

On the role of the public sphere in the EU's anticipated digital *acquis*

Raphael Cannell

Thesis submitted for assessment with a view to obtaining the degree of Master of Arts in
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School of Transnational Governance

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Supervisor: Andrea Renda, EUI STG

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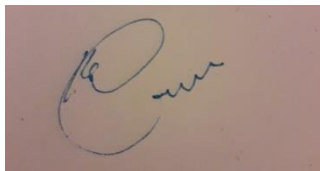
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ABSTRACT

It is widely held that with its new generation of digital regulation the EU is moving beyond a purely economic philosophy and towards a more comprehensive societal approach that places greater emphasis on values and public interest, a shift reflected in narratives of growing European ‘digital constitutionalism’. Exploring a specific element of this shift, I employ a model of the digital public sphere to assess the EU’s anticipated digital *acquis* as regards threats to democratic participation and engagement posed by the digital transformation. In doing so, I further attempt to render visible and address some of the major challenges facing the analytical framework of the public sphere in a context in which digital infrastructure, services and, in turn online public communication, are so dependent on mediation by private intermediaries.

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Introduction

It has been variously stated that the new generation of digital regulation in the European Union has moved beyond a purely economic philosophy towards a more comprehensive societal approach that places greater emphasis on values and public interest. Cioffi et al. view the recently adopted Digital Services Act (DSA), which seeks to secure a safe and legal online environment by placing new obligations on intermediary services, and Digital Markets Act (DMA), which looks to increase the contestability of multi-sided digital markets, as a ‘Polanyian’ moment, a shift from traditional competition policy and law towards ‘more...encompassing forms of socio-economic regulation’.¹ De Gregorio conceptualises this as a transition from ‘digital liberalism’ to ‘digital constitutionalism’, which he defines as ‘articulating the limits to the exercise of power in a networked society’.² Beyond this new form of constitutionalism, and in particular the increasing attention towards the protection of fundamental rights, what Renda calls the European attempt to ‘tame cyberspace’ also serves new imperatives, such as meeting the requirements of the Green Deal and addressing challenges to digital sovereignty.³

These shifts are welcome. Contrary to early cyberutopian prophecies, it is now commonly accepted that the current incarnation of the digital ecosystem is centred around a handful of intermediary platforms which mobilise a business-model of surveillance capitalism,⁴ data extraction and analytics to retain their dominance in multi-sided markets characterised by strong network effects and economies of scale, with deep societal effects. The risks posed by this ‘platformisation’ for the healthy functioning of democratic processes, are broadly recognised; debates over discrimination and hate speech, mis and disinformation and political polarisation in online spaces are commonplace. In this context, I aim to situate the shifting priorities EU digital regulatory efforts within the framework of public sphere theory. This framework, as a critical theory, attempts to shed light on the limits of democratic participation and engagement

¹ John W Cioffi, Martin F Kenney, and John Zysman, ‘Platform Power and Regulatory Politics: Polanyi for the Twenty-First Century’, *New Political Economy* 27, no. 5 (2022): 820–36.

² Giovanni De Gregorio, ‘The Rise of Digital Constitutionalism in the European Union’, *International Journal of Constitutional Law* 19, no. 1 (2021): 41–70. p. 42

³ Andrea Renda, ‘Making the Digital Economy “Fit for Europe”’, *European Law Journal* 26, no. 5–6 (2020): 345–54.

⁴ Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power: Barack Obama’s Books of 2019* (Profile books, 2019).

by highlighting structural deficiencies within networks of information flows, public political debate, and the construction of public opinion.

Drawing on Jürgen Habermas' *Structural Transformation of the Public Sphere* and its critiques,⁵ I attempt to develop a model of a democratic public sphere for the digital age to put EU regulation to the test: *How compatible is the EU's anticipated digital acquis with the concept of a democratic online public sphere? What aspects of the concept can we find? What is missing from the emerging acquis according to this model of democratic participation?* Addressing these questions satisfies a twofold objective: on the one hand it presents a lens for interrogating the political effects of European digital policy. Despite an extensive body of digital public sphere literature, and a growing scholarship on the current generation of EU digital regulation, there has not yet been a serious analysis of European digital policy through the lens of public sphere theory. Multiple scholars highlight aspects in the DSA's scope and approach that contribute to democratic values: Leiser demonstrates how the DSA has dramatically stepped up the EU's disinformation,⁶ while Savin praises its asymmetric approach to obligations as recognising an asymmetric problem.⁷ There has been one study of the DSA specifically using the framework of public space: Tarkowsky and Keller suggest the concept is largely missing and argue for a digital public *space* framework as the central 'mission' of European digital policy.⁸ But the authors go too far, expecting an unfeasible extent of transformation of digital capitalism that would be required to align with such a frame.

On the other hand, situating the theoretical framework within the existing realities of specific regulatory instruments also offers an opportunity to explore the current role and place of public sphere theory more generally, of particular relevance considering the academic mood of decline and scepticism currently associated with the model in relation to the digital sphere. In this

⁵ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (MIT press, 1991).

⁶ MR Leiser, 'Analysing the European Union's Digital Services Act Provisions for the Curtailment of Fake News, Disinformation, & Online Manipulation', *Disinformation, & Online Manipulation (April 24, 2023)*, 2023.

⁷ Andrej Savin, 'The EU Digital Services Act: Towards a More Responsible Internet', *Copenhagen Business School, CBS LAW Research Paper*, no. 21-04 (2021).

⁸ Paul Keller and Alek Tarkowski, 'Digital Public Space—A Missing Policy Frame for Shaping Europe's Digital Future', *Open Future*, 2021.

context, I therefore hope to address at least some of the issues it currently faces and illuminate its chances of survival.

The logic of the essay unfolds as follows. After an assessment of the state of play of digital public sphere scholarship, I will develop a model of the public sphere in the digital age that centres on six principles, which I will then apply to four specific regulations: the DSA, DMA, European Media Freedom Act (EMFA) and Artificial Intelligence Act (AIA). Using this logic, I will argue that while at the micro level of articles there are elements of each regulation that reflect various of the six principles of the public sphere model, particularly in the DSA's attempt empower a wide ecosystem of actors. Yet the European digital *acquis* does not represent the digital public sphere as an integrated philosophy at the macro level. Rather, the patchwork has gaps, incoherencies and trade-offs. Even when digital public sphere principles are addressed in the regulations, the extent is often limited: contributions are limited to the protection of fundamental rights such as freedom of expression, and there is often an overreliance on transparency measures. I will further suggest that the extent to which regulatory efforts *can* reach the normative ideal of the principles is inherently limited by both the structural realities of the platform ecosystem, and the fact that certain public sphere principles are beyond the realm of regulation. Nevertheless, this does not take away from the normative value of the model itself; it rather demonstrates that to maintain its critical value, the public sphere model must enter into a careful process of dialectical negotiation with the reality of technological development and the way it continues to shape society.

Part 1. Scholarship: The public sphere and the digital public sphere.

Philosophers and political scientists continue to theorise over the importance of public space to democratic politics. In *The Human Condition*, Arendt saw the agora of ancient Athens as the ideal historical space in which political debate could allow pluralistic ideas could be negotiated to shape the common good.⁹ Participating in this public realm was at the heart of her conception of freedom: only by acting in public rather than in the realm of the family could real freedom be achieved. Arendt posited that the conditions of modernity, particularly the ‘rise of the social’, led economic processes and the family, previously confined to the ‘private’ realm, to become public matters, which had been reserved for the strictly political. For this reason, the previously political public realm became a space where individuals ‘merely behave’ according to their private economic interests.¹⁰

It is to this intellectual heritage that Habermas’ owes his project of the public sphere. Rather than the Agora of ancient Greece, though, however, Habermas looks to the early modern European coffeehouses as the paradigmatic space for his framework of ideal public political deliberation and communication that he called the bourgeois public sphere. Defining it as ‘a sphere which mediates between society and state, in which the public organises itself as the bearer of public opinion’,¹¹ it represents a realm where enlightenment-style rational-critical deliberation among equal citizens reaches consensus over a ‘common good’. Habermas suggested that this distinction was present under the historical conditions of the late 17th and early 18th centuries. The relaxing of censorship controls permitted the necessary flow of news and the rise of critical journalism to underpin public discourse and help shape notions of the common good, and the gradual institutionalisation of capitalist modes of exchange and private property gave autonomy to private bourgeois individuals. This ideal public sphere was independent of state and society, where citizens ‘behave neither like business or professional people’ nor like those ‘subject to the legal constraints of a state bureaucracy’.¹²

⁹ Hannah Arendt, *The Human Condition* (University of Chicago press, 2013).

¹⁰ Seyla Benhabib, ‘The Embattled Public Sphere: Hannah Arendt, Juergen Habermas and Beyond’, *Theoria* 44, no. 90 (1 January 1997): 1–24, <https://doi.org/10.3167/th.1997.449002>. p. 6

¹¹ Jürgen Habermas, Sara Lennox, and Frank Lennox, ‘The Public Sphere: An Encyclopedia Article (1964)’, *New German Critique*, no. 3 (1974): 49–55.

¹² *Ibid.*

The bourgeois public sphere quickly lost its ideal status. In pondering its decline, Habermas posited that the conditions of 19th and 20th century modernity ‘refeudalised’ the public sphere, as on the one hand private economic interests became entangled with the common interest of citizens while the state increasingly entered the private sphere in the form of the welfare state.¹³ Central to this ‘structural transformation’ of the public sphere was the blurring of the private and public, for which the rise of mass-media was largely responsible. From the 1830s began ‘the transformation from a journalism of conviction to one of commerce’,¹⁴ as the yellow press prioritised spectacle, crime and gossip – ‘entertainment’ – over the political. The public sphere was therefore both depoliticised and ceased to be a space for equal participation as increasingly powerful mass-media conglomerates could exert greater influence over debate.¹⁵

The English translation of *Structural Transformation* in 1989 sparked extensive scholarly interest and controversy in the Anglo-American world. In her classic essay ‘Rethinking the Public Sphere’, Nancy Fraser in particular persuasively pulled apart some of the crucial normative assumptions that underpin Habermas’ model, demonstrating in particular how a strict distinction between the public and private, rather than empowering political participation, become exclusionary as topics confined to the realm of the private sphere were blocked from the political agenda.¹⁶

Despite this criticism, the internet revolution breathed new life into public sphere theory. Literature from the late 90s suggested that the internet space could help solve some of the challenges facing the public sphere in the 20th century. Kellner highlighted how the internet has ‘produced new public spheres and spaces for information, debate, and participation’,¹⁷ while Dahlberg suggested digital spaces facilitate ‘discourse that replicates the basic structure of rational-critical debate and that in various ways approximates the requirements of the public

¹³ Craig Calhoun, *Habermas and the Public Sphere* (MIT press, 1993). p. 15

¹⁴ Habermas, Lennox, and Lennox, ‘The Public Sphere: An Encyclopedia Article (1964)’.

¹⁵ Calhoun, *Habermas and the Public Sphere*.

¹⁶ Nancy Fraser, ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’, *Social Text*, no. 25/26 (1990): 56–80.

¹⁷ Douglas Kellner, ‘Intellectuals, the New Public Spheres, and Techno-Politics’, *New Political Science*, 1997, 169–88.

sphere'.¹⁸ In *The Wealth of Networks*, Benkler's develops the framework of a 'networked public sphere' to demonstrate the potential offered by the networked internet in revitalising participatory politics. He argues that through diminishing transaction costs of communication and coordination, and the introduction of 'non-market' forms of production, democratic participation in the internet age would thrive.¹⁹

More recent literature offers less optimism, accentuating the additional challenges posed by digital transformation and platformisation to the public sphere. Papacharissi notes the threat posed by the co-existence of 'consumerist' and 'civic' rhetoric in online spaces, threatening the infiltration of economic interests in the public sphere.²⁰ Other arguments centre on the role of algorithms and big data analytics: Caplan and Boyd have drawn attention to the ability of algorithms to sway public opinion and shape what content by which participants is made visible alongside a lack of transparency surrounding their construction and deployment.²¹ Habermas himself has weighed into this debate in a recent book, drawing out three central challenges to the development of a public sphere in the platform age of particular interest. First, he argues that the failure of social media platforms to perform proper editorial functions results in a lack of quality control of public information. Second, that the shifting nature of content on multi-sided platforms also push traditional media to adopt new forms of commercial strategy to fit the new algorithmic logics. Third, that the 'semi-private, semi-public communication spaces' blur the lines between rational-critical and personal-intimate forms of communication as participants fail to recognise the 'rules of the game'. Instead of promoting inclusive deliberation that seeks common ground, this results in a retreat into one's own sphere of knowledge and rejection of 'dissonant' voices.²²

¹⁸ Lincoln Dahlberg, 'Computer-Mediated Communication and the Public Sphere: A Critical Analysis', *Journal of Computer-Mediated Communication* 7, no. 1 (2001): JCMC714.

¹⁹ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven [Conn.]: Yale University Press, 2006).

²⁰ Zizi Papacharissi, 'The Virtual Sphere: The Internet as a Public Sphere', *New Media & Society* 4, no. 1 (2002): 9–27.

²¹ Robyn Caplan and Danah Boyd, 'Who Controls the Public Sphere in an Era of Algorithms', *Mediation, Automation, Power*, 2016, 1–19.

²² Jürgen Habermas, 'Reflections and Hypotheses on a Further Structural Transformation of the Political Public Sphere', *Theory, Culture & Society* 39, no. 4 (July 2022): 145–71, <https://doi.org/10.1177/02632764221112341>; for his new book (in German only), see Jürgen Habermas, *Ein Neuer Strukturwandel Der Öffentlichkeit Und Die Deliberative Politik*, Erste Auflage, Originalausgabe (Berlin: Suhrkamp, 2022).

Use of the public sphere as an analytical framework to investigate the societal effects of digital technologies provides an enduring effective link between the world of media and communication and democratic politics, and the processes of platformisation closely relate to the grand ideas Habermas was playing with – commercialisation, the manipulation of political debate, the circulation of information. Yet lurking beneath the surface of scholarly attempts to ascertain whether the new digital ecosystem either represent a new public sphere or limit the potential for one are a few interlinked weaknesses.

First, scholars use the term ‘public sphere’ in many diverse ways. While many of the works laid out above use the term in its original meaning – as a form or process of democratic political communication when individuals come together as a public – it is also heavily used as a pure synonym of public ‘space’ more generally. To be sure, while the nature of the spaces which the public sphere inhabits is fundamental in providing the conditions for the functioning of such a sphere, the ‘public sphere’ is a more specific idea. Even though this may seem a purely semantic weakness, the increasingly all-encompassing nature of the term reduces its critical value for identifying and addressing the limits of democratic processes in the digital age. Second, as we move further away from the mid-20th century society that Habermas’ model initially served to critique, questions arise over the continuing relevance of the public sphere as a useful tool of analysis. Already in the 1990s, Poster suggested that Habermas’ model of a ‘homogeneous space of embodied subjects in symmetrical relations, pursuing consensus through the critique of arguments and the presentation of validity claims’ is ‘systematically denied’ in the arenas of online politics.²³ This leads him to suggest the concept is obsolete in ‘assessing the Internet as a political domain’. Fenton has argued that current use of the public sphere model helps to perpetuate the current state of ‘fake democracy’, failing to perform the imperative of critical theory to offer better emancipatory futures. In particular, he contends, Habermas’ understanding of equality within the public sphere is structurally inconsistent with the social and economic inequalities and the ‘complexities of power in the digital age’.²⁴ Schlesinger similarly suggests we are in a state of ‘post-public sphere’, in which the model has run its course.²⁵

²³ Mark Poster, ‘Cyberdemocracy: Internet and the Public Sphere’, *Internet Culture* 201 (1997): 218.

²⁴ Natalie Fenton, ‘Fake Democracy: The Limits of Public Sphere Theory’, *Javnost - The Public* 25, no. 1–2 (3 April 2018): 28–34, <https://doi.org/10.1080/13183222.2018.1418821>.

²⁵ Philip Schlesinger, ‘After the Post-Public Sphere’, *Media, Culture & Society* 42, no. 7–8 (October 2020): 1545–63, <https://doi.org/10.1177/0163443720948003>.

Its overall failure to contribute practically to the development of something resembling a well-functioning public sphere in its Habermasian conception represents the third and most critical weakness of contemporary digital public sphere theory. Notwithstanding the extent of discussion over the challenges posed by the digital, networked or platform ecosystem to the existence of a public sphere, little attempt is made at illuminating the path ahead and few proposals for improvement are offered. To be sure, discussion of online political debate in internet and media studies has recently entered what Schlesinger terms a ‘regulatory turn’.²⁶ Caplan and Boyd have pointed to the potential of common algorithmic literacy to help address the problems of algorithmic manipulation of news information and the opportunities for wider diversity in access, choice and a fairer distribution of power to promote a more democratic public sphere provided by decentralisation both of technologies – for example that offered by blockchain– and markets – through stronger anti-trust mechanisms.²⁷ Philip Napoli, by contrast, has argued for a revitalisation of the concept of ‘public interest’ in social media and platform regulation, particularly ‘algorithmic governance in the public interest’, through ‘regulatory oversight’ or ‘professional codes of conduct’.²⁸ Yet while these works address important features of the public sphere model – such as equality and independence – they use vaguer frameworks like public ‘interest’, broad and difficult to define. When such works do specifically use the public sphere framework specifically, the proposals are often unfeasible: as a conclusion to his anthology of the digital public sphere, for example, Christian Fuch’s proposal for a development of a ‘public service internet’ including ‘pan European public service YouTube’ represents more utopia than serious recommendation.²⁹

How can we overcome these weaknesses? I would like to suggest that an effective approach to the third can in turn also shed light on the second. In line with the ‘regulatory turn’, in the second half of this essay I will attempt to offer one means of liberating the digital public sphere framework from its theoretical confines by situating it within the regulatory reality of the EU

²⁶ Ibid.

²⁷ Caplan and Boyd, ‘Who Controls the Public Sphere in an Era of Algorithms’.

²⁸ Philip M. Napoli, ‘Social Media and the Public Interest: Governance of News Platforms in the Realm of Individual and Algorithmic Gatekeepers’, *Telecommunications Policy* 39, no. 9 (2015): 751–60, <https://doi.org/10.1016/j.telpol.2014.12.003>.

²⁹ Christian Fuchs, *Digital Democracy and the Digital Public Sphere: Media, Communication and Society Volume Six* (Taylor & Francis, 2022). p. 290

digital *acquis*. Investigating the *practical* application of public sphere theory will in turn force us to confront some of the structural concerns associating with applying the model to the digital environment and help us understand whether the current scepticism of the digital public sphere as an analytical frame is warranted.

Part 2: Research logic

In order to achieve these goals, the next section will set out the following six ‘ideal’ principles to test the regulations’ compatibility with the model:

- *Open, equal and plural access to public discourse*
- *Private, autonomous participants*
- *Independence from private interests*
- *Independence from state interests*
- *Sphere of publics: coexisting of patterns of consensus and contestation, enlightenment-rational and romantic-emotive modes of communication*
- *Equal access to transparent information, common agreement over what constitutes ‘fact’ and ‘interpretation’*

I will centre the research on regulatory legislation associated with the anticipated digital *acquis*. The DSA represents the most obvious choice for this, given its focus on fundamental rights in cyberspace. But the need for a more integrated understanding of how public sphere theory interacts with the emerging European digital *acquis* in the broader sense, and the benefits of analysing synergies and interactions between the different pieces of legislation, warrants the inclusion of other regulatory efforts as well. On these grounds, I will also use the DMA, the proposed AIA and the proposed EMFA. The latter is perhaps the least natural choice, given that it is not strictly part of the ‘digital’ strategy. Nevertheless, its inclusion is justified on the basis of its strong focus on questions of ‘public opinion’ and ‘public discourse’, its particular addressing of the relationship between media and online platform intermediaries, and by extension its close relationship to the DSA. While to give a fully comprehensive account would require engagement with the entire regulatory output of the European digital strategy, including the proposed Data Governance Act and Data Act for example, space constraints make such aims unfeasible in this essay, but do not exclude their use in similar future research.

To ascertain whether and how the model of the digital public sphere model can be identified with these regulations, I will engage in an exploratory interpretative analysis of primary sources. These include the four Acts, but also accompanying documents such as impact assessments, speeches and communications to more fully reveal the considerations behind

them.³⁰ The rationale for this choice of exploratory text analysis is the breadth of study and complexity of concepts being discussed in the principles – such as ‘autonomy’, ‘open, equal and plural access’, or ‘private interests’. With more time and financial resources, complementing the text analysis with in-depth interviews of functionaries involved in designing and implementing the regulations would potentially have represented a more comprehensive design approach.

³⁰ In the case of the AIA I will also use the draft amendments of the European Parliament given their particular relevance to the public sphere, while for the EMFA, I will only make use of the original Commission proposal.

Part 3: A model for an online public sphere: six principles

1. Open, equal and plural access to public discourse

This addresses the boundaries of theoretical access, the question of *who* can participate. Habermas originally relies on Westphalian notions of the nation-state to answer this, through which he implies that the composition of such publics is historically equated with a national citizenship.³¹ Although historical interpretations of what makes up ‘citizenship’ have been both disputed, from this we can derive the *open access* criterion, stipulating that *all those affected by political issues must have the opportunity to participate in public discourse on those issues*.³² This principle thus comprises three essential features: not only is it important to ensure the broadest possible access, but that such access is on ‘terms of parity’. The idea of ‘plurality’ is similarly central to this principle: beyond simply access to debate for all, a plurality of diverse voices must have the possibility of representation and the opportunity to be heard within online public communication.

There were strong initial hopes that internet technologies would contribute to expansion of publics. Early scholarship on the digital public sphere centred on the point of diversity: as early as 1998, Douglas Kellner wrote that the internet has ‘produced new public spheres and spaces for information, debate, and participation’.³³ Similarly integral to Benkler’s networked public sphere model was the ‘ubiquitous individual ability to produce information’ which ‘creates the potential for near-universal intake’, further extending possibilities for participatory politics to those traditional left out of traditional media.³⁴ Yet this view of the diversification and expansion has been challenged, with such narratives concealing the additional obstacles to participation that ongoing processes of platformisation pose. Gerhards and Schafer find no

³¹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Studies in Contemporary German Social Thought (Cambridge, Mass: MIT Press, 1996).

³² Nancy Fraser, *Transnationalizing the Public Sphere* (John Wiley & Sons, 2014). p. 29; Fraser describes this as the ‘all-affected principle’.

³³ Kellner, ‘Intellectuals, the New Public Spheres, and Techno-Politics’.

³⁴ Robert A Cropp, ‘Benkler, Y.(2006). The Wealth of Networks: How Social Production Transforms Markets and Freedom. New Haven and London: Yale University Press. 528 Pp. \$40.00 (Papercloth)’, *Social Science Computer Review* 26, no. 2 (2008): 259–61.

empirical evidence to suggest a wider public participation in online platform mediated spaces than traditional media for political and scientific topics.³⁵

The rise of platform mediation serves to quell early cyberutopian hopes that the many-to-many networked architecture of online space would democratise news and information production in two fundamental ways: first it means that the ability to produce and share information or opinion is reliant on signing up to the particular platform and be compliant with its rules. ‘Access’ to forms of public communication may therefore be *conditional* rather than *open*. Second, algorithmic control over the communication of information and opinion through both recommendation and content moderation has deep implications for participatory parity. Rather than a lack of diversity in direct participation or expression, the problem becomes the ability to gain an audience, a variable ultimately controlled by the logic of the platform algorithms, which Geiger dubs the ‘algorithmic public sphere’,³⁶ shaped by powerful individuals and institutions. Poell et al. point to accusations that TikTok was systematically suppressing Black Lives Matter (BLM) content in 2020.³⁷ Similar evidence shows that moderation through ‘flagging’ can further lead to exclusion, as users in conflict flag up their opponents to silence them.³⁸

2. Private, autonomous participants

This first principle is dependent on the existence of a second – that the ‘public’ is made up of *private, autonomous individuals*. That participation in Habermas’ ideal 18th century model is limited to the ‘bourgeoisie’ is rooted in the ability for bourgeois individuals to take on a ‘private’ existence as autonomous agents. This public sphere of ‘privatised individuals’ was only possible under the material conditions of early capitalism,³⁹ in which private property became a central institution as individuals were freed from the inter-social ties of the old feudal

³⁵ Jürgen Gerhards and Mike S. Schäfer, ‘Is the Internet a Better Public Sphere? Comparing Old and New Media in the USA and Germany’, *New Media & Society* 12, no. 1 (February 2010): 143–60, <https://doi.org/10.1177/1461444809341444>.

³⁶ Stuart R. Geiger, Does Habermas Understand the Internet? The Algorithmic Construction of the Blog/Public Sphere (October 1, 2009). *Gnovis. A Journal of Communication, Culture, and Technology*, 10(1), 1-29, 2009

³⁷ Thomas Poell, David B. Nieborg, and Brooke Erin Duffy, *Platforms and Cultural Production* (Medford: Polity Press, 2022). p. 99

³⁸ York and Zuckerman, ‘Moderating the public sphere’

³⁹ Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*.

society. But the material conditions of autonomy of individuals as political participants are no longer defined by socio-economic class. While the principle is still relevant, the challenges to its realisation have evolved in regard to new realities of the digital environment.

The quintessential platform dynamics of algorithmic recommendation and big data analytics raise questions for the autonomy of participants. Gillespie argues that the algorithmic calculus upon which platform infrastructure is centred creates ‘calculated publics’, organising connectivity and interaction according to the (usually economic) interests of the platform. Taking the example of Amazon’s book purchasing recommendations based on ‘what other customers have bought’, he highlights how the platform is ‘invoking and claiming to know a public with which we are invited to feel an affinity’, a community which may have ‘nothing whatsoever to do with the publics that the user sought out’.⁴⁰ Crawford has compared this to traditional forms of book recommendations, such as the ‘bestseller’ list in newspapers. Yet, as she acknowledges, such a system involves a wide range of actors, and you are simply being told the books of which most copies were sold. By contrast, the algorithmic logic of grouping certain users together and thus, if indirectly, influencing opinion-formation processes, is insular and opaque – ‘we do not know its membership, its concerns, whether or why people loved or hated these books’.⁴¹ The principle of autonomous individuals is further threatened by the increasing participation of automated bots in online discourse. But their ability to replicate themselves and create ‘floods’ makes the messages they carry more likely to reach the public view by affecting ‘trending’ algorithms erroneously, with the potential to unduly influence opinions and political positions.

3. Independence from private interests

We can situate the influence of platform algorithms and big data analytics on political discourse within a tension fundamental to public sphere theory – the relationship between private and public power. Not only did the rise of large corporations in the 19th and 20th centuries reduce

⁴⁰ Tarleton Gillespie, Pablo J. Boczkowski, and Kirsten A. Foot, eds., *Media Technologies: Essays on Communication, Materiality, and Society*, Inside Technology (Cambridge, Massachusetts: The MIT Press, 2014).

⁴¹ Kate Crawford, ‘Can an Algorithm Be Agonistic? Ten Scenes from Life in Calculated Publics’, *Science, Technology, & Human Values* 41, no. 1 (January 2016): 77–92, <https://doi.org/10.1177/0162243915589635>.

the equality (principle 1) and therefore autonomy (principle 2) of participants in the public sphere, Habermas demonstrates how private economic interests also began to infiltrate public political discourse, as powerful mass-media corporations transformed a media dominated by critical journalism into one that prioritised profit-seeking. This classic Frankfurt School tale resonates heavily with the platform age, especially considering the market centralisation associated with the rise of gatekeepers. Indeed, as already demonstrated earlier, much of the scholarship on the impacts on the viability of a digital public sphere centres on the profit-maximising logics of platform mediation.⁴²

The Cambridge Analytica scandal provides a significant example of the manipulatory potential of economic interest in online public discourse and opinion-forming.⁴³ Scandals aside, everyday content recommendation and moderation practices, exerting both soft and hard control over discourse, also operate based on commercial logics. Instances of overzealous content moderation similarly demonstrate a desire to overregulate for fear of losing users and therefore valuable network effects and potentially advertisement revenue, sometimes at the expense of rights to expression.⁴⁴ Poell et al. argue that platforms are bound to either over- or under-moderate, as in practice their primary focus is on ‘appeasing advertisers above all else’.⁴⁵ Dahlgren similarly suggest that this algorithmic imperative to appease advertisers through personalised targeting exerts fragmentary effects on communication structures.⁴⁶

We should acknowledge the cyberutopian voices suggesting, in contrast to mass-media corporations which bend real editorial content to their economic logics, platforms simply mediate many to many information flows. Hepp describes platforms solely as providers of digital infrastructure for media services rather than editors.⁴⁷ Yet even if they do not have an

⁴² José van Dijck, *The Culture of Connectivity: A Critical History of Social Media* (Oxford ; New York: Oxford University Press, 2013). José van Dijck traced the rise of normalisation of interaction and communication norms in the age of web2 that follow the technological and economic meanings of major platforms.

⁴³ In 2018 a whistle-blower revealed that the company used the personal data of over 50 million Facebook profiles to develop algorithms to target specific groups with political advertising, fake profiles and article-sharing in order to influence the 2016 US Presidential Election.

⁴⁴ A good example is the Terror of War photograph of children in the Vietnam War that continues to be blacklisted by Facebook and other social media sites

⁴⁵ Poell, Nieborg, and Duffy, *Platforms and Cultural Production*. p. 99

⁴⁶ Peter Dahlgren, ‘The Internet, Public Spheres, and Political Communication: Dispersion and Deliberation’, *Political Communication* 22, no. 2 (April 2005): 147–62, <https://doi.org/10.1080/10584600590933160>. p. 149

⁴⁷ Andreas Hepp, *Deep Mediatization, Key Ideas in Media and Cultural Studies* (London ; New York: Routledge, 2020). p. 25

editorial role, algorithmic curation by platforms can still exert indirect influence on editorial content. For example, after 2013 when Facebook announced it would algorithmically prioritise content receiving the most likes and comments, digital media such as HuffPost and BuzzFeed began to generate more ‘clickworthy’ content.⁴⁸ This reveals more generally how traditional news organisations that use platform spaces have adapted their content to the logics of platform algorithms. Van Dijck et al. show that many news organisations on Twitter and Facebook have started focusing on making more video content for their non-political sections, such as lifestyle, technology and sports, as it is seen to boost traffic.⁴⁹ This evidence demonstrates the extent to which private economic interests currently pervade platform decisions of ‘public’ communication, in turn jeopardising the potential of a digital public sphere that is truly ‘independent’ of the market as the lines between ‘participation’ and ‘consumption’ become blurred.

4. Independence from state interests

An ideal public sphere depends on independence from the state as well as from the market – it must operate outside the sphere of government or bureaucracy. It is this that makes a public of private persons both independent and critical, as opposed to one of ‘monarchical representation’,⁵⁰ in which simply the interests of ruling elites are represented. The condition of this independence is essential for the public sphere to take on its principal role as the bearer of public opinion and hold power accountable to this public opinion. In turn, the demise of a well-functioning public sphere according to Habermas was partly predicated on the encroaching role of the state into the private sphere through welfare policies, as state and society became intertwined.⁵¹ In the platform age the condition of ‘independence’ seems to pertain primarily to the encroaching of *private* interests. But independence from the state is still crucial to a well-functioning online public sphere: in many jurisdictions state surveillance structures are still able to monitor and control the specific content of online discourse, and intentionally limit the options for platform usage. For example, ByteDance’s domestic equivalent to TikTok, Douyin,

⁴⁸ Poell, Nieborg, and Duffy, *Platforms and Cultural Production*. p. 103

⁴⁹ José van Dijck, Thomas Poell, and Martijn de Waal, *The Platform Society* (New York: Oxford University Press, 2018).

⁵⁰ Philipp Staab and Thorsten Thiel, ‘Social Media and the Digital Structural Transformation of the Public Sphere’, *Theory, Culture & Society* 39, no. 4 (July 2022): 129–43, <https://doi.org/10.1177/02632764221103527>.

⁵¹ Calhoun, *Habermas and the Public Sphere*.

employs over 10,000 content moderators to ensure that the platform abides by stringent Chinese censorship; Douyin must ban or flag content that makes fun of the national anthem, major policies, or that expresses support for disputed territories like Hong Kong and Taiwan.⁵²

5. Sphere of publics: coexisting of consensus and contestation, enlightenment-rational and romantic-emotive modes of communication

The original normative principle of the public sphere that has attracted the most potent criticism is that public communication is based on rational-critical debate leading to common consensus, which Habermas contends is at heart of democratic deliberation. This argumentation is the process by which not only individual interests are aggregated, but a search for the common good that transcends individual interests is conducted.⁵³ It is on this point that Habermas' divergence from the Frankfurt School becomes clearest: reflecting on the rise of fascism in the 1930s, Adorno and Horkheimer had become convinced of the 'instrumental' nature of rationality, leading for example to fascism.⁵⁴

The scholarship is quasi-unanimous in its depiction of the challenges rational discourse faces in the internet age. Papacharissi points out a narcissistic element to online political deliberation,⁵⁵ while Dahlgren argues that 'speech is not always so rational' and 'tolerance toward those who hold opposing views is at times wanting' in online political spaces.⁵⁶ This is persuasive particularly considering the means through which social media organises interaction and information-sharing. In the first place, there is a lack of nuance exhibited on social media networks, an impossibility considering the limited length of communications – take Twitter's limiting posts to a specific number of characters as an example. Benhabib saw the roots of this trend as the reduction of the individual to a 'type' or 'icon', flattening out the 'complexity and the co-constitution of self'.⁵⁷ This analysis takes on new relevance in the platform age of social

⁵² Dijck, Poell, and Waal, *The Platform Society*. p. 96

⁵³ Thomas McCarthy. *Practical discourse: On the relation of morality to politics*. (1992). p. 54

⁵⁴ Theodor W. Adorno, *Dialectic of Enlightenment*, Verso Classics (London: Blackwell Verso, 1997). pp. 6, 25

⁵⁵ Zizi Papacharissi, *The Virtual Sphere 2.0 The internet, the public sphere, and beyond* (Routledge 2008)

⁵⁶ Dahlgren, 'The Internet, Public Spheres, and Political Communication'.

⁵⁷ Benhabib, 'The Embattled Public Sphere'.

media, which often prioritises simple images, emotive and affective expression and crude self-representation.

These trends are not necessarily problematic: a large body of critique of the public sphere reflect a deeper romantic tradition of resistance to the very normative idea of the democratising or emancipating values of enlightenment-style rationality. McCarthy argues that ‘many intractable ethical-political disputes cannot be settled’ through liberal democratic consensus-building, which is an incoherent ambition in a plural and culturally diverse world.⁵⁸ Mouffe similarly suggests consensus as hegemonic, a means of protecting established interests and preventing real alternatives. She rather argues for an ‘agonistic’ democracy in which conflict rather than consensus is prioritised. Accordingly, democratic politics must be about ‘passions’ rather than reasoned argumentation. This has also been applied to online publics: Papachrissi’s account of the role of online storytelling demonstrates that discourse based on emotion can also produce emancipatory effects.⁵⁹ In this way, the original Habermasian ideal of pure rational-critical debate leading to a unified common consensus seems to counteract with the first principle’s provision of a plurality of voices, particularly in modern societies.

We can make further use of Fraser to overcome this tension. Looking back at what she called ‘subaltern counterpublics’, she demonstrated that even in the historical context of Habermas’ ideal bourgeois public sphere, ‘subordinate social groups’ were able to ‘invent and circulate counter-discourses’.⁶⁰ She uses this to argue that the ‘ideal’ is not a uniform public that comes to a singular consensus but rather a multitude of overlapping publics that allow for a plurality of voices to challenge existing narratives. Building on this trend, Dahlberg has argued for a ‘radical’ online public sphere, in which contestation between pluralities, as well as consensus, is celebrated.⁶¹ This does not necessitate a move away from rational-critical communication methods. Rather, the ideal public sphere is subdivided into multiple publics where *patterns of contestation and consensus building, and enlightenment-rational or romantic-emotive modes of communication can to co-exist* in online political discourse. I propose that the term ‘sphere

⁵⁸ Chantal Mouffe, *On the Political*, Thinking in Action (London ; New York: Routledge, 2005). Pp. 10-11, 63

⁵⁹ Zizi Papacharissi, *Affective Publics: Sentiment, Technology, and Politics*, Oxford Studies in Digital Politics (Oxford ; New York, NY: Oxford University Press, 2015).

⁶⁰ Fraser, ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’.

⁶¹ Lincoln Dahlberg, ‘Rethinking the Fragmentation of the Cyberpublic: From Consensus to Contestation’, *New Media & Society* 9, no. 5 (October 2007): 827–47, <https://doi.org/10.1177/1461444807081228>.

of publics' captures this ideal better than the singular 'public sphere' or even than the plural 'public spheres' which implies a lack of interaction between competing spheres.

But further risks challenge the realisation of this ideal. Despite the enthusiasm for a public sphere with multiple interest-publics, various scholars have also highlighted the means by which the plurality of publics can disintegrate into extreme interest-groups, where the same opinions circulate in a cycle of ideological homogeneity. Cass Sunstein similarly describes these atomised publics as 'deliberative enclaves',⁶² while Pariser famously termed them 'filter bubbles',⁶³ although there is little empirical evidence to corroborate these anecdotal observations.

6. Transparency of information sources, respected institutions of trust

While Habermas viewed the essential importance of factual information in this online sphere of publics as about 'equality' of information access (now part of principle 1),⁶⁴ in the 21st century, social media and unconventional broadcast media (such as YouTube) have changed patterns of production and consumption and diversified channels of information provision. This creates more space for alternative viewpoints but also presents significant challenges to validation and trust in the information provided. The shift from editorial content curation functions of mass-media to algorithmic content curation on social media, necessitated by the 'information overload' that the many-to-many architecture of platforms has produced, means that the availability and salience of information is disconnected from its actual validity.⁶⁵ In particular, the repetition of purported facts and interpretations whose validity is asserted by charismatic figures (high profile politicians, influencers) to large and receptive audiences of followers leads to the amplification of messages, independent of their actual truth-value. Private interests (principle 3) associated with 'traditional' media may act as further amplifiers of such messages, true or false, as shown dramatically in the recent legal case between Fox News and

⁶² Cass R. Sunstein, 'Deliberative Trouble? Why Groups Go to Extremes', *The Yale Law Journal* 110, no. 1 (October 2000): 71, <https://doi.org/10.2307/797587>.

⁶³ Eli Pariser. *The filter bubble: What the Internet is hiding from you*. penguin UK, 2011.

⁶⁴ Habermas, *Between Facts and Norms*. Habermas argues that equal access to information is essential to the rational argument and opinion-forming within the public sphere

⁶⁵ In his new book, Habermas himself argues that the failure of such platforms to perform proper editorial, rather than algorithmic, curation causes a lack of quality control of information

Dominion.⁶⁶ Both legitimate and malign actors have come to understand and use these mechanisms to influence debate as the ease of access to, and rapid dissemination of, information online that has led to the threat of active poisoning of debate by malicious placement of disinformation, and the unintentional influencing of debate through misinformation. In turn, both can clearly affect the ability of participants to exercise their autonomy in decision-making and opinion-forming within the public sphere (Principle two).

Deriving an ‘ideal’ principle in these conditions is no easy task given the blurred lines between what is permissible and what is not.⁶⁷ The public sphere requires the free interplay of views and opinions which will always involve differences of views about the basis on which information can and should be evaluated, moreover, as in other areas of life, citizens will always need ultimately to make their own assessment. Perhaps the best way to conceptualise the ideal is therefore that while there may be disagreements over the ‘interpretation’ aspects of information, *there must be some basis for agreement over what constitutes ‘facts’*. In this way, while plurality of information and the potential for affective contestation-based forms of debate must be assured, a base level of consensus, or at least over what the facts are must remain.⁶⁸ In addition, necessitated by the many-to-many architecture of the online ecosystem, the *transparency* of where that information comes from and whose interest it serves is of vital importance. In sum, first there must be transparency in the sources of information and second, there must exist reliable and respected institutions which can attest the trustworthiness of information, independent of the actors engaged in debate.

⁶⁶ See US Dominion, Inc., Dominion Voting Systems, Inc., and Dominion Voting Systems Corporation v. Fox News Network, LLC; US Dominion, Inc., Dominion Voting Systems, Inc., and Dominion Voting Systems Corporation v. Fox Corporation.

⁶⁷ For example, between both ‘good faith’ or malicious intentions and between ‘accurate’ and inaccurate’ information, between the revelatory power and potentially fragmentary effects of information plurality. Similarly, debate involves advocacy; advocacy involves emphasis, exaggeration, assignment of bad-faith motives to opposing parties. There

⁶⁸ Even those arguing for contestation in politics, such as Mouffe, a base level of commonality and understanding between different groupings for democracy to work effectively. Mouffe calls this balance ‘conflictual consensus’.

Part 4. Matching the principles to the anticipated EU digital *acquis*

This section attempts to match up EU legislation and proposals with the six-part model. Given the scope and complexity of the field, I will attempt a summary, rather than exhaustive picture, highlighting some of most important interactions and relationships.

Digital Services Act

The European Commission describes the DSA and DMA together as creating a single set of rules with two main goals: to create a safer digital space in which the fundamental rights of all users of digital services are protected and to establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally. The DSA is of most obvious interest for the public sphere model, both as a standard bearer for the EU's approach to digital regulation and its focus on shaping the rules of online communication and networking spaces, and the notion that the DSA addresses issues linked to the public sphere is suggested in various EU institutions' publicity and communications media. For example, when introducing the DSA proposal to the European Parliament Commissioner Breton acknowledged, *inter alia*, the role of digital platforms as 'systemic public spaces', arguing that the absence of rules and democratic control over the decisions of a handful of large platforms...is no longer tolerable.'⁶⁹ At a more granular level, the DSA text incorporates various elements relating to each of the six principles cited in section two.

The essential regulatory approach of the DSA gives digital platforms the opportunity to provide online mediation services without being held legally responsible for the 'content' which flows through them, as long as they apply 'due diligence' in moderating content, ensuring fairness of provision and reception of information by other services and individual users, while addressing illegalities and disinformation. So-called Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs) must meet the most stringent obligations, including carrying out risk assessments in relation to harmful and illegal content and providing

⁶⁹ Thierry Breton, Speech by Commissioner Breton on the Digital Services Act, Transcript of speech delivered at Brussels, (January 19 2022)

transparency on advertisements. The term ‘public space’ does not explicitly appear in the legislation, and VLOPs are defined by quantitative metrics – platforms become VLOPs when they count more than 10% of the EU population.⁷⁰ Nevertheless the impact assessment’s defining of platforms as ‘de facto public spaces’⁷¹ and references to the role of online platforms in the ‘dissemination to the public’ of information and opinion indicate how size and number of users can be considered proxies for the relative role of platforms in providing public spaces.⁷²

More specifically, reference to full and open access (principle 1) and autonomy of action (principle 2) appear frequently in the DSA articles in relation to protected fundamental rights. Article 14 stipulates that clear and unambiguous terms and conditions – that underpin content moderation practices, for example – must be applied ‘with due regard to...the fundamental rights of the recipients of the service, such as the freedom of expression’.⁷³ Similarly one of the four fundamental categories required as part of the systemic risk assessment by VLOPs is ‘any...negative effects for the exercise of fundamental rights, in particular...freedom of expression and information’.⁷⁴ Specific references to content moderation systems as a specific area of the risk assessment demonstrates that access to participation in online debate through platform intermediaries without arbitrary content removal is an important feature of the DSA.⁷⁵ This is further reflected in article 17 relating to the need for hosting services to provide a detailed ‘statement of reasons’ for content removal.⁷⁶

Here, by way of explanation, the DSA impact assessment notes that the ‘strong influence’ of algorithmic design choices by online platforms on ‘the shaping of public opinion’, which is ‘generally optimised to benefit the often advertising-driven business models of platforms’.⁷⁷ It

⁷⁰ The list of VLOPs and VLOSEs has just been published, including

⁷¹ European Commission, IMPACT ASSESSMENT Accompanying the document PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (2020), p. 9

⁷² European Commission, REGULATION (EU) 2022/2065 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), *Official Journal of the European Union*, Recital 5

⁷³ Ibid, article 14

⁷⁴ Ibid, article 34

⁷⁵ The impact assessment also highlights how ‘erroneous removals’ of content can have a ‘chilling effect on the users’ freedom of expression online’, including ‘beyond the specific content removed’.

⁷⁶ European Commission, Digital Services Act, article 17

⁷⁷ European Commission IMPACT ASSESSMENT accompanying the document PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, p. 12

also mentions that (prior to the DSA) online intermediaries are ‘setting and enforcing the rules [of online public space] themselves, driven by their commercial interests’.⁷⁸ Breton’s previously cited use of the term ‘democratic control’ clearly implies the normative assumption that, in relation to issues of democracy, these new public spaces should not be subject to private commercial interests. His concerns are similarly communicated in broader objectives for the digital age, namely Chapter IV of the *European Declaration on digital rights and principles*, which highlights the need for platforms to mitigate the risks they pose to democratic participation ‘given the role of their services in shaping public opinion and discourse’.⁷⁹ In this way, we see the implicit link between principle two and three – independence from private interest.

These concerns transpose into regulatory obligations for online platforms in the DSA, even though the principles as such are dealt with only indirectly. Article 26 requires online platforms to identify that certain information being presented is an advertisement, the entity on whose behalf the advertisement is presented, and the main parameters used to determine the chosen audience.⁸⁰ For VLOPs, article 34 requires a risk assessment including of ‘any ...negative effects on civic discourse’ resulting from the design of their recommender systems.⁸¹ Article 27 obliges all platforms to reveal the main parameters behind their recommender systems and their relative importance, alongside options for user-modification in their terms and conditions.⁸² In other words, there is an acceptance that users will be subject to algorithm-mediated decisions by platforms according to their commercial interests, but these parameters will be ‘transparent’ and modifiable.

This reflects a wider empowerment of users alongside new actors that perhaps represents the DSA’s most important contribution to the public sphere model. The data access related to the ‘design, the logic, the functioning...of algorithmic systems’ provided to so-called ‘vetted’ researchers represents one example.⁸³ The introduction of the concept of ‘trusted flaggers’ –

⁷⁸ Ibid, p. 39

⁷⁹ European Commission, *European Declaration on Digital Rights and Principles for the Digital Decade* (2022), chapter IV, article 15

⁸⁰ European Commission, *Digital Services Act*, article 26

⁸¹ Ibid, article 34

⁸² Ibid, article 27

⁸³ Ibid, article 40

entities (public, non-governmental or semi-private organisations)⁸⁴ with ‘particular expertise and competence’ in identifying illegal online content – similarly empowers civil society organisations to contribute to the moderation of online interaction and debate. The DSA stipulates that the notices about online illegal content provided by such trusted flaggers must take priority over other notices and be dealt with by platforms ‘without delay’.⁸⁵ This has significant implications for the realisation of the third principle of independence from private interests: even if private platforms control the rules of the online spaces they provide, citizens – as end users, trusted flaggers or researchers – are at least to some extent empowered to help shape and monitor those rules.

To conclude on the DSA, we should point out that the transparency requirements discussed do not represent transparency in the sense outlined in principle six – transparency deriving from access to multiple sources of information. Indeed, it is hard to imagine, in fact, how algorithm design could ever be ‘transparent’ to users (a) because their complexity is such that they are hardly transparent in all respects to their designers and (b) because they involve highly valued intellectual property of the actors involved. Nevertheless, the DSA does engage with the need for high quality, factually correct information at least as regards the issues of illegal content and disinformation. Of particular interest here is the *Strengthened Code of Practice on Disinformation*, a voluntary and co-regulatory mechanism backstopped by the DSA, to which a number of VLOPs are represented among 44 signatories. Relevant commitments include demonetising disinformation and increasing transparency of political and issue-based advertising.⁸⁶ Here we can once again see the connections between the principles, as such measures have the aim of reducing the potential spread of disinformation (principle six) by making the private interests of platforms more accountable (principle three).

Digital Markets Act

The DMA is even more explicitly an economic regulation in the traditional sense, designed to ensure the proper functioning of the EU internal market as regards so-called ‘gatekeepers’ –

⁸⁴ As stipulated in Ibid, recital 61

⁸⁵ Ibid, articles 19, 22

⁸⁶ European Commission, 2022 Strengthened Code of Practice on Disinformation (2022)

providers of one or more core platform services,⁸⁷ mediating between businesses and end-users, with an entrenched market position. Evidently, there is considerable overlap between gatekeepers as defined in the DMA and VLOPs/VLOSEs as defined in the DSA. The DMA, places obligations on gatekeepers designed to ensure the contestability of existing and future markets for all types of digital services. For example, search engines are prohibited from giving higher ranking to their own products or unfairly using end-user data obtained from businesses using their platforms, while they must provide access to businesses and end-users.⁸⁸ The DMA can be enforced through fines of up to 10% annual turnover, compared to just 6% in the DSA.

These internal market and competition policy concerns are not, as in the DSA, accompanied by any reference to democratic values or fundamental rights. Nevertheless, the specific elements of the DMA do implicitly assert certain principles of the model in two respects. First, the obligations of the DMA directed against ‘lock-in’ to particular services are designed to ensure that users have access to the fullest range of information and services. Article 5 stipulates that gatekeepers must allow end users to ‘access and use...content, subscriptions, features...where those end users acquired such items...without using the core platform services of the gatekeeper.’⁸⁹ Article 7 similarly stipulates that gatekeepers ‘shall make the basic functionalities of its number-independent interpersonal communications services interoperable with the...services of another provider...free of charge’.⁹⁰ Second, the obligations directed towards competition and the entry of new actors into the platform ecosystem, if effective, will contribute to the provision of new services and therefore new and more diverse forms of information and opinion flows. On the one hand, these obligations reflect the first principle as they create the possibilities for more diverse and plural representation within public debate and more diverse information respectively through the use of diverse services. But the increased choice and interoperability between different online spaces with different rules and communities also allows greater autonomy of participants, also contributing to the second principle. We should acknowledge that choice between services does not necessarily pertain to *political* online spaces. Nonetheless, these measures still become relevant to autonomy in the

⁸⁷ By core platform services, we refer, for example, to ...

⁸⁸ European Commission, Digital Services Act, articles 6 and 7

⁸⁹ European Commission, REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), *Official Journal of the European Union* (2022), article 5

⁹⁰ *Ibid*, article 7

public sphere when such online spaces *do* take on a political role and host public political discourse.

European Media Freedom Act

Compared to the DMA, the EMFA proposal is more obviously oriented towards public sphere issues. And despite its coverage of all media, it represents part of a ‘truly comprehensive media policy for the digital age’.⁹¹ The *Explanatory Memorandum* underlines the central role of a free and independent media in ‘shaping public opinion and help[ing] people and companies form views and make informed choices’.⁹² Recital 40 states that ‘Media play a decisive role in shaping public opinion and helping citizens participate in democratic processes’.⁹³ Indeed, the central mission of the EMFA to protect media pluralism specifically pertains to the first principle of equal access and diverse representation. Article 3 enshrines the ‘right to receive a plurality of news and current affairs content, produced with respect for editorial freedom...to the benefit of the public discourse.’⁹⁴ Article 5, by contrast, stipulates that ‘public service media providers shall provide...a plurality of information and opinions’.⁹⁵

The proposal also addresses the risk of interference by both private and state interests. Article 21 obliges member states to make legal provisions for ‘rules which ensure an assessment of media market concentrations’. It is significant that the article dictates that this analysis must take into account the impact of market concentration on media pluralism specifically, including ‘on the formation of public opinion and...diversity of media players on the market taking into account the online environment and the parties’ interests, links or activities in other media or non-media businesses’.⁹⁶ The narrative that the ‘independence of individual editorial decisions’ is threatened by market concentration the centralised power of a few media organisations

⁹¹ Thierry Breton, Speech by Commissioner Breton at European News Media Forum, Transcript of a speech delivered at Brussels, November 29 2021

⁹² European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (2022)

⁹³ Ibid, recital 40

⁹⁴ European Commission, European Media Freedom Act, article 3

⁹⁵ Ibid, article 5

⁹⁶ Ibid, article 21

clearly resonates with traditional public sphere tropes of the danger of the concentrated mass-media.

Yet the real target of the regulation is interference in editorial positions and media independence by state actors (principle 4). This is especially obvious in the final specific objective – ‘Ensuring transparent and fair allocation of economic resources in the internal media market’ – which article 24 attempts to act upon by stipulating that public funds must be allocated according to ‘transparent, objective, proportionate and non-discriminatory criteria and through open, proportionate and non-discriminatory procedures’.⁹⁷ Article 20 similarly sets out appropriate practices by national governments with regard to their treatment of media services, for instance stipulating that any regulatory measure affecting media service providers ‘shall be duly justified and proportionate’.⁹⁸ These articles reflect the role of the regulation as a response to democratic backsliding in Hungary and Poland.⁹⁹

Artificial Intelligence Act

The compatibility of the AIA, which uses a risk-based approach to impose tiered rules on providers and users of AI systems, including transparency obligations, and specific requirements for so-called high-risk AI applications such as risk assessments, with the model also centres around the first two principles. At the level of intention, two of the four specific objectives of the act as central to fundamental rights: the need to ‘ensure that AI systems...are safe and respect...fundamental rights’, and to ‘enhance governance and effective enforcement of...fundamental rights ...applicable to AI systems’.¹⁰⁰ Within this framework of fundamental rights protection, freedom of expression and information are highlighted in particular. The *Study to Support the Impact Assessment* mentions that content moderation AI systems can

⁹⁷ Ibid, article 24

⁹⁸ Ibid, article 20

⁹⁹ European Commission, *IMPACT ASSESSMENT REPORT* Accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (2022), p. 18; The impact assessment even mentions the ‘the orchestrated media capture by the government that has taken place over the last years’

¹⁰⁰ European Commission, *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL LAYING DOWN HARMONISED RULES ON ARTIFICIAL INTELLIGENCE (ARTIFICIAL INTELLIGENCE ACT) AND AMENDING CERTAIN UNION LEGISLATIVE ACTS* (2021), p. 3

‘erode freedom of expression by erring on the side of ‘false positives’’, and suggests their use in ‘organising, moderating, selecting and filtering content’ can create less space for original, or diverse, content.¹⁰¹ The threats mentioned here relating to fundamental rights, underpinning the mission of the AIA relating to the fundamental rights of freedom of expression, resonate with the challenges facing the first principle,– particularly the stated aim of maintain ‘pluralist, accessible and inclusive public debate’.¹⁰²

When we interrogate how these points are addressed in the actual regulatory mechanism, we have to look at the European Parliament amendments. The risks of AI systems to freedom of expression and information in the context of online public discourse were not specifically mentioned until the amended version, which added algorithmic recommendation systems of VLOPs (defined as such under the DSA) as high-risk use cases with the most stringent obligations. That the high-risk is placed under the heading ‘administration of justice and democratic processes’, further reveals its relationship to public sphere model.¹⁰³ Importantly, however, these amendments do not mention algorithmic content moderation.

The second principle of ensuring the autonomy of participants in the public sphere is better addressed in the regulation: providers of certain AI systems that ‘generate or manipulate image, audio or video content that appreciably resembles existing persons, objects, places’ that falsely claim authenticity – i.e. deepfakes – must ‘disclose that the content has been artificially generated or manipulated’.¹⁰⁴ Something similar appears in a second EP amendment relating specifically to Generative AI, for which providers must disclose that the content is generated AI. While the amended version makes clear these requirements ‘do not amount to considering foundation models as high-risk AI systems’ it nevertheless stipulates that they shall ‘guarantee that the objectives of this Regulation to ensure a high level of protection of fundamental rights’

¹⁰¹ European Commission, Study to Support an Impact Assessment of Regulatory Requirements for Artificial Intelligence in Europe FINAL REPORT (D5)

¹⁰² Ibid, p. 33

¹⁰³ European Parliament, DRAFT Compromise Amendments on the Draft Report Proposal for a regulation of the European Parliament and of the Council on harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (2023)

¹⁰⁴ European Commission, Artificial Intelligence Act, article 52

are achieved.¹⁰⁵ But this still becomes significant both for ensuring the quality control of information (principle six) – especially considering the potential for generative AI models to churn out mis and disinformation demonstrated by the recent flop of Google Bard – and protecting autonomy of participants in the public sphere (principle 2) when such content is used in political contexts and contributes to the forming of public opinion. And a further EP amendment that designates AI systems intended to influence voters in political campaigns as a specific high-risk use serves to beef up the protection of autonomy of participants specifically in political online discourse.¹⁰⁶

¹⁰⁵ See European Parliament, DRAFT Compromise Amendments on the Draft Report Proposal for a regulation of the European Parliament and of the Council on harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts

¹⁰⁶ Ibid

Part 5. Discussion: The European digital *acquis* and the public sphere

How can we use this matching to understand the overall compatibility of public sphere principles within these regulations? While specific principles are to some extent catered for in each regulation, what emerges is a patchwork of coverage rather than an integrated philosophy. Other EU documents and initiatives attempt to address this problem. For example, one of the six strategic priorities of the existing Commission is ‘protecting European democracy’, centred around a ‘democracy action plan’. At a more operational level, the *European Declaration on Digital Rights and Principles* demonstrates that in considering the impacts of the digital transformation something approximating the public sphere model is in the mind of European regulators: the fourth principle ‘participation in the digital public space’, includes commitments to ensuring ‘diverse content’, a ‘pluralistic public debate’, and ‘free democratic debate...in the digital environment’.¹⁰⁷ In this section I will discuss four key issues and limitations which emerge from broader reflection of the analysis in order to address the overall compatibility of these initiatives with the public sphere model.

Coverage

The most striking gap in the way the regulation reflects the digital public sphere model is principle five. While there are commitments to ‘pluralistic’ public debate and attempts to reduce the monetising potential of disinformation, there is no mention of the communicative dynamics that should underpin such debate, let alone more specific attempts to ensure a balance between rational-critical and romantic-emotive communication. The lack of any mention of this fifth principle is perhaps somewhat inevitable given that as an imperative it lies beyond the realms both of regulatory possibility – it is not for the regulatory authorities to influence, determine or enforce the extent to which citizens engage in democratic debate. While essentially absent from regulatory initiatives, the European digital policy framework comes closest to recognising this imperative in the *Digital Rights and Principles*’ commitment to ‘freedom of assembly and association in the digital environment’ alongside freedom of expression.¹⁰⁸ Dealing with this question demands parallel political initiatives to encourage greater public political engagement.

¹⁰⁷ European Commission, European declaration on digital rights and principles

¹⁰⁸ European Commission, European declaration on digital rights and principles

Similarly, when specific principles are explicitly or implicitly addressed in the regulation, they are often addressed only in part or to a limited extent. As a first example, we have already seen that the DSA and AIA's attempt, to protect freedom of expression and information can be identified as part of the first principle's ideal of open, equal and plural inclusion in public discourse. Of course, the right to freedom of expression forms an essential part of this principle both in ensuring that *everyone* can participate in the way they desire in the public sphere and in the acceptance and encouragement of a plurality of diverse voices within public discourse. Yet the principle also refers to the *parity* of potential participation rather than just the ability to participate.

To some extent perhaps the discrepancies between the regulatory approach and the public sphere model comes down to the necessary dependence of regulation on the existing *acquis*. Extensive use of the concept of fundamental rights, as in 'freedom of expression', to frame societal threats in the DSA, AIA and EFMA reflects, for example, the competences of the European Union according to the EU Charter of Fundamental Rights.

Dependence on commercial, not democratic logics

The influence of the pre-existing EU *acquis* is also implicated in another deficiency of the regulatory package, the apparent lack of independence from private interests. While in the empowerment of users and civil society to scrutinise platform governance, and in the DSA's attempts to provide wider accountability mechanisms, the emerging EU digital policy contributes to the third principle, it makes no attempt to contribute to reaching the normative ideal of complete independence. The DSA and DMA are framed within an 'internal market' logic which takes as given the existing structure of digital services in the EU; they serve to create common rules for the digital economy, a matter within existing EU competences. Indeed, the regulatory approach of the DSA in particular seems to depend on the existence of relatively few very large private actors which, while being clearly governed by private interests, nevertheless carry the main load in assuring the good functioning of online space in relation to non-economic (including public sphere) issues.

This does not, however, make the regulation package worthless from the perspective of the public sphere. Given the established parameters of the digital ecosystem and the economic realities and structures of digital spaces, infrastructure and services, striving for this normative ideal of independence would seem impossible. In a historical context very different from that which Habermas' model initially served to critique, in which digital infrastructure and therefore public communication is so dependent on mediation by intermediaries, can we possibly envisage the complete separation of private economic interests from public discourse? One way to move beyond this private-public dichotomy is to retreat away from the specific condition of independence. Van Dijck et al. for example discuss the possibility of upholding public 'values' through multistakeholder governance structures despite operating within a private framework.¹⁰⁹ Staab and Thiel have also highlighted the potential for 'privatisation without privatism'.¹¹⁰ Along these lines, perhaps we should ask, rather, whether *effective*, rather than absolute, independence from private interests is possible.

This is clearly a key question. Even though 'consumer' and 'citizen' are often used interchangeably in the DSA, protecting the 'consumer' is often consistent with promoting the individual citizen in their democratic engagement. Consumers are, after all, also citizens and the provisions of the acts relating to consumer protections are also linked to protections of fundamental rights. Similarly, even though the DMA is structurally dependent on continuing influence of private interests of gatekeepers within public spaces, its attempt to facilitate the entry of new market players at once legitimises the private governance of public spaces but also promotes the diversity of offerings and openness/access by this new 'type' of the consumer-citizen.

Incoherencies and management of trade-offs

The patchwork also incorporates inconsistencies, including the differing extent to which 'new' actors are empowered. While, as noted above, the DSA's inclusion of 'trusted flaggers' and 'vetted researchers' improves the ability of users to shape and monitor online public spaces, the EMFA instead commits to traditional actors. Article 17 gives favourable conditions under the

¹⁰⁹ Dijck, Poell, and Waal, *The Platform Society*.

¹¹⁰ Staab and Thiel, 'Social Media and the Digital Structural Transformation of the Public Sphere'. p. 131

DSA transparency rules for content moderation for self-classified ‘media service providers’. For example, while the DSA’s requirement of an ex-post statement of reasons by all online hosting services when they restrict access to content, the article requires platforms to ideally inform media service providers of such plans for removal *before* it takes place.¹¹¹ Yet far greater scrutiny is needed over what is classified as a ‘media service’. Indeed, Jan Barata argues that the current definition – ‘a service...where the principal purpose...consists in providing programmes or press publications to the general public...in order to inform, entertain or educate’¹¹² – is overly limited and potentially ‘discriminatory’, excluding (new) forms of journalism, independent experts and NGOs.¹¹³

It is clear that meeting the conditions of the public sphere model in practice involves trade-offs. Here, for example, we see that contribution to principle six has the potential to undermine contribution to principle one: while favourable conditions to ‘media services’ may contribute to the increased transparency of information dissemination, and therefore mitigate the effects of replacement of editorial by algorithmic content curation, in doing so it has the potential to damage the policy’s ability to ensure broad representation and inclusion of pluralist voices through its use of a traditional definition of media service.

These trade-offs clearly cannot be eliminated, partly because they are inherent to the model, but they can be managed. The DSA essentially delegates many of these trade-offs to the VLOPs and VLOSEs in particular. It is clearly not possible for the regulatory authorities to specify precisely content moderation or recommender system design and the control over the factors discussed above. Instead, the regulations attempt to assert a degree of control through, for example, the requirements for ‘risk analysis’ and risk mitigation in relation to these and other issues, and through the co-regulatory Code of Practice, and through transparency reports. It seems clear that we are in a situation where the key parameters and their possible evolution over time are actually unknown, at least outside of the large corporate players.

¹¹¹ European Commission, European Media Freedom Act, article 17

¹¹² Ibid, article 2

¹¹³ Joan Barata, ‘Protecting Media Content on Social Media Platforms’, *Verfassungsblog: On Matters Constitutional*, 25 November 2022, <https://doi.org/10.17176/20221125-121603-0>.

Operational effectiveness

The package of regulations I have been examining is novel and, up to now, unique. The legislators would argue that it will establish an order protecting democracy and avoiding various ‘harms’ *at the same time as* fostering innovation and competition. This is broadly recognised; De Streel and Larouche for example call the DMA a ‘revolution grounded on tradition’, in its aim to support sustaining innovation and favouring of behavioural over structural remedies.¹¹⁴ The novelty of the approach means it is subject to major uncertainties over effectiveness, and at best the control to be exerted over the major players is relatively weak. There are potentially large fines for serious transgressions, but the approach involves significant self-regulatory elements, only really overseen via various ‘transparency’ measures.¹¹⁵ Moreover, only the DSA and DMA have been adopted, there remain extensive questions about the detail of the EMFA and, in the light of ChatGPT and other generative models, the whole approach of the AIA.

Uncertainties therefore abound about the ultimate practical impact of the package. Marta Maroni has questioned for example the extent to which the new roles of ‘trusted flaggers’ and ‘vetted researchers’ lead to ‘wider public scrutiny’,¹¹⁶ while Buri and Van Hoboken raise concerns that public law enforcement organisations can count among entities listed as ‘trusted flaggers’.¹¹⁷ More broadly, we can ask whether the reliance on transparency measures really operates to the benefit of public sphere principles, as some scholars suggest the rules even institutionalise private economic interests in online public space: although ultimately concluding against the hypothesis, Heldt writes that the new rules could ‘consolidate’ the ‘dominant position’ of platform intermediaries,¹¹⁸ while Maroni argues that transparency under

¹¹⁴ Pierre Larouche and Alexandre de Streel, ‘The European Digital Markets Act: A Revolution Grounded on Traditions’, *Journal of European Competition Law & Practice* 12, no. 7 (8 September 2021): 542–60, <https://doi.org/10.1093/jeclap/lpab066>.

¹¹⁵ See Savin, ‘The EU Digital Services Act: Towards a More Responsible Internet’. for a discussion of excessive transparency measures.

¹¹⁶ Marta Maroni, ‘Mediated Transparency’: The Digital Services Act and the Legitimation of Platform Power (March 22, 2023). Forthcoming in Päivi Leino-Sandberg, Maarten Zbigniew Hillebrandt and Ida Koivisto (eds), (In)visible European Government: Critical Approaches to Transparency as an Ideal and a Practice, Helsinki Legal Studies Research Paper No. 77, p. 21

¹¹⁷ Ilaria Buri and Joris van Hoboken, ‘The Digital Services Act Proposal: a critical overview’, Digital Services Act Observatory discussion paper, *Institute for Information Law*

¹¹⁸ Amélie P Heldt, ‘EU Digital Services Act: The White Hope of Intermediary Regulation’, in *Digital Platform Regulation: Global Perspectives on Internet Governance* (Springer International Publishing Cham, 2022), 69–84.

the DSA function as legitimising force for platforms control,¹¹⁹ And we can levy similar criticism at both the EMFA and AIA.

¹¹⁹ Maroni, 'Mediated Transparency', p. 19

Implications for the model and conclusions

So far, we have perhaps offer two overall reflections regarding the compatibility of the regulations with the public sphere. First, that while they may move in the right direction towards reaching various principles, the regulatory initiatives ultimately fail to live up to the normative ideal of the model. Second, this is at least partly because of the dependence of the regulations both on the existing EU *acquis*, and because of the broader parameters of the digital ecosystem. Considering these constraints, it is necessary at this point to return to the theory to ask whether the missing presence of an online public sphere model as a coherent force in the emerging European digital policy is therefore at least partly a result of the failure of the model itself to work in the platform age. In other words, are the scholars arguing for its abandonment correct that the complexities of the digital environment are so extensive that the public sphere becomes an irrelevant concept?

I do not think so. Rather, it reinforces the need for continuing negotiation between the model and contemporary realities. Fraser has highlighted that the critical value of the public sphere model is dependent on its possession both of ‘normative legitimacy’ and ‘political efficacy’.¹²⁰ While she used this to discuss the risks of a ‘transnational’ public sphere given the centrality of the Westphalian model to Habermas’ analysis, a similar imperative can be identified in its digital counterpart. For ‘normative legitimacy’ and ‘political efficacy’ to co-exist, the model of the public sphere must tread a careful balance between representing an ‘ideal’ to be strived for and feasibility – that is, not so far from present reality that it becomes useless for critical comparison. The public sphere theory is capable of being more flexible in negotiating with the realities of digital transformation and platformisation. To do so, perhaps we need to move beyond a model that requires independence from private interests, but one that is free from manipulation and interference *despite* the existence of those private economic interests. Further, the need for flexibility goes beyond the current iteration of digital regulation. No doubt the current rapid rise of Generative AI will pose new threats to the realisation of a well-functioning public sphere, with which the model will need to engage.

¹²⁰ Fraser, *Transnationalizing the Public Sphere*.

In light of these negotiations, what remains, then, of the added value of the digital public sphere model? First, it offers a coherent means of moving beyond the rights and freedoms of individual citizens which it situates in collective communicative processes of political discourse. Second, its focus centres specifically on democratic processes. While the idea of ‘digital constitutionalism’ addresses democratic processes to some extent, its scope is much wider.¹²¹ Third, the fundamental message of the public sphere framework hinges on the relationship between the public and the private. It is this relationship that provides the central linkage between each of the six principles – the importance of a broad array of diverse ‘private’ individuals coming together as a ‘public’ (principle one), the need for those participants to be private and therefore autonomous (principle two), the importance of the public being independent of such ‘private’ interests (principle three), and the idea that common good and rationality prevent the private interests of individuals interfering with the common good (principle five). In this way, the comprehensive way in which the public sphere model links all fundamental aspects of democratic communicative processes to the relationship between the public and private spheres – perhaps *the* fundamental question in the platform age – makes the framework continually relevant, even if its normative ideals continue to be negotiated.

In this dissertation, I have tried to show two distinct things. By using a model of the public sphere as the conceptual lens, I have tried to offer insights into some of the successes and limitations of the effectiveness of part of the EU’s new generation digital *acquis* in its response to the threats posed by the digital transformation to democratic participation. While there are important strides taken by the DSA in terms of user, civil society and researcher empowerment in shaping and monitoring the rules and norms of online public space governance, there is no integrated philosophy of the public sphere at the macro level. Such an integrated philosophy, however, asks too much. Given the continued prioritising of commercial rather than democratic imperatives, of innovation and competition regulatory legacies, we should perhaps question whether the transition to ‘digital constitutionalism’ in Europe is even remotely complete. At the same time, acknowledging the more structural obstacles to the ability of the regulations to live up to the model, I have also tried to demonstrate the importance of a certain flexibility necessary in the model itself. Contrary to the narrative of decline, applying the model of the public sphere

¹²¹ De Gregorio, ‘The Rise of Digital Constitutionalism in the European Union’.

to the digital age remains a relevant and critical task even if that requires greater yet subtle negotiation with reality.

I have not attempted to do demonstrate either of these exhaustively. Given the Acts discussed are either still proposals or recently passed, most of the discussion points are still at the level of 'intention' rather than effectiveness, simply because it is still too early to see the real effects. The breadth of the concepts being dealt with also warrants a far deeper analysis using a broader range of sources. Indeed, this has been an exploratory intellectual exercise rather than anything else. The most fundamental omission has been the tension between the supranational nature of the regulation, to which I will dedicate the last few words. Surely an unvoiced hope underlying the regulations is that the 'Europeanising' of competences related to the digital ecosystem can contribute to the creation of specifically 'European' public spheres. And perhaps given the porous borders of online internet spaces and networks, along with the fact that the EU is currently leading this field, the contribution of European regulation to 'digital' public spheres therefore also has implications for future 'transnational' public spheres.

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