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THE NON-DISCRIMINATION PRINCIPLE AS A GENERAL PRINCIPLE OF THE EU LAW IN THE DIGITAL AGE

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Abstract: *The paper explores the application of the principle of non-discrimination, as a general principle of the EU legal order within the evolving topic of digital rights, with a particular focus on access to effective judicial protection for the users. The principle of non-discrimination, as a horizontal tool, should guide the interpretation and application of EU law. As it happened during the past decades for rights of works and equal opportunities gender related, the principle could be used in the field of digital regulation, particularly in securing procedural rights and effective remedies under Article 47 of the Charter.*

Key words: *General Principle, Judicial Remedies, EU Law, Digital Rights*

1. Introduction

The digital transformation has profoundly reshaped the society with a great impact on the fundamental rights of individuals. Rights which were not specifically articulated in the Constitution-Charter of the Member States or any other source at the apical structure. Today digital platforms become increasingly important for ensuring social engagement, economic activities, access to information generally and for the most part citizenship rights. Clearly, this technological change affected in both monetary and legal terms: all the way, innovation and efficiency, came with new kinds of inequality, exclusion, and uncertain assessment because the algorithm kept behind the scenes during the decision (Balkin, J. M. (2018). Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation. *U.C.D. Law Review, 51*, 1149). This paper seeks to examine the implications of the digital transformation for the general principle of non-discrimination affecting the European legal order. The particular principle of non-discrimination — which can be found in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union (CFR) and is also regarded as a pillar of the EU legal order by the Court of Justice of the European Union (CJEU) — needs to be reformed and reinterpreted to guarantee that it continues to protect equality and justice in the current digital era (Bassini M. (2019). Fundamental rights and private enforcement in the digital

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age. *European Law Journal: Review of European Law in Context, 25*(2), 182-197). The CJEU has recourses to the general principles of EU law in early cases in the 1950's, where the Court has referred to the non-discrimination principle and the proportionality principle to limit the restrictive effects of market regulation measures in terms of economic freedom (Judgment 17 December 1959, C-14/59, *Pont-à-Mousson v. Haute autorité*). It is however important to note that, without limitation, even if the application of the principle is closely connected to the nationality, the principle of non-discrimination, as refined further by the EU case law, has not only been found in concrete grounds as sex, age, nationality, and so on. This is, as we shall see in the course of time, now a horizontal element, a means of interpretation and, in practice, applicable to various subjects. Its nature is structural to all EU norms and provides a constitutional guarantee contained in the EU's rule of law framework and the protection of individual rights. Based on the Treaty since the Union was founded (Art. 7 EEC - currently Art. 18 TFEU), case law of the Court of Justice, as established by Prof. T. Tridimas in "The General Principles of EU Law", brought it up to serve as a cornerstone in the legal order of the European Union. Since it was clearly established within the economic sphere and the construction of the common market, the Court has progressively acknowledged equality of treatment as not just a sectoral rule, for instance in relation to the freedom of worker movement or gender equality, but as an overall interpretative criterion regulating the conduct of the EU institutions, Member States and all other actors in the EU market. The CJEU has unambiguously held from the *Mangold* case (C-144/04) and the *Kücükdeveci* case (C-555/07) that the prohibition of discrimination is a general principle of EU law, one that can produce direct effects and bind both Member States and private actors alike when implementing EU law (Judgment 22 November 2005, case C-144/04, par. 75: "*The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law*"). European jurisprudence has progressively raised the principle of prevention from a sectoral rule to a standard of the constitution and is at the very heart of coherence and legitimacy of the EU legal order. However, the digital era has put testable constraints upon this principle to conform to new circumstances (Bradford A. (2024), The False Choice Between Digital Regulation and Innovation, retrieved from https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=5567&context=faculty_scholarship). With these new technologies and economic shifts, this will require a rethinking of traditional conceptions of equality, and how the principle of non-discrimination can and will be applied. This article explains that the broader principle of non-discrimination is a critical tool for this translation in both the conceptual as well as the practical levels. The principle would therefore also serve to guide legislative and judicial action while the digital markets are being regulating, and to protect individuals particularly in relation to their digital rights. Finally, the principle is also a bridge between substantive equality — in which individuals are not unfairly regarded or alienated using algorithmic — and procedural justice, established by Art. 47 of the Charter. A consistent application of the principle of non-discrimination at the level of digital regulation (from the GDPR to DSA to the DMA to the AI Act, and beyond) will go a long way to ensuring that technological innovation is in line with the founding values and principles of fundamental rights of the EU (Lenaerts K. (1999). L'égalité de traitement en droit

communautaire, un principe unique aux apparences multiples, in *Cahier du droit européen, 3*, 3).

2. The Principle of Non-Discrimination in the EU Legal Order

The notion of equality – a dynamic concept – has always been closely related to the one of justice, developed by philosophers like Rousseau and contained in the Declaration of Independence of the United States in 1776. The transformation of the prohibition of discrimination from a specific legal rule into a general principle was driven by the CJEU through an extensive jurisprudential process which led to the protection of fundamental rights. Such evolution demonstrates how the European legal order progressively internalized equality as a guiding value of the European integration, extending its scope from the economic sphere of the internal market to the full spectrum of fundamental rights. As mentioned, European law protects not only formal but also substantive equality. The general principles of EU law have constitutional status, and a common characteristic is that they have been derived from the laws of the Member States and their common constitutional traditions, even if it is not fully clear what those common constitutional traditions are considering the very different types of Constitutions present in the EU. The most relevant development in the past 20 years has surely been the expansion of the application of the protection of fundamental rights. This element had a strong impact on the standard of scrutiny applied by the CJEU and on the ones that, hopefully, the higher Court in the EU legal order will also apply to the technological innovations which are analysed in this paper. Article 18 of the TFEU by prohibiting "*any discrimination on grounds of nationality*" within the scope of application of the Treaties increases the visibility of the equality principle as a political aspirational value and provides the legal basis for the Union to take actions against discrimination. Under Art. 18 TFEU the Council may adopt legislation applicable to Union citizens as well as to non-European Union citizens thereby raising the general standard of protection worldwide. On the basis of Art. 18 TFEU two very important pieces of secondary legislation have been adopted by the Union: the Directive 2000/43 imposing equal treatment for persons disregarding the racial or ethnic origin (Race Directive) and the Directive 2000/78 establishing a general framework for equal treatment at work. The scope of those directives was quite large in order to prohibits discrimination in the social sphere. With the entry into force of the CFR as a binding source of law, the norm benefitted from an extensive interpretation through which equality acquired an explicitly constitutional dimension. Article 20 CFR declares that "*everyone is equal before the law*," while Article 21 prohibits discrimination on a wide range of grounds, including sex, race, ethnic origin, religion, age, and sexual orientation. Importantly, Article 21(1) CFR adopts an open-ended clause - *such as* - allowing the Court of Justice to be able to extend the protection beyond the listed categories. Moreover, Art. 22 CFR protects linguistic diversity, Art. 23 guarantees equality between man and women, Art. 24 safeguards the rights of the child and, finally, Art. 26 concerns the rights of persons with disabilities. The extensive case law of the ECtHR also contributed to establishing the general right to equal treatment. The elevation of this right to a general principle of law is largely the result of judicial construction by the European judges. Through its case law,

the CJEU has progressively transformed non-discrimination from a rule applicable to specific policies, such as equal pay under Article 157 TFEU, into a structural element of the EU's identity and values. A relevant point occurred in the *Mangold* case (C-144/04), where the Court recognized that the prohibition of age discrimination is a general principle of EU law that has direct effect even in the absence of specific secondary legislation. The Court stated that this principle arose from the common constitutional traditions of the Member States and, consequently, should have been considered binding for all national authorities. This reasoning was also reaffirmed in the *Kücükdeveci* case (C-555/07), where the Court clarified that national courts must disapply any provision of domestic law contrary to the general principle of non-discrimination, even in horizontal relationships between private parties. These two judgments were particularly significant because they extended the applications of general principles beyond vertical relations between individuals and the State, and also confirmed that the equality and the non-discrimination principles enjoy a significant constitutional autonomy, capable of shaping the interpretation of both primary and secondary EU law. In this sense, non-discrimination functions not only as a right of individuals, but also as a structural principle ensuring the coherence and legitimacy of the Union's legal system. Subsequent jurisprudence consolidated this approach, namely the *Test-Achats* case (C-236/09) and the *Dansk Industri* case (C-441/14). Indeed, the principle evolved into a constitutional benchmark for assessing the proportionality and legitimacy of public measures which create a double standard differentiation between categories of individuals. Finally, even if the prohibition of discrimination primarily concerns substantive equality, however it is intrinsically linked to procedural justice and access to legal remedies as ensured by Art. 47 of the CFR. The interplay between Articles 21 and 47 of the Charter thus anchors equality not only in substance, but also in court.

3. Digital Transformation and Emerging Inequalities

Through network effects, economies of scale and data accumulation, only a handful of platforms — gatekeepers under Regulation 2022/1925 (DMA) — get to set the terms on which users can participate in digital ecosystems. And this concentration of power has implications for equality. The un-transparent terms of service of a dominant platform determine access to these essential online infrastructures, thus exposing the system to the risk of discriminatory exclusion. With little accountability or awareness of the ability of the users to contest effectively, users can be de-prioritized, delisted, or suspended through automated systems. This principle of non-discrimination in this case, calls not only for the abolishment of unfair or unjust disparate treatment, but for these structural protectors to create structures of equitable availability of digital infrastructures, and for due process in the administration of platform rules. Algorithmic systems are being put to use where algorithms automate the decisions that determine individuals' rights and interests, such as credit scoring, job placement or the processing of data. An additional layer of newly emerged inequality relates to access and control of data. In the digital economy, data is the raw material and the origin of market power. Big platforms collect copious amounts of information that allow them to optimize algorithms, customize

services, and remain competitive. Individuals, on the other hand, have no access to, experience with or ability to use their data in any meaningful way. That asymmetry of data carries implications about equality and non-discrimination, which typically happen in consumer law. It is likely that the traditional understandings of equality based on explicit differential treatment of identifiable groups, is unsuitable for the digital world depicted above. What is required now is a broader understanding of digital equality, based on the fundamental principle of non-discrimination but adapted to the structural realities of data-driven governance. Digital equality is substantive as well as procedural: It requires equal access to digital infrastructures, safeguards against algorithmic bias, and effective opportunities for redress. In the years ahead, it is clear that we will need not only a broad interpretation of the general principles, particularly of the non-discrimination one, but also a coherent EU normative framework. Perhaps this may require the adoption of a new Charter on the digital rights of individuals—a similar future model to that developed and implemented by the CFR.

4. Extending the Applications of the General Principle of Non-Discrimination to Digital Rights

The intrinsic flexibility of the general principle makes them the perfect interpretative tool to dynamically address the new forms of inequality, guiding the application of EU law in the complex regulatory field of digital governance. As the Union increasingly legislates to structure the digital economy and protect users' rights, the general principle of non-discrimination provides both a constitutional compass and a corrective mechanism, ensuring that technological innovation remains aligned with the founding values of the Union as listed in Art. 2 TEU. General principles serve as structural norms in the EU legal order, ensuring coherence across different legislative instruments and safeguarding the identity of the Union. Their role of constitutionalizing function becomes particularly significant in this fields characterized by rapid change and technological complexity in which the framework designed by the legislation is incomplete and fragmented. The fragmented body of EU digital regulation — composed by GDPR, the DSA, the DMA and the AI Act) — is in great need to find a necessary coordination with the *aquis communautaire* and conventional norms like for example abuse of dominant position (Art. 102 TFEU), through a coherent interpretation by the European courts.

The GDPR has some norms within the logic of non-discrimination: Article 5(1)(a) establishes the principle of fairness in data processing and Article 22 confers the right not to be subject to a decision based solely on automated processing. Recital 71 explicitly warns against discrimination based on sensitive data or factors such as race, religion, or political opinion. However, these provisions require interpretative reinforcement. Indeed, the concept of "fairness" in data processing remains largely vague and indeterminate. A possible first example of such an approach would be the *IAB Europe* case (C-604/22). Even if the judgment does not lay out the equality principle, one can be skeptical that such processing of large quantities of data hinders the proper exercise of users' rights. The DSA's obligations for transparency and due-process have clear implications for procedural equality, even without any explicit reference to it. The reason of the DMA is that access

to the markets needs to be done equally. Finally, the AI Act mentions "bias mitigation" and "training data quality," but does not adequately articulate equality. Thus, this body of secondary legislation, which accounts for the user's rights in a multi-layered architecture, requires that these principles be read, interpreted and applied in a manner consistent with the general principles.

5. Conclusions

Considering the general principles of EU as founding cornerstones of the EU legal order, considering in particular the principle of non-discrimination as one which incorporates the EU values stated in the Treaty since the early stage of the European integration, and, last but not least, considering the fragmentation of the legislative framework applicable to the digital sector, it is possible to humbly suggest two key points for actions: a systemic approach to the interpretation of the norms through the use of the general principle and the adoption by the Union of a Digital Rights Charter. These two elements could support the efforts of the Union regarding its so called digital sovereignty strategy, both in the ascending phase of the creation of the norms as well as in the descending phase of their application (Moscianese, 2024). Concorrenza e regolamentazione nei mercati digitali, Torino, Giappichelli). The Charter could serve as an interpretative codification of existing principles to enhance clarity and visibility, reaffirming that equality, transparency, and accountability are not policy aspirations but binding imperatives founded in EU values and expressed through written norms. It could also consolidate the role of the general principle of non-discrimination as a structural axis connecting diverse regulatory regimes. The systemic approach, eventually driven by the CJEU, could reinforce the cooperation between national and European judges. It is of utmost importance that equality principles be integrated into digital regulation to ensure continuity with the Union's legal tradition, reaffirming that technological progress must unfold within the framework of EU values and judicial effectiveness, and empowering national and EU courts to interpret digital rights consistently.

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