

## Discussion Report

### The role of fundamental rights in out-of-court dispute settlement under Art. 21 DSA

*Article 21 - Academic Advisory Board - Discussion Report No. 02*

*November 2024*

*Board Members:* João Pedro Quintais, Iva Nenadic, Giovanni De Gregorio, Hannah Ruschemeier

*Guest discussant:* Martin Husovec

#### **KEYWORDS:**

Fundamental rights; Standard of review by ODS bodies; Article 14 (4) DSA; EU Charter of Fundamental Rights (CFR)

#### **INTRODUCTION**

The Article 21 Academic Advisory Board (the Board) discusses the most challenging issues arising in the development of out-of-court dispute settlement bodies (ODS bodies) under the Digital Services Act (DSA). Article 21 DSA allows for different models of ODS bodies. The Board explores different models and discusses their upsides and downsides. It provides guidance to ODS bodies and regulators, and informs the work of academics and civil society organisations. It helps to develop reasonable solutions where the law and regulators leave ODS bodies discretion as to how they should operate.

Article 14 (4) of the DSA mandates that platforms shall enforce restrictions “in a diligent, objective and proportionate manner” and with due regard to “fundamental rights and freedoms as enshrined in the Charter.” European secondary legislation mandating private entities to account for fundamental rights laid out in the CFR, which is European primary law, raises difficult theoretical as well as practical questions. In its second meeting, the Board focused on the question of how Article 14 (4) of the DSA and the rights laid out in the CFR should be accounted for in decisions by ODS bodies.

**The Board recognises that the DSA places fundamental rights at the centre of the content moderation landscape it creates.** However, it does not provide precise guidance on how these rights

should be accounted for by the various actors in this landscape. The Board recommends that ODS bodies incorporate fundamental rights considerations into content moderation assessments, ensuring that moderation decisions align with the standards set by the DSA, the CFR, and the European Convention on Human Rights (ECHR).

**The Board emphasises that ODS bodies play a critical role in providing independent, swift, and thorough remedies to users, with the aim of protecting their rights.** Their work complements the more scaled content moderation practices of platforms and judicial remedies before courts and should contribute to informing systemic risk assessments.

**The Board stresses that fundamental rights assessments by ODS bodies must balance thoroughness and efficiency.** Therefore, ODS bodies should decide on a case-by-case basis whether a fundamental rights review is necessary. Additionally, the Board advises that ODS bodies facilitate dialogue among stakeholders, including researchers and civil society, to clarify the standards governing the review of fundamental rights in procedures under Article 21. The goal of this dialogue is to specify how fundamental rights apply to content moderation and to define the roles of different actors in upholding these rights under the DSA. Acknowledging the need for further discussion, the Board resolved to examine in greater detail how fundamental rights should be applied and to develop concrete legal standards for these assessments in a future meeting.

## PROBLEM STATEMENT

The Board believes that the DSA and the CFR require platforms to enforce restrictions on content under their terms and conditions with due regard to the fundamental rights of all parties involved (1.). Yet, it remains unclear how this obligation may be operationalised and what this means for ODS bodies (2.).

### 1. The obligation to respect fundamental rights when enforcing restrictions

Article 14 (4) DSA specifies that platforms, when enforcing restrictions on user content, have an obligation to pay due regard to the fundamental rights and freedoms as enshrined in the CFR, and to act in a diligent, objective and proportionate manner. In the academic discussion, there is some controversy on whether the DSA, as European secondary law, can be the source of fundamental rights obligations. Generally, the scope and applicability of the CFR is defined in the CFR itself. It remains uncertain what the role of secondary law can be in shaping the applicability of the CFR between private entities.

Despite these uncertainties, the case law of the European Court of Justice (CJEU) on the horizontal applicability of the Charter can provide some guidance on how fundamental rights apply between platforms and users. According to the CJEU's case law, the fundamental rights set out in the CFR do not only apply in disputes between private parties and public authorities but are also (indirectly) applicable to purely private disputes that do not involve a public authority. On several occasions, the CJEU has reiterated that at least some of the Charter's fundamental rights are applicable to private disputes, including disputes between platforms and users (CJEU, judgement of 17 April 2018, Egenberger, C 414-16, ECLI:EU:C:2018:257 [Article 21 and Article 47 CFR]; CJEU, judgement of 6 November 2018, Bauer and Broßonn, C-569/16, C-570/16, ECLI:EU:C:2018:871 [Article 31 (2) CFR]); CJEU, judgement of 11 September 2018, IR, C-68/17,

ECLI:EU:C:2018:696 [Article 21 CFR]; CJEU, judgement of 6 November 2018, Max-Planck-Gesellschaft, C-684/16, ECLI:EU:C:2018:874 [Article 32 (2) CFR]; CJEU, judgement of 22 January 2019, Cresco, C-193/17, ECLI:EU:C:2019:43 [Art. 21 CFR]).

So far, the CJEU did not have the occasion to decide on whether all fundamental rights, such as the right to freedom of expression (Art. 11 CFR), are applicable to private disputes, including disputes between platforms and users. Yet, in particular the following consideration supports this claim: Platforms, especially very large online platforms, are of vital importance for the exercise of fundamental rights, in particular for, but not limited to, the exercise of the fundamental right to freedom of expression: A large part of online communication is done publicly through social media platforms, meaning that these platforms serve as a public forum and play a crucial role in the exercise of the fundamental right to freedom of expression. The same applies to other fundamental rights that users may exercise on social media platforms (cf. Wischmeyer/Meißner, Horizontalwirkung der Unionsgrundrechte - Folgen für den Digital Services Act, Neue Juristische Wochenschrift, 2023, p. 2673 ff. and Denga, Plattformregulierung durch europäische Werte: Zur Bindung von Meinungsplattformen an EU-Grundrechte, Europarecht, 2021, p. 582 ff.)

### 2. The unclear operationalisation of the obligation of platforms to respect fundamental rights

The wording of Article 14 (4) DSA is vague and open to interpretation. The provision does not specify *how* platforms may operationalise their obligation to respect fundamental rights when enforcing restrictions under their terms and conditions. More specifically, the provision does not set out concrete criteria for assessing whether platforms comply with their fundamental rights obligations under the DSA.

*CJEU:*

Case-law of the CJEU does not help us further. It does not provide any specific legal guidelines on how to operationalise the platforms' obligation under Article 14 (4) of the DSA. Although there is some case law on freedom of expression, there is only dispersed and selective case law on the obligation of private actors to respect fundamental rights. An established judicial doctrine on the horizontal effect of the CFR (and still less on the obligation of platforms to respect fundamental rights) is hitherto lacking.

*European Court of Human Rights (ECtHR):*

The ECtHR has issued more specific judgments related to online platforms and user content. According to Art. 52 (3) CFR, these judgments shall be taken into account when interpreting the CFR. In the 2019 judgment of *Buivids v. Datu valsts inspekcija* (Case C-345/17), the CJEU explicitly stated that Article 11 CFR should be given "the same meaning and the same scope" as Article 10 of the ECHR "as interpreted by the case-law of the European Court of Human Rights". However, the ECtHR's case law only relates to the vertical relationship between the state and the citizen, not to the horizontal relationship between platforms and users. Just as the CJEU, the ECtHR does not provide specific guidance on how to apply fundamental rights to the horizontal relationship between platforms and users.

*National Courts:*

National courts in EU member states have sought to apply fundamental rights to disputes between platforms and users. In particular, Dutch and German courts had to deal with cases where users (partly public figures) requested platforms to reinstate their content which was removed for violating terms and conditions.

Dutch courts applied ECHR rights to these cases and weighed the users' fundamental rights (in

particular freedom of expression) against the platforms' fundamental rights (in particular right of property). Furthermore, Dutch courts stipulated that since both users and platforms can invoke fundamental rights there is no space for a strict review of whether content moderation measures are compatible with fundamental rights of users. According to Dutch case law, there is only room for a *plausibility check* of the fair balance between competing fundamental rights positions.

German courts applied the fundamental rights of the German Basic law to cases involving content moderation measures by platforms. They also proceeded to a balancing of the fundamental rights of platforms and users. Yet, they applied a stricter standard of review. According to German case law, platforms must inform users of intended content moderation measures and give them the opportunity to state their position. In addition, content moderation measures must be based on an objective reason and must be adequate (proportionate). Factors to take into account in the balancing exercise include inter alia the size of the platform (VLOPs), the availability of less restrictive content moderation measures and whether platforms place thematic restrictions on user content or not.

Yet, although national courts have developed specific guidelines on how to apply fundamental rights to content moderation measures of platforms, these guidelines cannot directly be relied on to assess whether platforms comply with the fundamental rights obligations under Art. 14 (4) DSA. Art. 14 (4) DSA seeks to harmonise fundamental rights obligations of platforms in the EU and replaces the jurisprudence of national courts.

(For further details see João Pedro Quintais et al., *Using Terms and Conditions to apply Fundamental Rights to Content Moderation*, *German Law Journal*, 2023, p. 881ff.)

This raises the following concrete question:

**Should ODS bodies do a fundamental rights review of content moderation decisions? And if so, in what kind of cases should they do such a review?**

The question of whether and when ODS bodies do a fundamental rights review of content moderation decisions raises overarching issues regarding the nature and purpose of both platforms and ODS bodies. The Board may want to consider how these overarching issues factor into their response to the concrete questions. These overarching issues include:

Should certain VLOPs, namely those that are important social communication platforms, face increased obligations to respect fundamental rights of users?

What is the role of ODS bodies in reviewing compliance of content moderation measures with fundamental rights law?

What are the respective roles of ODS bodies, courts, platforms and civil society in protecting fundamental rights of users?

This report does not address *how* fundamental rights should be applied, as this requires a more detailed discussion that would overwhelm a single report. The objective of this discussion report is to discuss the application of fundamental rights in a future session, using examples provided by User Rights as a basis for the discussion.

## OPTIONS

With a view to the concrete questions to be discussed in this meeting, the Board may consider the following options as potential ways forward.

**On the question *whether* ODS bodies should review whether content moderation actions comply with fundamental rights (in principle, meaning in at least some of the cases)**

### Option 1: No fundamental rights check of content moderation decisions

*Solution:*

ODS bodies shall not review whether content moderation actions comply with fundamental rights of users.

*Considerations*

There is a legal uncertainty surrounding the fundamental rights obligations of platforms. In this situation, ODS bodies should not rush ahead and apply (unclear) fundamental rights standards to content moderation decisions.

ODS bodies are not in a position to engage in complex fundamental rights balancing exercises.

Art. 14 (4) DSA can be read as containing a legal obligation on platforms to apply fundamental rights law through general obligations, e.g. risk assessments, not in concrete decisions.

(For this possible interpretation and arguments against such an interpretation see João Pedro Quintais et al., Using Terms and Conditions to apply Fundamental Rights to Content Moderation, German Law Journal, 2023, p. 896).

### Option 2: Fundamental rights check of content moderation decisions based on criteria taken from the DSA, the CFR and ECHR.

*Solution:*

ODS bodies should apply fundamental rights to content moderation decisions. The criteria for this fundamental rights check follow from Art. 14 (4) DSA and European fundamental rights law:

It follows from Art. 11 CFR (freedom of expression) that content moderation measures must be based on an objective reason. Any measure that reduces the right to freedom of expression is unjustified under the CFR unless it serves a legitimate aim. This reasoning is reflected in Art. 14 (4) DSA which states that platforms “shall act in a diligent and objective manner” in applying restrictions.

In addition, interferences with fundamental rights of the CFR are unjustified if they are

disproportionate. This reasoning is also reflected in Art. 14 (4) DSA which stipulates that providers shall act in a “proportionate manner” when they take content moderation measures. Criteria for the required balancing exercise may be taken from the case-law of the CJEU and the ECtHR. Relevant factors include the type of speech spread by the user (hate speech, political speech, etc.), the reach of a post, the availability of less restrictive content moderation measures (demotion before deletion, deletion before account suspension, etc) and the size (VLOPs or not) and orientation of the platform (thematic restriction or not).

Finally, platforms are required to implement content moderation measures consistently. This requirement is also reflected in Art. 16 (6) and Art. 20 (4) DSA and includes that platforms must treat similar cases similarly. The standard of review of ODS bodies coincides with Art. 20 (4) DSA.

These criteria largely correspond to the standards developed by the German Federal Court of Justice. Its case-law may serve as an additional source of inspiration for shaping the fundamental rights obligations of platforms (for this interpretation of the DSA and EU and international human rights law see Wischmeyer/Meißner, *Horizontalwirkung der Unionsgrundrechte - Folgen für den Digital Services Act*, *Neue Juristische Wochenschrift*, 2023, p. 2673 ff.).

#### *Considerations:*

It is true that there is legal uncertainty surrounding fundamental rights obligations of platforms. This implies that errors may occur in carrying out fundamental rights checks. Yet, ODS bodies may deal with this legal uncertainty and the possibility of errors in a constructive manner. In applying fundamental rights law to content moderation decisions, ODS bodies may contribute to the debate about fundamental rights obligations of platforms. In addition, they may learn from other relevant actors (in

particular courts or civil society organisations) and continuously improve their fundamental rights assessments.

ODS bodies play an important role in the ecosystem created by the DSA. They should contribute to the protection of fundamental rights as required by Art. 14 (4) DSA and European fundamental rights law. A central contribution ODS bodies can make to the ecosystem under the DSA is to make fundamental rights review more accessible.

Art. 14 (4) DSA states that platforms need to apply their terms and conditions with due regard to fundamental rights.

EU human rights law and Art. 14 (4) DSA place an obligation on platforms to respect fundamental rights of users not only through general obligations, but also in concrete decisions. ODS bodies must therefore carry out a fundamental rights check when reviewing content moderation decisions.

#### **On the question of when ODS bodies should review fundamental rights**

If ODS bodies are, in principle, tasked with reviewing whether content moderation measures comply with fundamental rights, the question arises as to when, or in what types of cases, such a review is appropriate.

#### Option 1: ODS bodies should review fundamental rights in all cases

##### *Solution:*

ODS bodies should, by default, review whether content moderation measures comply with fundamental rights, without differentiating between case types or the complexities of individual cases.

##### *Considerations*

Article 14 (4) of the DSA applies to all content moderation measures and should, therefore, always be considered.

#### Option 2: Distinguish between different procedural constellations



*Solution:*

ODS bodies should review fundamental rights in complaint situations, such as when content has been removed or demoted, or an account has been blocked, but not when content has been reported and the platform has failed to take action.

*Considerations*

ODS bodies should not review fundamental rights in all cases to ensure that the process remains efficient and cost-effective. Conducting fundamental rights assessments where they do not affect the case's outcome would create unnecessary work without adding value.

Applying fundamental rights in complaint situations is more straightforward. This aligns with the concept of the negative notion of fundamental rights, where the platform's actions, such as removal or demotion, may infringe on these rights.

In contrast, the application of fundamental rights is more complex in cases where content is reported and the platform fails to take action. For an infringement to occur, the platform's inaction would have to violate fundamental rights, but determining this may not always involve the rights of the person reporting the content.

Applying fundamental rights in report constellations would also raise the question of whether anyone can demand a review of fundamental rights assessments, even when the potential impact on fundamental rights does not directly affect them.

**Option 3: Case-by-case assessment based on several factors***Solution:*

Whether a fundamental rights review is necessary should be determined on a case-by-case basis. Factors such as the impact on fundamental rights and the complexity of the case should be considered in this assessment.

*Considerations*

If a user reports content and the platform does not remove it, but the reporter appeals to an ODS body that rules in their favour, the platform's decision to remove the content affects the rights of the user whose content is removed. Therefore, the ODS body must also consider the rights of the affected user. In this context, a strict distinction between complaint and report scenarios is not useful.

The decision to review fundamental rights should be based on factors such as the impact of the decision on fundamental rights and the complexity of the case. For instance, account removals have stronger implications than applying labels, and the type of speech—such as whether it involves a public figure or a political debate—can also be relevant. If the application of terms and conditions is unclear, a fundamental rights review may offer additional guidance.

## CONCLUSIONS REACHED BY THE BOARD

The Board concluded that ODS bodies should review whether content moderation actions comply with fundamental rights of users and impacted persons. Whether to conduct such an assessment, however, should be determined on a case-by-case basis, considering the complexity of each case among other factors. Additionally, the following considerations were derived from the Board discussion and informed its conclusion.

The Board agreed that ODS bodies should incorporate fundamental rights considerations when assessing content moderation decisions, in alignment with the standards outlined in the Digital Services Act (DSA), the EU Charter of Fundamental Rights (CFR), and the ECHR.

The Board also emphasised that any application of fundamental rights assessments to content moderation decisions must strike a balance between thoroughness and operational efficiency. These assessments should be approached with caution on a case-by-case basis, guided by clear criteria grounded in human rights jurisprudence, including principles of legitimacy, proportionality, and consistency. It further noted that various factors should inform these assessments, such as the impact on fundamental rights, the type of speech involved, the reach of the post, the complexity of the case, the severity of sanctions, and the availability of less restrictive measures.

Additionally, the Board highlighted that ODS bodies should support rather than replace the role of courts. Courts are often overburdened with cases related to content moderation, and assistance from ODS bodies could help ensure that platform restrictions are consistent with fundamental rights law. This approach would also make fundamental rights-based remedial avenues more accessible to users.

Finally, while the Board considered the importance of fundamental rights assessments, it recognised the need for further discussion on this topic. Accordingly, the Board agreed to examine

this matter in greater depth in a future session, drawing on examples provided by User Rights to guide their discussions.

### **Key considerations of the Board:**

#### *Rejection of the No Fundamental Rights Assessment Approach:*

The discussion centred on rejecting approaches that categorically exclude fundamental rights assessments. The Board expressed scepticism towards such approaches, arguing that bypassing fundamental rights checks neglects crucial considerations and fails to adequately protect users. Instead, the Board emphasised the importance of upholding a normative, rights-based approach within content moderation frameworks. This approach positions fundamental rights checks not merely as procedural requirements but as integral components of the normative framework of ODS bodies.

The Board acknowledges that platforms face significant challenges in ensuring effective large-scale enforcement while respecting fundamental rights. This makes it even more crucial for ODS bodies to provide thorough reviews where necessary. By offering more detailed assessments, ODS bodies add value to the content moderation landscape, complementing platform efforts and making a unique contribution to the ecosystem.

#### *Legal Uncertainty and the Learning Curve for ODS Bodies:*

Another key consideration is the legal uncertainty surrounding fundamental rights obligations for platforms, particularly in relation to content moderation decisions. ODS bodies must navigate these obligations amidst frequent ambiguity. The Board highlighted the need for ODS bodies to interpret complex, evolving regulations in real time, acknowledging that fundamental rights obligations may lack clear guidance. This legal ambiguity necessitates a learning curve for ODS bodies as they interpret, enforce, and assess

policies in these fluid conditions. Given the shifting regulatory landscape and evolving platform dynamics, ODS bodies must continuously adapt their understanding of how fundamental rights apply within unique case contexts.

*Contribution to the Public Debate:*

The Board highlighted the broader role of ODS bodies in contributing to public debate on fundamental rights in the digital sphere. They discussed the differing orientations of ODS bodies—some market-driven, others aligned with public interest—and how these orientations influence their approach to assessing fundamental rights. Bodies oriented towards public interest are often better positioned to prioritise users’ rights over commercial goals. Although ODS bodies cannot replace judicial roles, their involvement in cases concerning fundamental rights can spark critical discussions on how platforms account for these rights. In the European context, where fundamental rights are tightly interwoven with regulatory expectations, the engagement of ODS bodies plays a crucial role in shaping the digital rights landscape.

*ODS Bodies’ Mandate and the Limits of Article 14 (4) DSA:*

The Board discussed boundaries in the mandate of ODS bodies. Some Board Members argued that it is important to ensure that ODS bodies focus on upholding fundamental rights in individual cases of content moderation, as prescribed by Article 14 (4) of the Digital Services Act. Broader responsibilities, such as systemic risk assessments and overall policy compliance, are addressed under other DSA articles (specifically Articles 34 and 35), which assign these tasks to judicial or regulatory bodies. This division reinforces the role of ODS bodies as case-by-case reviewers rather than systemic evaluators. Within these limits, ODS bodies can only issue advisory recommendations rather than mandate compliance. The Board advised that ODS bodies employ this advisory role judiciously, reserving

fundamental rights reviews for significant cases and avoiding a “policy board” stance that could overstep their mandate.

Other Board Members argued that it was appropriate, or perhaps even necessary, for ODS bodies to not only assess the compatibility of individual decisions with fundamental rights but also to evaluate the broader policies applied in these contexts. They contended that when ODS bodies determine that certain policies conflict with fundamental rights, these findings should be reflected in their decisions.

The Board Members agreed, moreover, that the reporting from ODS bodies should actively contribute to discussions about the impact of policies on fundamental rights.

*Case-by-Case Fundamental Rights Assessments:*

The Board also noted that fundamental rights assessments could impose significant costs in terms of both financial resources and time. Complex cases requiring detailed factual or legal analysis are likely to incur higher fees and procedural burdens. Thus, striking a balance between the need for thorough rights reviews and the efficiency of dispute resolution processes is essential.

The Board explored three potential approaches to deciding whether to apply fundamental rights reviews: routine, categorical, and case-by-case. While a routine review could streamline processes in the long term, it may be overly burdensome. A categorical approach, which restricts reviews to specific case types, like account removals, could address inefficiencies. However, a case-by-case review allows for a more nuanced understanding of each situation but requires clear criteria to determine when such assessments are warranted. The Board advocated for a selective, case-by-case approach to fundamental rights assessments in content moderation, as fundamental rights cannot be uniformly applied across all cases due to variations in complexity and context. This selective application allows ODS bodies to



balance individual case demands with platform obligations.

The Board identified two main issue categories: cases where terms may be poorly drafted, creating confusion, and those where applying the terms introduces ambiguity in balancing rights. For cases with potentially disproportionate consequences, such as permanent bans, the Board called for proportional enforcement to prevent excessive penalties for minor infractions. They discussed a “Gross Disproportionality” standard, focusing on extreme cases to ensure fair application without unnecessary interference.

Additional criteria, such as account suspensions versus removals, public figure status, political discourse, and types of illegal content, were suggested to guide when additional review is necessary. A framework distinguishing cases with unclear policy applications from those where application leads to rights violations could help ODS bodies intervene selectively, upholding fairness without imposing broad mandates on platform policy.

#### *Challenges in Interpreting and Enforcing Platform Terms:*

The Board highlighted another critical challenge: the often vague wording of platform terms of service, which complicates interpretation and enforcement. They acknowledged that the challenge lies less in drafting these terms than in their practical application on a case-by-case basis, which can lead to inconsistent enforcement. ODS bodies play a crucial role by interpreting these terms within the fundamental rights framework, especially on sensitive issues like freedom of expression. The Board underscored the dual responsibility: platforms must enforce policies fairly and consistently, and ODS bodies must carefully review these applications to ensure user rights are protected.

#### *Defining Scope and Pre-Qualifications to Balance Efficiency with User Rights:*

The Board discussed the scope and feasibility of fundamental rights reviews, especially regarding the practicality of assessing certain types of reviews, such as those concerning monetisation or visibility restrictions. In contrast, cases involving high-restriction measures, like account suspensions, were identified as clear candidates for such reviews. Operationalising fundamental rights assessments in a scalable manner is vital for balancing efficiency with user rights; structured, automated approaches, such as a “box-ticking” method, could streamline the process by allowing users to respond to predefined questions reflecting organisational criteria. This would facilitate the efficient categorisation of cases, reserving in-depth reviews for those flagged by multiple indicators of fundamental rights concerns.

Classification of speakers, identifying who is affected by moderation policies, emerged as a crucial consideration but may be complicated by nuanced definitions. Incorporating a speaker qualification component in the complaint submission process could deepen the understanding of each case’s context, as tailored questions aimed at identifying the user’s category or role would inform the necessary level of scrutiny. The Board also emphasised the importance of pre-qualification factors (such as platform size, type of speech, and speaker characteristics) which would significantly influence the level of scrutiny required and ensure consistency and appropriateness in assessments. Furthermore, requiring complainants to articulate specific, detailed concerns about fundamental rights violations could clarify issues and improve the relevance of the review process. The use of trusted intermediaries or flaggers was also suggested to help filter cases, providing a professional perspective for evaluating cases based on complexity and merit.

**NEXT MEETING AND CONTACT**

The Board will hold its next meeting in January 2025. You can find all relevant information and news on the Board's website: <https://user-rights.org/en/advisory-board>.

To contact the Board, please write: [board@user-rights.org](mailto:board@user-rights.org)

This report has been drafted by Ibrahim Sabra, Research Fellow of the Article 21 Academic Advisory Board, in cooperation with the Board Members.