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Between Rights, Interests, and Risk – The Role of the Proportionality Balancing in the EU Digital Law

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General Note about the Content

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Abstract

The emerging corpus of the EU Digital Law pursues and aims to balance two contradictory objectives: rights protection and respect for economic interests. Legislative inflation in the digital milieu and the above two contradictory goals create a complex and indeterminate legal landscape. The mixture of proportionality principle balancing and risk based approach is used to strike a balance between conflicting objectives and limit uncertainty. Proportionality also aims to solve the complexity and indeterminacy of the EU Digital Law. However, the principle is subject to relentless criticism, accusing it of overt utilitarianism, rights relativism, and hidden judicial policymaking. I argue that the proportionality principle is structurally ingrained in the EU Digital Law, and therefore, rights and interests balancing is inevitable. Private parties assessing risk also play an important role in the EU Digital Law proportionality balancing. Therefore, there is a need for a theoretical and pragmatic frame that explains the principle's proper use and its strengths and limitations. I propose that the way to properly understand the necessary role of the principle in the EU Digital Law is virtue ethics perspective, along with Robert Alexy's theory of law. Alexy's law ideal dimension argument and his law as a rational discourse perspective are of a wealthy explanatory value for proportionality. This theoretical frame enables us to see proportionality as an essential legal virtue. In this article, I first describe the theory of proportionality principle, its main criticism, and the principle's various incarnations in the EU Digital Law. Then, I explain why manifold new digital laws are complex and indeterminate, given their dual objectives of rights protection and allowing for economic interests pursuit. I describe how risk-based approach further complicates the landscape. Then, I briefly describe Robert Alexy's theory of law to analyze how Alexy's rhetorical perspective on law and proportionality principle helps better use the principle in pragmatically achieving EU Digital Law objectives.

Keywords

Proportionality principle, EU Digital Law, digital constitutionalism, risk, balancing, risk-based approach, fundamental rights.

Contents

1. Introduction 1
2. Proportionality Principle in the EU Digital Law and its Discontents 3
2.1 Constitutional Role of Proportionality Balancing 3
2.2 Proportionality as a Way to Resolve Conflicts in the Digital Milieu 6
2.3 Criticism of the Proportionality Principle 10
3. Complexity and Indeterminacy of the EU Digital Law – Between Rights, Interests and Risk 15
3.1 Inherent Complexity of the EU Digital Law 15
3.2. Complexity and Risk-Based Approach 18
3.3 Indeterminacy of the EU Digital Law Objectives – Rights and Interests as Equal Priorities 21
3.4 Indeterminacy of the EU Digital Law Rules Due to Risk-Based Approach 28
4. Proportionality as a Virtue Excercised in a Rational, Legal Discourse 33
4.1 Law as a Rational Discoruse and Law's Ideal Dimension – Robert Alexy's Theory of Law 33
4.2 Proportionality as a Legal Virtue 38
5. Inevitability of the Proportionality Balancing in the EU Digital Law 40

1. Introduction

In this paper, I argue that the EU Digital Law faces two challenges that may jeopardize its objectives: rights and economic interests protection. I claim that the proportionality principle is necessary to simultaneously achieve these objectives and address the diagnosed challenges. The first challenge is complexity, related to rapid legislative inflation contributing to a lack of a clear sense of the rights and obligations of parties in a given case. The second is indeterminacy, which stems from the EU Digital Law usually pursuing those two structurally conflicting objectives, to which a similar degree of legitimacy is given—protection of rights

and economic interests. These two objectives simultaneously appear throughout the majority of the EU digital laws[1].

The proportionality principle is used to solve both these challenges and, therefore, should be central to the digital law discourse. As a judicial methodology, the principle aids in cutting through complexity, indeterminacy, and reconciling rights protection and economic interests in a given case. The principle also helps to clarify the role of the risk-based approach when rights and interests are balanced[2]. However, burdened with numerous shortcomings, the principle is capable of achieving only this much. The fundamental political conflicts regarding right and wrong in the digital milieu will persist, as the principle's application rarely provides generalizable answers to contentious issues[3]. The risk-based approach's pervasiveness in digital regulation further complicates the picture.

The principle is criticized by numerous scholars for its arbitrariness when applied[4]. However, I argue that imperfections of proportionality are its feature rather than a bug. There is nothing wrong with proportionality's imperfection and related judges' discretion, provided that arguments and reasons for a decision are transparent, decision-makers are accountable, and decisions themselves can be challenged. Virtue ethics and rhetorical perspective on law and Alexy's law's ideal dimension argument help to explain and understand why[5].

I argue that simultaneously acknowledging the vital role of the proportionality principle and being conscious of its imperfections is the only feasible way forward to reconcile rights and

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[1] See section 3.2.
[2] For the overview of the risk based approach in the General Data Protection Regulation, Digital Services Act and Artificial Intelligence Act see generally: Giovanni De Gregorio and Pietro Dunn, 'The European Risk-Based Approaches: Connecting Constitutional Dots in the Digital Age' (2022) 59 Common Market Law Review <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/59.2/COLA2022032> accessed 15 November 2023.
[3] Principle is applied case by case, for more see especially: Robert Alexy, *A Theory of Constitutional Rights* (1st edition, Oxford University Press 2010).
[4] For the overview of the criticism of the proportionality principle see: para 3.3.
[5] See: Part 4.

interests, other than rigid and casuistic regulation through rules. Moreover, the principle benefits legal discourse as it helps unveil real social tensions underneath the particular legal case and the extra-legal factors guiding its solution. The example can be value judgments and discretion by the courts or interests pursued by economic actors covered by the mixture of risk-based and rights rhetorics.

To showcase the above points, in the second part I describe the proportionality principle and review its criticism. Further, in the third part I explain what I mean by the rising complexity of the EU Digital Law and what challenges it poses. Next, I describe why the EU Digital Law faces an indeterminacy challenge due to a duality of the objectives it pursues—that is, both protection of rights and economic interests. Further, I describe various incarnations of the proportionality principle as appearing in the EU Digital Law. I will briefly discuss the interrelation between the proportionality principle and risk-based approach and how the principle was applied in a few chosen landmark cases. I further explain why the proportionality principle is embedded in these laws due to the EU Digital Law objectives' duality and must be applied whenever a conflict emerges. Only then, in part four, will I describe how the criticism of proportionality can be countered with Robert Alexy's theory of law as a rational discourse and his law's ideal dimension argument. I conclude in part five by proposing that seeing proportionality as a legal virtue is the way to the principle's effective and pragmatic application in the EU Digital Law.

2. Proportionality Principle in the EU Digital Law and its Discontents

2.1 Constitutional Role of Proportionality Balancing

The proportionality principle is a constitutional principle that provides a legal methodology to determine whether a limitation to the right introduced by law can be reconciled with eg. a constitution or another higher-level act (in the case of the EU, these are

the EU Treaties)[6]. The principle is present in most modern Western constitutions and is an important standard in international and European human rights law[7]. It is also a general principle of the EU law[8]. The proportionality principle can be found in numerous limitation clauses, whose role is to define the scope of permitted limitations to the right[9]. Usually, a limitation clause states that a certain right needs to be necessary, proportionate, and pursuing public interest acceptable in a democratic society. Limitation clauses often also state that the limitation to the right cannot breach the essence of a subject right in order to be proportionate[10].

To evaluate whether a law is proportionate, that is, whether a limitation to a right is reconcilable with the constitution of a democratic society, the proportionality principle usually envisions a four-step test[11]. According to how Alexy and Barak conceptualize the principle, the first step is to evaluate whether a subject measure pursues a legitimate goal or proper purpose, which justifies a limitation to the right. The second step is to investigate a rational connection or suitability of a measure to achieve a legitimate goal or purpose. That means that a measure must be fit to pursue an envisioned goal. There must be a reasonable expectation that the measure will achieve its purpose. The third step is to inquire whether a measure chosen is not excessive or whether the least harmful one for a right was chosen. It means whether a measure is necessary. The third part of the test demands assessing whether

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[6] For the general theory of the principle and its structure see especially: Robert Alexy, *A Theory of Constitutional Rights* (1st edition, Oxford University Press 2010), and Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012).

[7] For the general overview of how the principle is present in the Western constitutional and international law see: Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012), Chapter 8 – The legal sources of proportionality, pp 211-242.

[8] Consolidated version of the Treaty on European Union (TEU), Title I - Common Provisions, Article 5 (ex Article 5 TEC), OJ C 202, 7.6.2016, p. 18.

[9] See for example: Art. 52 of the Charter of Fundamental Rights of the European Union, 2000, C 364/1 (CFEU). For the general overview of the character of limitation clauses see: Barak, *Proportionality: Constitutional Rights and Their Limitations,* Chapter 5, pp 107-128.

[10] Art. 52 of the CFEU.

[11] See (6)

other, less restrictive measures could have been chosen. The last part of the proportionality test is *stricto sensu* proportionality balancing, which means that a measure's benefits must be balanced against a detriment to a right. A negative impact on a right cannot be disproportionate to a benefit achieved by a measure. This step requires essentially a value judgment about the relative weights of competing rights and interests[12]. Proportionality is also a facet of the subsidiarity principle, which demands that what can be regulated and governed by an authority at a lower level of an institutional hierarchy should remain so[13].

The proportionality principle played an important role in resolving landmark digital law cases[14]. Two following cases showcase how proportionality resolves conflicts between competing rights and interests. In *Volker und Markus Schecke and Eifert* the CJEU decided that publication on the freely accessible website of information naming beneficiaries of the EU funds and amounts received is disproportionate in pursuing general interest against the privacy of the beneficiaries of the funds[15]. Limitations to rights should be applied only as strictly necessary, which was not the case when such data was indiscriminately disclosed, even if taxpayers' interest in transparency as to public funds was at stake[16]. In *Digital Rights Ireland* the CJEU invalidated the Data Retention Directive[17], which allowed for the retention of electronic communication data by service providers for the purpose of national security and

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[12] See: Robert Alexy, *Law's Ideal Dimension* (Oxford University Press 2021), Chapter 11: The Weight Formula, pp 154-174. There, the author explains his methodology for weighting conflicting rights and interests.
[13] Art. 5 of TEU.
[14] See especially: Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others, Kärntner Landesregierung and Others [2014] ECLI:EU:C:2014:238 (Joined Cases C-293/12 and C-594/12), Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González [2014] ECLI:EU:C:2014:317 (Case C-131/12), Maximillian Schrems v Data Protection Commissioner [2015] ECLI:EU:C:2015:650 (Case C-362/14), Bodil Lindqvist v Åklagarkammaren i Jönköping [2003] ECLI:EU:C:2003:596 (Case C-101/01), Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen [2010] ECLI:EU:C:2010:662 (Joined Cases C-92/09 and C-93/09).
[15] Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen [2010] ECLI:EU:C:2010:662 (Joined Cases C-92/09 and C-93/09), paras 77, 79, 85, 86.
[16] Ibid para 65.
[17] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ 2006 L105/54 (Data Retention Directive).

the fight against terrorism purposes. The CJEU stated that the EU legislature adopted the measure that exceeds what proportionality demands, specifically because of the lack of strict necessity of indiscriminate time and space data retention of not predetermined categories of individuals[18].

The examples above show that courts often resort to proportionality balancing in order to weigh and compare often incommensurable values that are very difficult to reconcile against each other, such as rights to privacy against the public interest in access to information. The difficulty lies in both mentioned rights pursuing the objective of a democratic society—a priority needs to be given only to one in a given case, with potential additional safeguards for another. Proportionality then also demands nuance and respect for all values at stake to the extent possible. Such respect is to be achieved through following proportionality as a procedure to arrive at a just (and proportionate) outcome.

2.2 Proportionality as a Way to Resolve Conflicts in the Digital Milieu

However, the proportionality principle is not only a constitutional methodology to balance rights and interests and invalidate unconstitutional laws (or stating that their application would violate the treaty order, in case of the EU law). It can also be found at the subconstitutional, secondary law level as a way to resolve conflicts or rights and interests where more than one law applies, such as conflicts between rights to privacy and data protection, intellectual property, or freedom of expression[19]. There is also an internal proportionality of particular laws, where conflict of rights and interests need to be reconciled

[18] Digital Rights Ireland para 65, 57, and 59.
[19] Respectively: Promusicae v Telefónica de España SAU [2008] ECLI:EU:C:2008:54 (Case C-275/06) and GC and Others v Commission nationale de l'informatique et des libertés (CNIL) (C-136/17) [2019] ECLI:EU:C:2019:773.

internally or with a recourse to a fundamental rights doctrine[20]. For instance, although the GDPR focuses on rights to privacy and data protection, it also provides numerous norms demanding balancing internal to data protection, but with respect to other rights and interests, such as freedom of expression[21] or scientific research[22]. All these incarnations of the proportionality principle can be found across the EU Digital Law, with underlining rights provided in the CFEU and Treaties and their proportionality limitation clauses[23]. Fundamental rights and Treaty law are an umbrella aiming to unify and integrate the EU law and its interpretation downstream. The proportionality test is used as a reconciliation tool between rights.

In addition to the above, there is another level of abstraction[24] at which three other types of proportionality balancing are present in the EU Digital Law. That is 1) proportionality in the form of rules established by the legislator, 2) proportionality balancing through principles to be yet reconciled, and 3) risk-based approach and risk management as a form of private rights and interests balancing, with the digital rights serving as a trump to challenge the balance established by a private party.

In the first instance, that of the rule determination, the legislator establishes the balance of rights and interests that is a predefined balance in a given case. For instance, data rights, when evoked, enforce a preestablished balance between the interests and rights of a data subject and a controller[25]. Also, the proposed AI Act's list of prohibited AI practices codifies a balance

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[20] For the in depth analysis of internal proportionality balancing in the GDPR, and how GDPR internally reconciles the right to data protection with other rights see: Jef Ausloos, *The Right to Erasure in EU Data Protection Law* (Oxford University Press 2020).
[21] Art. 85 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119/1 (GDPR)
[22] Art. 89 of he GDPR.
[23] Art. 5 of TEU and Art. 52 of the CFEU.
[24] For the description of the method of levels of abstraction (LoA) see: Luciano Floridi, *The Philosophy of Information* (Oxford University Press 2011), Chapter 3.
[25] Sectons 2, 3 and 4 of the GDPR.

in which such prohibited uses are not proportionate to many rights protected by law and thus outlawed[26]. The balance is established by virtue of a democratic legitimacy vested in the legislator. Thus, a rule prohibiting certain behavior provides an already established balance of rights and interests, which is legitimate in a democratic society. What a lawyer needs to do in such a case is a clear, traditional, syllogistic mode of legal thinking and practice—subsumption of an abstract legal norm (e.g. prohibiting sensitive data processing[27]) to facts in a given case[28].

In the second case, that of applying principles, the balance needs to be established by their proper application against other applicable principles. Conflicting principles need to be balanced[29]. As an effect of the balancing exercise in a particular case, a rule emerges, which can be analogously utilized further. In such a situation, the balance can be established by the party initiating regulated activity, then challenged by other subject parties, and finally adjudicated by a court. Additionally, the law can, in an abstract way, give priority to certain rights and interests, providing an abstract guideline for setting up a balance[30].

To exemplify two above-mentioned types of proportionality balancing (preestablished by the rules and to be established through principles application); when data protection law is applied, it often needs to be reconciled against other rights protected by the CFEU or other secondary laws, such as those protecting copyright or freedom of expression. The objective of privacy and data protection also needs to be reconciled internally against exceptions provided in the GDPR[31]. The examples of complex proportionality balancing, where numerous rights

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[26] Art. 5 of the 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, COM(2021) 206 final, 2021/0106 (COD) (proposed AI Act – EU Commission version).
[27] Art. 9 of the GDPR.
[28] About the difference between subsumption and balancing see: Robert Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 Ratio Juris 433.
[29] See (6).
[30] For example 'EDPS Guidelines on Assessing the Proportionality of Measures That Limit the Fundamental Rights to Privacy and to the Protection of Personal Data | European Data Protection Supervisor' (*edps.europa.eu*) <https://edps.europa.eu/data-protection/our-work/publications/guidelines/edps-guidelines-assessing-proportionality-measures_en>.
[31] Art. 85, 86, 87, 88 and 89 of the GDPR.

were to be reconciled and at stake, were *Google vs Spain*[32] and *Promusicae*[33]. In the first case, still based on the legacy Data Protection Directive[34], the Court needed to reconcile the right to privacy with a public interest in access to information. It also needed to decide on the scope of responsibility of search engine providers for the personal data they process. Beyond others, the outcome is the famous rule and right then transposed into the GDPR, the right to be forgotten[35]. Through this right, the CJEU established a permanent balance in personal data privacy against public interest in access to information. Now, by default, the right to be forgotten entitles the deletion of data by a controller if no other persistent legitimate interest (to be proven) exists at the time of a request for deletion.

In the second case, *Promusicae*, the CJEU left it to the Member States to establish a balance between data protection and intellectual property rights in their national laws. The CJEU stated that the Data Protection Directive does not demand enactment of the laws transposing the Directive in a way that requires internet services providers to disclose personal data of potential infringers to those that pursue civil lawsuits to protect their intellectual property. Thus, the CJEU left the issue for further balancing to the Member States legislatures or their courts. The CJEU thus stated that it is not within the EU's competencies to establish a balance and prioritize copyright or privacy and data protection.

The third instance, that of risk-based approach and risk management as a form of private rights and interests balancing, needs to be analyzed separately, as it poses particular challenges. I differentiate this type of balancing even though it relates to both rules' application with a

[32] Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (C-131/12) [2014] ECLI:EU:C:2014:317.
[33] Productores de Música de España (Promusicae) v Telefónica de España SAU (C-275/06) [2008] ECLI:EU:C:2008:54.
[34] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31 (Data Protection Directive).
[35] Art. 17 of the GDPR.

predetermined balance and principles application with a balance to be yet determined. The risk-based approach balancing is analyzed in more depth in para 3.4. Still, here, it must be noted that this instance of proportionality balancing introduces a subjective private perspective on balance in a given case. Such a private perspective is supplied by risk analysis, which ought to determine the balance of rights and interests in view of a risk posed by a regulated activity (such as data processing in the GDPR or development and deployment of AI systems in proposed AI Act).

Therefore, from a holistic perspective, the proportionality principle is a tangible judicial tool for balancing rights and interests, conflict reconciliation, and the meta principle of law. That is because it is the law's nature to coordinate human action and resolve conflicts[36]. Thus, as a judicial tool, proportionality is necessary to connect various rights and interests. It determines their relation and codependencies when subject rights and interests appear together in real life. In this way and at the same time, the proportionality principle is a meta value and a virtue of the legal system[37]. That means that proportionality recognizes the pluralism of conflicting rights and demands their best possible reconciliation in a given case.

2.3 Criticism of the Proportionality Principle

The theory of proportionality is well-developed and elaborate, but the principle is still a subject of ongoing and comprehensive scholarly analysis[38] and relentless criticism[39]. The

[36] Such contention can be both supported by realistic or pragmatic theories of law, and positivist one's such as respectively those that can be found in: Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, H L A Hart, *The Concept of Law* (Oxford University Press 1961).
[37] This view is especially pronounced by Alexy in: Robert Alexy, *Law's Ideal Dimension.*
[38] For example: Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal 158., Eric Engle, 'The History of the General Principle of Proportionality: An Overview' (2012) 10 Dartmouth Law Journal 1., CB Tranberg, 'Proportionality and Data Protection in the Case Law of the European Court of Justice' (2011) 1 International Data Privacy Law 239., Kai Moller, 'Proportionality: Challenging the Critics' (2012) 10 International Journal of Constitutional Law 709.
[39] For example: Filippo Fontanelli, 'The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights' (2016) 36 Oxford Journal of Legal Studies 630., Lorenzo Dalla Corte, 'On Proportionality in the Data Protection Jurisprudence of the CJEU' [2022] International Data Privacy Law., Francisco J Urbina, 'A Critique of Proportionality' (2012) 57 American Journal of Jurisprudence 49.

main argument against proportionality is that, at the conceptual level, it relativizes the rights and strips them out of absolute qualities needed to safeguard the right's underlining content properly[40]. The principle is also criticized for aiming to compare and weigh against each other incommensurable values[41]. Further, proportionality prioritizes utilitarian ethics, which allows for the sacrifice of important values if benefits for other values can be obtained. In fact, the majority of the principle's criticism is motivated by this utilitarian provenance[42]. Moreover, the use of proportionality by courts is commonly criticized as a way to merely justify and legitimize judges' decisions, but without an actual and substantial balancing that, in theory, the proportionality method demands[43].

Therefore, Fontanelli, when analyzing the principle concludes that we face a mythology of proportionality principle rather than a coherent and rational doctrine[44]. He states that applying fundamental rights to digital activities is more a question of setting new policies rather than subsuming new facts under existing standards.[45] In his article focused on the principle's application in the digital milieu, he provides a synopsis of various arguments raised against proportionality balancing and adds numerous important arguments about the principle's insufficiencies in the digital milieu. His essential contention is that the principle

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[40] Habermas states that "*In the proportionality test, values must be brought into a transitive order with other values from case to case. Because there are no rational standards for this, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies."* in Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, MIT Press 1996) pp. 259.

[41] This argument underpins Filippo Fontanelli, 'The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights'.

[42] Such as in Francisco J Urbina, 'A Critique of Proportionality' (2012) 57 American Journal of Jurisprudence 49.

[43] See (41).

[44] "The language of proportionality has become a mythology,a shorthand for legitimacy." in underpins Filippo Fontanelli, 'The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights'. p. 631.

[45] Ibid p. 638.

has been used as a policy-setting tool that adjusted existing rules and principles to the idiosyncrasies of the digital realm.

In this way, he argues that proportionality methodology is a way to set up policies by courts and to downgrade certain fundamental rights depending on the socio-technological circumstances. For example, in his view, the Lindqvist case[46] legitimized the factual diminution of a right to privacy and data protection caused by the emergence of the internet.[47] As Fontanelli explains, the internet lowers level of privacy protection by default, and CJEU sanctioned it by not treating sharing personal data online as a transfer of data. In this way, the CJEU precluded the application of the international data transfer regime but also avoided an absurd result from the perspective of internet development. Another example of how the CJEU rewinded traditional rules from the analogue world, to adjust them to the digital milieu is the concept of intermediary liability[48]. To prioritize economic growth and innovation, a traditional editorial liability for the content has been waived for the sake of unconstrained information sharing. Through the proportionality principle, it is as if the CJEU argued why a given level of fundamental right protection needs to be lowered due to how socio-technological reality changes.

Because establishing the balance between rights and interests online is different from those in the real, Fontanelli states that

"There is a potential problem every time regulation of internet behaviour purports to rest on a seemingly neutral balancing of values, because the sheer scale of massive behaviour online

[46] Bodil Lindqvist v Åklagarkammaren i Jönköping [2003] ECLI:EU:C:2003:596 (Case C-101/01).
[47] Filippo Fontanelli, 'The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights'. p. 639.
[48] Now regulated through Digital Services Act (DSA). See: European Parliament and Council of the European Union, '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)' [2022] OJ L 277/1 (DSA).

makes it impossible to strike a balance that is acceptable to all people whose fundamental rights are affected."[49]

Therefore, according to this author, proportionality is usually used by the CJEU as a window dressing for pragmatic or policy-based arguments. He suggests that proportionality should be abandoned when certain conditions commonplace in the digital milieu prevail. Rules dedicated to digital spaces should be used, since "*the three-step proportionality test is helpless to arbitrate fundamental rights implications in internet disputes*"[50] and that it is "*an inadequate heuristic device to resolve legal disputes in which fundamental rights are affected by internet activities*"[51]. Therefore, according to the author, proportionaluty balancing is to disconnected from the realities of the digital milieu.

He continues and states that the inadequacy of proportionality as a measure to regulate human affairs online stems from idiosyncrasies of human affairs in the digital arena[52]. Optimization according to proportionality and weights assigned to competing values is impossible and only serves to "*infuse legitimacy by way of a recurrent mythology, rather than through authoritative reasoning"*[53]. Usually, this is an effect of unscrupulous proportionality reasoning provided by courts, which falls short of appropriate necessity and proportionality *sensu stricto* assessment—alternative measures for regulation are not explored. Furthermore, in the CJEU proportionality judgments, argumentation relies on

"*fuzzy and truncated reasoning (intensity of infringements is not measured; alternative measures are not explored and compared with the status quo; the interests of various groups are contrasted 'impressionistically' and not analytically; the reasoning shifts uncontrollably*

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[49] Filippo Fontanelli, 'The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights'. p.649.
[50] Ibidem p. 633.
[51] Ibid p. 631.
[52] Ibid. p. 660.
[53] Ibid.

and inadvertently from the interest of the parties to the dispute to the interest of society at large, etc)"[54].

Because, according to Fontanelli, in this way, proportionality leads to bad outcomes; it is worse than nothing[55]. Fontanelli calls for laws specific to the digital milieu that are properly connected to it from a regulatory perspective (designed to solve issues specific to the digital milieu). Instead of omnipresent proportionality balancing and covert policymaking by courts concealed by legitimizing proportionality use, he suggests using rules more native and thus adjusted to the digital milieu.

His call seems to be addressed since recent years provided a wave of new digital laws—often conceptualized as the digital constitutionalism movement[56], or what I call an emerging EU Digital Law. However, to Fontanelli's possible disappointment, the proportionality principle is still structurally ingrained in these new laws. However, before analyzing how proportionality is present in the EU Digital Law, I investigate the reasons for its presence therein—that is, a need to reconcile rights and interests, which, on the other hand, causes EU Digital Law's complexity and indeterminacy, which, again, in my view can be only solved through proportionality principle.

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[54] Ibid.
[55] Ibid.
[56] For the overview of digital constitutionalism see: Giovanni De Gregorio,, *Digital Constitutionalism in Europe - Reframing Rights and Powers in the Algorithmic Society*, (Cambridge University Press 2022).

3. Complexity and Indeterminacy of the EU Digital Law – Between Rights, Interests and Risk

3.1 Inherent Complexity of the EU Digital Law

The European Union is at the forefront of digital regulation[57]. The number of new laws and regulations makes it tough for even an expert in digital law to be up to date on the recent legislative initiatives[58]. Those practicing lawyers without a focus on digital issues may usually not be even aware of new but very significant developments, such as Digital Services[59] and Market Acts[60], proposal for the AI Act[61], or the corpus of the digital consumer protection law[62]. Clear and consistent application of data protection law is still a challenge a few years after the introduction of the GDPR[63].

All these laws are applied in numerous jurisdictions with varying political priorities and legal cultures. On top of new legislative developments are guidelines by authorities and court decisions that impact how the law is interpreted[64]. Furthermore, a high level of technical expertise is needed to understand digital law, which needs to be updated constantly, along

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[57] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European strategy for data' COM(2020) 66 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0066, accessed 16.11.2023.

[58] For the overview of the emerging corpus of the EU Digital Law see: Kai Zenner, J. Scott Marcus and Kamil Sekut, 'A Dataset on EU Legislation for the Digital World' (*Bruegel | the Brussels-based Economic Think Tank* 5 July 2023) <https://www.bruegel.org/dataset/dataset-eu-legislation-digital-world> accessed 2 November 2023.

[59] The DSA

[60] 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) (Text with EEA relevance) PE/17/2022/REV/1, *OJ L 265, 12.10.2022* (DMA).

[61] Proposed AI Act – EU Commission version.

[62] For example: Directive 2011/83/EU on Consumer Rights [2011] OJ L304/64., Directive 2005/29/EC on Unfair Commercial Practices [2005] OJ L149/22., Directive 1999/44/EC on Consumer Sales and Guarantees [1999] OJ L171/12., Directive 97/7/EC on Distance Selling of Consumer Financial Services [1997] OJ L144/19., Directive 93/13/EEC on Unfair Terms in Consumer Contracts [1993] OJ L95/29.

[63] Testimony to this fact is a recent EDPS conference in June 2022, titled Effective enforcement in the digital world": see: 'Home | EDPS Conference 2022' (*www.edpsconference2022.eu*16 June 2022) <https://www.edpsconference2022.eu/en.html>. Accessed 16.11.2023.

[64] Especially influential in this regard are European Data Protection Board guidelines, that clarify data protection rules and principles.

with the dynamically evolving technological field, as showcased by the sudden and unfolding revolution of ChatGPT. There is a dynamically growing body of digital legal scholarship that aims to bring rationality and coherence to the interpretation of these new laws. The magnitude of this scholarship and interest paid to the field is a testimony to the imperfection of enacted laws and court decisions. The imperfections are necessarily caused by the sheer volume of information that needs to be digested to draft a wise law or strike a proper verdict. Thus, digital lawyer faces a bramble bush of new legal norms to be applied to a constantly changing technical landscape and balanced against various public and private rights and interests[65].

I argue that numerous new concepts, principles, and rules pose a challenge to the traditional paradigm of rule to the fact subsumption based on syllogistic logic[66]. In the digital milieu it is often tough to arrive at an authoritative and unambiguous rule to fact application. That is because of a gap between technical and legal understanding of the concepts, as well as a lack of clarity regarding their scope[67], and finally, because of a lack of clarity regarding legislative intentions. Depending on the interest pursued, I believe that compelling arguments can often be forged to solve a case in two or more rational but contradictory ways.

An example can be a core concept of personal data[68]. The concept impacts a variety of digital laws, such as GDPR, Law Enforcement Directive (LED Directive), ePrivacy Directive,

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[65] For Llewellyn the brumble bush is a metaphor for a complexity and indeterminacy of the legal system. Karl N Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (Oxford University Press 2008).
[66] For the overview of the modes of legal reasoning theory see in general: Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994).
[67] Catherine A. Jasserand, Avoiding terminological confusion between the notions of 'biometrics' and 'biometric data': an investigation into the meanings of the terms from a European data protection and a scientific perspective, *International Data Privacy Law*, Volume 6, Issue 1, February 2016, Pages 63–76.
[68] Art. 4(1) of the GDPR states that "'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;'.

Data Governance Act[69], and soon-to-be-enacted Data Act[70]. Its reach also impacts how privacy and data protection laws are applied beyond the EU[71]. However, the concept is yet uncertain due to its novelty, technical, social, and philosophical, but also physical meaning, that meanings all overlap and need to be transposed into a legal meaning. There does not exist yet a definitive consensus as to how the concept of personal data should be interpreted[72].

Another example of a challenge to traditional legal syllogism is numerous new principles appearing quite suddenly in the new digital laws. What distinguishes the following principles from those that can be found e.g. in the GDPR, such as purpose limitation and storage limitation[73], is the lack of any preceding tradition and doctrine of their application[74]. An example can be AI principles as proposed by the amendments added by the European Parliament, such as "human agency and oversight", "technical robustness and safety", "privacy and data governance", "transparency", "diversity, non-discrimination and fairness", or "social and environmental well-being"[75]. As much as these concepts have been present for some time in the expert and academic discourse[76], they have never been before a source of rights and duties. Therefore, their application and meaning (understood as their practical

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[69] Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) (Text with EEA relevance), PE/85/2021/REV/1, *OJ L 152, 3.6.2022.* (DGA).

[70] Proposal for a regulation of the European Parliament and of the Council on harmonized rules on fair access to and use of data (Data Act), COM/2022/68 final, (Data Act).

[71] See in depth discussion in: Paul M Schwartz and Daniel J Solove, 'The PII Problem: Privacy and a New Concept of Personally Identifiable Information' (*papers.ssrn.com*5 December 2011) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1909366>.

[72] See the overview debate on personal data either as context dependent, or an absolute concept in: Nadezhda Purtova, 'The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law' (2018) 10 Law, Innovation and Technology 40.

[73] Art. 5 of the GDPR.

[74] Data protection doctrine has already almost 40 years and can be dated back to as early as Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data from 1981. See: https://www.coe.int/en/web/data-protection/convention108-and-protocol - Accessed 16.11.2023.

[75] Article 4a of the proposed AI Act: General principles applicable to all AI systems in the version of the EU Parliament. See: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html. Accessed 16.11.2023.

[76] For example in the work o High-level expert group on artificial intelligence. See: https://digital-strategy.ec.europa.eu/en/policies/expert-group-ai . Accessed 16.11.2023.

consequences[77]) is extremely uncertain. It is easily conceivable that depending on a political and ideological priority, they can be given any subjective meaning by adjusting the degree of their intensity accordingly (that is, the scope of prohibited or allowed behavior), depending solely on political priorities in a given time and space.

On top of this, there is a gap between legal and technical communities' understanding of concepts, which has already caused numerous problems in e.g. the realm of biometric technologies, such as facial recognition[78]. Legal and technical experts engaged in a debate to rationalize the GDPR's definition of biometric data, which clearly has not foreseen and considered the consequences of this definition's literal meaning. This impact includes a blurry level of rights protection but also uncertainty regarding the legitimate use of biometric data through biometric technologies. Biometric technologies, although very impactful for a democratic society, are a narrow example of the complexity problem. Another example of a broader impact is the definition of automated decision making and human in the loop duty, that can be found in the Art. 22 of the GDPR. It is still contested what is the precise meaning of the right not to be subject to automated decision making, and to what it entitles a data subject, or whether such right's existance is feasible at all[79].

3.2. Complexity and Risk-Based Approach

What contributes to this possibility and further exacerbates the complexity problem is risk-based approach, which is widely implemented throughout the EU Digital Law[80].

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[77] According to Charles Peirce a meaning of an idea or concept is nothing else then its practical consequences. See pragmatic maxim in Charles S. Peirce, How to Make Our Ideas Clear, Popular Science Monthly 12 (January 1878), 286-302.

[78] See (67).

[79] Wachter and Mittelstadt argue that such a right effectively does not exist. See: Sandra Wachter, Brent Mittelstadt and Luciano Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7 International Data Privacy Law 76.

[80] For the comprehensive analysis of risk-based approach in data protection see generally: Gellert, Raphaël, *The Risk-Based Approach to Data Protection* (Oxford, 2020; online edn, Oxford Academic, 22 Oct. 2020), https://doi-org.kuleuven.e-bronnen.be/10.1093/oso/9780198837718.001.0001, accessed 14 Nov. 2023.

Examples can be GDPR, proposal or AI Act, Digital Services Act and Digital Market Acts, which all have risk based regulatory elements[81]. According to the risk-based approach, for a set of facts, the law does not prescribe determined behavior but determines regulated behavior as risky (such as personal data processing) and demands that the action is taken or not according to the level of risk it poses, and safeguards undertaken to mitigate the risk. Therefore, the party undertaking the behavior foremostly must assess the risk according to the guidelines and criteria provided by law and other relevant fields of knowledge (such as technical expertise and risk management). Subject party then decides whether to undertake the action if the level of risk can be mitigated or whether it should abandon it. If the action is taken, then certain risk management measures need to be introduced, corresponding to the level of risk, diminishing the risk to the acceptable level. In this way, law based on the risk based approach neither allows nor prohibits a certain behaviour, unlike classical rule based laws.

Risk based law provides a set of rules and principles according to which risk is to be evaluated. Risk-based approach assumes that compliance with rules and principles will diminish risk to an acceptable level[82]. That is the level where the probability of negative occurrence is diminished to an acceptable degree (depending on the context). Therefore, in risk-based regulations, it is often not the question of whether something is legal or not but whether, in a particular context, it is legitimate and justified to undertake certain risks. The decision to undertake a risk is usually a privilege of the initiating party, further possible to be

[81] Giovanni De Gregorio and Pietro Dunn, 'The European Risk-Based Approaches: Connecting Constitutional Dots in the Digital Age' (2022) 59 Common Market Law Review <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/59.2/COLA2022032> accessed 15 November 2023.

[82] For the clarification of the role of risk-based approach in data protection see: Article 29 Data Protection Working Party Statement on the Role of a Risk-Based Approach in Data Protection Legal Frameworks' (2014) <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp218_en.pdf> accessed 16 November 2023.

reviewed by relevant courts and authorities based on facts and necessary documentation accompanying the risk assessment and mitigation process.

Consequently, and from a practical perspective, a legal decision often boils down to a business decision whether to undertake risk and accept a potential collateral punishment (usually in the form of a fee) if the risk materializes. That means that risk-based approach is essentially agnostic regarding certain actions' moral and ethical dimensions, reducing them to utilitarian considerations. Such an approach is hailed as much more effective for the goals that other more "moral or ethical" approaches might pursue (e.g. right or rule based approach[83]). Sunstein argues that, at face value, immoral, such a risk management focused and utilitarian approach is more effective in e.g. environment protection, in effect contributing to the moral goals of which devoidness it is accused[84]. Due to risk management regulation popularity in previous decades, it was copied to data protection. The goal is to not overtly constrain or prohibit legitimate economic activities.

The existence of risk based approach adds to the complexity and uncertainty of legal interpretation, as this approach again deviates from the traditional syllogistic logic of facts to predefined rules subsumption. Such syllogism is what people were used to—either I can do something or not. Thus, I argue that what risk based approach leaves a layman interpreting a digital law with, once we leave the arm chair, academic ivory tower perspective, is an ambiguous, and morally agnostic mountain of conflicting rules, that seems to be totally subjective, unless interpreted by a skilled lawyer equipped with a very specialized theoretical,

[83] About the relationship between rights and risk based approach see generally: Raphael Gellert, 'We Have Always Managed Risks in Data Protection Law: Understanding the Similarities and Differences between the Rights-Based and the Risk-Based Approaches to Data Protection' (2016) 2 European Data Protection Law Review (EDPL) 481.
[84] See generally: Cass Sunstein, 'Moral Heuristics' [2003] Law & Economics Working Papers <https://chicagounbound.uchicago.edu/law_and_economics/326/>.

technical and experiential toolkit. Even demanding to meet such a Herculean[85] benchmark of craft from judges is a very high expectation.

Still, to avoid unreconcilable indeterminacy, it is necessary to use both these regulatory and judicial tools: a risk-based approach and proportionality balancing. Otherwise, the EU Digital Law would not be able to achieve simultaneously two competing objectives that it pursues. That is rights protection while respecting the pursuit of various interests (with a priority on economic ones).

3.3 Indeterminacy of the EU Digital Law Objectives – Rights and Interests as Equal Priorities

What further contributes to the complexity and underpins the EU Digital Law is its indeterminacy as to its objectives and which of these objectives is practically more important. The key digital laws lack a definitive objective that does not need to be balanced against a competing one. Although incarnating in different linguistic frames throughout different laws, it is possible to contend that two simultaneous goals lead almost every EU Digital Law. That is, on the one hand, fundamental rights protection and, on the other, economic growth within a free market paradigm. Therefore, at the meta or political level, each digital law aims to strike a balance between these often conflicting goals. These two objectives are given a similar degree of recognition (therefore, to some extent, a similar degree of legitimacy).

The first reason for this situation is that from a political and pragmatic perspective, the Single Market is no less, if not more important objective of the European Union[86], than

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[85] In Dworkin's theory of law as integrity, Hercules is an ideal judge, that knows the legal system and its objective perfectly and can always strike a proper verdict. See generally Dworkin's theory in: Ronald Dworkin, *Law's Empire:* (Belknap Press 1988).

[86] Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union* (Reprint edition, Yale University Press 2014) <https://www.amazon.com/Passage-Europe-Continent-Became-Union/dp/0300205333> accessed 16 November 2023. This book provide in depth history behind European integration and forces driving it. After Second World War trauma and a need for peace were priorities that were to be achieved through

fundamental rights protection. Only after establishing a moderately well-functioning Single Market, a political ambition appeared for further integration through a unifying ideology of fundamental rights[87]. Fundamental rights then supplied EU law interpretation rather than the other way[88].

I argue that, in principle, rights protection and economic interests are irreconcilable *in abstracto*, because digital laws usually give comparable legitimacy to claims and arguments based on rights protection and economic interests. Obviously, that rights should prevail in a democratic society is self explainable and normatively reinforced by the CFEU. Still, freedom to conduct a business is also a right. More importantly, from a pragmatic, historical, and political perspective, a drive to build the EU Single Market was a cardinal and is still an ongoing objective of the EU. Peace and growth are achieved through the Single Market, and hence, a higher level of rights protection is possible. Rights protection beyond the Member States emerged as a pan-European priority only after the success of the Single Market[89]. Therefore, although, in principle, not equal in normative weight to rights, economic interests should not be easily brushed off as a legal argument justifying various practices in the digital milieu. They are furnished with legitimacy and lawfulness by the EU Digital Law to the extent that they are regulated and constrained by rights.

The second reason is that, literally reading, the goals of fundamental rights protection and respect for economic interests are usually mentioned one after the other, and in the same, opening provisions of the EU digital laws. These first provisions create an interpretative

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economic integration and interdependency. Even now, although rights are dominant rhetoric, what underpinned the process of European integration were rights related to pursuing the build up of the Single Market.

[87] In the form of the CFEU, and also to some extent ECHR before.

[88] Source – rights were present in the CJEU case law, but not in the law as such

[89] The Lisbon Treaty and accompanying CFEU were only adopted in 2009, whereas the history of the Single Market is more then 70 years old.

frame for the following norms[90]. This pattern of the duality of the objectives is present throughout all major EU digital laws.

The General Data Protection Regulation (GDPR) is one of the main EU Digital laws since it governs the ways and means of personal data processing, which processing is omnipresent online and often inevitable. Therefore, GDPR impact is manifold. Art. 1 states that GDPR "*lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data.*", and that it "*protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data*.", and finally that "*The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data.*"[91]

Therefore, although the processing of personal data is regulated and lawful only if data protection rules and principles are respected, the processing of personal data is allowed at the basic level, despite often inherent risks related[92]. This is a pragmatic contention that without personal data processing, the development of the digital economy is impossible. However, the tension is underlined and persists between rights protection and economic interest.

The ePrivacy Directive, sets out the rules for confidentiality of communication and end-to-end devices. In Art. 1 it states that this Directive

"*provides for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right*

[90] Through establishing an objective to which these laws strive. Teleological interpretation, very popular in the EU Law, dictates that law is to be interpreted according to the objectives it aims to achieve.
[91] Art. 1 of the GDPR
[92] Processing personal data is treated as inherently risky, and therefore a need for the right to data protection. About sources and history of EU Data Protection Law see: Orla Lynskey. *The Foundations of EU Data Protection Law*. Oxford University Press, 2015.

to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community.".[93]

These objectives essentially repeat the objectives of the GDPR and the underlining logic—protect privacy (confidentiality of communication), but do not constrain the flow of data itself (which is necessary for economic activity).

Data Governance Act lays down "*conditions for the re-use, within the Union, of certain categories of data held by public sector bodies*"[94]. The majority of DGA provisions are *lex specialis* to GDPR[95], which means that due to the objective of the re-use of data, including personal data, DGA further extends GDPR's regulatory objective of free movement of data. However, DGA states at the same time that it does not lower in any way the level of rights protection associated with personal data, especially rights to privacy and data protection. Regardless, the structure of the DGA is designed to encourage data processing and sharing while respecting rights to privacy and data protection[96]. The law thus proclaims that it is in itself possible to reconcile these two goals.

Before providing further examples, what needs to be noted is the contradiction within the objectives pursued by the corpus of these data protection or data laws. The risk of unwanted events in case of personal data processing (such as harm, or the leakage of data) is usually directly proportional to the amount and quality of the data processed[97]. Simultaneously, the degree of economic benefit (depending on the nature of the organization

[93] Art. 1 of the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) OJ L 201/37.
[94] Art. 1 of the DGA.
[95] Recital 4 of the DGA.
[96] Recital 6 of the DGA.
[97] source

that processes data) is usually directly proportional to the quantity and quality of the data processed (as well as the technical and organizational capacity to process it). Therefore, the categorical statement that it is possible to protect rights and privacy and data protection while deriving economic benefits is a contradiction if understood at face value and in a maximalistic way. Therefore, as will be discussed further, there is a need for nuance and balancing through the proportionality principle.

Digital Single Market Copyright Directive (Copyright Directive) in its Art. 1 states that it

"*lays down rules which aim to harmonise further Union law applicable to copyright and related rights in the framework of the internal market, taking into account, in particular, digital and cross-border uses of protected content. It also lays down rules on exceptions and limitations to copyright and related rights, on the facilitation of licences, as well as rules which aim to ensure a well-functioning marketplace for the exploitation of works and other subject matter.*"[98].

Therefore, the Directive aims to adjust copyright rules to the digital markets. A functioning market, that is an ability to pursue an economic interest, is a persistent and important policy objective. Rights (copyright in this case) here as well are not treated in an absolutistic way and are balanced against a policy of economic interest protection of those with stakes in others' copyright.

Art. 1.1 of the Digital Market Acts (DMA), a landmark digital competition protection law, states that

[98] Art. 1 of the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance) OJ L 130, 17.5.2019, p. 92-125, (Copyright Directive).

"*The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users.*"[99]

Here, as well, market efficiency and equal opportunity to pursue an economic interest is the main goal, as well as users' welfare, achieved through the rules of the DMA. However, the provision mentions opposition between the interest of the gatekeepers, on the one hand, and business owners, on the other. By bringing a balance into this relationship, users are to benefit[100]. As a competition law, DMA aims to prevent monopolization of the digital market and thus enhance consumer welfare[101]. Still, this objective is balanced against the economic interests of powerful gatekeepers. In this case, the economic interest of the weaker parties in the digital marketplace can be understood as their economic rights according to CFEU, such as to conduct a business, which can be constrained if equal access to the market is not safeguarded by the law.

Artifical Intelligence regulation follows a similar logic, which is however less explicitly verbalized where the objectives of the draft AI Act are expressed[102]. Art. 1 of the draft AI Act states that the Act

"*lays down: (a) harmonised rules for the placing on the market, the putting into service and the use of artificial intelligence systems ('AI systems') in the Union; (b) prohibitions of certain artificial intelligence practices; (c) specific requirements for high-risk*

[99] Art. 1.1 DMA.
[100] Recital 2 DMA.
[101] Ibid.
[102] For the overview of the up to date versions of the proposal for AI Act by the EU Commission and amendments by the Council and the EU Parliament see: https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence. Accessed 16.11.2023.

AI systems and obligations for operators of such systems; (d) harmonised transparency rules for AI systems intended to interact with natural persons, emotion recognition systems and biometric categorisation systems, and AI systems used to generate or manipulate image, audio or video content; (e) rules on market monitoring and surveillance."

Since AI systems' objective is usually to pursue an economic interest, the AI Act facilitates their provision in a way that minimizes risks to fundamental rights. It also prohibits certain AI use cases, assuming that they cannot be reconciled with rights protection through risk management procedures (on which the draft AI Act heavily relies)[103]. Still, the marketplace is a priority, and the draft AI Act allows for placing on a market risky AI systems, provided that the risk is properly managed.

Finally, the Digital Services Act (DSA), which is a new EU standard for content provision and moderation online, aims to

"*contribute to the proper functioning of the internal market for intermediary services by setting out harmonised rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected."*[104]

Therefore, through setting up rules and regulating the intermediary services, safety, predictability, and trust in markets are established. This is achieved by extension of the exemption of liability of intermediary services, provided that they comply with the DSA[105].

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[103] All versions of the AI Act demand introduction of an ellaboarte risk management programs for developers and users of high risk AI systems. For a in depth analysing of licencing schemes for high risk AI systems see: Gianclaudio Malgieri and Frank Pasquale, 'Licensing High-Risk Artificial Intelligence: Toward Ex Ante Justification for a Disruptive Technology' (2024) 52 Computer Law & Security Review 105899 <https://www.sciencedirect.com/science/article/pii/S0267364923001097> accessed 16 November 2023.
[104] Art. 1 of the DSA.
[105] Chapter II of the DSA.

Again, a priority is to set up a stage for economic interest pursuit devoid of practices that would undermine safety and trust in the marketplace.

The EU Consumer protection law is more one-sided, where the interest of the customer is a principal policy goal. There is an assumption that, in principle, a party providing a service or a product is usually in a stronger contractual position than a customer. Therefore, these laws aim to bring a proportional balance by outweighing the initial advantage possessed by the providers of products and services.[106] However, as such, the consumer protection law also aims to facilitate an enhanced market exchange and economic interest pursuit by favoring the interests of the consumer and their rights in cases where there is a possibility for their abuse (such as manipulation or unequal contractual strength, which both affects rights and economic interests of a consumer).

Therefore, along with complexity, indeterminacy is a structural feature ingrained in the EU Digital Law. That also means that a conflict of rights and interests necessary emerges. If the EU Digital Law does not decisively prioritize rights or economic interests, then such conflicts need to be resolved case by case. What then the EU Digital Law provides is a regulatory roadmap to guide risky behavior and to solve potential disputes through the proportionality principle.

3.4 Indeterminacy of the EU Digital Law Rules Due to Risk-Based Approach

In many of the EU digital laws, behavior subject to regulation (e.g., processing personal data or supplying AI systems) and any potential emerging conflicts are designed to be guided and solved in three principal ways. These are 1) rules; prohibiting certain behaviours, 2) principles; optimization requirements that need to be applied and reconciled against each other through proportionality principle, and 3) meta-regulation through risk

[106] See generally : Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Edward Elgar Publishing 2014).

based approach; assessment of the risk by the legally entitled party that sets up an initial balance of rights and interests, undertakes regulated action, adjusting risk management measures depending on the severity of the risk.

Regulation through principles and risk is what dominates the EU Digital Law. Examples of pervasiveness of principles are data protection principles, such as purpose limitation, or storage limitation[107]. These principles define the legality of any personal data processing. Risk based approach is present e.g. in the GDPR, draft AI Act, DSA , and DMA[108]. Principles provide an abstract guideline for the behavior. What they require needs to be evaluated once they are applied in a given case. Rules only emerge when principles are applied to a given case and are reconciled against another principles. Rules are legal norms providing direct rights and correlated duties. A newly emerged rule in such a way can be analogously applied in a similar case later[109].

Direct rules are rare in the EU Digital law. However, principles application, which creates rules, is moderated by the risk based approach, demanding risk assessment-based conduct. Moderation by risk impacts principles and rules in a way that relativizes rules application in a traditional way—in their role of prohibitions or authorizations for certain behavior. The risk-based approach adds that even if the rule is derived from the principle, it can still be further relativized by the context and risk assessment of the party conducting a certain behaviour. Such a party having applicable principles and rules to a behaviour, can still ask itself whether it can regardless undertake certain action given technical and organizational

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[107] Art. 5 of the GDPR.
[108] For the overview of the topic see generally: Giovanni De Gregorio and Pietro Dunn, 'The European Risk-Based Approaches: Connecting Constitutional Dots in the Digital Age' (2022) 59 Common Market Law Review <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/59.2/COLA2022032> accessed 15 November 2023.
[109] For the theory of constitutional rights and proportionality principle see: For the general theory of the principle and its structure see especially: Robert Alexy, *A Theory of Constitutional Rights* (1st edition, Oxford University Press 2010).

or any other relevant context, even though the behavior is risky (except when there is a clearcut prohibition, such as behavioral categorization without prior notice or social credit scoring[110]).

Risky here means that certain behaviour can negatively impact rights and interests of the parties with an interest in a behaviour (such as in the case of personal data processing of a data subject). However, the party can decide that the likelihood of a negative impact is negligible; there are safeguards in place, and thus, it can undertake the risk. The verdict can also be negative—the risk is too severe, and there are no safeguards, so the behavior should be ceased. Both outcomes could stem from the same rule emerging from the principle application, but moderation through risk changes the final outcome.

An example can be collecting data online for the purpose of training AI models, which triggers the application of the GDPR, draft AI Act, and Copyright Directive. This example shows how, depending on the context, the same rules can prohibit or allow the collection of certain data. To legitimize data collection, which may include personal data and copyrighted material, exemption for data mining for research purposes from the Copyright Directive can be used[111], and exemption to process personal data for scientific research purposes in the GDPR[112]. Although the dataset can include sensitive data, such processing can also be justified[113].

The contentious issue here is the definition of research, which is ambiguous as to whether research is an activity only for public interest or also when used directly for

[110] Title II of the proposed AI Act.
[111] Art. 4 of the Copyright Directive.
[112] Art. 89 of the GDPR.
[113] Article 9.2(j) of the GDPR.

commercial purposes[114]. A hefty argument can be used that private entities conduct the most important AI research; thus, that is how progress is made in the field. Therefore, such activities should be recognized as research falling under exemptions from the GDPR and Copyright Directive.

Draft AI Act further will regulate how such a dataset should be composed and documented to mitigate risks—the legality of the AI system will be dependent on the effects directly stemming from the quality of the dataset[115]. In this situation, if we assume that the organization conducting research and training of AI has appropriate technical and organizational safeguards to minimize risks such as data leakage (risking privacy and copyright infringements by access to data by unauthorized), and has a properly composed dataset (which is an organizational and administrative burden able to be undertaken by big or very specialized institutions), then the rules from the GDPR, Copyright Directive and draft AI Act allow collecting data and training AI system. Otherwise, if the organization cannot technically and organizationally cope with the risk, the same rules can prohibit it since the risk to rights (e.g. data leakage) is too severe. Nevertheless, whether the subject party can undertake the risk is a highly subjective matter, not predefined by the legal text.

This relativism and risk dependency do not apply to all rules. Some of the new ones are lessons from a few years' application of older digital laws. Therefore, there is a tendency to append new digital laws with clearcut rules that are supplying the older digital laws and are in effect their new *lex specialis*. However, principle-based and risk based regulation still prevails for the actual subject matter of these new laws. An example can be both the DSA and

[114] For instance Recital 159 of the GDPR indicates that research for commercial purposes also is considered as falling under Art. 89 of the GDPR, since it states that research should be understood broadly, also encompassing private research.
[115] Art. 10 of the proposed AI Act.

draft AI Act, which laws prohibit dark pattern interfaces[116], soliciting targeted ads to minors[117], facial recognition systems, and manipulative AI[118]. These prohibitions are clear rules that amend the GDPR, resolving ambiguities of the GDPR that were recognized in hindsight after a few years of the GDPR being in force. After all, these rules counter privacy infringements—not necessarily an explicit goal of the DSA and the draft AI Act. The actual subject matter of the DSA and draft AI Act is to respectively provide a broad frame for content governance online and putting on the market AI systems according to the risk. At the same time, both these laws still heavily rely on the interplay between principles and risk-based regulation.

To summarize, it is the pursuance of economic interests that usually causes risks to fundamental rights in a digital milieu[119]. At the same time, most of the EU Digital Laws legitimize economic interests by constraining them through the above mentioned regulations, which also protect rights. In this way an abstract ex ante balance is aimed to be achieved. However, every time a factual conflict of interest emerges, parties with legal claims want to protect their rights or pursue their economic interests further. Therefore, the balance needs to be achieved case by case and considering the facts. However, the fact of ingrained competition of objectives in the EU Digital Law causes uncertainty since it is rare that certain rights or interests are given determined priority in abstracto. The benefit of this indeterminacy is flexibility and adjustability to new technologies. Still, at the same time, addresses of the law do not have clear-cut authorizations and prohibitions. Lawmaker tells them to decide by themselves what to do, using the guidelines and methods of risk management and

[116] Recital 67 and Art. 25 of the DSA.
[117] Art. 28 of the DSA.
[118] Title II of the proposed AI Act.
[119] For the excellent overview of the challenges to rights caused by economic activities see Chapter I in Alessandro Mantelero. Human Rights Impact Assessment and AI. In: Beyond Data. Information Technology and Law Series, vol 36. T.M.C. Asser Press, The Hague, 2022.

proportionality judicial thinking. Given the ingrained conflict of rights and interests described in XYZ, the relevant and structurally present method to guide subject behavior and dispute resolution is a consequence of the proportionality principle.

At the same time, however, criticism of proportionality, described in 2.3, cannot be ignored. For proportionality to properly fulfill its role, neither impossible expectations should be created, such as a necessity for the courts or other entitled parties to meticulously pass through each step of proportionality assessment, nor acceptance for relativism and too far going judicial discretion. A pragmatic perspective is needed, explaining why proportionality is necessary and helpful, but also what are its limitations. I believe that seeing the principle from the perspective of Robert Alexy's theory of law and his law as ideal dimension argument provides a suitable normative framework for understanding proportionality and it as a legal virtue in the EU Digital Law that allows to strike a balance between rights protection and economic interests pursuit.

4. Proportionality as a Virtue Excercised in a Rational, Legal Discourse

4.1 Law as a Rational Discoruse and Law's Ideal Dimension – Robert Alexy's Theory of Law

It is impossible to ignore Robert Alexy's contribution to the contemporary theory of law. His work contributes to understanding constitutional rights in relation to the proportionality principle[120] and legal argumentation[121]. His work started an important discussion on the nature of rights and proportionality balancing, in which luminaries such as

[120] See (6).
[121] See generally : Robert Alexy, Ruth Adler and Neil MacCormick, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Revised ed edition, Oxford University Press 2010).

Habermas[122], and Barak[123] took part. What distinguishes Alexy's work is his effort to reconcile a normative, or ideal, validity claim-based perspective on law with legal practice based on rhetorics, legal argumentation, and interest pursuit. He simultaneously explains both theory and practice of law. Synthesis of his views is provided in his law's ideal dimension argument[124].

To the question of what law is, Alexy states that law is everything that has been enacted in an appropriate and legitimate procedure[125], except for those norms that cross Radbruch's extreme injustice threshold[126]. Alexy states that there needs to be an essential minimum moral integrity content of any law because it is in the nature of a concept of law that it appeals to a transcendent moral element[127]. However, only extremely unjust laws are not laws. The threshold of extreme injustice is evaluated through the famous Radbruch's formula. Alexy provides an example of laws expropriating Jews by Germans before and during the Second World War as those crossing the threshold of extreme injustice[128]. These laws were *ex tunc* invalid. Except for laws not passing Radbruch's formula test, all other laws are valid even though they might be unjust, because they were enacted in a legitimate procedure by the legitimate government. This last contention is how Alexy reconciles the law naturalism perspective with legal positivism or conventionalism, which latter perspectives are

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[122] For how Alexy-Habermas debate can be seen from the perspective of ECtHR jurisprudence see: Steven Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' (2004) 63 The Cambridge Law Journal 412.
[123] Robert Alexy, Proportionality, constitutional law, and sub-constitutional law: A reply to Aharon Barak, *International Journal of Constitutional Law*, Volume 16, Issue 3, July 2018, Pages 871–879.
[124] Robert Alexy, *Law's Ideal Dimension* (Oxford University Press 2021).
[125] According to Hartian rule of recognition. See generally: Hart, H. L. A. (herbert Lionel Adolphus). *The Concept of Law*. Edited by Joseph Raz and Penelope A. Bulloch, 3rd ed., Oxford University Press, 2012.
[126] Gustav Radbruch, Statutory Lawlessness and Supra-Statutory Law (1946), *Oxford Journal of Legal Studies*, Volume 26, Issue 1, Spring 2006, Pages 1–11.
[127] Robert Alexy, *Law's Ideal Dimension,* Chapter 3 : The Dual Nature of Law, pp 36-50.
[128] Robert Alexy, *Law's Ideal Dimension,* Chapter 8: Gustav Radbruch's Concept of Law, pp 107-118.

usually disinterested in the law's moral dimension (or only interested to a very limited extent)[129].

Alexy's further work also strives to constructively reconcile seemingly irreconcilable into an integral perspective. For discussing the nature of law, Alexy states that the nature of law is dual, resembling the Janus face, which looks simultaneously in two opposing directions[130]. The first direction is that of valid claims to the normative ideal. Law aspires to realize valid normative claims, such as claims to justice or legitimacy. Defining law solely on a factual and positive basis, without the law's moral claim (or law's ideal dimension) does not provide a full picture. The second direction is that of a positive and facts based dimension. Law is simultaneously a practical social tool to reconcile conflicts and provide a coordination tool for people, with a threat of using legitimate force to coerce compliance with an established legal order. Both the ideal, moral dimension and the positive one are necessary parts of the concept of law.

Alexy also provides the theory of constitutional rights and of the proportionality principle. A constitution consists of principles and rules. Rights usually take the form of principles, rarely rules, except for categorical prohibitions, such as those of torture or slavery[131]. Whereas rules define in a determinate way the entitlements and duties of subject parties, delineating clearly allowed and prohibited behavior, principles operate at a higher level of abstraction. Principles are optimization requirements that demand that certain values they prescribe will be realized to the furthest possible extent[132]. In this way, rights as principles are social aspirations that must be implemented. However, principles are in

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[129] Robert Alexy, *Law's Ideal Dimension,* Chapter 1: The Nature of Legal Philsophy, pp 7-17.
[130] See (127).
[131] Art. 3 and 4 of the European Convention on Human Rights., Art. 4 and 5 of the CFEU. These are categorical prohibitions which are not subject to limitation clauses and proportionality balancing.
[132] See (6).

constant tension with other principles forming a constitution. Since a constitution defines an abstract order that must be realized in practice, principles are optimization requirements, demanding the realization of their content as much as possible when in conflict with another principle. Therefore, principles also define the extent to which certain rights can be limited. The proportionality principle is the precise way in which principles are to be optimized against each other and reconciled. Therefore, it is through proportionality balancing in a given case that the content of a right is determined. A rule is an effect of a proportionality principle applied to a conflicting principle. A rule is a permanent balance of rights in a given case that then can be analogously transcribed to solve other similar cases.

Although providing an elaborate methodology for proportionality balancing (presented in para 2.1), Alexy acknowledges a practical dimension through which the law's objectives are realized. Therefore, he argues, notwithstanding his theories above, that law has an inherently discursive nature and is a part of social practice[133]. That means that what is law is established through a social discussion governed by rules, ascribing procedures for valid law enactment, and law's rational evaluation, with the use of argumentation. Alexy contends that in a society, people pursue their particular interests with the use of law, but what nevertheless unites everybody is shared ideal to which the realization law as a system strives. Therefore, law is a special form of discourse and a rational one[134].

Therefore, although people, while engaged in a legal discourse, pursue their particular interests, such as political, ideological, or economic ones, they need to justify their pursuits in a form appropriate for a legal discourse. Justification of interest pursuit needs to be formed as a rational, legal argument, where a necessary element is a validity claim to a certain value

[133] Robert Alexy, *Law's Ideal Dimension,* Chapter 17: A Discourse – Theoretical Conception of Practical Reason, pp 255-274.
[134] Robert Alexy, *Law's Ideal Dimension,* Chapter 19: Legal Argumentation as Rational Discourse, pp 288-298.

furthered by a legal system as a whole. For example, pursuing economic interest can be justified with recourse to the right to freedom to conduct a business or other liberties. Therefore, although particularisms collide, it is possible to reconcile them by evaluating the arguments justifying those interests. The strongest arguments are most rationally justifiable given the ideals a law wants to achieve (or from the point of particular law objectives). The courts adjudicate based on the rhetorical arguments presented by the parties. Moreover, courts themselves need to explain and justify their verdicts, evoking values to which the legal system aspires.

The practice of the proportionality principle follows the same rules[135]. Proportionality is an important concept in law as an ideal realized through rational, legal discourse. Parties pursue their case and justify the priority of their rights and interests, necessarily arguing against the priority of competing rights and interests. However, such arguments need to be justified, which means that an inherent legitimacy of other competing rights and interests is acknowledged. A court must decide which arguments are more rational to better realize a legal system's objectives. This perspective shows that proportionality as a judicial mode of thinking is therefore omnipresent in the legal practice, as any party subject to a dispute needs to use legal arguments against competing ones. Although there are numerous instances where clear rules are applicable and elaborate proportionality balancing is unnecessary, in numerous cases, a contention persists as to which norm and how to apply. Such contention is a necessary outcome of the very nature of legal practice—applying abstract norms to the real world. The gap between norm and reality is a cause of uncertainty that is bridged when law is

[135] Alexy says that *'[proportionality is] an argument form of rational legal discourse. As such, it is indispensable in order to introduce "order into legal thought". It makes clear which points are decisive and how these points are related to one another.'* in Robert Alexy, *A Theory of Constitutional Rights,* p 64.

applied. The final verdict on how norm should be applied to a fact is sanctioned by democratic legitimacy vested in courts.

That is a way in which theory meets practive. However, Alexy goes even so far as to state that usually, at a constitutional level, once there is uncertainty regarding the precise content of a right or principle and purely legal argumentation is exhausted, legal discourse becomes nothing else than a practical discourse. In such a discourse, what takes place is weighing against each other of moral, ethical, political, and interest-based arguments. As an effect, judges, when deciding using the proportionality principle—that is, when a conflict of rights and interests arises, with arguments supporting contradictory claims—need to also decide on a certain values' priority. Their decision is covered in the veil of objective legal argument. The extent to which such proportionality judgment is correct is measured by the degree to which it is just and to the degree that such judgements furthers the legal system's objectives.

4.2 Proportionality as a Legal Virtue

I argue that the clearer the objective of a given law, the more certainly principles and rules are applied. Consequently, an easier and more determined application of proportionality balancing—if needed. The reason is that the goal towards which a particular law strives is clearly defined in such cases. Therefore, teleological interpretation of the legal text can be used to aid textual and systemic interpretation methods in case of doubt. However, suppose the subject law's objectives are undetermined, or dual and contradictory, as with the various EU digital laws. In that case, there is more uncertainty, and the broader necessity for discretion exists when balancing rights and interests with proportionality principle's use.

I assume that given EU Digital Law's structural dependence on two contradictory objectives, as explained in XYZ, proportionality balancing is inevitable, necessary, and occurs very often when EU Digital Law is applied. I propose that combining Alexy's various strands

of legal theory, with virtue ethics perspective[136] , can provide a better understanding of this principle's role and its better, more pragmatic application, but with the view to the ideal of proportionality. Virtue ethics emphasizes practice as a dimension in which morality and ethics is realized[137]. Only through applying principles and rules in real life, to a real problem one has a knowledge of the content of moral and ethical principles. However, in order to achieve an appropriate outcome in practice, one needs to know which good one's action strives for. In the case of legal practice, this can be Dworkinian ideal of law as an integrity[138], or the Rawlsian ideal of justice as fairness[139]. All these legal ideals can be interpreted as leading to a good social and individual life.

However, virtue ethics demands that in order to be able to differentiate between good and bad and to choose a good action leading toward a certain good, one needs to develop certain traits of character, which are necessary to choose a good course of action and persist in it. Therefore, character virtues are necessary for moral and ethical conduct. In legal practice, these virtues for a person interpreting law can be wisdom, knowledge, courage, justice, or moderation. Similarly, one can speak about virtues of a legal system, such as those envisioned by Fuller[140], like generality, non-retroactivity, stability, clarity, or consistency. I add proportionality to the list of lawyers' and legal system's virtues. Proportionality as a legal virtue is an ability to strike the best possible balance of rights and interests in a given case, in a particular time, space, and social context, with the view to the reasonably foreseeable consequences of such a decision.

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[136] Who's father is Aristotle. See: Aristotle, WD Ross and Lesley Brown, *The Nicomachean Ethics* (Oxford University Press 2009).
[137] See Introduction to Aristotle, WD Ross and Lesley Brown, *The Nicomachean Ethics* (Oxford University Press 2009).
[138] In Dworkin's theory of law as integrity, Hercules is an ideal judge, that knows the legal system and its objective perfectly and can always strike a proper verdict. See generally Dworkin's theory in: Ronald Dworkin, *Law's Empire:* (Belknap Press 1988).
[139] See generally: John Rawls, A Theory of Justice. Belknap Press, 2005.
[140] See generally : Lon L Fuller, *The Morality of Law: Revised Edition* (Yale University Press 1969).

From this perspective, I interpret numerous criticism of the proportionality principle as a failure of lawyers, decisionmakers and judges to properly exercise virtues that are demanded while conducting proportionality balancing. One of such virtues is meticulousness and care, with which in theory, the judge should pass through each step of the proportionality balancing test. From this point of view, it is not a failure of the concept of proportionality but a failure of how it has been put into practice. Given its dual objectives, such a contention assumes that the principle's use is inevitable in the EU Digital Law.

Moreover, the other criticism related to proportionality's application can be interpreted as an accusation for failing to properly exercise the virtue of proportionality while applying the principle of proportionality. The claim of failure is usually evoked when a court failed to establish a proper balance, gave priority only to one right or interest, or when used proportionality simply as a rhetorical tool to justify policy choice without however acknowledging the fact with the use of proper arguments—I assume that such arguments are possible to construct when a court faces necessary policy choice.

5. Inevitability of the Proportionality Balancing in the EU Digital Law

This links to the Alexy's rhetorical or argumentative perspective on law. From such a perspecive proportionality is a methodology to arrive at a certain decision in a certain case. Therefore, I argue that what should be criticized is the way the proportionality principle is exercised, rather than the concept as such. If proper attention is given to developing virtues necessary for the principle exercise, then the judgments with proportionality use will be better. What changes if this proposal is accepted is that it is necessary to start to criticize more the way judges judge and how they justify their decisions based on the proportionality principle—that is also, how they exercise the virtue of proportionality. Similarly, given the prevalence of risk based approach and, in consequence, numerous private parties deciding on proportionality of given introduced measures, the focus of the criticism should be on the way

they exercise their virtues when applying the proportionality principle, along with on the arguments they use, including those to justify risks taken.

The rhetorical perspective explains the imperfections of the proportionality principle and helps to understand its necessity as a judicial tool. Thus, I argue that proportionality is an imperfect but necessary rhetorical tool to limit courts' and authorities' (but also private parties') discretion, streamlining their reasons for action into a legal language with recourse to valid legal claims. Proportionality forces to disclose discretionary arguments and frame them into legal language, especially when irreconcilable conflict emerges, such as between rights and economic interests. Therefore, the party using the proportionality principle needs to necessarily give a recourse to the rights and interests of the party against which it does something (even if it is just a lip service). This recognition provided by proportionality balancing is important, as it acknowledges the existence of a conflict and conflicting reasons—reconciled only in a particular case. I thus argue that proportionality is the legitimate tool to provide a provisionary balance, but avoiding overregulation by cutting the Gordian knot of already complex and uncertain digital law. After all, an imperfect but working solution is better than no solution[141].

However, proportionality is subject to criticism for that very reason—that it is rarely used meticulously by judges and that numerous step of proportionality methodology are skipped, or cherry picked to justify a decision. I believe that as much as we should not resign from the ideal of the proportionality principle as described by Alexy, we need to as well accept the pragmatics of legal decision making, which is short of perfect. Proportionality offers a method to justify rights limitation in a way closest to the Fuller's rule of law virtues and ideal, since it forces to

[141] Nirvana fallacy is comparing of a realistic solution with an idealized one, and discounting or even dismissing the realistic solution as a result of comparing to a "perfect world" or impossible standard, ignoring the fact that improvements are often good enough reason. See https://www.logicallyfallacious.com/logicalfallacies/Nirvana-Fallacy. Accessed 16.11.2023.

disclose a substantial arguments behind the decision (both by lawmaker, the judge, or any other party conducting proportionality test).

I believe there is a need for pragmatic demystification of proportionality in the digital law, while affirming the practice and the principle's use. That is because proportionality helps to focus the attention of judges, politicians, legal scholars, and subject parties on their role and power, especially in the digital milieu. The role of the party that conducts the proportionality test, or risk assesment, is often equivalent to the role of a judge giving priority to this or that right or interest. This contention is especially important given the popularity of risk-based approach in the EU digital laws, which privileges the judgment of a party undertaking certain regulated behaviour (such as data processing), by allowing it to set up an initial balance (e.g. to decide whether to process personal data or not in a given case). This initial balance is rarely challenged, except for the influence caused by the strategic litigation. That is why the proportionality principle plays an essential role in the EU Digital Law not only at the adjudication level but also in everyday law interpretation. Such use of proportionality as a methodology to resolve conflicts between rights and interests in the digital milieu is the closest it is pragmatically possible to get to the ideal of coherent and rational EU Digital Law.