderation, and the hidden decisions that shape social media* (Yale University Press 2018).
[23] Robert Gorwa, Reuben Binns, and Christian Katzenbach, 'Algorithmic content moderation: Technical and political challenges in the automation of platform governance' (2020) 7(1) Big Data & Society 1; Tarleton Gillespie, 'Content moderation, AI, and the question of scale' (2020) 7(2) Big Data & Society 1; Thiago Dias Oliva, 'Content Moderation Technologies: Applying Human Rights Standards to Protect Freedom of Expression' (2020) 20(4) Human Rights Law Review 607.
[24] Christophe Olivier Schneble, Bernice Simone Elger, and David Shaw, 'The Cambridge Analytica affair and Internet-mediated research' (2018) 19(8) Embo reports <https://www.embopress.org/doi/full/10.15252/embr.201846579> accessed 20 December 2024.
[25] Christina Fink, 'Dangerous speech, anti-muslim violence, and Facebook in Myanmar' (2018) 71 International Affairs 43.
[26] Wolfgang Schulz, 'Regulating Intermediaries to Protect Personality Rights Online – The Case of the German NetzDG' in Marion Albers and Ingo Wolfgang Sarlet (eds), *Personality and Data Protection Rights on the Internet* (Springer, 2022).
[27] In German: *Netzwerkdurchsetzungsgesetz*.
[28] NetzDG, §3. Note: as of 2024, the law is no longer in force. The content of the law is quoted as it was when it was adopted in 2017.
[29] ibid §3b.
[30] ibid §3(6).
[31] Often referred to as the 'loi Avia' or Avia law, named after the member of parliament who proposed it.
[32] *Proposition de loi visant à lutter contre les contenus haineux en ligne*, Article 1.

deadline for the removal of content, expecting companies to remove unlawful content immediately. This lack of a deadline led the French Constitutional Council to consider the law a serious threat to the freedom of expression of French social media users, as it could have forced companies to remove more content than necessary to avoid liability. As a result, the main provisions of the law were annulled.[33] In 2021, Austria became the third EU Member State to adopt stricter obligations for social media platforms with the KoPl-G. This law was very similar to the German legislation, requiring the removal of content that is illegal under the Austrian criminal code within 24 hours or 7 days, depending on whether the content is clearly illegal or not.[34] Such content includes illegal hate speech, which is defined under Austrian law as public incitement to violence against or the intention to violate the human dignity of a person or a group of persons on the grounds of their race, skin colour, language, religion or belief, nationality, descent or national or ethnic origin, sex, disability, age or sexual orientation.[35]

3 ECONOMIC INTEGRATION, SOCIAL PROGRESS AND THE DIGITAL SINGLE MARKET STRATEGY

European integration is characterized by several major successive historical stages, from the creation of the Coal and Steel Community in 1951, to the Maastricht Treaty in 1992, which established the European Communities and introduced the single currency, to the Lisbon Treaty in 2007. This process can be examined in terms of a constant tension between economic integration (through the market) and socio-political integration (through institutions and the development of social policies and fundamental rights).[36] Before the Second World War, Friedrich Hayek, an ardent defender of market liberalism, had imagined that European integration would be political in the first place, and that only when a 'strong federal government' was established would it create a common market and centralize policy in this area – thus preventing the advocates of extensive welfare states from interfering with the operation of the market.[37] In the end, the opposite happened, as the European Union began as a customs union before gradually building itself around the single market project, leading to an acceleration of the liberal transformation of the European polity since the 1980s.[38] Integration has thus taken place pragmatically, first in limited economic sectors, then gradually, under the guidance of supranational institutions to which powers have been delegated, but in a limited way (the 'Monnet method').[39] This is not to say, of course, that the European Union has always favoured economic integration over social progress. In particular, the jurisprudence of the CJEU has played a major role in promoting individual

[33] Conseil Constitutionnel, Décision n°2020-801, 18 June 2020 <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042031998/> accessed 20 December 2024.
[34] KoPl-G Article 3.
[35] Austrian Criminal Code (*Strafgesetzbuch*, StGB) §283.
[36] Enrico Spolaore, 'What Is European Integration Really About? A Political Guide for Economists' (2013) 27(3) Journal of Economic Perspectives 125.
[37] Fritz W Scharpf, 'The asymmetry of European integration, or why the EU cannot be a 'social market economy' (2010) 8(2) Socio-Economic Review 211.
[38] ibid.
[39] Wolfgang Wessels, 'Revisiting the Monnet Method – A contribution to the periodisation of the European Union's history' in Michaela Bachem-Rehm, Claudia Hiepel, and Henning Türk (eds), *Teilungen überwinden* (De Gruyter Oldenbourg 2014).

rights,[40] and the adoption of the European Charter of Fundamental Rights in 2000 is a particularly striking demonstration of the EU's will to be more than a single market. However, economic development can sometimes come at the expense of the protection of individual rights. In this sense, some authors characterize integration through the single market as a 'Trojan horse of neoliberalism',[41] with a 'liberalizing and deregulatory' effect that undermines market economies based on stronger social dimensions[42] (Bartl speaks of a form of 'Internal market rationality').[43]

The rapid emergence of new technologies has created new challenges for the internal market. EU economic integration has been challenged as Member States have begun to regulate digital services and markets, such as the case of Member States regulation of social media well illustrates.[44] In principle, Article 26 of the Treaty on the Functioning of the European Union (TFEU) lays down the obligation to adopt measures to ensure the proper functioning of the internal market. This article is supplemented by Article 114 TFEU, which states that, with a view to completing the internal market, the European Union shall have the task of working towards the approximation of the laws of the Member States.[45] In digital matters, this obligation has led the European Commission, under the leadership of Jean-Claude Juncker, to launch in 2015 a strategy for the creation of the *Digital Single Market*, i.e. the development of the single market principle but reaffirmed in the digital age. This strategy pursues economic integration objectives in a number of sectors, including connectivity, e-health, the data economy, artificial intelligence and digital platforms. In some of these sectors, the aim is to encourage investment focused on greater digitisation of public services or better governance of the data economy.[46] In other sectors, the EU aims to promote the Digital Single Market not only through the development of public policies or improved governance, but also through stricter regulation of existing players, in particular US transnational technology companies. This is the case with the regulation of content sharing between third parties, i.e. in relation to the activity of these companies as social media platforms.[47] Faced with the emergence of legislation in different Member States and the

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[40] Olof Larsson, 'Political and constitutional overrides: the case of the Court of Justice of the European Union (2020) 28(12) Journal of European Public Policy 1932; Renaud Dehousse, *The European Court of Justice – The Politics of Judicial Integration* (Springer 1998).

[41] Sebastian Heidebrecht, 'From Market Liberalism to Public Intervention: Digital Sovereignty and Changing European Union Digital Single Market Governance' (2024) 62(1) JCMS: Journal of Common Market Studies 205; Christoph Hermann, 'Neoliberalism in the European Union' (2007) 79(1) Studies in Political Economy 61; Alan W Cafruny and Magnus Ryner (eds), *A Ruined Fortress? Neoliberal Hegemony and Transformation in Europe* (Rowman & Littlefield Publishers 2003).

[42] Scharpf (n 37).

[43] Marija Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21(5) European Law Journal 572.

[44] Michelle Cini and Patryk Czulno, 'Digital Single Market and the EU Competition Regime: An Explanation of Policy Change' (2022) 44(1) Journal of European Integration 41.

[45] Annegret Engel, 'Licence to Regulate: Article 114 TFEU as Choice of Legal Basis in the Digital Single Market' in Annegret Engel, Xavier Groussot, and Gunnar Thor Petursson (eds), *New Directions in Digitalisation – Perspectives from EU Competition Law and the Charter of Fundamental Rights* (Springer 2025).

[46] See for example Clarissa Valli Buttow and Sophie Weerts, 'Managing public sector data: National challenges in the context of the European Union's new data governance models (2024) 29(3) Information Polity 261; see also Clarissa Valli Buttow and Sophie Weerts, 'Public sector information in the European Union policy: The misbalance between economy and individuals' (2022) 9(2) Big Data & Society <https://journals.sagepub.com/doi/10.1177/20539517221124587> accessed 20 December 2024.

[47] Miikka Hiltunen, 'Social Media Platforms within Internal Market Construction: Patterns of Reproduction in EU Platform Law' (2022) 23(9) German Law Journal 1226.

problem of illegal content online, the European Commission saw an urgent need to propose a Europe-wide regulatory framework for social media companies.[48] It has done so by introducing the DSA, which aims to update the liability exemption framework of the ECD. Announced by Ursula von der Leyen in 2019 and presented to the European Parliament in December 2020, the DSA has been the subject of intense debate between early 2021 and 2022. The official aim of the DSA is to strengthen the protection of users of online social media platforms. To this end, the DSA introduces a number of due diligence measures,[49] including the obligation for companies to carry out systemic risk analyses[50] and undergo external audits.[51] Other measures are inspired by the principles of good administrative procedure, such as the obligation for companies to ensure that their terms and conditions are clear and precise[52] and the introduction of appeal procedures allowing users to challenge the removal of content directly with the platforms.[53]

From the perspective of law and political economy studies, this paper aims to interrogate current developments in European integration, particularly in relation to the realisation of a digital single market and the implementation of the DSA within it. The aim of such an approach is different from dogmatic legal analysis that seeks to interpret and explain the content of European law.[54] The aim is not to better explain or understand the rules, but rather to analyse what these rules and their application reveal about the power dynamics between states, individuals, companies and the EU. Indeed, law and political economy is a field of study that takes as its starting point the context of the polycrises that humanity and global governance are facing in the 21st century (climate disruption, crises of democracy and the rise of illiberalism, the resurgence of war, growing inequality) and that examines how 'legal discourse has helped to consolidate these problems by serving as a powerful authorising terrain for a series of 'neoliberal' political projects that have fuelled these same crises'.[55] Thus, the focus of this research perspective is on 'issues of power and

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[48] Commission, 'Digital Services Act: EU's landmark rules for online platforms enter into force' (n 3).
[49] Sebastian Felix Schwemer, 'Digital Services Act: A reform of the e-Commerce Directive and much more' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Edward Elgard Publishing 2023).
[50] Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market For Digital Services and amending Directive 200/31/EC (Digital Services Act) [2022] OJ L277/1, Article 34; Sara Tommasi, 'Risk-Based Approach in the Digital Services Act and in the Artificial Intelligence Act' in Sara Tommasi (ed), *The Risk of Discrimination in the Digital Single Market – From the Digital Services Act to the Future* (Springer 2023).
[51] Digital Services Act Article 37; Johann Laux, Sandra Wachter, and Brent Mittelstadt, 'Taming the few: Platform regulation, independent audits, and the risk of capture created by the DMA and DSA' (2021) 43 Computer Law & Security Review <https://www.sciencedirect.com/science/article/pii/S0267364921000868?via%3Dihub> accessed 20 December 2024.
[52] Digital Services Act Article 14; Mathieu Fasel and Sophie Weerts, 'Can Facebook's community standards keep up with legal certainty? Content moderation governance under the pressure of the Digital Services Act' (2024) 16(3) Policy & Internet 588.
[53] Digital Services Act Article 20.
[54] Mark Van Hoecke, 'La systématisation dans la dogmatique juridique' (1986) 10 Rechtstheorie Beiheft 217; see also Ulla Neergaard, Ruth Nielsen, and Lynn Roseberry, *European Legal Method: Paradoxes and Revitalisation* (Djøf Forlag, Copenhagen 2011).
[55] Neoliberalism is understood as 'a mode of governance and legitimation that enforces specific distributions and configurations of 'market discipline' that support profits and managerial power over democratically determined social guarantees – for instance, labor market 'liberalization', erosion of unions' role in the economy, and rollbacks of social provision' – Jedediah S Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K Sabeel Rahman, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis (2020) 129 The Yale law Journal 1789.

inequality, between individuals, groups, states and regions'.[56] From this perspective, the paper aims to ask how the DSA fits into the tension between economic integration and the protection of individual rights within the EU. As an object of analysis, the paper focuses on a case study, that of the legal challenge by social media platforms to the Austrian KoPl-G, a law aimed at imposing stricter obligations on these companies in Austria, which was adopted and subsequently challenged at the same time as parliamentary discussions on the DSA were taking place at EU level.

4 CASE STUDY: BIG TECH LITIGATION AGAINST AUSTRIA'S COMMUNICATION PLATFORMS ACT

The adoption of the KoPl-G triggered a legal dispute between the Austrian Communications Authority (KommAustria), which is responsible for enforcing the law, and the social media platforms subject to its provisions. The dispute centred solely on the question of who should be held responsible for the obligations laid down in the law.

The KoPl-G entered into force on 1 January 2021.[57] According to §1 of the law, it applies to 'domestic and foreign service providers who offer communication platforms for profit'. The law provides for certain exceptions, in particular if (1) 'the number of users in Austria authorized to access the communication platform via registration in the previous calendar year was less than 100,000', or (2) 'if the turnover generated by the operation of the communication platform in Austria in the previous calendar year was less than EUR 500,000'. A further exception applies to service providers whose communication platforms primarily offer non-profit services. The law assigns KommAustria the task of designating, by means of official decisions, which companies are subject to its obligations.

Between 26 March 2021 and 22 April 2021, KommAustria designated the companies subject to the law. Three companies – Google, Meta, and TikTok, all of which are registered in Ireland – challenged this designation by submitting objections directly to KommAustria.[58] The companies raised similar objections, arguing that the Austrian law could not be applied to them because it conflicted with the 'country of origin' principle set out in Article 3 of the ECD. This article states:

> […] 2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.
> […]
> 4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:
> (a) the measures shall be:

[56] Michael A Wilkinson and Hjalte Lokdam, 'Law and Political Economy' (2018) LSE Law, Society and Economy Working Papers 7/2018 <https://eprints.lse.ac.uk/87544/1/Wilkinson_Law%20Political%20Economy_Author.pdf> accessed 20 December 2024.

[57] An outline of the chronology of events relating to the legal challenge to the KoPl-G can be found in Annex 1.

[58] Bundesverwaltungsgericht, Case W195 2241960-1 (2021). <https://www.bvwg.gv.at/presse/703149.html> accessed 20 December 2024.

> (i) necessary for one of the following reasons:
> - public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,
> - the protection of public health,
> - public security, including the safeguarding of national security and defence,
> - the protection of consumers, including investors.
> (ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;
> (iii) proportionate to those objectives;
> (b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:
> - asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,
> - notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.
> […]

The companies argue that Article 3 should be interpreted as meaning that only the Member State in which an information society service is established has the power to take measures that may restrict the free movement of those services. While acknowledging that Article 3 of the ECD contains exceptions allowing other Member States to take measures in respect of services established elsewhere, Google, Meta, and TikTok argue that, although they are established in Ireland and the Austrian law is based on a legitimate exception to Article 3, the broad and abstract application of the law to all services, rather than to a specific information society service, should invalidate it. They argue that such a law constitutes an unjustified restriction on the free movement of the services they provide. At the very least, the companies argue that if the law is not invalid, it should not apply to them.[59]

In order to clarify whether the KoPl-G is in line with the ECD, KommAustria referred the case to the Austrian Federal Administrative Court (*Bundesverwaltungsgericht*). Under the Austrian legal system, this court has jurisdiction to hear appeals against decisions made by federal administrative bodies, such as KommAustria pursuant to Art. 130, §1, N1 of the Austrian Federal Constitutional Law. In a decision issued on 28 September 2021, the court ruled that the KoPl-G was valid and not incompatible with the ECD. In its decision,[60] the Court argued that the adoption of the KoPl-G fell within the exceptions set out in paragraphs 4 and 5 of Article 3 of the ECD. These exceptions allow a Member State in which an information society service is not established to take measures against such services, contrary to the country-of-origin principle, provided that there are justifiable grounds of public policy, public health, or public security, and that the measures taken are proportionate

[59] Bundesverwaltungsgericht (n 58).
[60] ibid.

to the objective pursued. The Court found that these conditions were met in the case of the KoPl-G. By introducing measures to prevent the dissemination of hateful content, the KoPl-G seeks to protect highly valuable interests, such as the protection of minors and human dignity. Given the importance of these objectives, a restriction of the country-of-origin principle is considered justified.[61] Furthermore, the Court did not find any problems with the proportionality of the KoPl-G.

As the companies were not convinced by the Federal Administrative Court's confirmation of KommAustria's decision, they appealed to the Supreme Administrative Court (*Verwaltungsgerichtshof*). In their appeal, the companies reiterated their argument that the KoPl-G was incompatible with EU law, in particular because it contradicted the country-of-origin principle established by the ECD. On 24 May 2022, the Supreme Administrative Court ruled on the appeal.[62] The Court pointed out that Article 3, paragraph 2 of the ECD provides that the free movement of services provided by information society companies may not, in principle, be restricted by a Member State other than the one in which those services are established. This provision embodies the country-of-origin principle, which means that companies providing information society services are generally only subject to measures adopted by the Member State in which they are established. However, the Supreme Administrative Court also noted that Article 3, paragraph 4 allows other Member States to take specific and targeted measures against such companies under certain conditions. Contrary to KommAustria and the Federal Administrative Court, the Supreme Administrative Court expressed uncertainty as to whether measures of a general and abstract nature, such as those proposed by the KoPl-G, can be considered 'specific and targeted' within the meaning of Article 3, paragraph 4 of the ECD, without intermediary measures of a specific and concrete nature directed at a single information society service. This question is crucial for determining whether the exceptions set out in paragraph 4 apply and, consequently, whether the KoPl-G is valid. As this question directly concerns coordinated EU law, the Supreme Administrative Court declined to rule itself and referred a preliminary question to the CJEU.

The CJEU answered to the preliminary question on 9 November 2023. In its answer, the CJEU emphasized that the primary objective of the ECD is to ensure the free movement of information society services between Member States. In order to achieve this, the Directive seeks to remove the obstacles created by 'the different national regimes applicable to those services through the principle of control in the Member State of origin'.[63] The CJEU recognised that, in certain circumstances, Member States other than the Member State of origin of the service may take measures 'in order to safeguard public policy, the protection of public health or public security, or the protection of consumers'. However, in response to the request submitted by the Supreme Administrative Court for a preliminary ruling, the CJEU clarified that such measures must not, under any circumstances, consist of 'general and abstract measures that apply indiscriminately to any provider of a category of information society services'. This means that measures contrary to the principle of control

[61] Bundesverwaltungsgericht (n 58) §3.5.1.
[62] Verwaltungsgerichtshof. CASE EU 2022/0003-005-1. <https://www.vwgh.gv.at/rechtsprechung/vorabentscheidungsantraege_an_den_eugh/Ro_2021030032.pdf> accessed 20 December 2024.
[63] Case C-376/22 *Google Ireland and Others v Kommunikationsbehörde Austria* EU:C:2023:835.

in the country of origin can only be covered by the exception provided for in paragraph 4 if they apply to a single, clearly defined information society service. Such measures cannot apply to an indeterminate number of services, whose identity cannot be determined a priori. The CJEU justified this interpretation by stating that allowing Member States to impose general and abstract obligations would 'call into question the principle of control in the Member State of origin' as established by the ECD. It would also 'undermine mutual trust between Member States and contravene the principle of mutual recognition'. Furthermore, the free movement of services would be jeopardized if companies subject to the KoPl-G 'would find themselves subject to different legislation', which would have a direct impact on the proper functioning of the internal market.

In answering to the question referred for a preliminary ruling, the CJEU confirmed the concerns of the Supreme Administrative Court. At the same time, it vindicated Google, Meta, and TikTok by confirming that the KoPl-G could not be applied to them on the grounds that this law was incompatible with the ECD. In a decision issued on 20 December 2023, the Supreme Administrative Court acknowledged the CJEU's ruling, concluding that the companies had been unlawfully subjected to the law.[64] As a result of this ruling and the simultaneous adoption of the DSA by the European Union in October 2022, the KoPl-G was repealed by the Austrian government in February 2024.

5 A NEW PERSPECTIVE ON THE ADOPTION AND OBJECTIVES OF THE DSA

The most striking element to emerge from the analysis of the case is the perfect alignment between the arguments initially put forward by the big tech companies as part of their litigation strategy and the final reasoning of the CJEU. This case demonstrates how European rules are, in this case, aligned with the interests of the companies, in opposition to those of the Austrian State. The latter, dissatisfied with the leeway given to social media companies by the liability exemption introduced in the ECD in the early 2000s, is attempting to formulate a stricter legal framework for these companies based on the exceptions allowed by the ECD for the protection of public safety and public security. The Austrian government's aim is to ensure the correct application of its national law. In other words, it wants to ensure that, despite the exemption framework provided by the ECD, content that is considered illegal under Austrian law cannot be disseminated on the companies' platforms. Social media companies, on the other hand, are strongly opposed to these new obligations, which they see as synonymous with additional workload and, consequently, increased costs. The companies' argument in this case is primarily based on the principle of control in the state of origin, as defined in Article 3 of the ECD. This principle directly embodies the idea of integration through the internal market for companies providing cross-border services and is seen as serving as a crucial cornerstone in the completion of the digital single market.[65] From a litigation strategy point of view, companies have simply used European law provisions on the completion of the internal market to undermine the efforts of the Austrian

[64] Verwaltungsgerichtshof. Document Ro 2021/03/0032-8,0033-7, 0034-6 (2023) <https://ris.bka.gv.at/Dokumente/Vwgh/JWT_2021030032_20231220J00/JWT_2021030032_20231220J00.pdf> accessed 20 December 2024.

[65] De Streel and Husovec (n 17).

state to ensure better compliance with its national law. In this way, companies skilfully mobilized principles of European law and used them against a Member State in order to emerge victorious.

By winning the case, the social media companies have litigated in a way that contributes to the realisation of the Digital Single Market. The companies' main concern, of course, is not European integration, but the avoidance of a regulatory burden that they see as potentially damaging to their business. In this sense, the litigation against the KoPl-G is in line with their systematic opposition in the courts to any European or national legislation that affects them.[66] However, by preventing the KoPl-G from taking full effect, the companies are litigating in a way that serves European integration. In the case studied, there was thus a reciprocal interaction between the legal framework of the ECD and the strategy of the companies. On the one hand, the general EU regulatory framework facilitated the companies' opposition to the national law; on the other hand, the companies' strategy and their successful litigation accelerated the process of strengthening the internal market for digital communication services. These two observations provide a basis for discussion. While these findings are based on a single case study and thus have limited generalisability, the perfect alignment between the companies' arguments and the ECD legal framework highlights the power dynamics between companies, the European Union, and Member States in relation to the different objectives that each of these parties seeks to achieve in the context of regulating social media companies. In this context, the Austrian case study sheds light on how the EU's institutional and policy framework can inherently favour business interests and provides insight into the EU's underlying rationale when regulating to achieve digital single market integration.

Indeed, the outcome of the legal challenge to the KoPl-G is particularly interesting when juxtaposed with the process of adopting the DSA, as it provides a new perspective on this process. The legal challenge in front of the CJEU takes place at the same time as the parliamentary phase of the DSA. In this respect, a reading of the preparatory documents for the law reveals some interesting elements. In these documents, the European Commission discusses the need to better protect users of social media platform services across the EU. However, the main focus of the impact assessment is elsewhere, as one of the Commission's main concerns is said to be the fragmentation of the internal market that countries such as Germany and Austria are creating through their national laws regulating social media companies.[67] In the preparatory documents, the Commission stresses several times that these national initiatives, although well-intentioned in the fight against illegal content, pose a risk to the economic environment of Internet companies in the EU because of the legal uncertainty they create. In this sense, one of the main objectives of the DSA is the need to update the liability exemption framework for social media companies, which dates back to the adoption of the ECD in 2000,[68] and to reaffirm its value for the Digital Single Market.[69]

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[66] See notably 'The EU Is Taking on Big Tech. It May be Outmatched' (*Wired*, 9 June 2024). <https://www.wired.com/story/european-commission-big-tech-regulation-outlook/> accessed 20 December 2024.

[67] European Commission, 'Impact assessment accompanying the proposal for a regulation of the European parliament and of the council' SWD/2020/348 final23-25. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020SC0348 > accessed 27 March 2024

[68] De Streel and Husovec (n 17).

[69] Commission, 'Impact assessment' (n 67).

These elements underline the extent to which, beyond the official narrative of user protection and the good administrative practice and due diligence provisions it contains, the DSA is also here to counter Member States' attempts to adopt national laws to better protect users and to enforce their criminal law online, as these attempts could be detrimental to legal certainty and, thus, to economic growth. From this perspective, the Austrian proceedings can be seen in a different light, because the companies' triumph over the Austrian state comes at just the right time: by overturning Austrian law, the companies are helping to achieve the objective of combating legal fragmentation within the EU. In this sense, the companies have performed a crucial service for the Commission by opposing the Austrian law, as the annulment of the KoPl-G has pre-emptively resolved the complex issue that would have arisen from the coexistence of this law and the DSA. In this configuration, social media companies have found themselves to be allies of the European Commission. Their particular interests differ (the former want to avoid a regulatory burden, the latter wants to promote economic integration), but their general interest is the same: Member State regulation aimed solely at protecting users is seen as detrimental to economic interests. Such an insight into the EU's underlying rationale paves the way for adopting a more critical perspective on the issue of social media regulation in general. Such a perspective, based on a deeper analysis of power relations, could be used to interrogate current developments at the EU level, especially with the entry into force of the DSA. Indeed, the DSA is generating a lot of discussion, especially in academic circles. However, the work that deals with the DSA seems to support the Commission's narrative,[70] which presents the law as a legislation to protect 'consumers and their fundamental rights online by setting clear and proportionate rules',[71] aiming to rebalance 'the roles of users, platforms and public authorities according to European values, putting citizens at the centre'.

Such narrative overlooks the fact that the liability exemption framework for social media companies remains unchanged – despite the fact that it was this framework that was criticised by Member States for contributing to companies' failure to fight illegal and harmful content online, thereby endangering both users and the good functioning of democratic societies. Indeed, the general framework of exemption from liability for social media companies in relation to third-party content on their platforms has been very favourable to these companies since its inception. The economic success of such companies since the beginning of the 21st century can largely be attributed to this lack of liability.[72] Cohen has shown how, at its inception, this framework was rooted in the libertarian vision of the internet as a space free from government control, where laws should have minimal impact. This ideology is most evident in Section 230 of the CDA, but it also influenced the ECD. Over time, this general exemption has frustrated some EU Member States. They felt that the lack of liability meant that companies were not taking enough proactive measures to remove illegal content from their platforms. This led countries such as Germany, France, and Austria to adopt stricter laws, imposing additional obligations that challenged the existing liability exemption framework. As the case study shows, Austria's attempt was fiercely opposed by

[70] See De Gregorio (n 5); Frosio (n 6); Chander (n 7).
[71] European Commission, 'The Digital Services Act – Ensuring a safe and accountable environment' (2024) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en> accessed 20 December 2024.
[72] Cohen (n 13).

the companies, who ultimately prevailed. At the same time, the European Union viewed national initiatives such as Austria's unfavourably, as they fragmented the internal market. With the adoption of the DSA and the success of companies against Austria's KoPl-G, national efforts were abandoned,[73] and concerns about legal fragmentation have dissipated. The legal situation is now much clearer. For companies providing communication services such as social media, the DSA applies uniformly across Europe, without competing with any national law. This avoids the complex issue of how national laws would have interacted with the European framework. Legally, the DSA maintains the existing liability exemption framework of the ECD, while introducing new regulatory tools inspired by the field of compliance. The DSA seeks to demonstrate that these additions will better protect users and meet the demands of Member States. However, the DSA does not radically change to the way social media companies are regulated in the EU, as the libertarian-inspired liability exemption framework remains intact.[74] Contrary to some claims,[75] the DSA does not appear to be an aggressive regulation targeting companies. This is supported by reports showing that, like other EU digital legislation, the DSA was subject to intense lobbying throughout its legislative process, some of which was successful.[76] For example, companies successfully lobbied to exclude a ban on surveillance advertising, which was part of the original draft and would have radically changed the way social media companies make money by harvesting users' personal data.[77] The various elements presented above form a cluster of clues that leads us to question the European Commission's narrative, which claims that the primary role of the DSA is to ensure a secure Internet for users within the European Union. Furthermore, it seems wise to question the purpose of the DSA from a larger perspective, particularly by placing this legislation in the context of the resurgence of industrial policy in the European Union.[78] The current digital context reflects a growing awareness of the need to achieve strategic autonomy from the United States, with increasing calls for digital sovereignty.[79] From this perspective, the DSA should be seen as part of the EU's efforts to promote European companies whose business models are more in line with European values and are less dependent on American tech giants. However, the question is whether this can be achieved without radical changes to the regulatory framework that also applies to US companies. This requires a reading of the law that adopts a political economy perspective, in contrast to the focus of the dominant legal literature – which typically concentrates on

[73] The other law in force alongside the KoPl-G, the NetzDG, was abandoned by Germany when the DSA came into force. The fact that the CJEU had ruled in the Austrian case that national laws regulating social media ran counter to the principle of control in the country of origin probably played a part in this decision.
[74] Hiltunen (n 47).
[75] Algorithm Watch, 'A guide to the Digital Services Act, the EU's new law to rein in Big Tech' (21 September 2022) <https://algorithmwatch.org/en/dsa-explained/> accessed 20 December 2024.
[76] Emilia Korkea-aho, 'Legal Lobbying: The Evolving (But Hidden) Role of Lawyers and Law Firms in the EU Public Affairs Market' (2021) 22(1) German Law Journal 65; Robert Gorwa, Grzegorz Lechowski, and Daniel Schneiß, 'Platform lobbying: Policy influence strategies and the EU's Digital Services Act' (2024) 13(2) Internet Policy Review 1.
[77] Corporate Europe Observatory, 'How corporate lobbying undermined the EU's push to ban surveillance ads' (18 January 2022) <https://corporateeurope.org/en/2022/01/how-corporate-lobbying-undermined-eus-push-ban-surveillance-ads> accessed 20 December 2024.
[78] Kathleen R McNamara, 'Transforming Europe? The EU's industrial policy and geopolitical turn' (2024) 31(9) Journal of European Public Policy 2371.
[79] Luciano Floridi, 'The Fight for Digital Sovereignty: What It is, and Why It Matters, Especially for the EU' (2020) 33 Philosophy & Technology 369.

discussing the DSA's new obligations and their implementation.[80] Such a perspective would question the deeper reasons for this law and the new power relations it introduces or maintains, beyond the official narrative of its purpose. The case study of Austria is a first step to show how the regulatory framework for social media platforms might inherently favour corporate interests. Yet, it is not sufficient to fully map out interests or power dynamics, merely adding to the body of evidence that suggests the need to move in this direction. This evidence is supported by the literature on single market rationality[81] and the asymmetry of European integration,[82] which discusses how, in the process of European economic integration, a neoliberal vision – primarily favourable to business interests – has often prevailed over more socially oriented approaches. Furthermore, in the current context of democratic crisis and the rise of illiberalism, it is important to consider the potential for the DSA to be misused in ways that could serve anti-democratic agendas.[83] In all of these respects, future research on regulatory developments in social media governance, both within the European Union and beyond, would benefit from adopting analytical frameworks rooted in political economy studies to interpret the law through these lenses.

6 CONCLUSION

This paper has analysed the case of the KoPl-G and the subsequent legal battle with major social media companies. It has then placed the findings of the case in the context of the adoption of the DSA, a period that remains underexplored in the literature on social media regulation.

The case study has shown that the strategic use of EU law by social media companies has demonstrated how internal market principles can be very favourable to corporate interests. On the basis of the Austrian case study, this paper shows how social media platforms successfully used the ECD and internal market principles to challenge a national legislation aimed at combating illegal online content. By overturning Austria's KoPl-G, these companies ensured the dominance of an EU-wide framework over national regulatory efforts, thus contributing to safeguard the coherence of the Digital Single Market. From this perspective, the case reveals an alignment between corporate interests and the EU regulatory framework for social media companies.

This alignment is particularly interesting when considering the context of the adoption of the DSA, which was debated at the same time as the KoPl-G was being challenged in court. Officially, the DSA is presented as user protection legislation aimed at greater corporate accountability and transparency. However, the alignment between corporate interests and the EU regulatory framework in the Austrian case contributes to challenge this

[80] For example: Caroline Cauffmanand and Catalina Goanta, 'A New Order: The Digital Services Act and Consumer Protection' (2021) 12(4) European Journal of Risk Regulation 758 https://doi.org/10.1017/err.2021.8; João Pedro Quintais and Sebastian Felix Schwemer, 'The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?' (2022) 13(2) European Journal of Risk Regulation 191. https://doi.org/10.1017/err.2022.1

[81] Bartl (n 43).

[82] Scharpf (n 37).

[83] For this discussion, see in particular the work of Rachel Griffin (notably: 'EU Platform Regulation in the Age of Neo-Illiberalism – Working Paper' (*SSRN*, 29 March 2024) <https://ssrn.com/abstract=4777875> accessed 20 December 2024).

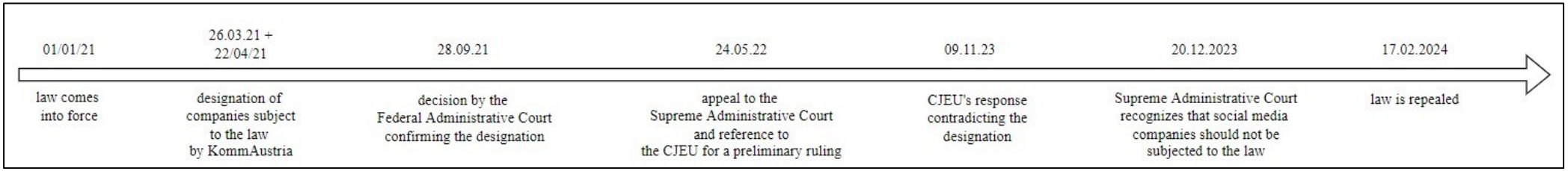
image of the DSA as a counterbalance to the power of Big Tech. Indeed, the preparatory works for this legislation show that the adoption of the DSA was not really motivated by a desire to better protect users, but mainly by fears of legal fragmentation in the digital single market. Moreover, by maintaining the liability exemption framework of the ECD, which has also proven to be very favourable to corporate interests, the DSA does not appear to represent a major change in the approach taken to social media regulation in the EU.

These elements cast doubt on the DSA's ability to act as a counterweight to the big tech companies. Next to new regulatory tools based on compliance mechanisms, the DSA overall retains a regulatory approach that has historically favoured corporate interests over public and user protection. This continuity casts doubt on the DSA's ability to bring about a paradigm shift in European social media regulation. On the contrary, the Austrian case study shows how social media platforms have been able to skilfully mobilise the EU regulatory framework to resist the obligations imposed on them. In the face of such a situation, compliance-based regulatory instruments, which express a similar form of 'corporate rationality', seem unable to sufficiently compensate for an unchanged dominant paradigm favouring corporate interests.

On this basis, the findings of the paper call for a reassessment of the underlying motives and potential consequences of the DSA. Future research should go beyond the mere discussion of the content of new rules and their implementation, and more critically examine the power relations between the EU, Member States, citizens and companies that this law enables. Critical lenses are needed to explore how social media regulation shapes not only market efficiency, but also issues of social justice, democratic accountability and the balance between public and private interests in the digital age.

Annex 1

Figure 1: Timeline of the KoPl-G and relevant events in the litigation process



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