

Public Rules of Recognition of Platform Standards

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I. Introduction

Internet platforms influence how we interact with others. Their governing and standard-setting role has been recognized for some time, leading to a body of scholarship that focuses on what has been called “platform law”.¹ The distinct normative quality of platform standards provides for conflict with the normative claims of national legal systems. Now that a first wave of legislation and litigation concerning such standards has subsided, the paper explores the interaction between platform standards and meanwhile enacted (supra-)national law. It investigates how the state-based legal systems respond to, recognize or constrain the normative orders that platforms built. For this purpose, the paper adopts a descriptive approach:

In a first step, it applies the concept of transnational law to the standards set by digital platforms, situating platform governance within a theoretical framework that recognizes the global reach and normative force of these standards. Identifying platform standards as transnational legal orders, the paper contrasts between the normative models of *Meta*, whose standards were subject to much scrutiny and therefore especially differentiated, and the social network *X*, which is undergoing an increasing process of differentiation from other platforms. It also analyzes where platform standards depart from the classic form of contract through their public, social-constructive dimension, their quality as a contractual network, and their reinforcement through technological architectures.

In a second step, the paper shifts the focus from the platforms’ normative orders to the way public legal systems respond to and recognize those orders. Drawing on a variety of legislative and judicial responses from the EU and the US it explores the abstract criteria under which state-based laws and courts acknowledge platform standards as a form of normative ordering. From the analysis, elements of so-called public rules of recognition emerge that indicate when platform standards may coexist alongside national legal frameworks as a distinct normative order.

II. Platform Standards as Transnational Legal Orders

Platform standards consist not only of the decisions that companies make about what content to remove from their platforms, but more broadly of “the formal and informal rules that are generated by platforms to govern the rights and liabilities of their users”.² On a general level, a distinction can be made between contractual and technical standards:³ The former include the terms of service users have to accept, as well as other incorporated rules and policies, such as community standards. The latter involve the contingent, often invisible but no less important technological platform architecture which has the effect of steering user actions.⁴

Such standards display the characteristics of a transnational legal order as a contractual network.

1. Legal

Their *legal* character follows from their capacity to produce and enforce a normative order outside of a state-based system as a “semiautonomous social field”.⁵ What connects virtually all major

¹ David Kaye, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UNITED NATIONS A/HRC/38/35, perma.cc/R7EW-HGTE, at 3.

² Molly K. Land, *The Problem of Platform Law: Pluralistic Legal Ordering on Social Media*, in THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM 975, 978 f. (Paul Schiff Berman ed., 2020).

³ *Id.* at 980 f. At this point, it is not necessary to differentiate further between substantive and procedural standards.

⁴ Przemyslaw Jacek Palka, *Terms of Service Are Not Contracts – Beyond Contract Law in the Regulation of Online Platforms*, in EUROPEAN CONTRACT LAW IN THE DIGITAL AGE 135, 156 (Stefan Grundmann ed., 2018).

⁵ See generally Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOCIETY REVIEW 719 (1973); see also Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 392 ff. (2008), tracing the development.

platforms overall is an operative logic of economic efficiency, optimized for user engagement and advertising revenue. However, on a smaller scale – although platform standards have become subject to scrutiny through statutory requirements – platforms actively create distinct social orders by defining environments for their users through community standards and moderation practices.

Under the *Meta Terms of Service* for instance, services are built specifically to enable users to “build communities”.⁶ Such communities are bound to positive norms termed “values”, that include above all “voice”, as well as authenticity, safety, privacy, and dignity.⁷ The standards also feature repressive norms, for example – before the company changed its approach in early 2025 – a restriction of the display of nudity because “some people in our community may be sensitive to this type of content, particularly due to cultural background or age”.⁸ In contrast,⁹ the platform X claims to serve the public conversation which is reflecting in a more relaxed norm around sensitive content: “We believe that users should be able to create, distribute, and consume material related to sexual themes as long as it is consensually produced and distributed”.¹⁰

These norms are enforced through an array of mechanisms, beginning with the technological architecture of the platform that only allows for certain interactions, and ending with users being subjected to sanctions. Such sanctions range from algorithmic-enforced annotating, demoting or taking down user content to restricting or disabling the associated user accounts. The enforcement action in turn is subject to human review and an appeals process, creating a “miniature” legal system.¹¹ Platforms therefore produce and enforce their own digital normativity through explicit standards and implicit design choices.

2. Transnational

Platform standards have a *transnational* character because they order social relationships that transcend the nation-state.¹² This is not simply a consequence of a platform’s global online accessibility but results from the fact that the distinctive normative orders are not confined to a single state’s legal system but overcome national boundaries.¹³ *Meta* for example thinks of their services as global communities, leading to a globally uniform application of the community standards;¹⁴ X also has a transnational orientation claiming to be concerned with the value of “global public conversation”.¹⁵

Under *Eller’s* typology of the transnational dimensions of contract, platform standards come closest to the second type of transnational contracts drafted by business associations.¹⁶ Although he primarily describes model contracts that are used by downstream parties for the conclusion of individual contracts, a parallel is visible: Platforms also deliberately depart from the normative framework of national contract law to create a platform-specific legal order required by their

⁶ Meta, *Community Standards – Introduction* (Dec. 19, 2024), perma.cc/52G5-2VZL.

⁷ *Id.*

⁸ Meta, *Community Standards – Adult Nudity and Sexual Activity* (Dec. 19, 2024), perma.cc/EKC9-VJNG.

⁹ Meta has changed its approach in early 2025 as a reflection of the political climate in the US, cf. Meta, *More Speech and Fewer Mistakes* (Jan. 7, 2025), <https://about.fb.com/news/2025/01/meta-more-speech-fewer-mistakes/>.

¹⁰ X, *Rules and Policies – Adult Content Policy* (Dec. 19, 2024), perma.cc/K6QL-BBLX.

¹¹ Klaas Hendrik Eller, *Transnational Contract Law*, in THE OXFORD HANDBOOK OF TRANSNATIONAL LAW 514, 516 (Peer Zumbansen ed., 2021). *Meta* has taken this further with the establishment of the Oversight Board as a dedicated appeals body, consciously framing it in juridical terms as a “Supreme Court”, cf. Ezra Klein, *Mark Zuckerberg on Facebook’s Hardest Year, And What Comes Next*, VOX (Apr. 2, 2018), perma.cc/R3Q8-S22F; critical Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526 (2022); Thomas E. Kadri, *Juridical Discourse for Platforms Content Moderation: Response*, 136 HARV. L. REV. F. 163 (2022).

¹² See Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 3, 20 (Gregory Shaffer & Terence C. Halliday eds., 2015).

¹³ See *Id.* at 18 f.

¹⁴ Meta, *Policies – The Community Standards apply the same to everyone, everywhere* (Dec. 19, 2024), perma.cc/R72H-MCMP.

¹⁵ X, *Help Center – The X Rules* (Dec. 19, 2024), perma.cc/NF3Q-ZPVL (emphasis added).

¹⁶ See Eller, *supra* note 11 at 518.

economic model.¹⁷ *Meta's* restrictions on nudity, justified with the sensitivity of some of users, may be explained with a bias towards US civility norms,¹⁸ however, also are about promoting engagement and serving majoritarian preferences: “People will only build community on Meta Products if they feel safe and secure”.¹⁹

3. Order

Lastly, platform standards produce *order*, primarily through contractual means. They seem to employ the classic form of contract through consent-based private ordering that is geared towards state enforcement. Granted that platform standards maintain a link and subscribe to (inter-)national legal systems – for example through frequent choice of law²⁰ and liability²¹ clauses. However, this perspective tends to overlook certain special features of platforms standards:²²

First, such contracts have a public and social productive dimension.²³ Standards set by the largest platforms do not adhere to privity of contract but become meaningful for social practices independent from the contracting parties. Speech on platforms for instance has become formative for public expectations.²⁴ This gives limits to freedom of expression a social dimension. Platform standards also show public repercussions concerning negative externalities of contracts, for example with regards to creative expression. When platforms contractually create new exclusive rights for rightsholders,²⁵ socially meritorious productive downstream uses of copyright protected works are suppressed. Externalities also occur when platforms magnify harms, for instance concerning hate speech: “The Rohingya suffered far more from the hate speech that Facebook (now, Meta) allowed on its platform than Facebook did”.²⁶ Instead of reductively speaking of “private” ordering, such contracting is therefore better addressed and understood as a form of *social* ordering.²⁷

Second, another blind spot follows from a focus on the contractual relationship between platform provider and single users. The platforms’ mode of operation does not hinge on isolated bilateral contracts vis-à-vis single users but on the users’ interconnectedness. Its value stems from network effects. Platform standards therefore can also be understood as a contractual network.²⁸ *Teubner* has characterized such relationships in the business context as interrelated contracts between independent entities to achieve economic coordination.²⁹ The elements of coordination in pursuit of a shared goal and interdependency are also given for platforms: User engage as autonomous entities, deciding when to share which content, while platforms coordinate user exchange, for example through technical infrastructure such as algorithmized recommendations.³⁰

Third, rather than depending on state enforcement of contractual terms, platform standards become effective through technological architecture expressed in code. User exchange is

¹⁷ See *Id.*

¹⁸ In this direction LEE A. BYGRAVE, *INTERNET GOVERNANCE BY CONTRACT* 90 (2015).

¹⁹ Meta, *Terms of Service*, 1.5 (Dec. 19, 2024), perma.cc/3DPV-6QES.

²⁰ See Meta, *Terms of Service*, 4.4 (Dec. 19, 2024), perma.cc/3DPV-6QES; X, *Terms of Service*, 6 (Dec. 19, 2024), perma.cc/BPH6-T43P.

²¹ See Meta, *Terms of Service*, 4.3 (Dec. 19, 2024), perma.cc/3DPV-6QES; X, *Terms of Service*, 5 (Dec. 19, 2024), perma.cc/BPH6-T43P.

²² See in general Eller, *supra* note 11 at 521.

²³ See generally Bertram Lomfeld & Dan Wielsch, *Foreword: The Public Dimension of Contract: Contractual Pluralism Beyond Privity*, 76 LAW AND CONTEMPORARY PROBLEMS i (2013); concerning platforms Dan Wielsch, *Die Ordnungen der Netzwerke. AGB – Code – Community Standards* 61, 62 (2018).

²⁴ Wielsch, *supra* note 23 at 61 f.

²⁵ See Xiyin Tang, *Privatizing Copyright*, 121 MICH. L. REV. 753 (2022).

²⁶ Mark MacCarthy, *Transparency Is Essential for Effective Social Media Regulation*, BROOKINGS INST. (Dec. 20, 2024), perma.cc/3TLD-JYEG.

²⁷ See Eller, *supra* note 11 at 523; Wielsch, *supra* note 23 at 63.

²⁸ Niva Elkin-Koren, Giovanni De Gregorio & Maayan Perel, *Social Media as Contractual Networks: A Bottom up Check on Content Moderation*, 107 IOWA L. REV. 987, 1035 f. (2021).

²⁹ GUNTHER TEUBNER, *NETWORKS AS CONNECTED CONTRACTS* passim (Hugh Collins ed., 2011).

³⁰ Elkin-Koren, De Gregorio, and Perel, *supra* note 28 at 1035.

mediated through the contingent forms that a platform provides for.³¹ Due to their social constructive character, the self-enforcing regulatory quality of such code shows special consequences for platforms: How they coordinate user action is detached from any verbal communication processes, or “de-verbalized”,³² and therefore disembedded from a communicative rationality that is based on a shared understanding through dialogue.³³ It also shows that addressing *normative* contractual disparities in platform standards is insufficient as the technological management is not subject to contract but falls under the discretion of the platform provider.³⁴ An emphasis on the contractual relationship alone would fail to recognize this *factual* inequality.

III. Public Rules of Recognition

Platform standards have been around for some time. Since at least the early 2010s, they are also subject to extensive debate, resulting in a vast array of ideas, proposals and demands for how to make them better, more just and provide them with greater legitimacy. Understanding platform standards as a transnational legal and social productive order sheds light not only on possible inadequacies of purely national regulation. More importantly, it focuses on the interaction with statist law. Because: Just as platform orders respond to regulatory activity, their logic also influences legal evolution in (supra-)national legal systems.³⁵ Under this viewpoint, the role of the state therefore is not marginalized but focuses on the question under what conditions it recognizes platform normativities.³⁶ When are platform orders accepted to coexist in that the normativity of the platform is recognized? Under which circumstances, on the other hand, is its recognition denied, promoting a homogenization of the environments and foreclosing any influence?

A look at legislative and judicial responses to platform standards under EU and US law allows to identify abstract criteria of such “public rules of recognition”³⁷. These rules guide how platform standards gain legal validity and recognition within public legal systems. They concern less the legal requirements imposed for the operation of a platform as such, but the embedded principles, whose presence within platform standards means that states do not interfere with their normativity.

The search for public rules of recognition in EU law, of course, must start with the Digital Services Act (DSA). Also considered are provisions from the Digital Single Market Directive (DSM Directive) concerning copyright on platforms, and a decision by the German Federal Court of Justice (BGH) on the validity of Facebooks terms of use from before the DSA’s enactment. Such court decisions are of high interest in this undertaking. Other than legislators, courts are forced to justify their reasoning in legal code and thereby point to the general principles behind the rulemaking. Concerning the US legal landscape, this essay takes recent platform state laws in a representative spectrum into account: from New York,³⁸ struck down by

³¹ Wielsch, *supra* note 23 at 69.

³² *Id.* at 68.

³³ Cf. JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (VOL. I) 273 ff. (1984).

³⁴ Palka, *supra* note 4 at 151 ff.

³⁵ See generally concerning this dialectic Dan Wielsch, *Global Law’s Toolbox: Private Regulation by Standards*, 60 THE AMERICAN JOURNAL OF COMPARATIVE LAW 1075, 1077, 1095 (2012); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1197 ff. (2006).

³⁶ Wielsch, *supra* note 35 at 1077. This is not to suggest that the orders, however, depend on such recognition.

³⁷ *Id.* at 1095 f.

³⁸ N.Y. Gen. Bus. Law § 394-ccc.

a District Court in February of 2023,³⁹ and California,⁴⁰ to Texas⁴¹ and Florida⁴² that are subject to an ongoing court dispute that meanwhile also led to a Supreme Court decision.⁴³

Focusing on these rules, overall, three criteria of public rules of recognition stand out: (1) consent, (2) legitimacy and reflexivity through procedure, and (3) the presence of self-limitations.

1. Consent

Implied in all legislative and judicial responses to platform standards is the notion that users must have submitted to them in some form. For example, Art. 14(1), (4) DSA provides for transparency around any restrictions concerning the platform use in the platform's terms and conditions; Art. 17(3)(e) DSA requires reference to the contractual ground the platform relied upon for a moderation decision. The DSA therefore operates on the assumption that the legal basis for platform normativity are the terms and conditions which depend on user acceptance.⁴⁴ The same applies to the Florida (§ 501.2041(1)(h)), Texas (§143A.001(6)) and California (§ 22676) statutes that (in case of Texas and California at least factually) only apply concerning persons that have an account and therefore submitted to platform standards. The German Federal Court of Justice also accepts terms and conditions to be a vehicle for platform restrictions,⁴⁵ linking the normative order to user acceptance.

Meaningful is what is not required: The recognition of platform standards does not depend on a representation of *all* affected interests,⁴⁶ such as third parties that never accepted any terms, however, are affected by their standards. Mere formal user consent is enough. While notice and consent models are widely regarded as insufficient to legitimize platform operations because the conditions necessary for consent to function are missing in the platform environment,⁴⁷ the role of consent, however, must not be overstated. As all featured legal systems require if not substantive then at least procedural standards on top, it serves as a minimum and necessary but not sufficient rule of recognition.

2. Legitimacy and Reflexivity Through Procedure

(Supra-)National legal systems reacted to the emergence of platform normativity with procedural guarantees as well. This concerns on one hand appeal processes to moderation decisions, most comprehensively in the DSA: Art. 20 DSA establishes an internal complaint-handling system that provides users with the power to lodge complaints against restrictions for a period of at least 6 months. This is complemented with an out-of-court dispute settlement mechanism under Art. 21 DSA that allows for platform-independent appeals via certified bodies. However, such bodies have no power to impose a binding settlement (Art. 21 (2) DSA). Texas provides for a similar complaint and appeal mechanism.⁴⁸

More relevant for platform standards on the other hand are rules directed at the application and enforcement of the normativity-forming community standards. Art. 14 (4) DSA for example obliges platform providers to enforce their policy in an objective, meaning non-discriminatory and non-arbitrary,⁴⁹ and proportionate manner. This stands in line with case law from the

³⁹ Volokh v. James, No. 22-CV-10195, 2023 WL 1991435, at *11 (S.D.N.Y. 2023).

⁴⁰ Cal. Bus. & Prof. Code §§ 22675–22681.

⁴¹ Tex. Bus. & Com. Code §§ 120.001–.151 and Tex. Civ. Prac. & Remedies Code §§ 143A.001–.008.

⁴² Fla. Stat. § 501.2041.

⁴³ Moody v. NetChoice, LLC, 603 U.S. ____ (2024); NetChoice, LLC v. Paxton, 603 U.S. ____ (2024).

⁴⁴ Wolfgang Schulz & Christian Ollig, *Hybrid Speech Governance: New Approaches to Govern Social Media Platforms under the European Digital Services Act?*, 14 JIPITEC, 573 (2023).

⁴⁵ See BGH, 29.7.2021 – III ZR 179/20, NJW 2021, 3179 para. 39, 78.

⁴⁶ In contrast for model standard contract terms, see Wielsch, *supra* note 35 at 1096 f.

⁴⁷ See Elettra Bietti, *Consent as a Free Pass: Platform Power and the Limits of the Informational Turn*, 40 PACE L. REV. 310 (2019); BYGRAVE, *supra* note 18 at 143, 145.

⁴⁸ Tex. Bus. & Com. Code §§ 120.101-04.

⁴⁹ Schulz and Ollig, *supra* note 44 at 574.

German Federal Court of Justice, prohibiting an arbitrary enforcement of standards when a platform does not restrict discussions to certain subject matter.⁵⁰ Similarly, Florida provides for a consistent application of restrictions among users.⁵¹ Art. 14 (4) DSA goes even a step further and makes enforcement with “due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service” mandatory. New York and California do not provide for procedural guarantees.

The different provisions show that procedure plays an important role for the recognition of platform normativity. For one, this involves the legitimation of platform standards. Formally regarded, as a *private* order built on a contractual basis, platform standards offer no legal legitimation other than private autonomy through consent – which, however, cannot legitimize their privity-overcoming effects on third parties. But even user-based consent provides only little legitimation as it is agnostic to information asymmetries and power disparities.⁵² Due to their *transnational* character and public dimension, they also cannot rely upon the procedural and substantive legitimation of national law.⁵³ The proceduralization requirements therefore serve to compensate for the one-sided design of the order, establishing weak democratic legitimacy.⁵⁴

On the other hand, the procedural mechanisms serve as a counterstrategy against an uncontrolled expansion of platform orders. In this context, they resemble constitutional limitations, not directed at political power but at the rationality of platforms. The concept of societal constitutionalism applies a functional perspective to political constitutions: Their constitutive function lies in restraining political power from interfering with social autonomies.⁵⁵ However, platform standards show that orders may also be generated decentralized beyond the political system, which prompts the question: what constitutional limitations exist for such orders?⁵⁶

Platform standards perform such constitutive functions. They consist of positivized constitutional norms, e.g. in the case of *Meta* the overarching “values”,⁵⁷ and the body of community standards, informal practices and technological design choices that define a platform’s identity, their “we”.⁵⁸ They provide for different interacting arenas of an organized professional and a spontaneous sphere,⁵⁹ the former consisting for instance of content moderation systems and oversight bodies, the latter channeling external pressures and impulses for example through user communities and grassroots activism. Most importantly here, reflexive processes that ensure both self-regulation and responsiveness to external pressures are present.⁶⁰ Examples include the development of rules to regulate the platform’s output such as community standards (internal reflexivity), the responding to societal pressures by integrating of human rights principles⁶¹ (external reflexivity), and the set-up of the Oversight Board, reflecting both platform rules and human rights standards (hybrid reflexivity).⁶²

⁵⁰ BGH, 29.7.2021 – III ZR 179/20, NJW 2021, 3179 para. 82.

⁵¹ Fla. Stat. §501.2041(2)(b).

⁵² Cf. See Bietti, *supra* note 47; BYGRAVE, *supra* note 18 at 143, 145; Gunther Teubner & Angelo Jr Golia, *Societal Constitutionalism in the Digital World: An Introduction*, 30 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 1, 11 (2023).

⁵³ That is based on democratic deliberation and fundamental rights compliance, see Wielsch, *supra* note 35 at 1078.

⁵⁴ Schulz and Ollig, *supra* note 44 at 573; in this direction see also Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, 4 SOCIAL MEDIA + SOCIETY 1 (2018).

⁵⁵ See GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 17 (2012); Dan Wielsch, *Private Governance of Knowledge: Societally-Crafted Intellectual Properties Regimes*, 20 IND. J. GLOBAL LEGAL STUD. 907, 909, 919 (2013).

⁵⁶ See generally Wielsch, *supra* note 55 at 919.

⁵⁷ Lorenzo Gradoni, *Constitutional Review via Facebook’s Oversight Board: How platform governance had its Marbury v Madison*, Verfassungsblog (Dec. 19, 2024), perma.cc/AF7E-RWC3.

⁵⁸ See generally Angelo Jr Golia & Gunther Teubner, *Societal Constitutionalism: Background, Theory, Debates*, 15 ICL JOURNAL 357, 378 (2021).

⁵⁹ See generally *Id.* at 380 ff.

⁶⁰ See generally *Id.* at 385 f.

⁶¹ Meta, *Community Standards – Introduction* (Dec. 19, 2024), perma.cc/52G5-2VZL.

⁶² See Lucas Henrique Muniz Da Conceição, *A Constitutional Reflector? Assessing Societal and Digital Constitutionalism in Meta’s Oversight Board*, 13 GLOBAL CONSTITUTIONALISM 557 (2024).

Under this framework, the rule of law-like procedural mechanisms can be understood as limitations or instances where the law makes such reflexivity normatively binding.⁶³ The appeals processes for instance enforce critical evaluation of platform decisions and the requirement of neutral enforcement standards institutionalizes reflexivity because platforms are held to monitor and adjust their practices on an ongoing basis. Furthermore, the Oversight Board for example reflects the role of state courts in reviewing state legislation as an internal self-limitation.⁶⁴

This demonstrates that the recognition of platform normativity hinges on procedural mechanisms that provide for legitimacy but also ensure that a platform is capable of self-regulation in response to internal dynamics and external influences.

3. Presence of Self-Limitations

a. Transparency

Central to all regulatory and judicial responses to platform standards is transparency. The analyzed legislation and jurisprudence show general as well as individualized information obligations, as well as recurring reporting obligations.

As a general information obligation, Art. 14 (1) DSA obliges platform providers to provide information on any policies, procedures, measures and tools used for the purpose of content moderation, as well as the rules of procedure of internal complaint handling systems. In parallel, the Florida and Texas statutes both require platform providers to publish explanations of community standards;⁶⁵ Florida additionally demands notices concerning rule changes.⁶⁶ Under New York Law, platforms must in a narrower fashion make available how they respond and address incidents of hateful conduct.⁶⁷ The Californian statute requires a list of potential actions taken against user content.⁶⁸

Concerning individual decisions such as the demotion of content, account suspensions or terminations, information must be provided under Art. 17 (1), (3) DSA on the reasons, including the facts relied on in taking the decision, whether automated means were used, and what contractual ground the decision was based on. Under both Floridian and Texan law, platforms must notify users of moderation decisions with a detailed explanation.⁶⁹ In a similar fashion, the German Federal Supreme Court obliged Facebook to inform users of content removal and the reason.⁷⁰ The Texas law goes even further, extending to “a description of each tool, practice, action, or technique used in enforcing the acceptable use policy”.⁷¹ The New York and California statutes do not concern single moderating decisions.

Transparency reporting obligations follow from Art. 15 DSA consisting of an at least yearly machine-readable report on content moderation that includes the number and type of measures taken categorized by the type of violation of the terms and conditions. Parallel to that, in Texas platforms are obliged to periodically publish data on their content moderation, disclosing i.a. what rule was being enforced and what action was taken.⁷² Under the California Law, a terms of

⁶³ See Wielsch, *supra* note 55 at 923.

⁶⁴ See Teubner and Golia, *supra* note 52 at 11 that demand such constitutional review. It is no coincidence that the Oversight Board Trust has meanwhile established with the “Appeals Centre Europe” its own out-of-court dispute settlement body certified under the Art. 21 DSA, see Oversight Board, *Statements from the Oversight Board Trust and Oversight Board Members on the announcement of the Appeals Centre Europe* (Dec. 19, 2024), perma.cc/4HU2-JZZL.

⁶⁵ Fla. Stat. § 501.2041(2)(a); Tex. Bus. & Com. Code § 120.052.

⁶⁶ Fla. Stat. § 501.2041(2)(c).

⁶⁷ N.Y. Gen. Bus. Law § 394-ccc(3).

⁶⁸ Cal. Bus. & Prof. Code §§ 22676(b)(3).

⁶⁹ Fla. Stat. § 501.2041(2)(d), (3); Tex. Bus. & Com. Code §§ 120.101–104.

⁷⁰ BGH, 29.7.2021 – III ZR 179/20, NJW 2021, 3179 para. 85.

⁷¹ Tex. Bus. & Com. Code §§ 120.051(a), 120.053(7), see Daphne Keller, *Platform Transparency and the First Amendment*, 4 J. FREE SPEECH L. 1, 14 (2023).

⁷² Tex. Bus. & Com. Code § 120.053.

service report including a description of moderation practices and information on flagged content must be submitted semiannually.⁷³

The provisions show that transparency currently is a focus point of platform regulation, which answers to constant calls from academia and civil society.⁷⁴ From the perspective of societal constitutionalism it plays an important role because it provides for external reflexivity by forcing platforms to open their processes to scrutiny. Through exposure transparency enables critique, pushes platforms to engage with outsiders, and to justify and adapt moderation policies. This again points to a platform's capability of self-regulation as a criterion for public recognition.

At first glance, transparency also qualifies as a normativity-preserving rule of recognition because it seems to keep a platform's normative order intact: Platforms are not forced to establish certain rules but only to articulate theirs – coherence is owed, not substance.⁷⁵ However, in the platform context transparency mandates are very likely to introduce substantive changes to a platform's environment. *Keller* makes the compelling case that information obligations of platforms tend to cause them to tighten their speech norms.⁷⁶ This is because increased exposure to liability and costly litigation creates economic incentives to take down content at the expense of users. Furthermore, due to the sheer number of decisions, errors will force platforms to specify their rules or just moderate less.⁷⁷ Some rulemakers intend this effect as “de-facto speech rules”⁷⁸ as a necessary intermediate stage towards more substantive change.⁷⁹ It would therefore be misguided to understand transparency as a public rule of recognition in the sense of recognizing the normativity of a platform.

b. Substantive Requirements

Lastly, (supra-)national legal systems have responded to platform normativity with substantive requirements. On the extreme end, the Texas statute prohibits moderating content based on viewpoint.⁸⁰ The Florida law in contrast only applies to known political candidates and journalistic enterprises:⁸¹ Concerning political candidates, platforms are enjoined from prioritizing or demoting their content and content about them, concerning journalistic enterprises from “censoring”⁸², banning or demoting content.⁸³ The German Federal Supreme Court held that banning certain political views on Facebook is unlawful as the platform is not restricted to discussions of distinct subject matter.⁸⁴ New York and California do not impose any substantive requirements.

Surprisingly, the DSA is not clear on the substantive front: Art. 14 (4) DSA, which demands due regard to freedom of expression and freedom of media, is limited in its wording to the application and enforcement of restrictions from the terms and conditions – making it a

⁷³ Cal. Bus. & Prof. Code §§ 22676(b)(3).

⁷⁴ See in detail Robert Gorwa & Timothy Garton Ash, *Democratic Transparency in the Platform Society*, in SOCIAL MEDIA AND DEMOCRACY 286, 293 ff. (Joshua A. Tucker & Nathaniel Persily eds., 2020); generally Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L. J. 2418, 2479 (2019); Evelyn Douek, *The Siren Call of Content Moderation Formalism*, in SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 139, 143, 153 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022).

⁷⁵ Consequently, Art. 17 (1) DSA for instance presupposes the normative order of the platform as given: “*their* terms and conditions”, emphasis added.

⁷⁶ Keller, *supra* note 71 at 76.

⁷⁷ *Id.* at 21, 23, 25, 31.

⁷⁸ *Id.* at 23.

⁷⁹ See generally Mark MacCarthy, *Transparency Is Essential for Effective Social Media Regulation*, BROOKINGS INST. (Dec. 20, 2024), perma.cc/3TLD-JYEG.

⁸⁰ Tex. Bus. & Com. Code § 143A.002(a).

⁸¹ Fla. Stat. §501.2041(2)(h),(j).

⁸² Encompassing to „delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to“ content, Fla. Stat. §501.2041(1)(b).

⁸³ Fla. Stat. §501.2041(2)(h),(j).

⁸⁴ BGH, 29.7.2021 – III ZR 179/20, NJW 2021, 3179 para. 81.

procedural guarantee only. In contrast, recital 45 to the DSA deems it appropriate to subject the “content, application and enforcement”⁸⁵ to substantive standards. While the recital is not binding, there are better reasons to bind platforms to fundamental rights not only concerning their enforcement but also their rulemaking.⁸⁶ This is supported by the objective of the DSA to effectively protect the fundamental rights (Art. 1 (1) DSA) and by the fact that the balance of interests would be significantly disturbed if a platform’s terms and conditions were substantively inappropriate.⁸⁷

aa. Limiting Function of Substantive Requirements

Considering the Supreme Court decision in the *Netchoice* case, it is doubtful whether the US laws, in particular the Texas law, will be upheld in this form. The Supreme Court classified the content moderation practices of platforms as an expressive product based on certain viewpoints.⁸⁸ Platform normativity is therefore recognized simply because it is protected expression – any reference to conflicting rights is irrelevant. What the statutes make explicit nonetheless is where the willingness of legislators to recognize platform normativity ends. Again, it seems to follow the functional logic of constitutional limitations: A limitation is warranted when a social autonomy expands their logic to the detriment of others.⁸⁹

bb. Florida Deplatforming Law and Maximizing User Engagement

Take the Florida deplatforming law as an example. It addresses the algorithmic placement of content, a practice that is grounded in the general platform logic of maximizing advertising value through user engagement. This logic would encroach upon the democratic opinion-forming process under the political system when certain candidates or journalistic enterprises are cut off from public reach.⁹⁰ The DSA’s approach of tying platform standards to fundamental rights also fits into this picture. Fundamental rights serve as boundaries to platform logic by allowing users to invoke their autonomous communicative spheres free from any intervention.⁹¹

cc. Art. 17 DSM Directive and Copyright’s Property Logic

Another example can be found in a slightly different context, not concerning free but creative expression. Part of platform standards are also rules for the use of intellectual property, especially copyrighted material. These rules are influenced by opaque license agreements between platforms and rightsholders. *Tang* has drawn attention to the fact that platforms grant rightsholders special rights that exceed the statutory exclusive rights under copyright.⁹² In a leaked contract with music publishers and songwriters, *Facebook* for example allowed rightsholders to request takedowns of user content that contains copyrighted material based on a “bona fide writer objection”.⁹³ While the terms of the license agreements are kept secret through strict confidentiality clauses,⁹⁴ platforms pass them down to users by reserving broad content removal rights in the terms of

⁸⁵ Emphasis added.

⁸⁶ João Pedro Quintais, Naomi Appelman & Ronan Ó Fathaigh, *Using Terms and Conditions to Apply Fundamental Rights to Content Moderation*, 24 GERMAN LAW JOURNAL 881, 894 ff. (2023); Schulz and Ollig, *supra* note 44 at 575 f.

⁸⁷ Raue, *Art. 14 DSA – Allgemeine Geschäftsbedingungen*, DIGITAL SERVICES ACT 75 f. (Hofmann & Raue eds., 1 ed. 2023).

⁸⁸ *Moody v. NetChoice, LLC*, 603 U.S. ____ (2024).

⁸⁹ See Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?* (Jan. 24, 2006), <https://papers.ssrn.com/abstract=876941> (Dec. 19, 2024); Wielsch, *supra* note 55 at 909: “encroaching.”

⁹⁰ Of course, this does not mean that the legislator actually pursued the goal of preventing this. There is much to suggest that there were other political reasons in the case of Texas and Florida.

⁹¹ See generally on this role in the transnational context TEUBNER, *supra* note 55 at 139 ff.

⁹² Tang, *supra* note 25.

⁹³ Facebook, *Facebook – Publisher License Agreement*, Digital Music News (Dec. 19, 2024), perma.cc/57RA-JZMK, at 2.

⁹⁴ *Id.*, at 4.

service.⁹⁵ The *Facebook Music Guidelines* that are incorporated into the *Meta Terms of Service* for instance state: “You may not use content on our Products to create a music listening experience. (...) Unauthorized content may be removed.”⁹⁶

This example illustrates why it is reductive to think of platform standards as a form of private or even contractual ordering. On one side, it underlines the public dimension of the standards. The privacy of the license agreements is bypassed through extensive moderation powers towards users. The license terms not only restrict the freedom of the platform provider but of every user. The application of statutory limitations to copyright, which are not mentioned in the contract terms and conflict with the contractual rights of the rightholders,⁹⁷ is placed at the discretion of the platform – which has contractually committed to exercise it in favor of the platform owners at their request.

On the other side, the example also highlights the independent role of the enforcement mechanisms. Many platforms rely on automated systems that can identify and filter user content based on large databases filled with information on copyrighted works from rightholders.⁹⁸ It is a form of factual self-enforcing technological management that is decoupled from the normative contractual grounds between platform and user.⁹⁹

At the same time, a narrow understanding of platform standards as bilateral relationships demonstrates its limitations. At issue are not just restrictions of individual users. A contractual approach cannot reflect effects of the license terms on other users. If platform standards are understood as contractual networks, however, such negative spillovers¹⁰⁰ can be recognized and addressed.¹⁰¹ This could mean for instance that the platform bears an obligation to deploy content moderation without prejudice to the interests of the network as a whole.¹⁰²

The response to this platform practice under the DSM Directive functionally resembles a constitutional limitation. The normative claim that is expanding onto other social autonomies here is the property logic¹⁰³ of copyright law. The restrictive contractual terms enable rightholders to enforce transactions with users – irrespective of the operational logic of other social autonomies,¹⁰⁴ effectively rewriting substantive law.¹⁰⁵ The DSM Directive seems to subscribe to the property logic at first glance because it requires platforms to make best efforts to obtain permissions from rightholders for works uploaded by users (Art. 17 (1) DSM Directive). However, it also states that the relationship between platform and rightholders must not prevent the availability of user-uploaded works that fall under copyright limitations (Art. 17 (7) DSM Directive). Under the German implementation of the Directive for example this has led to platforms being forced to leave uses online that presumably fall under a limitation until an appeal is concluded.¹⁰⁶ Additionally, they must enable users to flag uses as fair,¹⁰⁷ meaning that law makes external reflexivity normatively binding for platforms.

⁹⁵ See Tang, *supra* note 25 at 758 n. 20. For example, see Facebook, *Music Guidelines* (Dec. 19, 2024), perma.cc/ECD5-QG2A: “Unauthorized content may be removed”.

⁹⁶ Facebook, *Music Guidelines* (Dec. 19, 2024), perma.cc/ECD5-QG2A.

⁹⁷ Tang, *supra* note 25 at 774.

⁹⁸ See *Id.* at 765 ff. with examples.

⁹⁹ See Palka, *supra* note 4 at 154 ff.

¹⁰⁰ Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUMBIA LAW REVIEW, 2007, at 257.

¹⁰¹ See for example the approach of Elkin-Koren, De Gregorio, and Perel, *supra* note 28.

¹⁰² *Id.* at 1042.

¹⁰³ This term was coined by Thomas Dreier, *Primär- Und Folgemärkte*, in *GEISTIGES EIGENTUM IM DIENST DER INNOVATION* 51, 70 (Gerhard Schricker, Thomas Dreier, & Annette Kur eds., 1 ed. 2001).

¹⁰⁴ DAN WIELSCH, *ZUGANGSREGELN: DIE RECHTSVERFASSUNG DER WISSENSTEILUNG* 41 (2008); Dan Wielsch, *Relationales Urheberrecht: Die Vielen Umwelten Des Urheberrechts*, 5 ZGE/IPJ 274, 295 (2013).

¹⁰⁵ Tang, *supra* note 25 at 769 ff.

¹⁰⁶ § 9(1) Act on the Copyright Liability of Online Content Sharing Service Providers (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG).

¹⁰⁷ § 11 (1) No. 3 Act on the Copyright Liability of Online Content Sharing Service Providers (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG).

Both examples show the need to prevent the platform logic from encroaching on social autonomies. The substantive requirements can therefore be interpreted as societal constitutional limitations in function, however, not in origin: They are stop rules *external* to the platform standards, and not internally developed, which comes with the disadvantage of interfering with the platform normativity and a dependance on compliance. That legislators perceive such external limitations as necessary can be attributed to the absence of adequate internal self-limitations.¹⁰⁸ Conversely, an element of public rules of recognition therefore lies in the presence of such self-limitations.

IV. Conclusion

Platforms standards, comprising of the formal and informal rules that are generated by platforms to govern the rights and liabilities of their users, constitute transnational legal orders. They have a *legal* character because they produce and enforce distinct normative orders with values such as to “build communities” (*Meta*) or to “serve the public conversation” (X) through explicit community standards and implicit technological design choices. As their normative orders transcend the nation-state, platform standards are *transnational* structures. They constitute an *order* through contracts that seem to employ the classic form, however, have special characteristics: They share a public, social constructive character in that they govern free speech and creative expression beyond contractual privity and therefore should be understood as a form of social ordering; they are part of a contractual network with the consequence that taking only the bilateral relationship between platform and user but not the users’ interconnectedness into account does not capture the complexity of a platform; and, they are self-enforced through contingent technological architectures designed at the discretion of the platform provider.

Platform standards as distinct transnational legal orders interact with (supra-)national law, evoking the question under what circumstances their normativity is recognized as law and accepted to coexist. After a first wave of legislation and litigation, looking at European and US regulation and case law in response to platform standards, three elements of such public rules of recognition emerge:

- (1) Consent: Instead of requiring a representation of all affected interests, all analyzed responses to platform standards let on formal consent suffice.
- (2) Legitimacy and reflexivity through procedure: Comprehensive procedural mechanisms in the legislative and juridical responses provide for legal legitimation that platform standards lack as a transnational order determined by platforms and only formally consented to. Under the framework of societal constitutionalism, these instances demonstrate how the law makes internal, external and hybrid reflexive processes normatively binding for platforms to ensure both self-regulation and responsiveness to external pressures.
- (3) Presence of self-limitations: The transparency requirements regularly placed on platforms provide for reflexivity and force a justification of standards, however, are also likely to evoke substantive changes to the normativity of platforms due to the increased exposure to liability. The substantive requirements directly interfere with the normativity. They resemble external societal constitutional limitations that restrain the platform logic from expanding into social autonomies. This can be illustrated with two examples: the Florida deplatforming law that (at least formally) tries to prevent a logic of economic efficiency to encroach on the political system, and Art. 17 DSM Directive that restricts the property logic of copyright from expanding on social autonomies through the practice of platforms to provide copyright holders with extra-statutory exclusive rights. The fact that legislators attach so much importance to internal self-limitations,

¹⁰⁸ It should be noted, however, that there could also be another motivation relevant, such as the attempt to influence the stop rules in one's favor. In this respect, not the recognition but the protection of normativity from external influences is relevant – the opposite direction.

which apparently are not developed to an adequate extent, underlines their quality as an element of a rule of recognition.

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