The Shades of the Concept of Transparency on the Horizon of European Technology Law and Platform Regulation

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Abstract

The complex notion of transparency is increasingly present both in legislation and in legal policy documents. Whether defined as a principle, an expectation, or an explicitly strict and complex set of legal requirements, it has become a central element of data protection and of the ever-expanding regulation of technologies and platforms. The aim of this paper is to examine and clarify the conceptual elements of transparency. This is achieved by comparing three different but strongly related fields of law: data protection, artificial intelligence, and platform regulation, through a comparative interpretation of European Union requirements. The main finding of the study is that while the basic conceptual elements of transparency in these areas of law are similar, the specific definitions used by legislators differ significantly. These differences make it challenging to discern the exact content of the concepts, potentially causing issues in the practical application of the law. These problems arise when the legislation in the areas under consideration is jointly applicable to a technological solution or service. By clarifying or converging the concepts in use along the lines set out in the study, the legislator may be able to resolve these problems, the stakeholders and practitioners may have a clearer picture of the applicable requirements.

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1. Introduction

The concept of transparency has become a key element in the regulation of personal data protection, artificial intelligence and platform services. The selection and

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examination of these three areas from the focus of the concept of transparency is particularly justified. Apart from financial and fiscal transparency, these three areas are the most rooted in the use of the concept and the most complex in the regulation of transparency. In order to underpin this thought, it is necessary to examine the historical development of the concept of transparency and its requirements, as this will be the basis for the regulations that will be developed later:

The expectation of transparency first appeared in connection with the ways in which the state exercises power. As a precursor to the idea of accountability, which is so closely and often inextricably linked to the notion of accountability for enforcing transparency requirements, we can already find a forerunner of transparency in 13th century England, in the Magna Carta Libertatum of 1215, in which King John Lackland was forced to issue a charter of liberty granting the rights of the Orders.

One of the central requirements of this document is that the English monarch cannot introduce new taxes without consulting the nobility, and later all the landowners concerned,[4] he must constantly account to them for his decisions and the reasons for them. Another manifestation of the same requirement can be seen in the 95 Theses of Wittenberg, published by Martin Luther in 1517, which states that the church is accountable to its adherents for the sale of indulgences, and more generally.[5]

The narrower conceptual scope originally emerged around the late 1700s in a specific context.[6] A Massachusetts senator, later vice president of the United States, in a debate on the distribution of newspapers by mail, uttered the following sentence in relation to government transparency: 'However firmly liberty may be established in any country, it cannot long subsist if the channels of information be stopped.'[7]

The use of the term in this role laid the foundations of the nascent American democracy. It could be defined as a highly political definition and programme. This expressed the orientation that the modern state can only see itself as transparent if it builds an open relationship with the people and society. Such transparency legitimates the political power of the day and ensures openness in state operations through continuous communication and accountability.[8] Transparency, like the above, has long been a political manifesto and expectation rather than a concept with specific legal content. The idea of transparency has appeared in detailed rules, general policy formulations and interpretations.[9]

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[4] Funnell, Warwick. "The Reason Why: The English Constitution and the Latent Promise of Liberty in the History of Accounting." *Accounting, Business & Financial History* 17, no. 2 (2007): 265–270. https://doi.org/10.1080/09585200701376618.

[5] McNally, Robert E. "The Ninety-Five Theses of Martin Luther: 1517–1967." *Theological Studies* 28, no. 3 (1967): 439–480. https://doi.org/10.1177/004056396702800301.

[6] Handlin, Amy, ed. *Dirty Deals?: An Encyclopedia of Lobbying, Political Influence, and Corruption*. Santa Barbara: Bloomsbury Publishing USA, 2014. 125.

[7] Warner, Michael. *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America.* Cambridge: Harvard University Press, 2009. 128.

[8] Korff, Douwe, Ben Wagner, Julia Powles, Renata Avila, and Ulf Buermeyer. "Boundaries of Law: Exploring Transparency, Accountability, and Oversight of Government Surveillance Regimes." *Global Report, University of Cambridge Faculty of Law Research Paper*, 2017.

[9] Goodin, Robert, Mark Bovens, and Thomas Schillemans, eds. "Public Accountability." In *The Oxford Handbook of Public Accountability*, edited by Goodin, Robert, Mark Bovens, and Thomas Schillemans.

Observing the European aspects, the concept and the demand for transparency in the functioning of the state started to emerge almost at the same time as developments in the US. In the Netherlands, the issue was already visible in the mid-18th century.[10] Around the 1750s, citizens of free cities held assemblies, the main topic of which was how to participate in debates on matters of public interest,[11] which eventually led to the launch of revolutionary movements based on this issue,[12] giving impetus to the American and French revolutionary movements.

The ideas eventually appeared in the Declaration of the Rights of Man and Citizen 1789, with Article 14 stating as one of the rights of citizens that 'All the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put; and to fix the proportion, the mode of assessment and of collection and the duration of the taxes', and Article 15 stating that 'Society has the right to require of every public agent an account of his administration', all of which were a cornerstone of ensuring governmental transparency. These articles laid the groundwork for modern transparency laws by introducing accountability mechanisms that ensure governmental operations are subject to public oversight and scrutiny, principles that continue to influence transparency regulations today

Sweden was the first country to legislate on our narrow subject, in 1766, on the subject of access to official documents, as part of the requirements for freedom of the press. This pioneering legislation set an example for other countries, influencing the development of transparency laws worldwide by establishing the principle that public documents should be accessible to citizens.

Freedom of information, as a central but not exhaustive requirement of transparency, became a judicially enforceable guarantee of governmental transparency in some jurisdictions only in the second half of the 20th century.

In the period around the Second World War, for understandable reasons, the issue was pushed into the background: in some European countries, totalitarian dictatorships emerged during this period, one of the central elements of which is that while the state remains opaque, not allowing insight into its own processes, it tries to make its citizens, including their private sphere, transparent (e.g. secret police activity, informer networks), in order to maintain the existing power structure and to further reduce the role of power decentralisation.[13] In terms of its orientation, transparency

Oxford: Oxford University Press, 2014. 2–3.

[10] Meijer, Albert. "Government Transparency in Historical Perspective: From the Ancient Regime to Open Data in the Netherlands." *International Journal of Public Administration* 38, no. 3 (2015): 192–193. https://doi.org/10.1080/01900692.2014.934837.

[11] Pots, Roel. *Cultuur, Koningen en Democraten: Overheid en Cultuur in Nederland.* Nijmegen: SUN, 2000. 20-45.

[12] Van de Sande, A. "Vaderland in Wording. Een Halve Eeuw Nederlandse Geschiedenis in Vogelvlucht." In *Het Ontstaan van het Moderne Nederland: Staats- en Natievorming tussen 1780 en 1830*, edited by Fritschy, Wantje, and Johan Gerhard Toebes, 63–75. Nijmegen: SUN, 1996.

[13] De Hert, Paul, and Serge Gutwirth. "Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power." In *Privacy and the Criminal Law*, edited by Erik Claes, Duff Antony and Serge Gutwirth, 61–104. Dordrecht: Springer, 2006.

seeks to emphasise the opposite of this in relation to the role of the modern state, through the idea of the transparent state - opaque citizen, which was understandably not one of the most fashionable expectations at this historical moment, but which led to its major expansion after the war, with the emergence of the transparency and accountability movement.[14]

The trend has given a new impetus to the idea of transparency. In this interpretative framework, in addition to the transparency of state activity (government transparency), the accountability of the individuals involved in this activity and of the whole state organisation has become the focus of studies.[15]

Beyond the political dimension of accountability, it has naturally attracted the study of legal responsibility, first in public law,[16] and then in private law.[17] Within this concept, accountability has emerged as a necessary condition for the proper, legal and legitimate functioning of the socio-political system.[18] The governance doctrines that emerged immediately before the 21st century definitively brought the issue of transparency to the centre of public law thinking.[19] Governance-related thought examined the issue of transparency within the context of effective, good governance and saw it as a necessary element,[20] a precondition for its development. They have approached in this respect both the specific issues of organisational transparency[21] and the implications for ideas and legal norms of governance.[22]

This leads to a differentiation of the concept of transparency, which is embedded in different areas of law with different meanings, each of which concerns a different aspect of the complex concept. The key role of transparency in different areas of law is not only to facilitate the understanding of legal norms and standards, but also to form the basis of democratic institutions. Transparency promotes the legitimacy of

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[14] Dubnick, M. J. "Clarifying Accountability: An Ethical Theory Framework." In *Public Sector Ethics: Finding and Implementing Values*, edited by Charles Sampford and Noel Preston, 68–72. London: Routledge, 1998.

[15] Christensen, Tom, and Per Lægreid, eds. *The Ashgate Research Companion to New Public Management*. Burlington: Ashgate Publishing, 2011. 17-20.

[16] Bovens, Mark. "Analysing and Assessing Accountability: A Conceptual Framework." *European Law Journal* 13, no. 4 (2007): 447–468. https://doi.org/10.1111/j.1468-0386.2007.00378.x.

[17] Hackett, Ciara, and Luke Moffett. "Mapping the Public/Private-Law Divide: A Hybrid Approach to Corporate Accountability." *International Journal of Law in Context* 12, no. 3 (2016): 312–336. https://doi.org/10.1017/S1744552316000239.

[18] Mashaw, Jerry L. "Accountability and Institutional Design: Some Thoughts on the Grammar of Governance." In *Public Accountability: Designs, Dilemmas and Experiences*, edited by Michael W. Dowdle, 120–150. Cambridge: Cambridge University Press, 2006.

[19] Weiss, Thomas G. "Governance, Good Governance and Global Governance: Conceptual and Actual Challenges." *Third World Quarterly* 21, no. 5 (2000): 795–800. https://doi.org/10.1080/713701075.

[20] Weiss, Friedl, and Silke Steiner. "Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison." *Fordham International Law Journal* 30, no. 5 (2006): 1545–1547.

[21] Johnston, Michael. "Good Governance: Rule of Law, Transparency, and Accountability." New York: United Nations Public Administration Network, 2016, 5–10.; Ball, Carolyn. "What is Transparency?" *Public Integrity* 11, no. 4 (2009): 293–308. https://doi.org/10.2753/PIN1099-9922110400.

[22] Keping, Yu. "Governance and Good Governance: A New Framework for Political Analysis." *Fudan Journal of the Humanities and Social Sciences* 11, no. 1 (2018): 1–8.

legal norms and decisions, increases social trust and enables citizens to participate actively in public life and decision-making processes.[23] With the gradual expansion of the concept, the scope of the principle has not only started to cover public policy and public law aspects, but has also penetrated into certain areas of private relations, which are also governed by public law. Based on the political, general public law aspects, transparency measures ensure that citizens and users have access to understandable and accessible information about laws, regulations, the organisation of the state and decision-making processes.[24]

In data protection law and platform regulation, we are already seeing a different regulatory landscape, with private actors appearing alongside public entities - as data controllers, gatekeeper service providers or providers of core platform services. In many respects, their need for transparency in regulation is created by the fact that the services they provide have a similar or even more significant impact on data subjects and users today than a public law relationship.[25] Market or interest actors can become a force in which they can act independently of all other actors, often without fundamental guarantees in the public domain.[26]

2. Transparency in European data protection law

Transparency is a cornerstone and key element of the requirements in the field of European data protection regulation. It is a fundamental principle that permeates European data protection regulation. It ensures that data processing processes can remain under the control of the data subject and that there is accessible and meaningful information and redress where the principle is not applied in practice.[27] Already in the original interpretation of the right of informational self-determination developed by the German Constitutional Court, it seemed clear that transparency plays a guaranteeing role in this respect (BvR 209/83), ensuring that the data subject understands the information about the data processing process that concerns him or her, including the related enforcement processes.

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[23] Bovens, Mark. (2007). *op. cit.*

[24] Bertot, Carlo J., Paul T. Jaeger, and Justin M. Grimes. "Promoting Transparency and Accountability Through ICTs, Social Media, and Collaborative e-Government." *Transforming Government: People, Process and Policy* 6, no. 1 (2012): 78–85. https://doi.org/10.1108/17506161211214831.; Veale, Michael, and Frederik Zuiderveen Borgesius. "Adtech and Real-Time Bidding under European Data Protection Law." *German Law Journal* 23, no. 2 (2022): 226–256.

[25] Heimburg, Vincent, and Manuel Wiesche. "Digital Platform Regulation: Opportunities for Information Systems Research." *Internet Research* 33, no. 7 (2023): 72–85. https://doi.org/10.1108/INTR-05-2022-0321.

[26] Mak, Vanessa. "The Platform Economy: Regulatory Instruments." In *Legal Pluralism in European Contract Law*, edited by Vanessa Mak, Oxford Studies in European Law (Oxford, 2020). Online edn: Oxford Academic, October 22, 2020. Klein, Tamás. "Platform Regulation and the Protection of Fundamental Rights." *Symbolon - Revista de Stiințe Teatrale* 25, no. 2 (47) (2024): 18–22.

[27] Ivanova, Yordanka. „The Role of the EU Fundamental Right to Data Protection in an Algorithmic and Big Data World." In *Data Protection and Privacy, Volume 13: Data Protection and Artificial Intelligence*, edited by Dara Hallinan, Ronald Leenes, Serge Gutwirth, and Paul De Hert. Oxford: Hart Publishing, 2021. http://dx.doi.org/10.2139/ssrn.3697089.

Under these auspices, the GDPR, again reinforcing data controller-centric regulation,[28] applies transparency as a fundamental principle and, by extension, as a detailed requirement.[29] Of particular relevance for the delineation of the conceptual elements is Recital 39, which states that 'the principle of transparency requires that any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used. That principle concerns, in particular, information to the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the natural persons concerned and their right to obtain confirmation and communication of personal data concerning them which are being processed.'

It can be seen that the European legislator in this case focuses on information and communication when outlining transparency, on the assumption that if this is fully and legally implemented, transparency will be ensured at all stages of data management as a process. In this context, it highlights comprehensibility, accessibility, clear and plain language as elements and interpretations of transparency.

By way of partial exception, Article 12 of the GDPR requires data controllers to provide data subjects with information on processing 'in a concise, transparent, intelligible and easily accessible form, using clear and plain language…'.

This provision is particularly important, as transparency forms the foundation of trust between data controllers and data subjects.[30] However, the conceptual elements of transparency appear inconsistent, fluctuating between the recitals and the articles. The wording of the Article can be understood, on a purely logical and grammatical interpretation, as requiring transparent information and, in addition to this notion of transparency, setting out requirements for clarity, ease of access, clear and plain language. On the contrary, the general interpretation of transparency discussed in the introduction and the recital of the GDPR do not support this interpretation either – most likely, the legislator has here explained and detailed the requirements of transparent information rather than separating them from the conceptual core.

This interpretation is reinforced by the ideas set out in Recital 58 of the GDPR that '… principle of transparency requires that any information addressed to the public or to the data subject be concise, easily accessible and easy to understand, and that clear and plain language...'. It is worth to note that while the concept defined as a principle in the GDPR's terminology ultimately creates and should be interpreted as explicitly legally binding requirements, in other areas of public law regulation (e.g. in national

[28] Hoofnagle, Chris J., Bart van der Sloot, and Frederik Zuiderveen Borgesius. "The European Union General Data Protection Regulation: What it is and What it Means." *Information & Communications Technology Law* 28, no. 1 (2019): 64–98.

[29] Abiteboul, Serge, and Julia Stoyanovich. "Transparency, Fairness, Data Protection, Neutrality: Data Management Challenges in the Face of New Regulation." *Journal of Data and Information Quality* 11, no. 3 (2019): 1–9. https://doi.org/10.1145/3310231.

[30] Felzmann, Heike, Eduard Villaronga F., Christoph Lutz, and Aurelia Tamò-Larrieux. "Transparency You Can Trust: Transparency Requirements for Artificial Intelligence Between Legal Norms and Contextual Concerns." *Big Data & Society* 6, no. 1 (2019): 2053951719860542. https://doi.org/10.1177/2053951719860542.

administrative law), transparency as a principle does not always have such a strong legal binding force.[31]

In order to further clarify the notion of transparency in the field of data protection, it is useful to look at the guidelines of the European Data Protection Board. The EDPB has issued a number of guidelines that relate to detailing the transparency requirements of the GDPR and facilitating their application. Of particular importance among these is the EDPB's 2018 guidance (which took over the guidance of the previous Workgroup 29), according to which transparency requires that data controllers provide clear, understandable and easily accessible information to data subjects, avoiding legal jargon and complex wording.[32]

The Guidelines emphasise that the information should be accurate and up-to-date and presented in a form that is easily accessible to stakeholders, in line with the requirements set out in Recital 58 above. This interpretation raises the issue of simple, plain language, which simplifies, explains and makes complex legal constructions manageable for the data subject, even in cases where the data subject is a child or a vulnerable group. This simple language and comprehensibility is also reflected in the literature on transparency and in the analysis of other regulatory areas in our study.[33] What is unique in the interpretation of the EDPB is the emphasis on free of charge, which, although less emphasised in other fields of law, is generally implicit in the requirements, not as an expressis verbis requirement. In this respect, free of charge can be interpreted as the existence of a further boundary condition guaranteeing accessibility and availability.[34]

The Guidelines specifically highlight the requirement that data controllers should pay particular attention to ensuring transparency when presenting the purposes and legal bases of processing. Data subjects must clearly understand why their data are being processed and the legal basis for this processing. According to the EDPB, transparency is essential in data protection law, as it enables data subjects to exercise their rights effectively and data controllers to be held accountable for their processing activities.[35] This is closely linked to the exercise of data subjects' rights. The GDPR provides data subjects with a number of rights, including the right of access, the right of rectification, the right to erasure ('right to be forgotten'), the right to restriction of processing, the right to data portability and the right to object, but the effective exercise of these rights is highly dependent on transparency through information, as data subjects can only exercise their rights if they are properly informed about the processing activities.[36] To give just one example, in exercising the right of access, data subjects

[31] Jashari, Murat, and Islam Pepaj. "The Role of the Principle of Transparency and Accountability in Public Administration." *Acta Universitatis Danubius. Administratio* 10, no. 1 (2018): 60–65.
[32] EDPB. *Guidelines on Transparency under Regulation 2016/679 (wp260rev.01).* 2018.
[33] Ződi, Zsolt. "The Limits of Plain Legal Language: Understanding the Comprehensible Style in Law." *International Journal of Law in Context* 15, no. 3 (2019): 246–262. https://doi.org/10.1017/S1744552316000239.
[34] EDPB. *Guidelines 03/2022 on Dark Patterns in Social Media Platform Interfaces: How to Recognise and Avoid Them.* Adopted on March 14, 2022.
[35] EDPB. *Guidelines on Transparency under Regulation 2016/679 (wp260rev.01).* 2018. *op. cit.*
[36] Mahieu, René LP, and Jef Ausloos. "Harnessing the Collective Potential of GDPR Access Rights:

have the right to be informed whether their personal data are being processed and, if so, to request access to those data, as well as the purposes of the processing, the types of data processed and the recipients to whom the data are transferred or further transmitted. Data controllers should ensure that this information is easily accessible and understandable to data subjects, which contributes to transparency and the effective exercise of data subjects' rights.

The requirements can be interpreted as a two-tier or multi-tier information obligation, whereby data subjects must be provided with a set of information regarding the processing, which must be provided in full and in summary form, which must be an extract of the information and must set out in an intelligible manner the main circumstances of the processing. Some authors trace this obligation not necessarily back to the principle of transparency but to the principle of fairness,[37] which is linked to the explanation of data protection requirements linked to transparency, also referring back to Recital 39 here. This is also reinforced by Recital 60 of the GDPR, which states that 'the principle of fair and transparent processing requires that existence of the processing operation and its purposes.' This interpretation again emphasises the information part of notion of transparency.

However, it is important to underline that Article 5 (1) a) of the GDPR goes further: it requires that personal data are processed lawfully, fairly and in a transparent manner for the data subject. Here, the interpretation of transparency becomes more emphatic, according to which transparency cannot and should not be identified only with the obligation to provide information in a transparent manner, but must permeate the whole processing, i.e. all stages and operations of processing must remain intelligible to the data subject and must be traceable to some extent, even if the technology used for processing limits this. In fact, technological developments are constantly creating new situations where transparency is practically feasible. According to an Article 29 Working Party and EDPB Guideline 2018, data controllers should pay particular attention to the transparency of algorithms and automated decision-making systems, as these technologies are often complex and difficult to understand for data subjects,[38] and are often referred to as 'black boxes' for a reason.

In this respect, the transparency of algorithms has long been the subject of professional and academic studies,[39] which, in addition to clarifying the scope of the

Towards an Ecology of Transparency." *Internet Policy Review* 3, no. 4 (2020).

[37] Binns, Reuben, Max Van Kleek, Michael Veale, et al. "It's Reducing a Human Being to a Percentage: Perceptions of Justice in Algorithmic Decisions." In *Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems,* edited by Hamidi, F., Scheuerman, M. K., and Branham, S. M. Montreal: Association for Computing Machinery, 2018. 1–14. https://doi.org/10.1145/3173574.3173951.

[38] Article 29 Data Protection Working Party. *"Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679."* Adopted on October 3, 2017. Revised and adopted on February 6, 2018.

[39] Wischmeyer, Thomas. "Artificial Intelligence and Transparency: Opening the Black Box." In *Regulating Artificial Intelligence*, edited by Thomas Wischmeyer and Timo Rademacher, 197–210. Cham: Springer, 2020.; Diakopoulos, Nicholas. "Accountability, Transparency, and Algorithms." In *The Oxford Handbook of Ethics of AI*, edited by Markus D. Dubber, Frank Pasquale, and Sunit Das, 197–210. Oxford: Oxford University Press, 2020.; Csatlós, Erzsébet. "Hungarian Administrative Processes in the Digital Age: An Attempt to a Comprehensive Examination." *Intersections* 10, no. 1 (2024): 189–209. https://doi.org/10.173

data used, may include the outline of decision methods and even third-party certification of the decision algorithm. Third-party certification involves independent entities reviewing and validating the algorithms to ensure their compliance with legal and ethical standards. This process helps to identify potential biases, security vulnerabilities, and misuse, thus enhancing trust and accountability in software solutions. Examining the problem of transparency may be particularly important, as despite regulatory efforts, information inequalities have recently increased significantly to the detriment of stakeholders.[40] In the context of the present study, in situations based on algorithmic decision making, there is also a significant chance that the exact workings of the decision mechanism will not even be known to stakeholders, nor will they be able to see through it (at least in detail). In this respect, the GDPR requirements apply to all profiling processes related to the provision of goods or services to EU data subjects or to the monitoring of their behaviour in the EU, irrespective of the location of the controller or processor. The GDPR in fact identifies two often closely related but not necessarily coexisting behaviours in its rules: profiling and automated decision-making. These two legal concepts also raise a number of interpretative issues from a transparency perspective, which are reviewed below. This is greatly assisted by the WP251 Guidelines of the Article 29 Workgroup, which address the interpretation issues of the rules on profiling and automated decision making and provide examples of good practices. According to this opinion, the relevant requirements of the GDPR in this area are precisely aimed at ensuring transparency. The opinion highlights, as a conceptual element in the context of ensuring transparency, enhanced information on profiling and automated decision-making, the logic used in these processes and the relevance, and possible consequences of the methodology used. Here, we can see that the opinion emphasises, in addition to the information element, the notion of transparency as a concept that permeates the whole of data processing.

The requirements of the GDPR strengthen this interpretation and impose corresponding obligations on the controller to take action when using such solutions. Transparency measures may also be understood as measures to protect the rights, freedoms and legitimate interests of the data subject, but they do not bring any new element to the conceptual analysis compared to the interpretation of the opinion. The issue of profiling and automated decision-making, however, leads us to the next field of regulation, since a more detailed picture can be obtained by comparing this regulation with the European regulation on artificial intelligence.

3. Transparency in emerging artificial intelligence regulation

According to the logic of European data protection regulation outlined above, transparency is of particular importance for algorithms and automated decision-making

56/ieejsp.v10i1.1250.

[40] Kasy, Maximilian, and Rediet Abebe. "Fairness, Equality, and Power in Algorithmic Decision-Making." In *Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency*, edited by Madeleine Clare Elish, William Isaac, and Richard S. Zemel, 576–586. New York: Association for Computing Machinery, 2021. https://doi.org/10.1145/3442188.3445919.

systems.[41] These technological solutions implement complex data processing workflows, which in many cases may not be easily mapped even by the creator or operator of the technology, due to the black box effect.[42] If they also involve the processing of personal data, achieving legal compliance of the solution will require compliance with both the transparency requirements outlined above and other regulations on algorithmic decision making, if the solution falls within their scope.

This is the subject of the new European regulation (EU 2024/1689), which has now entered into force as a set of requirements for the legal use of artificial intelligence.

This regulation strongly incorporates transparency into its requirements, as it states in the scope of the regulation that its purpose is to „… [establishing] harmonised transparency rules for AI systems…" (Article 1 (2) (d)).

The European legislator does see a clear demand for such rules, as stated in Recital 72: '(72) To address concerns related to opacity and complexity of certain AI systems and help deployers to fulfil their obligations under this Regulation, transparency should be required for high-risk AI systems before they are placed on the market or put it into service. High-risk AI systems should be designed in a manner to enable deployers to understand how the AI system works, evaluate its functionality, and comprehend its strengths and limitations. High-risk AI systems should be accompanied by appropriate information in the form of instructions of use.'

The central core of the transparency rules is set out in Section 2 of the Regulation, from which we can decipher the Regulation's use of the term transparency. It is not defined in the Regulation, but only requires (Article 13(1)) that their operation must be designed in such a way that they are sufficiently transparent to allow users to interpret the output of the system and use it appropriately, in the case of high-risk AI systems.

There are some conclusions to be drawn from this provision: on the one hand, the scope of the transparency requirements of the AI Regulation in this respect only covers high-risk AI systems that comply with Article 6(1) of the Regulation and with the continuously updated Annex III.[43] In this respect, transparency will therefore not necessarily be a requirement in all cases of AI systems, in contrast to the fact that data protection law imposes such requirements for all operations involving the processing of personal data.

However, more importantly for our topic, instead of clarifying the concept of transparency as interpreted in the legislation, the legislation associates in this respect minimum requirements of interpretability and information, which are set out in

[41] Varošanec, Ida. "On the Path to the Future: Mapping the Notion of Transparency in the EU Regulatory Framework for AI." *International Review of Law, Computers & Technology* 36, no. 2 (2022): 95–117. https://doi.org/10.1080/13600869.2022.2060471.

[42] Pasquale, Frank. *The Black Box Society: The Secret Algorithms Behind Money and Information.* Cambridge, MA: Harvard University Press, 2016.

[43] Haresamudram, Kashyap, Stefan Larsson, and Fredrik Heintz. "Three Levels of AI Transparency." *Computer* 56, no. 2 (2023): 93–100. https://doi.org/10.1109/MC.2022.3213181. Csatlós, Erzsébet. "Prospective Implementation of AI for Enhancing European (In)security: Challenges in Reasoning of Automated Travel Authorization Decisions." *Computer Law & Security Review* 54 (2024): Article 105995. https://doi.org/10.1016/j.clsr.2024.105995.

paragraphs 2 to 3. In these, it partly associates elements that already exist in data protection law (clear, accessible, understandable, brief for users), but in addition to these, it also adds requirements relating to the technological capabilities and the problems encountered. This is done by imposing the obligation to create a document (instructions for use) whose mandatory content mixes the more general transparency requirements, discussed above, with other information obligations. These contain both information enabling legal claims to be made (the legal instrument of authorised representative) and information on the system (purpose, accuracy, stability, cybersecurity measures, risks, input data, human supervision, maintenance), but it is not possible to define precisely which of these, which of these are part of the narrower notion of transparency and which are merely other information obligations, if at all, since there is an interpretation that all information obligations should be considered as transparency-enhancing measures. This dilemma is also expressed in the title of the article when it uses the phrase 'Transparency and provision of information to deployers'. This encapsulates the challenge of balancing general transparency principles with specific, actionable information obligations, highlighting the tension between theoretical clarity and practical implementation. The phrase underscores the need for deployers to not only access transparent information but also translate it into operationally relevant practices.

It should also be noted that, based on the mandatory content of the instructions for use, additional requirements of the Regulation can also have a transparency-enhancing effect,[44] and thus contribute to the concept of transparency as applied in the Regulation – specifically human supervision, compliance assessment, the obligation to prepare technical documentation – but their link to transparency is not explicitly stated in the legislation. There is also a debate in the academic discourse as to which of the requirements have a significant content and relevance for transparency.[45]

4. Interpreting transparency in platform regulation

Going further in our analysis, the third most important area where transparency requirements arise is the European regulatory framework for platforms, core platform services and gatekeeper services. Due to the length limitations of this article, we will instead carry out a more restricted analysis of the conceptual elements. On the one hand, we will examine the emergence and use of the conceptual elements on the basis of the requirements of the Digital Service Act and the Digital Single Market Act, which form the core of the current regulation, and on the other hand, we will only deal in detail with those requirements that provide a genuinely different or additional content for the interpretation of the concept.

The Digital Services Act (hereinafter: DSA, EU 2022/2065), released in October 2022, redefined the scope and obligations of intermediary service providers as

[44] Varošanec, I. *op. cit.*

[45] Busuioc, Madalina, Deirdre Curtin, and Marco Almada. "Reclaiming Transparency: Contesting the Logics of Secrecy within the AI Act." *European Law Open* 2, no. 1 (2023): 79–105. https://doi.org/10.1017/elo.2022.47.

defined by the e-commerce Directive. It achieved this by separating platform services, such as online platforms and certain sub-categories of online search engines, from the previous broader category of platform services. Additionally, it introduced obligations prioritising consumer rights and enhancing transparency, moving away from simply exempting intermediary service providers from liability.

However, in this area, the DSA follows a different path than we have seen in the GDPR or the AI Regulation. Rather, transparency, when it appears *expressis verbis* in the regulation, is linked to a narrower notion of transparency that manifests itself in a reporting obligation.[46] This can be stated by reference to the fact that, for all intermediary service providers, Article 15 of the DSA, as well as Article 24 for online platform providers, captures the central conceptual element of transparency as a reporting obligation, and this meaning is reinforced in Recital 49 when it states that 'to ensure an adequate level of transparency and accountability, providers of intermediary services should make publicly available an annual report in a machine-readable format, in accordance with the harmonised requirements contained in this Regulation'.

This reporting concerns the service as a whole and not the individual relationships that develop in the use of the service, which are subject to the requirements of the GDPR and the AI Regulation. The reporting is mainly related to content management activities and information on the different characteristics of these service providers compared to traditional intermediary services (e.g. number of suspensions, administrative jurisprudence on infringements, utilisation of internal complaint handling system, operational logic of automated decision making, etc.).

There is a clear critical view in the literature that such a narrowing of transparency to reporting cannot achieve the expectations that could bring real transparency to services,[47] because it would require that all individual service provision processes are informed by clear, meaningful information and that transparency permeates the whole service as conceptualised above.[48] Since the objective of this study does not consider this to be a priority, we can only conclude that, from a regulatory point of view, this legislative solution may be logical (trusting that the regulations complement each other and achieve the expected legislative objective), but it definitely undermines the clarity and interpretability of transparency as a legal concept. Meanwhile, an annually generated report that is questionably verifiable and subject to regulatory control has been shown not to increase users' sense of transparency,[49] but rather to be identified as a compliance obligation linked to the publicity of their activities, and thus more distantly linked to the already identified reporting dimensions

[46] Maroni, Marta. "Mediated Transparency: The Digital Services Act and the Legitimisation of Platform Power." In *Visible European Government*, 305–326. London: Routledge, 2023.
[47] Ződi, Zsolt. "Transparency and Justification Requirements in European Platform Law [Átláthatósági és indokolási követelmények az európai platformjogban]." *In Medias Res* 12, no. 2 (2023): 5–24. https://doi.org/10.59851/imr.12.2.1.
[48] G'Sell, Florence. "The Digital Services Act (DSA): A General Assessment." In *Content Regulation in the European Union – The Digital Services Act*, edited by Christina Angelopoulos, 1–15. Trier: TRIER Studies on Digital Law, 2023. https://doi.org/10.2139/ssrn.4403433.
[49] Lupiáñez-Villanueva, Francisco, George Gaskell, and Pietro Tornese, et al. *Behavioural Study on the Transparency of Online Platforms.* Luxembourg: Publications Office of the European Union, 2018.

of transparency.

The picture of the application of the concept of transparency is further nuanced by the fact that a risk-based approach to regulation is used: both on the basis of the size of the undertaking providing the service and the specific characteristics of the service provided. Under Article 15 (2) of the DSA, intermediary service providers that qualify as micro or small enterprises as defined in Recommendation 2003/361/EC and do not qualify as an online giant platform within the meaning of Article 33 of the DSA are not required to produce a transparency report. Regulatory differentiation in this direction is a legitimate legislative objective to mitigate over-regulation and the potential stifling effects of regulation on innovation but may have consequences from a transparency perspective. The fact that a micro or small enterprise operates a particular intermediary service does not mean that this service cannot be more complex or less transparent than that operated by a large or global enterprise.

It can also be noted that the regulation sets out different transparency obligations for online advertising and recommender systems. In relation to recommender systems, the DSA establishes similar conceptual elements (Article 27 (1)) as we have already identified in relation to the GDPR, namely clear and accessible language, which must be reflected in the contractual terms and conditions, GTCs, applicable to them, and which relate to the main parameters of the recommender system and the possibilities to modify and influence them. This also reflects the requirement, already discussed, to make the essence and implementation of the service understandable and comprehensible.

The provisions on transparency of online advertising systems, however, take a completely different approach: here, the legislator identifies the existence of a repository and a tool to query it, which allow for the interpretation and research of the data, as a factor leading to transparency. This repository contains a number of important elements required by the legislation, such as the characteristics of the advertising process, commercial information, which can be interpreted and make the process more traceable. The transparency in this respect is given by the researchability of the algorithms behind the advertising systems, the exploration of the correlations as interpreted by the legislator.[50]

In addition to the above requirements of the DSA, it is clearly identifiable that in many cases the regulation regulates topics partly related to transparency but does not assign the concept of transparency to them, identifies them as a different requirement, or does not link them to the contexts already discussed.

The DMA (EU 2022/1925) deals with the issue of transparency in a narrow way compared to the DSA regulation, and in a specific manner. The central elements of the concept of transparency in the DMA are not to be found in the legally binding articles, but rather in the recitals which provide the interpretation and framework for

[50] Kaushal, Rishabh, Jacob Kerkhof, and Catalina Goanta, et al. "Automated Transparency: A Legal and Empirical Analysis of the Digital Services Act Transparency Database." In *Proceedings of the 2024 ACM Conference on Fairness, Accountability, and Transparency*, edited by Ricardo Baeza-Yates, Fabro Steibel, and Meg Young, 1121–1132. New York: Association for Computing Machinery, 2024. https://doi.org/10.1145/3630106.3658960.

them. Recitals 45 and 58 again focus on the information element of transparency with regard to gatekeeper services providing online advertising services: they approach it as free information on request. The requirement of transparency is not mentioned in general terms in the Regulation, but continues to be linked to specific activities and service elements, such as transparency of the conditions for ranking on the basic platform service and related indexing and search engine crawling, and profiling, as already mentioned in the analysis of the GDPR, but does not introduce any new conceptual elements, adding only that gatekeepers must provide at least a description of the basis on which profiling is carried out, audited by an independent body, which may enhance the confidence of users and data subjects in the existence of independent assessment and auditing, but also raises risks on the side of ensuring a truly independent assessment.[51]

Transparency is only *expressis verbis* in the context of the gatekeeper undertakings' report to the Commission (Article 11), but even there the legislator does not specify what is meant by the need to describe in a transparent manner the measures taken to comply. Specific measures that could be described include the methodologies used to ensure compliance, such as internal auditing processes, third-party evaluations, or detailed documentation of steps taken to meet legal requirements. Including such measures would provide clarity and better align the reporting obligations with transparency goals. Similarly to the DSA, it can be identified that the DMA Regulation also regulates topics partly related to transparency, but in this case it does not assign them to the concept of transparency, no new conceptual element is defined.

5. Conclusion

A regulatory trend towards transparency can be clearly seen in the European regulation in these three fields. Looking at the historical context, we can see that transparency is moving from expectations to requirements. Initially, transparency was tied to manifesto-style, political content, but it has evolved into requirements with concrete legal binding force. In this process, however, there does not seem to have been a process of clarification, whereby the legislator would have separated the conceptual elements from the previous, politically interpretable expectations of transparency, and would have assigned them to transparency as a legal concept.

This is also illustrated by the fact that the concept of transparency is not defined, or is only indirectly defined, in the norms under examination – it has no legal interpretation (not only in the field of technology law), which leaves room for the legislator to give it an uncertain legal content. The direct consequence of this is that different sets of requirements are established for transparency from one legal norm to another. This leads to fluctuations, with the regulations examined focusing on information, its comprehensibility, accessibility, plain language and free of charge, while in other cases the focus is on the comprehensibility of the technological solution,

[51] Laux, Johann, Sandra Wachter, and Brent Mittelstadt. "Taming the Few: Platform Regulation, Independent Audits, and the Risks of Capture Created by the DMA and DSA." *Computer Law & Security Review* 43 (2021): 105613. https://doi.org/10.1016/j.clsr.2021.105613.

the traceability of its operation and the interpretability of the decisions taken. This in itself would not raise any particular concern, but the European legislator tends to combine these under a single transparency requirement with varying content. At the same time, the wording of the standards is often tautological: in many cases, the relevant standards stipulate that a given technology, solution or information must be transparent, but do not specify or do not specify precisely what criteria are required for full compliance, and only use general definitions (conciseness, clarity, unambiguity), which could pose a risk for operators and service providers in the course of practical implementation. The lack of objective criteria may also lead to a situation where a service provider subject to the personal scope of the Regulations concerned cannot be sure of full compliance with the requirements even if he behaves in a lawful manner. Objective standards are difficult to establish. The interpretation of transparency always involves the subject as a factor, and this can be traced back to the subject of transparency. The range of users and stakeholders of a service can be so wide that the question of how to make it uniformly comprehensible, understandable and traceable for this wide range of users and stakeholders is a regulatory issue, and this is reflected in the difficulties of actually complying with the obligation to provide information. The legislator could improve these difficult conditions of application by clarifying, through interpretation, the dimension of transparency that it requires. The first signs of this are clearly visible in the DSA legislation, where the legislator has chosen to formulate the main requirements in a reporting obligation, and to focus the requirements of the concept of transparency on this. It should be noted, however, that in all four regulations examined, it can be concluded that the standard does not meet the requirement of conceptual precision, because a complex concept is used without being sufficiently narrowed down either in its interpretation or in the normative content.

European legislation, particularly the part dealing with technological development, has set ambitious objectives to address the risks and dangers posed by the mass adoption of these technologies. The ambition to create transparency in the digital space is clearly an important part of these objectives – transparency requirements are therefore included in all the major pieces of legislation in the field of technology law. In particular, those which are the subject of this article. In summary, however, the legislation that expects data controllers and service providers to create transparency is not exactly transparent in its own regulation. The regulations under examination arbitrarily, without further justification, grab one element from the complex conceptual system of transparency and neglect to clarify what exactly is meant by transparency, what conceptual elements are assigned to it and how these are used to filter out the legally binding requirements. In order to ensure that European legislation – which is unique in many respects and which responds to the modern technological acquis in terms of protecting the rights of European citizens – does not create a significant competitive disadvantage for service providers operating in the European market and does not become a brake on innovation, further clarification is needed to clearly define the conceptual elements and associated compliance obligations that are assigned to each piece of legislation.

Such clarification would increase transparency and help service providers by

providing them with more precise compliance obligations which are easier to implement and to account for. It is precisely the subjective element of transparency that makes clarification difficult: the traditional understanding of transparency will always be dependent on the subject of transparency. Nevertheless, a better delimitation of the conceptual elements is conceivable: a piece of legislation could develop its own set of conceptual elements, giving a better definition of the conceptual elements, which would help to ensure that the rules themselves use the concept precisely and avoid problems of interpretation.

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