



Saving EU digital constitutionalism through the proportionality principle and a transatlantic digital accord

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Abstract

The article explains the importance of the emerging movement for EU digital constitutionalism (EUDC), which reflects a Union-wide effort to address through regulation the challenges posed by digitalisation. The article outlines the core legislative acts that have been introduced by proponents of EUDC. It describes why EUDC is important for fundamental rights protection and European foreign policy, and how the ‘Brussels effect’ extends the impact of EUDC. It enquires into whether EUDC is sustainable, taking into consideration waning EU global influence and the need for economic growth. The EU needs to strike a balance between fundamental rights protection and economic growth. The proportionality principle is the right tool for this. A proportional approach should be followed in establishing a transatlantic digital accord with the US—an agreement on the basic principles governing the digital space. A more proportional approach will pave the way to such an agreement—giving EUDC a global scope.

Keywords

Digital constitutionalism, Digitalisation, Digital single market, EU–US relations, Information technology law, Proportionality principle

Introduction

EU digital constitutionalism (EUDC) is a regulatory movement which aims to address the challenges posed to society by digitalisation (De Gregorio 2021). The movement also aims to counteract the growing power of data, which jeopardises the sovereignty of the

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state and threatens fundamental rights. EUDC aims to adopt the values of contemporary constitutionalism and apply them to the digital society (Celeste 2019, 1–5). The ‘digital’ in EUDC refers to the development of the digital space, based on the progress in information technologies and their application. ‘Constitutionalism’ refers to defining the fundamental principles and rules governing society and the state. EUDC does not seek to change the most basic normative principles and rules governing society, such as the constitutions of the member states or the treaties. However, the challenge posed by digitalisation, and the scope and impact of new regulations, legitimise comparison to constitutional norms.

Digitalisation and the merging of interactions in the physical world with those online have compressed geographical distances and bridged physical barriers. They have enabled the flow of volumes of information that were previously unthinkable. The resultant infosphere has created a new space for humans to flourish in and for economic growth (Floridi 2014; Rifkin 2014). On the other hand, digitalisation challenges the social structure, creating numerous tensions. Concepts such as platform, informational or surveillance capitalism (Srnicek 2017; Cohen 2019; Zuboff 2019), and data power (Lynskey 2019) describe some of the ways in which the infosphere may threaten our fundamental rights. For example, nudging, manipulation (Sunstein & Thaler 2009; Yeung 2017) and monopolies are omnipresent in the platform economy (Stucke and Ezechachi 2016).

The EU has taken on the role of a global leader in addressing these challenges. It is the only governing power that has found the will to effectively regulate the growing power of Google, Amazon, Facebook, Apple and Microsoft (‘GAFAM’, as per Rikap 2021). Moreover, it is the only governing power that has not allowed the good of society to be overtaken by either the oligarchic interest of powerful digital capital, as in the US, or by a totalitarian will to use digital tools to subjugate the population, as in China. The EU’s global leadership in regulating the digital world has so far been fuelled by the ‘Brussels effect’—the ability of the EU to leverage and externalise its demanding rules by setting high-level standards for access to the single market (Bradford 2012). However, it is not clear how long the EU will be able to maintain its economic might or whether loosening the regulatory burden may be necessary to foster the economic growth needed to protect social stability and cohesiveness. Also, the overall decline of Europe as a global player may damage its ability to be a leader in setting the rules in the digital space.

The success of EUDC will mean the protection of EU citizens from the dangers posed by digitalisation. However, for EUDC to succeed, the EU must take a more pragmatic approach. First of all, this means showing more respect for the proportionality principle—that is, setting clear priorities and avoiding overregulation. Second, we need a transatlantic digital accord, meaning an international treaty with the US on the basic principles governing the digital space. While this would probably result in less ambitious regulation, such an agreement would ensure that EUDC has a truly global scope. Without this, the EU would remain the only jurisdiction with high and ambitious standards, but would be operating in an uneven environment for economic competition.

What does EUDC consist of?

So far, EUDC consists of a few cross-sectoral regulations which have set up a partial framework for conduct in the digital space. Initially the achievements of EUDC consisted of rudimentary laws regulating, for example, the flow of goods and services online, such as the eCommerce Directive (European Parliament and Council 2000), and the protection of personal data, such as the Data Protection Directive (European Parliament and Council 1995). During the first decades of the twenty-first century the pace of digitalisation accelerated, and so did the regulatory initiatives to tackle it. Entering into force in 2018, the General Data Protection Regulation (GDPR) (European Parliament and Council 2016) is a shining example of the success of EUDC and its global clout. The regulation impacted thinking about how to regulate and protect personal data all around the world. This is evidenced by the copying of some of the rights and obligations of the GDPR in, among others, China, Turkey and Colombia. In addition to legislation, the decisions of the European Commission and the jurisprudence of the European Court of Justice contributed to forming the movement for EUDC. These were also decisions and cases against GAFAM companies.

Currently the EU is in the middle of designing and enacting a comprehensive regulatory package that will revolutionise the digital economy. This effort was spearheaded by the publication of the *Digital Single Market Strategy* (European Commission 2015), which set the agenda for the development of the digital economy in the EU. The planned measures aim to set a level playing field for the future. They range from laws to protect competition in the digital economy, enhance data protection, and create data markets and repositories, to safeguarding the safety of artificial intelligence (AI) systems.

The GDPR will soon be supplemented by the ePrivacy Regulation (European Commission 2017)—a law setting out the rules for the confidentiality of electronic communication, including machine-to-machine communication. The work on the ePrivacy Regulation is taking longer than expected due to an inability to find political consensus. However, if its basic tenet is retained—the need for providers to ensure the confidentiality of electronic communication data and meta-data—it will have an impact on what kinds of data can be used for analytical purposes and how they can be used. For example, the use of communication data and meta-data to target advertisements will be curtailed, and pop-up ads on social media directly related to the content of your communications will no longer be possible.

The Digital Markets Act (DMA) (European Commission 2020b) will define a catalogue of behaviours harmful to online competition. The DMA aims to protect weaker economic actors from abuses by platform owners and other digital services providers. For instance, the DMA will oblige platform owners to disclose data related to the activity of the businesses on its platform to those businesses, which previously they have not had to do—something which is the source of a major economic and contractual power imbalance. The implementation of such a rule will mean that smaller players will be less dependent on the platform owner and have access to more business intelligence. But the

DMA goes much further than this, also translating the principles of competition law doctrine into the digital space—an important tool in fighting monopolies online.

The Digital Services Act (European Commission 2020a) will establish rules for content provision and moderation in the digital space. It will also establish clear rules of responsibility for the content. By obliging service providers to comply with transparent terms of service and setting rules for content moderation, as well as obliging service providers to notify the relevant authorities of possible crimes, the Act will end the discretionary power of major players, that is, GAFAM, to censor content. People will no longer be at the mercy of the platform owners to allow their freedom of speech and access to digital town squares, which these platforms currently act as.

The AI Act (European Commission 2021a) will set the rules and conditions for introducing AI systems into the single market. It aims to safeguard a dignity-centred approach to the development of AI systems. This will involve prohibiting AI systems that pose a risk to fundamental rights. The AI Act will establish due diligence and compliance rules but will also ban risky AI systems. For example, the act will probably ban most facial recognition systems and will oblige the users of AI to notify citizens if they are exposed to an algorithm able to materially distort their behaviour.

Finally, the Data Governance Act (European Commission 2020c) and Data Act (European Commission 2021b) will create rules for sharing data and creating data hubs. Both regulations aim to enable orderly and free data sharing in order to unleash the potential of data flows and their applications in the European economy. The Data Governance Act will regulate the rights and obligations of data intermediaries, while the Data Act will regulate and facilitate the process of data sharing. Both regulations are the means through which a new data market is to be established. This is the EU's way of regaining the competitive edge that it has already lost in the field of commercial platforms, which are dominated by US-originating companies.

Proportionality and the global impact of EUDC

The Brussels effect has so far sustained the global reach of the EU's ambitious digital agenda (Bradford 2012) by leveraging the market power of the EU to force entities wishing to enter the single market to accept higher legal standards. For cost reasons, once a company intends to comply with EU standards, it makes much more sense for it to do so in all of its operations. The consequence is that some companies based outside the EU also comply with the EU's higher legal standards. So far, the Brussels effect has had an impact in fields such as product and food safety, data protection, the exploitation of natural resources, plane emissions and antitrust. It is an open question as to what extent the Brussels effect will impact EUDC, because of the many different areas it will regulate.

Still, there is no doubt that the global leadership of the EU is necessary to secure democratic values and the protection of fundamental rights against both unrestrained capitalism and digitally enabled totalitarian tendencies in the digital realm. However, to

support this agenda the EU must cooperate globally and reach an agreement with other key players—with the US as a priority—to make sure that European values are as strongly held outside of the EU. This will guarantee a stable and secure digital space for Europeans in the years to come. But to reach a transatlantic agreement on the digital space, the EU must bear in mind both what unites us with and what divides us from our cousins across the ocean.

The neoliberal ideology found in *The Closing of the American Mind* (Bloom 1987)—which justifies, for example, extreme social inequality and a lack of public healthcare—is alien to Europeans, who are habituated to the social market economy. However, the EU's proclivity to regulate does indeed constrain innovation and economic growth. Thus, as much as protecting fundamental rights against the dangers of the digital space is imperative, this needs to be balanced against the need for economic growth, which sustains the stability and cohesiveness of our society. And that is why a more American, laissez-faire approach might be needed. At present the EU is not considered a business-friendly environment, especially when it comes to setting up a company in the digital economy. The compliance burden that has to be met by new businesses forces them to hire lawyers from the outset of operations as the regulatory wall is otherwise incomprehensible. This hampers EU growth and innovation.

Therefore, the EU needs to set its priorities and use the proportionality principle more. This means only imposing regulatory burdens where it is essential. Such an approach, aiming to simplify the rules and putting more emphasis on the freedom to innovate and conduct business, would necessarily lower the scope of protection. But it would also open up the field for establishing a transatlantic consensus on the digital space—the only way in which, in the long term, our most basic fundamental rights in this space can be effectively protected.

Conclusion

A transatlantic digital accord should be a pillar of the free, democratic world extended into the digital realm. But striking it will not be an easy task. The US has so far failed to properly safeguard the fundamental rights of its citizens in the digital space. It is a long way behind the EU in this regard. This can clearly be seen in the lack of comprehensive privacy and data protection, as well as in the problems faced when trying to set up a legal regime to regulate platforms and their monopolistic practices. The enormous political and lobbying power of digital giants and the strong oligarchic tendencies within the US democracy hinder the process. The ongoing Department of Justice antitrust lawsuits against the owners of the platforms are just the first steps to better regulation. However, it is American scholars and civil society that have taken action and conceptualised the dangers of the digital space (Zuboff 2019; Cohen 2019; Kapczynski 2020).

The geopolitical situation is forcing like-minded partners to come together to fight for freedom in the digital space. We are at present witnessing the emergence of the great digital divide between the democratic and the authoritarian worlds. The former is

addressing the social challenges posed by digitalisation and trying to streamline the development of the digital space in a way that serves democracy. In the latter, we are seeing the weaponisation of the digital space to control society on the one hand, and on the other, to use it as a tool against the free world. The digital authoritarianism of China (Lilkov 2020), followed by Russia and the other acolytes of authoritarianism, will naturally bring the EU and the US together. But this political will should lead to an agreement on contentious issues in order to seal the transatlantic relationship in the digital realm.

A few of the critical issues regarding the digital space that the EU and the US need to resolve are personal data protection, responsibility for content, taxation, competition protection and the regulation of AI systems. Reaching agreement on all of them will not be easy, and signing an international treaty will take years. But we need to start this process. Only by coming together can we face the challenges posed not only by the digital space itself but also by our adversaries using it as a tool against us. The EU should start by moderating EUDC through a more conscious use of the proportionality principle and then sit down at the table with the Americans to start negotiating the Transatlantic Digital Accord.

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