Hardly law or hard law? Investigating the dimensions of functionality and legalisation of codes of conduct in recent EU legislation and the normative repercussions thereof

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Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31 (COM 2020/67 Final) (European Union)

*E.L. Rev. 752 Abstract

In the wake of the "new governance" movement, the EU has increasingly relied on soft law instruments that include non-political stakeholders into the policy process. Codes of conduct are such instruments. They have traditionally been used in EU law in a wide but inconsistent variety of ways. However, recent high-profile information and communication technology legislative instruments such as the Audiovisual Media Services Directive, *the* General Data Protection Regulation *and the* Digital Services Act *use codes of conduct in a relatively similar way that seems to mark a new trend in EU policymaking. This contribution argues that codes under these three instruments display unique features across their functional dimensions (implementation, accountability and enforcement) and the dimensions of legalisation (obligation, precision and delegation). While this approach may be understandable with a view to achieving a further integration of the European Digital Single Market, it raises important questions regarding its normative repercussions and the legitimacy of these instruments.*

Introduction

Legal means such as the progressive development of common rules and enforcement procedures have helped achieve the economic, social and political integration process of the EU (European Union) throughout its existence. [1] During the 1990s, the EU began evaluating the impact and effectiveness of its legislation [2] as part of the "Simplification of Legislation in the Internal Market (SLIM) programme". [3] The influence of the "new governance" approach [4] and recommendations from studies such as the so-called Molitor **E.L. Rev. 753* Report [5] led to the growing involvement of a large number of (non-political) actors and stakeholders such as experts and civil servants. [6] As Curtin observes, the EU's "grand treaties" that were essentially "law with politics" started making way for "informal governance" or "non-law with non-politics". [7] The elements to this approach

are collectively called the Better Regulation Agenda and scholars consider it a dynamic phenomenon that changes along with evolving political circumstances. [8]

A wealth of EU documents followed that propagate this idea of "better regulation". The 2001 White Paper on Governance states that the EU should complement policy tools more effectively with non-legislative instruments to improve the quality and reduce the quantity of rulemaking. [9] The 2002 Action plan "Simplifying and improving the regulatory environment" [10] contains the statement that "alternatives" to legislation can be used to achieve Treaty objectives while simplifying law-making activities and legislation. [11] The Inter-Institutional Agreement on Better Law-Making from 2003 proposes the use of "alternative regulation mechanisms" in "suitable cases" or where the use of a legal instrument is not specifically required, and where this represents "added value for the general interest". [12] The Communication on a renewed EU strategy 2011–14 for Corporate Social Responsibility guided the Commission to launch a process "to develop a code of good practice for self- and co-regulation exercises". [13] This plan birthed the "Principles for Better Self- and Co-regulation", [14] offering best practices for the conception and implementation phases of alternative regulation mechanisms. A Community of Practice for better self- and co-regulation was also set up. [15] This group gathers practitioners of alternative regulation and according to Senden it "stimulates a maturing debate, where the articulation and complementarity between hard regulation, on the one hand, and self- and co-regulation, on the other is explored in various ways". [16] Finally, the 2016 Interinstitutional Agreement on Better Law-Making declares that consultation with the public and with stakeholders, ex-post evaluation of legislation, and impact assessment before new initiatives are adopted can help achieve "the objective" of better law-making. [17]

The aforementioned terms "self-regulation" and "co-regulation" essentially describe the involvement of non-state actors in the regulatory process. Self-regulation is understood as the creation and implementation of rules to constrain the conduct of a set of private actors, with these actors themselves ***E.L. Rev. 754*** shaping the procedures, rules and norms, [18] with minimal or no intervention by the state. [19] Co-regulation is different in that it encompasses constructions that link non-state regulatory systems to state regulation, [20] by relying on private entities to perform a variety of government functions while state authorities provide oversight and enforcement. [21]

Instruments produced by this approach can be labelled as "soft law" instruments. [22] Although there is no consensus among scholars on the exact conditions for an instrument to qualify as being either hard or soft, the most streamlined and generally accepted statement would be that hard law imposes binding obligations whereas soft law does not. [23] Soft law, then, has a certain normative content and generates practical effects, [24] although it does so through factors other than legally binding force. [25]

The key trigger for this research is the prominent role that several recent pieces of EU legislation award to a specific soft law instrument: codes of conduct. Particularly EU instruments that lay down the Union's policy on information and communication technology (ICT) have emphasised the use of codes. For example, the Audiovisual Media Services Directive (AVMSD) in its 2018 amendment places codes firmly in the limelight through arts 4a.1 and 28b, stating that codes can help in particular to protect minors against harmful content. A second example of a high-profile ICT instrument is the General Data Protection Regulation [26] (GDPR). It encourages the development of codes by private actors "to contribute to the proper application of this Regulation" by specifying how its principles should be applied (art.40 GDPR). Finally, the proposed Digital Services Act [27] (DSA) similarly frames codes in its arts 35 and 36 as important tools to achieve the objectives of the instrument they are embedded in.

Problematically, however, there is little to no research on codes of conduct in the field of EU law, nor in the sub-field of the EU's ICT policy. This is remarkable since it has been well-established in scholarly literature that the EU employs a multi-level and multi-actor harmonisation-oriented regulatory strategy, [28] making soft law instruments an important aspect of any study relating to the EU's regulatory clout. This becomes all the more important when regulating digital spaces where there are no traditional patterns of ***E.L. Rev. 755*** territorial sovereignty and private actors have a strong influence. [29] The European Commission has also pointed out that codes of conduct under the GDPR specifically necessitate further research. [30]

This article first illustrates the EU's fragmented approach to codes of conduct by discussing the theoretical position of codes in EU law and the several "types" of codes that can be identified in practice. Second, it will be argued that there are important similarities in how three recent EU legislative instruments focused on the ICT sector (the AVMSD, the GDPR and the DSA) use codes of conduct. Third, the contribution proposes that these codes showcase unique features across three dimensions of

functionality and three dimensions of legalisation. Fourth, the two research questions at the heart of this contribution will be answered: does the EU legislator employ a new approach to using codes of conduct? And what are the normative repercussions of this approach, with specific attention for legitimacy? By making these arguments and offering answers to these research questions, the contribution hopes to stimulate further legal scholarship on codes of conduct—especially regarding the EU's ICT policy.

This article employs a traditional legal doctrinal research methodology. EU documents such as white papers, inter-institutional agreements, directives and regulations are identified as positive statements of norms. [31] The norms outlined in those documents are then applied to codes as a specific regulatory tool, employing a method of deductive and explanatory legal reasoning. [32] In this way, the article uses an internal legal methodology: legal principles, doctrines and concepts are used to build critical reasoning around authoritative texts. [33] By systematically exposing and applying the rules governing codes in EU law, the contribution analyses the applicable rules, areas of difficulty and possible normative developments. [34]

The traditional use of codes of conduct in EU law

The theoretical position of codes in EU law

First of all, it must be emphasised that codes of conduct in this contribution will be analysed exclusively as they are found in the unique domain of EU law. Codes as they are discussed here must therefore be differentiated from codes of conduct under public international law, where they are not a source of international law yet can be followed by states as if they were, or they are acknowledged as a source of international law but neither rights nor obligations may be conferred by them. [35] Codes of conduct in this contribution also do not correspond with how they are understood in corporate law, i.e. voluntary ***E.L. Rev. 756*** commitments by companies or industry associations that propose standards and principles for business activities in the marketplace. [36]

The legal basis for codes under EU law is found in art.288 TFEU, which lists the legal acts the European Union can take. Although the only soft law tools mentioned here are recommendations and opinions, the list in art.288 TFEU is not exhaustive. [37] Scholars have sorted the wide array of EU soft law instruments into three categories. [38] First, there are the "preparatory and informative instruments". Examples thereof are the EU's Green Papers, White Papers, action programmes and informative communications. Their main goal is facilitating future legislation and policy action through providing a new—or increasing an existing—basis of support. As dubbed by McLure, such instruments fulfil a "pre-law function". [39] Second, there are "interpretative and decisional instruments". These provide guidance to the interpretation and application of existing EU law with a view to enhancing legal certainty, equality and transparency. [40] Finally, "steering instruments" establish or give further effect to "EU objectives and policy or related policy areas", [41] with the end goal often being to achieve closer cooperation or even harmonisation between member states. Recommendations, resolutions and codes of conduct are cited as instruments used typically for this goal. [42]

Senden calls codes of conduct under EU law "non-formal instruments, in the sense that they occur only in daily practice" with a para-law function. [43] This covers three possible goals: they could be a temporary alternative to legislation until they are later replaced by legislation; they can also be a permanent alternative to legislation if legislation is seen as an option in the case of unsatisfactory compliance or non-compliance with the code; or they can have the earlier-mentioned pre-law function where they facilitate the future adoption of legislation by providing or increasing support for the rules. [44] These scholarly attempts at categorising and defining soft law tools in EU law are important since there is no meaningful legal framework at the EU level that specifies soft law tools' legal nature, the conditions for their validity, their precise areas of application, their links with hard law, and their limits. ***E.L. Rev. 757*** [45]

The traditional use of codes in EU law: a fragmented landscape

This lack of a meaningful legal framework at the EU level results in a very fragmented landscape of how codes of conduct have been used in EU law. The Union labels a variety of instruments as "codes of conduct", with great differences in their material scope, their development process, their legal effects, and more. This makes it difficult to determine a coherent set of characteristics that neatly groups them under "steering instruments" as mentioned before.

A first group of instruments called "codes of conduct" relate to the behaviour of the EU institutions. [46] These are akin to other codes found in international organisations and governmental authorities that stipulate the relationships among civil servants and between civil servants and citizens. [47] For that reason, we can call these "internal" codes. [48] For example, there is a code for members of the European Commission regarding conflicts of interest, discretion and integrity. [49] The European Parliament also has a code regarding financial interests and potential conflicts of interest. [50] The European Data Protection Supervisor (EDPS) also has a dedicated code of conduct. [51] These do not correspond to the idea of codes as steering instruments.

A second group of "codes" is situated on the level where the Union and the Member States interact. Seeruthun-Kowalczyk calls these "external" codes since they aim to guide the behaviour of the EU member states. [52] They fit into the earlier categorisation as steering instruments [53] : they establish or give further effect to EU objectives and (related) policy. [54] Senden describes them as being structured "in a comparable way to legal rules meaning that various principles of law can be applied to them by analogy". [55] Their status as soft law makes them easier to conclude than hard law instruments and imply lower bureaucratic transaction costs. [56]

An example of such an external code is the *Code of Conduct on Arms Exports*. Introduced in 1998, it left the power to make decisions on arms exports with the EU Member States, but contained criteria that form grounds for refusal with the ultimate aim of harmonising practices across the EU. [57] Ten years later, the code was replaced by a binding instrument. [58] Another example is the *Code of Conduct on Business Taxation*. Taxation is traditionally a sensitive topic, directly linked to a state's sovereignty and its attractiveness for investment. Using a code of conduct proved sufficiently politically digestible while also ***E.L. Rev. 758*** achieving normative, external effects. [59] Interestingly, the code is contained in a Resolution adopted as a joint decision by the Council and the Representatives of the Governments of the Member States (RGM). [60] Such a joint act by these two institutions is known as a "mixed act". [61] While Nouwen argues that a decision adopted by the RGM alone is at the very least an intergovernmental act—and possibly an international treaty—he reasons that mixed acts such as the code in question are an EU-specific instrument. [62]

A third group of codes in EU law can be situated in the direct relationship between the EU and private actors. The *Inter Institutional Agreement Annex 3 Code of Conduct (IIAA3 Code of Conduct)* is an example thereof. In 2011, the European Parliament and the European Commission set up a Joint Transparency Register meant to collect the information of lobbying groups. Registered interest groups must subsequently obey the code of conduct included in annex 3 of the agreement. Although it is voluntary to join the register, the European institutions have provided several incentives that make it de facto impossible to carry out lobbying activities without registration (e.g. only registered groups can meet with Commissioners and the Director-General, can be eligible to speak during public hearings of the European Parliament's committees, and more). There is a system of regular reports and quality checks thereof, third-party alerts on the veracity of those reports, and the possibility for third parties to file complaints on non-compliance with the code—with the possibility of an interest group being removed from the register and losing the privileges associated with the registration. [63] It is difficult to fit this code in with the aforementioned idea of "steering instruments".

A fourth group of codes in EU law is situated in the horizontal relationship between private actors, with direct and indirect interactions with the EU institutions. These codes are either the product of an individual company, or of an industry association that represents the interests of corporations within the same sector. Some EU legislative instruments acknowledge those tools developed by private stakeholders and seek to harness these private interests to achieve policy objectives. See, for example, the EU's Regulation 2018/1807 on a framework for the free flow of non-personal data in the European Union [64] that calls for the use of codes of conduct to sort out issues of liability [65] and to provide detailed information, operational requirements, model terms and conditions for data porting. [66] The EU Code of Conduct on Agricultural Data Sharing by Contractual Agreement was specifically developed to answer this call, developed by a coalition of associations in the EU agri-food sector. [67]

A fifth group of codes seems to exist that is still situated in the horizontal relationship between private actors, but with a somewhat higher level of involvement by the European Union. For example, reports declare that the *2016 Code of conduct on countering illegal hate speech online* was developed "at the behest of the European Commission under the threat of introducing statutory regulation" with extremely ***E.L. Rev. 759*** limited involvement of the Member States and the "systematic exclusion" of civil society groups. [68] Similarly, the status of the *2018 Code of practice on disinformation* as a self-regulatory instrument

has been called into question; it has been labelled a "government-initiated 'self-regulatory' instrument" [69] with the goal of getting IT companies to "sign on" to the content. [70] Although such a code does have the over-arching goal of helping achieve EU policy and objectives, their design (heavily driven by an EU institution, aimed at private actors) is very different from most of the other codes discussed—including what is generally expected from a steering instrument.

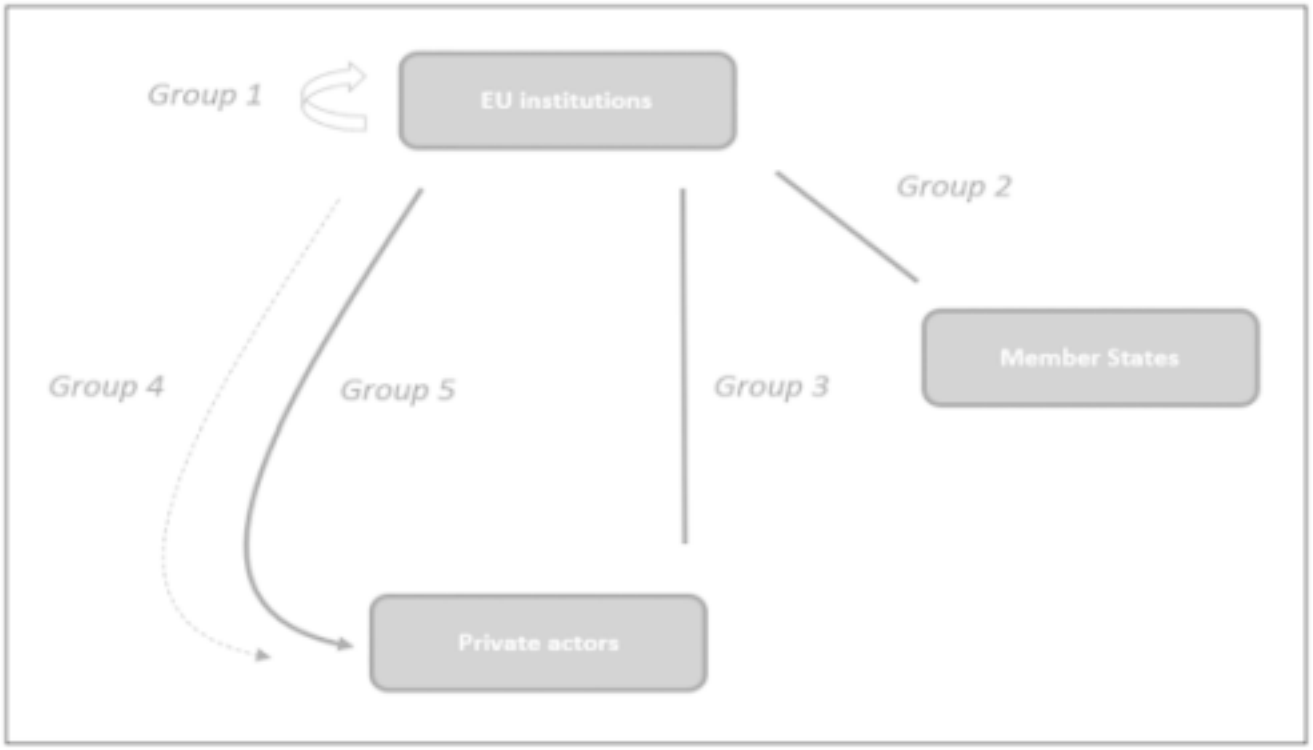

Fig.1: *A schematic overview of codes of conduct under EU law.*

The aforementioned examples of codes of conduct in EU law make it difficult to pinpoint precise characteristics that connect all of them. Although some remain close to the idea of a "steering instrument", their material scope, the actors targeted, and processes through which these codes were developed can all vary drastically. In some cases, it can even be considered that they have outgrown their origins as soft law instrument (see below for more).

Even when EU policymakers seem to discuss a specific group of codes, there can be great inconsistencies. For example, in the context of the abovementioned fourth group of codes, the EU institutions have referred to them as being self-regulatory tools, [71] either self-regulatory or co-regulatory tools, [72] implying that they ***E.L. Rev. 760*** are not self-regulatory tools, [73] or explicitly calling them co-regulatory tools. [74] The use of the term "code of conduct" therefore does not easily point to one specific type of instrument.

Codes of conduct in recent EU legislation: the AVMSD, GDPR and DSA as a new approach

However, three recent high-profile EU legislative instruments seem to mark a new trend in how codes of conduct are used. After all, these ICT-oriented instruments all use codes in relatively similar ways that merit further discussion: the 2018 revision of the AVMSD, the GDPR and the DSA. The most important provisions relating to codes will be briefly explained for each instrument. A more in-depth analysis follows in the next section of this contribution, centring on the unique dimensions of functionality and legalisation that codes in these three instruments display.

Codes of conduct in the AVMSD

The AVMSD coordinates the national regulation of all audiovisual media, ranging from TV broadcasts, to on-demand services such as Netflix, and video-sharing platforms such as YouTube. It was most recently amended in 2018. [75] Although the 2010 AVMSD [76] already acknowledged the importance of self-and co-regulation, it only briefly mentioned codes of conduct specifically. The 2018 AVMSD, on the other hand, heavily encourages codes throughout a number of provisions.

The 2018 AVMSD makes a two-fold territorial distinction between codes of conduct. First, art.4a.1 of the 2018 AVMSD proposes "national codes of conduct". The European legislator imposes specific requirements for those codes (denoted by the use of "shall"): these codes must be "broadly accepted by the main stakeholders in the Member States concerned", their objectives must be "clearly and unambiguously set out", there must be "regular, transparent and independent monitoring and evaluation of the achievement of the objectives" and there must be "effective enforcement including effective and proportionate sanctions".

Second, art.4a.2 of the 2018 AVMSD explains that it is possible to have EU-wide codes, called "Union codes of conduct" requirements similar to the national codes. Additionally, the draft union codes (the EU legislator issues specific and amendments) must be submitted to the European Commission.

Finally, art.4a.3 gives national jurisdictions important leeway regarding codes by stating that they are "free to require media service providers under their jurisdiction to comply with more detailed or stricter rules […] including where their national independent regulatory authorities or bodies conclude that any code of conduct or parts thereof have proven not to be sufficiently effective". The latter notion of "not to be sufficiently effective" seems to be particularly open-ended. ***E.L. Rev. 761***

The AVMSD offers several concrete use cases for codes. Article 6a determines that Member States shall encourage codes (see art.6a.4) to avoid that minors are exposed to audiovisual media services that "may impair [their] physical, mental or moral development". Article 9.3 states that codes should be used to "effectively reduce" minors' exposure to inappropriate audiovisual commercial communications for alcoholic beverages. Similarly, art.9.4 states that codes should "effectively reduce" minors' exposure to inappropriate audiovisual commercial communications that promote unhealthy food and beverages if this accompanies or is included in children's programmes.

Article 28b forms the other major use case of codes. Article 28b.1.a determines that Member States must ensure that video-sharing platform providers under their jurisdiction protect minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development. The Directive encourages the use of co-regulation explicitly, [77] as "it is appropriate to involve VSP providers as much as possible". [78] Although art.28b.10 AVMSD indicates that self-regulation through Union codes of conduct can also play a role, the explicit reference to co-regulation in art.28b.4 gives a clear signal that there should be a national legal framework that provides for the obligation to introduce appropriate measures. These may be operationalised by the VSPs, but can be enforced by the national media regulators. [79]

The role of ERGA (European Regulators Group for Audiovisual Media Services) must also be discussed. The organisation was established to ensure "the consistent application of the Union audiovisual regulatory framework across all Member States" (rec.56 AVMSD). It facilitates cooperation among the national regulatory authorities or bodies, and between the national regulatory authorities or bodies and the Commission (rec.56 AVMSD); it also provides the Commission with technical expertise and facilitates the exchange of best practices, including on codes of conduct (rec.58 AVMSD). ERGA also has proposed a Framework for Effective Co-regulation of Video Sharing Platforms that contains suggestions to stimulate discussions on codes. [80] The document is not meant to be exhaustive or prescriptive.

Codes of conduct in the GDPR

In 2018, the GDPR entered into application. It updates the EU's personal data protection framework that had previously been in place under the 1995 Data Protection Directive, adapting principles, obligations and rights to keep pace with the rapid technological advances that have taken place in the last two decades.

Most pertinent for this contribution is how the GDPR presents codes as instruments "intended to contribute to the proper application" of the GDPR (art.40.1 GDPR) with "the purpose of specifying the application" of the regulation (art.40.2 GDPR). They are thus posited as secondary instruments vis-à-vis the GDPR as the primary instrument (see below for a further discussion). This is reinforced by other provisions, such as arts 24.3 and 28.5 GDPR that declare that private actors may use adherence to approved codes to demonstrate compliance with their obligations under the regulation. Adherence to a code may

even be taken into account by regulatory authorities when deciding on the height of a fine or even whether a fine should be imposed at all (art.83.2.j GDPR). Codes under the GDPR therefore act as a liability reduction mechanism.

Similarly to the AVMSD, there is a distinction between the territorial scope of codes. First, arts 40.5 and 40.6 GDPR describe "national codes of conduct", that cover processing activities contained in one ***E.L. Rev. 762*** member state.[81] Draft national codes must mandatorily be submitted to the national supervisory authority (SA), who will provide an opinion on their compliance with the GDPR and potentially approve them (art.40.5 GDPR). Second, art.40.7 sets out the possibility for a "transnational code", covering processing activities in more than one EU Member State.[82] A draft code must be submitted to the code owner's chosen SA (the "competent supervisory authority" in GDPR parlance) and two co-reviewing SAs. If the draft is approved, the European Data Protection Board (EDPB) issues its own opinion on the draft code as the central EU-level authority that supervises the consistent application of the GDPR. It is only after this so-called "consistency opinion"[83] that the competent SA may grant final approval. Third, and finally, art.40.9 GDPR states that the European Commission may decide to grant an approved transnational code the status of "general validity". It is implied that a code of this type can cover processing activities in all EU Member States[84] —going one step further than transnational codes, which may apply in several but not necessarily all Member States. A code having general validity may also be used to transfer data from the EU to third countries (art.46.2.e GDPR).

The GDPR has an interesting view on the monitoring of codes, declaring in art.40.4 GDPR that a code "shall contain mechanisms which enable […] the mandatory monitoring of compliance". Article 41 GDPR then further elaborates on what is expected of monitoring bodies and their activities. Most notably, a monitoring body must gain accreditation by a competent national supervisory authority, and this can only be granted if four criteria are fulfilled: (1) a demonstration of independence and expertise; (2) procedures that allow an assessment of eligibility of interested parties; (3) procedures and structures to handle complaints and make them transparent; and (4) a lack of conflict of interests (see art.41.2 GDPR).

It must be noted that the EDPB has released several crucial guidance documents on codes of conduct since the entry into application of the GDPR. Guidelines 01/2019[85] is a particularly important document that further defines certain terminology related to codes of conduct and—crucially—lays down procedures and requirements that must be followed for a code to gain approval by the regulatory authorities. This is also the case for Guidelines 04/2021,[86] although this document deals specifically with codes used to transfer data outside the EU. It has been made clear that the content in these documents must be complied with for a code to successfully gain approval. ***E.L. Rev. 763***[87]

Codes of conduct in the DSA

The DSA[88] is part of a legislative package by the EU to govern digital services,[89] with the Digital Markets Act (DMA) forming the other half of the package. The DSA imposes obligations on digital services—in particular online platforms—regarding the removal of illegal goods, services or content; it also offers safeguards for users whose content may have been erroneously deleted; and it lays down transparency obligations (for example regarding online platforms' algorithms and recommendation systems).

Article 35 DSA has a similar wording to art.40 GDPR, stating that codes are intended "to contribute to the proper application of this Regulation, taking into account in particular the specific challenges of tackling different types of illegal content and systemic risks […]". Nonetheless, the DSA has its own unique interpretation of codes, mentioning for example that the Commission "may invite" certain platforms as well as civil society organisations and other parties "to participate in the drawing up of codes of conduct, including by setting out commitments to take specific risk mitigation measures, as well as a regular reporting framework on any measures taken and their outcomes."

Much like the GDPR and its pan-European authority the EDPB, the DSA designs a so-called European Board for Digital Services (EBDS). The EBDS is tasked together with the Commission in art.35.3 DSA to ensure that codes "clearly set out their objectives, contain key performance indicators to measure the achievement of those objectives and take due account of the needs and interests of all interested parties, including citizens, at Union level. The Commission and the Board shall also aim to ensure that participants report regularly […] on any measures taken and their outcomes." Additionally, it is the Commission and the Board who will assess whether codes meet their aims on the basis of regular monitoring and evaluations.

Article 36 DSA is remarkable because it creates a specific type of code to deal with online advertising. The goal of such codes would be "to contribute to further transparency in online advertising" (art.36.1 DSA). The codes are mandated to mention certain transparency elements (art.36.2 DSA).

Finally, art.28.b DSA determines that "very large online platforms" (a DSA-specific term that is not relevant for this current contribution) "shall be subject, at their own expense and at least once a year, to audits to assess compliance with […] commitments undertaken" regarding the two types of codes.

Especially intriguing for this contribution is the Code of Practice on Disinformation. Originally unveiled in 2018, this Code was presented as a "self-regulatory framework" [90] signed by major tech companies such as platforms Facebook, Google, Twitter and—eventually—Microsoft and TikTok. However, ex-post assessments recommended that there should be "a shift from the current flexible self-regulatory approach to a more co-regulatory one". [91] As a result, in June 2022, the "2022 Strengthened Code of Practice on Disinformation" was unveiled. This revised version of the code was presented as being "the result of the work carried out by the signatories" and noted that it is "not endorsed by the Commission, while the Commission set out its expectations in the Guidance and considers that, as a whole, the Code fulfils these expectations". [92] Additionally, the European legislator now explicitly links the Code to the proposal for a ***E.L. Rev. 764*** DSA: it is stated that the "Code of Practice aims to become a Code of Conduct under Article 35 of the DSA, after entry into force" [93] —including a sanctions regime in the event of non-compliance. [94]

The unique dimensions of functionality and legalisation in recent EU codes of conduct

The codes that were discussed above under the AVMSD, the GDPR and the DSA at first sight seem to be situated somewhere in between the "fourth" and "fifth" groups of codes of conduct that were identified earlier. They can therefore be considered a form of steering instruments since they give further effect to EU objectives and policy [95] (i.e. the successful implementation of the GDPR) by encouraging private actors to develop codes as soft law tools. However, it will now be argued that these instruments and their approach to codes represent a new "trend" in how the EU approaches codes of conduct. This is due to the unique features they display across two dimensions: their functional dimensions, and the dimensions of legalisation.

Three functional dimensions: implementation, accountability, enforcement

The first function of codes in the AVMSD, GDPR and DSA can be described as an *implementation function*. Codes are embedded within these instruments to aid the further implementation of the hard law instrument itself. The GDPR and DSA are explicit in this by using the exact same phrasing that codes are "intended to contribute to the proper application" of their respective instrument (art.40.1 GDPR, art.35.1 DSA). The AVMSD is less explicit, but consistently calls for the use of codes to achieve the overall objectives of the Directive (such as protecting minors against harmful content).

Additionally, all three instruments give concrete examples of the topics that codes should tackle to aid this implementation. The AVMSD mentions inappropriate audiovisual commercial communications for alcoholic beverages and unhealthy foods (arts 9.3 and 9.4); the GDPR suggests that codes could help clarify how data is correctly collected, how it could be pseudonymised, how children's data should be treated, and more (art.40.2 GDPR); and the DSA dedicates an entire article to encouraging codes regarding online advertising (art.36 DSA). The implementation function thus makes the abstract provisions of the main instrument more concrete for actors in the field through codes.

Second, codes in the AVMSD, GDPR and DSA have an *accountability function*. This builds on the previous function: if a code has correctly specified the abstract provisions of the main instrument, then adherence to the code can demonstrate compliance with the main instrument (or at least specific provisions). This is a "positive" approach to accountability. Vice versa, if a code does not correctly specify the main instrument or insufficiently specifies it, there are compliance issues. This is a "negative" approach to accountability.

The GDPR frames accountability in a positive manner. Its arts 24.3 and 28.5 determine that adherence to a code may be used "as an element by which to demonstrate compliance with the obligations". [96] Codes may also be used to demonstrate that appropriate technical and organisational measures were taken to ensure a level of risk-appropriate security (art.32.3 GDPR). And codes will be taken into account when assessing the impact of data processing operations (art.35.8 GDPR). Scholars have noted that this function ***E.L. Rev. 765*** can be of particular importance for SMEs as a cost-effective solution to compliance as they navigate their obligations under the GDPR. [97]

The DSA's approach is both positive and negative. Positively, it states that adherence to and compliance with codes "may be considered as an appropriate risk mitigating measure" when dealing with illegal content and systemic risks such as disinformation or manipulative and abusive activities. It is also noted that platforms having infringed certain provisions should draw up an action plan that specifies how the infringement will be dealt with; participation in a code is mentioned as a possible measure (art.50.2 DSA). Negatively, the DSA determines that "the refusal without proper explanations by an online platform of the Commission's invitation to participate in the application of such a code of conduct could be taken into account […] when determining whether the online platform has infringed the obligations laid down by this Regulation" (rec.68 DSA).

The AVMSD takes a fully negative approach to accountability. It declares that national regulatory authorities may lay down more detailed or stricter rules if they conclude "that any code of conduct or parts thereof have proven not to be sufficiently effective" (art.4a.3 AVMSD). Further references to a more negative interpretation are that a 'legislative backstop' is an important success factor for compliance with codes (rec.12 AVMSD).

Finally, codes in the three instruments have an *enforcement function*. All three instruments mention that codes of conduct can play a role during enforcement procedures linked to the provisions of the main instrument. This also flows out of the aforementioned accountability function.

The AVMSD declares that codes should provide for regular, transparent and independent monitoring and evaluation of the achievement of their objectives; enforcement is paramount and must occur through effective and proportionate sanctions (art.4a.1 AVMSD). Insufficiently effective codes (or parts of codes) may lead to national regulatory authorities imposing more detailed or stricter rules (art.4a.3 AVMSD). Since the AVMSD is a directive, enforcement is largely left up to the member states. Reports have shown divergent practices in how stringently national authorities enforce codes of conduct. [98]

Codes under the GDPR are interesting since the so-called "monitoring body" that must mandatorily be assigned to a code (art.40.4 GDPR) is appointed as the first to act. It must take "appropriate action in cases of infringement of the code […] including suspension or exclusion […]. It shall inform the competent supervisory authority of such actions and the reasons for taking them" (art.41.4 GDPR). The GDPR thereby creates a fascinating co-regulatory system: a private body must monitor compliance with the rules and take enforcement action where needed, but under the supervision of the national supervisory authorities who can also revoke the body's power and take discretionary action (see art.41.5 read in conjunction with art.41.4 GDPR). Additionally, art.83 para.2 (j) GDPR stipulates that supervisory authorities will give "due regard" to adherence to a code "[w]hen deciding whether to impose an administrative fine and deciding on the amount". Adherence to a code can thus influence both the height of a potential fine, and the fact of whether it is even imposed or not. As said before, codes thereby function as a liability reduction mechanism: by participating in a code, an enterprise may obtain lower fines or a lower risk of fines.

Finally, the DSA mentions that both the Commission and the EBDS will monitor the objectives, key performance indicators, and needs and interests of all parties regarding codes. They will also assess whether codes meet their aims and publish these conclusions. Particularly interesting are the mentions of enforcement in the 2022 Strengthened Code of Practice on Disinformation as a sort of proto-code to the DSA. The code mentions that Signatories have to implement their chosen commitments and measures within six months after signature; within seven months they must provide the Commission with baseline reports ***E.L. Rev. 766*** detailing their implementation. [99] Additionally, the Signatories commit themselves to cooperating with the Commission, the European Regulators Group for Audiovisual Media Services (ERGA) and the European Digital Media Observatory (EDMO) regarding implementation and monitoring. [100] As stated by Thierry Breton, European Commissioner for the Internal Market, "[v]ery large platforms that repeatedly break the Code and do not carry out risk mitigation measures properly risk fines of up to 6% of their global turnover". [101]

Three dimensions of legalisation: obligation, precision, delegation

The combination of these extensive functional dimensions with language typically associated with hard law raises questions regarding the exact legal character of these codes. The vagueness and explicitly voluntarily language usually associated with codes makes way for more concrete stipulations and more explicitly binding words such as "shall".

Scholars have observed that "formally non-binding agreements can gradually become politically, socially and morally binding for the actors involved". [102] Some scholars speak of a "hardening" of soft law instruments [103] or "juridification". [104] The terms "judicialisation" and "legalisation" have also been used to describe this phenomenon. [105] This contribution follows the view

taken by Terpan that this process encompasses "the transformation of non-legal norms into soft law (limited legalisation) or hard law (complete legalisation), as well as the hardening of soft law (soft law becoming hard law)". [106]

To theoretically underpin how soft law can become "hardened", Herberg describes a three level-structure that is not necessarily dependent on the content of the provisions itself, but rather on the supporting features that render the contents operational. [107] Teubner agrees with this theory, but interprets it as an application of Hart's classic conceptualisation of law as the combination of primary and secondary rules [108]: it is through the institutionalisation of secondary norm-formation processes that soft law can become hard. [109] The influential work of Abbott and Keohane forms the final piece of the puzzle. They identify three dimensions that determine the legal nature of instruments: obligation (actors are bound by a rule or commitment and their behaviour is scrutinised), precision (the required, authorised or proscribed conduct is unambiguously defined) and delegation (third parties have been granted authority to implement, interpret, and apply the ***E.L. Rev. 767*** rules, to resolve disputes, and possibly to create further rules). The more maximised each dimension, the "harder" an instrument.

First, we inspect the *dimension of obligation* of codes of conduct under the AVMSD, GDPR and DSA. Codes are traditionally voluntary rule sets; they set out non-binding standards and principles. [110] As a result, it remains up to each individual enterprise in a sector whether or not it wishes to commit to the rules laid out in a code. However, codes under all three instruments contain accountability and enforcement functions within the broader context of the hard law instrument they are nestled in. By reframing codes as a means to demonstrate compliance with their respective hard law instrument and as liability reduction mechanisms (to influence the amount or even the very imposition of fines), corporations are faced with a strong de facto obligation to participate in codes. Otherwise, the enterprise exposes itself to a higher risk of fines *or* a risk of higher fines. Companies will thus no longer participate in codes for traditional reasons such as demonstrating goodwill to regulators [111] and pre-empting binding legislation. [112] Rather, they will be involved in codes because codes are directly linked to punitive hard law provisions. This technique is undoubtedly a response to the EU's previous finding that "[t]he absence of genuinely dissuasive and punitive sanctions" is a major weak point of codes, [113] but it is a far-reaching new approach. The proposed DSA arguably goes even further, stating in rec.68 that "[t]he refusal without proper explanations by an online platform of the Commission's invitation to participate in the application of such a code of conduct could be taken into account, where relevant, when determining whether the online platform has infringed the obligations laid down by this Regulation". The fact that compliance with a code could be perceived as a condition to receive a legal benefit [114] places a financial and punitive pressure on corporations that raises questions about whether or not the EU is overstepping its powers.

The *dimension of precision* also sees a marked hardening. Codes of conduct are traditionally carriers of "open" norms, i.e. imprecise broad goals that offer corporations discretion in how to implement them. [115] As described before regarding the implementation function, the opposite holds true for the AVMSD, GDPR and DSA: they posit broad hard law provisions and determine that codes are meant to specify those provisions by offering prescriptive and specific solutions that can result in compliance. The AVMSD mentions that codes should be clear and unambiguous (art.4a.1.b AVMSD) and that they should effectively reduce minors' exposure to certain content (arts 9.3, 9.4 and 28b.2 AVMSD). The GDPR is even more explicit: codes should be used "so as to facilitate the effective application of this Regulation … In particular, such codes of conduct could calibrate the obligations of controllers and processors" (rec.98 GDPR). Particularly notable is the EDPB's determination that codes should "codify how the GDPR shall apply in a specific, practical and precise manner. The agreed standards and rules will need to be unambiguous, ***E.L. Rev. 768*** concrete, attainable and enforceable". [116] Finally, the DSA mentions that codes must set out their objectives and that they must contain key performance indicators for the purpose of measuring the achievement of those objectives. However, even more interesting is the 2022 Strengthened Code of Practice on Disinformation. The document contains a total of 44 "Commitments" that are often accompanied by several "Measures" meant to achieve the Commitments. Both the Commitments and the Measures are worded in a very precise way and use specific terminology that is defined in the DSA and in the Code itself. [117] By embedding codes of conduct directly into hard law provisions and considering them a tool to specify its binding obligations, they are used in the opposite way of their original function as a means of expressing broad and open-ended intentions. [118] Once again, a hardening of codes of conduct can be perceived, this time along the dimension of precision.

Lastly, there is the *dimension of delegation*. To reiterate, this entails that third parties are given authority to implement and enforce a rule, for example when administrative and judicial authorities interpret and extend broad principles. [119] This is how hard law traditionally functions: an instrument sets out legal principles, which are then interpreted, implemented and enforced by a range of authorities. This stands in contrast to the typical reliance of codes of conduct on non-judicial monitoring mechanisms

that offer advice or make non-binding decisions. Again, codes under all three instruments display a hardening of this dimension. The AVMSD gives national independent regulatory authorities or bodies the power to conclude if a national code (or part of it) has not been sufficiently effective and to lay down stricter or more detailed rules as a result (art.4a.3 AVMSD). The Commission will review draft Union codes (art.4a.2 AVMSD) although it remains unclear what other steps it can take. The GDPR, on the other hand, is very extensive and detailed in its system of delegation. Article 40.5 GDPR makes the submission of national codes to national supervisory authorities for approval mandatory. Similarly, art.40.7 GDPR obliges the submission of transnational codes to a total of three supervisory authorities (a supervisory authority of the code owner's choice and two co-reviewing supervisory authorities). Once they have approved the draft, the EDPB still has to give its approval (the so-called "consistency opinion") [120] before the national authority can ultimately award a final approval. Moreover, arts 64 and 65 GDPR set out the authoritative status of the EDPB's opinion, the need for supervisory authorities to explain why they would diverge from the EDPB's opinion, and a dispute resolution procedure by the EDPB. Additionally, the EDPB is responsible for issuing guidelines and recommendations regarding the GDPR —including on the functioning of codes of conduct. [121] Finally, the DSA creates the EBDS. Together with the European Commission, it monitors the content of codes, ensures that participants regularly report, and assess whether the aims of codes are being met (art.35 paras 3–5 DSA). The EBDS is also given the task of developing and implementing "standards, guidelines, reports, templates and code of conducts" (art.49.1.e DSA). This hardening of the dimension of delegation risks diminishing the decentralised, non-governmental nature of codes and their cooperative character.

***E.L. Rev. 769** [122]

The earlier figure visually representing the use of codes in EU law can now be updated with our findings on the unique characteristics of codes of conduct under the AVMSD, GDPR, and DSA.

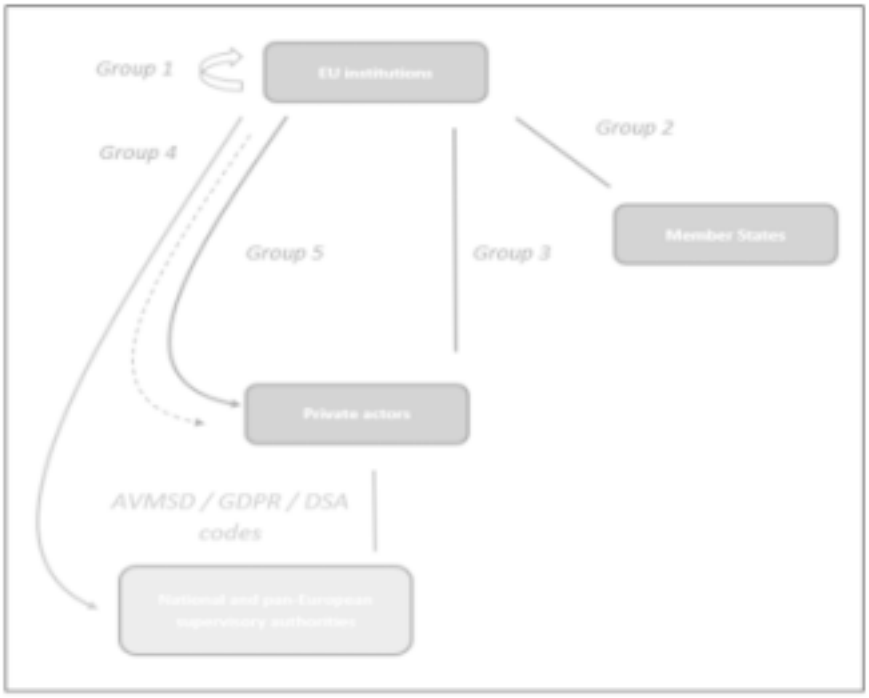

Fig.2: *A schematic overview of codes of conduct under EU law, including GDPR codes.*

The normative repercussions of the EU's new approach to codes of conduct

A general trend towards "harder" regulation?

Codes under the AVMSD, GDPR and DSA therefore seem to take up a unique place in the "pantheon" of codes of conduct in EU law. Their dimensions of functionality and of legalisation make them uniquely "hard" vis-à-vis other codes in EU law.

This is an understandable phenomenon from the perspective of European integration regarding the Digital Single Market. [123] The AVMSD, GDPR and the DSA all relate to the ICT sector and digital services. Since the internet is inherently borderless, a

"hard" approach that leaves little room for deviation on the national level—either by national authorities or by corporate actors—seems to be a "prima facie" necessary approach to achieve a harmonised EU-wide regime. This aligns with Terpan's view that the integrative dynamics driving the EU naturally nudge the institution towards the use of hard instruments, which in turn influences soft law to evolve towards a harder interpretation. [124]

Nonetheless, while this finding is notable in the context of codes of conduct in EU law, it aligns with a broader ongoing pattern whereby the EU increasingly interconnects hard and soft norms. [125] This has several possible explanations. Alternative forms of regulation have traditionally struggled with legal certainty, [126] effectiveness, [127] and accountability. [128] Hard law instruments, on the other hand, generally perform better on these aspects. Additionally, they have a proven track record in achieving the EU's policy goals. [129] It is therefore a logical step for the European legislator to wish to combine the inclusiveness and flexibility of codes with the uniformity and rigidity of hard law instruments to achieve the "best of both *E.L. Rev. 770* worlds". The GDPR 's preparatory documents certainly point in this direction, speaking of "[g]oing a step further in co-regulation" [130] and adding nudges toward a "harder" direction. [131]

Specifically for codes, this argument is supported by the example of the *EU's Code of Conduct on Business Taxation* (which has been briefly discussed before). As the EU became increasingly integrated, it became clear that significant differences in business taxation between member states distorted the single market and caused certain member states to incur significant tax revenue losses and tax burdens on labour. [132] At the same time, differing ideological and economic preferences meant that there was not enough support for EU legislation on the topic. Instead, a code of conduct was introduced as a "non-legally binding instrument that engages Member States at a political level to respect principles of fair competition, and to refrain from tax measures that are harmful". [133] The explicit nature of the code as a soft instrument made it politically digestible.

However, in the years following the adoption of the code, two intriguing processes took place. First, internally, tax measures were reviewed by an expert group (the "Primarolo Group") established by the Member States, using the provisions of the code as a threshold. Member States were given strict deadlines to roll back "harmful" tax measures and had to request formal extensions if more time was needed. [134] Member States' fierce reactions show that the code and its implementation were taken very seriously. [135] Second, externally, the Code of Conduct on Business Taxation was presented as more than a mere political commitment as the EU approached its enlargement from 15 Member States to 27 around the turn of the millennium. In fact, the code was presented as part of the legal "acquis communautaire" of the EU that new Member States must accept to enter the Union. [136] As scholarly work strikingly puts it: "What was soft law for the old EU-15 states became hard law for the accession states". [137] All references to the original political character of the code disappeared completely by the time of the accession negotiations with Croatia in 2008, [138] and adherence was presented as an unconditional obligation.

Repercussions for legitimacy

This new approach to codes of conduct under the AVMSD, GDPR and DSA does raise important questions regarding the legitimacy of such codes. Legitimacy amounts to "a generalized perception or assumption *E.L. Rev. 771* that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions". [139] The validity of the binding character of laws is legitimised by the idea that the norms are grounded in the consensus of participants through argumentation. [140] Representative democratic systems thus act as intermediaries to transform individual bundles of opinions into law issued by the state. [141] This does not mean that soft law tools are necessarily incompatible with legitimacy. A sincere "new governance" approach seeks an alternative way of achieving the respect and regard for citizens that is required of public normative orders. [142] The pluralism of the new governance approach could even be argued to be a central precondition to the EU's legitimacy. [143]

However, the codes of conduct discussed in this contribution appear to have a difficult relationship with legitimacy. Especially when considering "throughput legitimacy" (i.e. the quality of governance processes judged by policymakers' accountability and the transparency, inclusiveness and openness of the governance process [144]) such codes struggle. Is there sincere accountability if the hard law instrument lays down in obligatory and precise terms what is expected of soft law instruments, and if institutions such as the Commission, pan-European bodies (such as ERGA, the EDPB and the EBDS) and national regulators take a clearly hierarchical position vis-à-vis private actors in the policymaking process? Can the development process of AVMSD, GDPR

and DSA codes be perceived as inclusive and open if there is a distinct lack of dedication to civil society involvement—even though all three instruments deal with very concrete societal issues? [145] And is there sufficient transparency when it is this challenging to find publicly available information on the status of the code development process, let alone to find an overview of and consult approved codes of conduct—certainly at the national level, with different languages and differing standards in the public sharing of information by authorities?

Issues with legitimacy have important repercussions both from an intra-EU and extra-EU perspective. Intra-EU, it can potentially damage the credibility of the EU legislator. EU regulation has long-since struggled with accusations of being insufficiently democratic due to a lack of stakeholder participation, [146] and it would only add fuel to the flames if it is perceived that soft law is simply a guise for hard law. This also jeopardises the objective of "inclusive policymaking" in the Better Regulation Agenda. [147] On the other hand, soft law too has often been accused of lacking democratic input since regulatory authorities ***E.L. Rev. 772*** are traditionally involved to a limited degree. [148] The fact that the balance would now move to the opposite end of the spectrum for EU soft law (i.e. a lack of democratic quality due to the absence of private stakeholders being able to make their voice meaningfully heard) is deeply ironic.

Extra-EU, there is other important criticism. Many of the companies targeted by the AVMSD, GDPR and DSA are non-European companies; think of Meta, TikTok, Google, AliBaba, Samsung, Apple, Amazon, and more. Particularly with regard to the GDPR, the European Union has been accused of engaging in "data imperialism" [149] and of enforcing "a unilateral expansion of the application of European law to non-EU businesses". [150] Such a "power-based approach" is found problematic in light of other states' sovereignty and the rights of the actors subject to the EU's rules. [151] The result could be viewed as a double issue with legitimacy: other states' jurisdictional interests are overruled, and individuals can be faced with conflicting legal rules that create an excessive burden and loss of confidence in the validity of the law. [152]

Conclusion

This article has argued that codes of conduct have an unclear theoretical position in the canon of EU law. Their practical use has also been inconsistent. However, recent high-profile ICT legislative instruments such as the AVMSD, the GDPR and the DSA all use of codes of conduct in a similar way. They showcase unique dimensions of functionality and legalisation that may be understandable with a view to achieving a further integration of the European Digital Single Market, but it nonetheless raises important questions regarding the normative repercussions of this approach and the impact thereof on their legitimacy. This, in turn, is problematic from an intra-EU and extra-EU perspective. More academic research is now needed on codes in the EU's ICT policy. This is particularly important as new instruments such as the Artificial Intelligence Act [153] appear on the horizon and continue to place an emphasis on the use of codes of conduct.

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