A European common framework to address access restrictions

PLSC-style paper discussion for Digital Legal Talks 2022 (Utrecht)

Abstract

This project concerns the development of a European common framework to address access restrictions on social media platforms. The framework provides judges, lawyers, academics, and platform users with a roadmap to solve access problems on social media platforms. It clarifies the interplay of European and national rules governing the user term-based relation between the user and the platform operator and aims to safeguard a uniform approach to legal redress for platform users in the European Union. The creation of this framework also paves the way for a structured discussion on the role social media platforms play in the creation of norms on the internet.

The research's structure is two-folded. The first part of the study aims at the identification of the different building blocks for the framework. This identification is based on a comparative study of the case-law of four European Member States: Denmark, Germany, Italy, and the Netherlands. Despite a lacking universal approach to resolve access restriction issues on social media platform, problems of (questionable) content removals and suspensions of accounts on social media platforms exist and are addressed in courts. Simultaneously, the case-law study allows to incorporate a technology-neutral approach. The analysis of the problem starts from the point of view of general access restrictions, rather than from a platform point of view. Consequently, the comparative study consists of two parts: it compares *internally* within the Member States whether online access restrictions are resolved differently from physical access restrictions, and secondly it *externally* compares the practice in the Member States to expose any existing discrepancies in the European Union.

The second part focuses on the arrangement of the different building blocks into a common framework. Following the findings of the comparative study, the blocks are firstly divided into three layers through which access restriction issues are addressed: the foundational, access, and content layers. Following this initial organization, the various legal orders applicable to access restrictions are assigned to their respective layer. These two steps – the division in layers and the allocation of the plural legal orders - lead to a blueprint of the common framework.

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Preface / disclaimer

This piece submitted for a PLSC-style paper discussion at the Digital Legal Talks 2022 conference in Utrecht forms the first part of a larger PhD project. Following this first part, the dissertation continues with a doctrinal study into the different building blocks of the common framework. A preview of the final result of the entire project can be found on the last pager of this work.

Due to the limited scope of this piece and to allow for a good discussion during the conference, only certain parts of the full study have been included. That means simultaneously that some of the aspects discussed in this piece might, at times, only represent a summary of the findings. This is especially the case for the comparative study, for which this piece only touches upon the conclusions of the findings in the individual Member States, whereas the dissertation extensively discusses the details of the national case-law.

My interest in signing up for a PLSC-style paper discussion has been to see whether the identification and systematization of the framework's elements come across naturally and to see where perhaps the strong and weak points of the framework lie. As the second part of the dissertation forms a doctrinal study that is based on this first part, it is especially important for me to see whether I continue my study with the 'correct' elements.

Thank you in advance for taking the time to read my work and I am looking forward to the discussions on the 24th of November.

Berdien van der Donk

1. Social media platforms and the power of their user terms

How many times have you *actually* read a full set of user terms in your life? If you did, you are amongst a very exclusive group of people. In 2016, a study by Obar and Oeldorf-Hirsch showed that people accepted user terms despite the terms dictating to give up their first-born child and to share all their data with the NSA.[1]

In 2019, Benoliel and Becher confirmed empirically that user terms are unreadable for basically anyone.[2] Despite this, people all around the globe accept various *user terms, terms and conditions*, *community guidelines*, and *terms of service* every single day. Without reading hardly anything – the average time spent reading user terms is less than one minute [3] – these persons may accept contracts that include clauses that are not beneficial to them. The internet has increased and accelerated this development. When buying a house or signing a work agreement, people tend to (thoroughly) read the contracts. However, with online user terms, these same people click "I agree" on a computer screen without paying much attention. Luckily for these unaware users, the law protects consumers against certain clauses in numerous ways.

If something is illegal by law, a platform cannot give access to it, *even* if their users would consent to it in the user terms. That is why there are no legal online platforms for the sale of cocaine, and why The Pirate Bay eventually went underground. As putting a halt to illegal content is in society's interest, it seems unlikely that many disagree with these removals. Rather, social media platforms are increasingly urged to quickly remove any content disseminating terrorist videos, child sexual abuse material, and sales listings of defective counterfeit products in order to keep the internet a safe and pleasant place.[4]

However, large-scale social media platforms' user terms restrict access to more than just content that is illegal by law. Whereas platforms cannot make the illegal legal, they do remove posts that are *lawful, but awful*. User terms also restrict the access to content that is perfectly legal - at least in certain jurisdictions in the world - but which content is deemed unwanted by the specific social media platform. Such a restriction could be

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[1] Jonathan A Obar and Anne Oeldorf-Hirsch, 'The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services' (Social Science Research Network 2018) SSRN Scholarly Paper ID 2757465 <https://papers.ssrn.com/abstract=2757465> accessed 21 September 2021.

[2] Uri Benoliel and Shmuel I Becher, 'The Duty to Read the Unreadable' (2019) 60 Boston College Law Review; Obar and Oeldorf-Hirsch (n 1).

[3] Thomas J Maronick, 'Do Consumers Read Terms of Service Agreements When Installing Software? - A Two-Study Empirical Analysis' (2014) 4 International Journal of Business and Social Research 137.

[4] Most recently with the Regulation (EU) 2022/2065 (Digital Services Act), but also prior through initiatives such as Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online 2018 [OJ L 63]; The EU Code of conduct on countering illegal hate speech online 2016; European Commission, Memorandum of Understanding on the sale of counterfeit goods 2011 [Ref Ares (2016) 3934515]; Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018 2018 [COM (2018) 640 final].

harmless: a platform could decide that it only wishes to host cat-videos, banning any videos displaying hamsters, dogs, and goldfish. The restrictions can also be used to eliminate spam-posts. Similarly, a platform could impose a rule that every user's identification has to be verified, eliminating the opportunity to have an anonymous account. The latter example might be welcomed by some as it could reduce spam and negativity but might simultaneously be harmful for others that use anonymous accounts for whistleblowing.

There is a universal understanding that platforms, being private companies, can restrict the service that they provide,[5] whilst simultaneously a discussion has arisen concerning the subconscious feeling that *some* platforms should not moderate *too much* speech. Subconsciously, it seems that certain types of platforms should be assigned more leeway to moderate the content on their platform than others. Fewer people presumably oppose a decision of Pornhub to remove videos featuring cats,[6] as platforms must be allowed to decide the scope of their service (e.g., adult sexual content only). However, on large-scale social media platforms like Twitter, Facebook, or TikTok, such cat videos make up a big chunk of the content available, and many would oppose it when these platforms would remove animal content in its entirety.

Problematically, a user cannot simply choose not to comply with these normative rules. The technical interface often does not allow a user to enter a social media platform without creating an account, and to create an account, the user must accept the user terms. Subsequently, these user terms dictate the process to (permanently) restrict a user's access to the account in case of a (recurrent) breach of the rules.[7] That means that the power to dictate what should and should not be allowed to be shared lies de facto in the hands of social media platforms. Simultaneously, the *networking effect* of social media platforms – the service of a platform becomes more attractive as more people join – makes it hard for individual users to move to another platform.[8]

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[5] See for an in-depth analysis on online platforms' ability to freely draft user terms a previous study on the scope of the freedom of contract of private parties: Berdien van der Donk, 'The Freedom to Conduct a Business as a Counterargument to Limit Platform Users' Freedom of Expression' (Springer International Publishing) <https://doi.org/10.1007/16495_2021_33> accessed 20 April 2022.

[6] Pornhub's user terms allow the removal of cat videos: "*The Website is for adult-oriented content. Other categories of content may be rejected or deleted in our sole discretion*", see Terms of Service (14 April 2022) <https://pornhub.com/information/terms> (accessed 21 April 2022). Any video including cats in an adult-oriented content will also be removed according to Pornhub's transparency report: "*We also consider exploiting an animal for sexual gratification as an activity that we simply won't tolerate on the platform.*", see Pornhub Transparency Report 2020: <https://help.pornhub.com/hc/en-us/articles/4419860718483-2020-Transparency-Report> (accessed 21 April 2022).

[7] See for a demonstration of this possibility an earlier case-study: Berdien van der Donk, 'Ex-Ante and Ex-Post Access Restrictions in Online Marketplace's Terms of Service' Forthcoming European Review of Private Law.

[8] Spencer Waller, 'Antitrust and Social Networking' (2011) 90 North Carolina Law Review. The 'social lock-in' that is created by these networking effects has been discussed in light of competition law and the necessary interoperability of social media platforms' services, see for example Inge Graef, 'Mandating Portability and Interoperability in Online Social Networks:

When a user cannot technically circumvent these normative restrictions nor transferring to another service proves a suitable alternative, are there any alternative steps a user can take when an account has been blocked or content has been removed from a social media platform? What *legal* redress mechanisms does the user have to get content reinstated or to regain access to a suspended or terminated account? This paper focuses on mapping those possibilities for internet users in the European Union.

1.1. A foundational disagreement on the qualification of platforms

One of the ways to oppose a social media platform's normative decision to restrict access is through *must-carry* claims: demanding a court to host or reinstate content that would otherwise be restricted in the social media platform's user terms. The discussion on these *must-carry claims* for social media platforms has been on the rise during the last years. In the United States, all must carry-claims to date have been unsuccessful due to platform's protection under section 230.[9] In Europe, however, the discussion on must-carry claims is far from settled. The legal literature has solely addressed individual Member States or a comparison of the practice in an individual Member State and the practice in the United States.[10] However, the discussions on the national Member States and recent case-law in Germany, Italy, and The Netherlands shows that the 'European approach' simply does not exist. Courts in the Member States have reached various conclusions, leading to diverging implications for users and platforms in different Member States. For example, in Italy, social media platforms have been forced to pay immaterial damages for wrongful content removals as high as 14.000 euro for a personal social media account and 3.000 for removed content.[11] Contrarily, in the Netherlands, a claim for reputational damage was rejected even in the case of a *wrongful removal*.[12]

Regulatory and Competition Law Issues in the European Union' (2015) 39 Telecommunications Policy 502. The Digital Markets Act has a brand-new provision on mandatory interoperability for gatekeepers (art. 6), though this obligation does not extend to the inclusion of content normatively banned by another platform and will therefore unfortunately not address nor solve this issue.

[9] Daphne Keller, 'Why D.C. Pundits' Must-Carry Claims Are Relevant to Global Censorship' <http://cyberlaw.stanford.edu/blog/2018/09/why-dc-pundits-must-carry-claims-are-relevant-global-censorship> accessed 3 August 2022; Daphne Keller, 'Who Do You Sue? State and Platform Hybrid Power Over Online Speech' Stanford University <https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf>.

[10] On Germany, see Matthias C Kettemann and Anna Sophia Tiedeke, 'Back up: Can Users Sue Platforms to Reinstate Deleted Content?' (2020) 9 Internet Policy Review <https://policyreview.info/articles/analysis/back-can-users-sue-platforms-reinstate-deleted-content> accessed 3 August 2022; Regarding Italy: Marco Bassini, 'Libertà di espressione e social network, tra nuovi "spazi pubblici" e "poteri privati". Spunti di comparazione' 33; Luca Rinaldi, 'Le Piattaforme Tra Diritto Pubblico e Diritto Privato: Libertà d'espressione, Discorso Politico e Social Network in Alcuni Casi Recenti Tra Italia e Stati Uniti' 211.

[11] *Tribunale di Bologna sez II (De Gaetano)* [2021] RG 5206/2020; *Corte appello L'Aquila (Correggiari)* [2021] N 1659/2021.

[12] *Rechtbank Amsterdam (BLCKBX/Google)* (2021) ECLI:NL:RBAMS:2021:4308, §4.17. A wrongful removal refers to a removal that is not in line with the user terms of a social media platform.

The diverging outcomes of the national cases can be traced back to the Member States' different qualification of social media platforms. Comparing the qualification of social media platforms in Denmark, Germany, Italy, and the Netherlands, the verdict differs between public fora, private property, and private property with a spectrum of procedural rules and (indirect) fundamental rights influence depending on how 'general' the platform has opened up its service. These subtle differences in the definition of social media platforms have a significant impact on the ability and outcome of social media platform users' appeal on content moderation decisions.[13] It defines whether the relationship between a social media platform and its users is viewed as a purely contractual matter (Italy), a relationship with elements of a public fora (Denmark), private property (the Netherlands), or a private service with potential public/social interest, allowing for the horizontal application of fundamental rights (Germany).

Reaching consensus on the qualification of a social media platforms is not an easy fix. In addition to the divergent qualifications applied by the Member States' courts, social media platforms have been and are continuously perceived very differently in the academic literature. Platforms have been addressed as part of various regulatory doctrines related to competition law, such as public utilities,[14] essential facilities,[15] and as essential facilities and public utilities combined.[16] Their role has been compared to

[13] Compare for example the Dutch cases *Rechtbank Noord-Holland (Van Haga/LinkedIn)* (2021) ECLI:NL:RBNHO:2021:8539; *BLCKBX/Google* (n 12); *Bundesgerichtshof (Inhaltesperrung)* (2021) III ZR 192/20, ECLI:DE:BGH:2021:290721UIIIZR192.20.0; *Bundesgerichtshof (Kontosperrung)* (2021) III ZR 179/20, ECLI:DE:BGH:2021:290721UIIIZR179.20.0. The Dutch users have – apart from social media platforms who do not substantiate their user terms – no right to claim reinstatement or regain access to a platform, whereas German users could indirectly claim access to a platform that is open to the general public and claim reinstatement if content is removed from such a platform without an objective reason.

[14] Christoph Busch, 'Reguliering Digitaler Plattformen als Infrastrukturen der Daseinsvorsorge' 36; Vicente Bagnoli, 'Digital Platforms as Public Utilities' (2020) 51 IIC - International Review of Intellectual Property and Competition Law 903; Friso Bostoen, 'Are Online Platforms the New Utilities—and Should They Be Regulated as Such? Inspiration from over 100 Years of Telecommunications Regulation' <https://fsr.eui.eu/bostoen-f-are-online-platforms-the-new-utilities-and-should-they-be-regulated-as-such-inspiration-from-over-100-years-of-telecommunications-regulation/> accessed 14 September 2021; K Sabeel Rahman, 'The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept' (2017) 39 Cardozo Law Review 1621; Jean-Christophe Plantin and others, 'Infrastructure Studies Meet Platform Studies in the Age of Google and Facebook' (2018) 20 New Media & Society 293; Tarleton Gillespie and Mike Ananny, 'Exceptional Platforms' (*The Internet, Policy & Politics Conferences*, 2016) <http://blogs.oii.ox.ac.uk/ipp-conference/2016/programme-2016/track-b-governance/platform-studies/tarleton-gillespie-mike-ananny.html>.

[15] Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457>.

[16] Adam Thierer, 'The Perils of Classifying Social Media Platforms as Public Utilities' [2012] SSRN Electronic Journal.

general public spaces,[17] public spheres,[18] a public forum,[19] multiple coexisting and competing public spheres,[20] something in-between a public and a private space,[21] as privately governed space,[22] as private businesses taking over (at least partially) the role of the state,[23] as digital mediums,[24] and as systems "synchronizing offline and online spaces".[25]

A final conclusion is yet to be reached.[26] *If* reaching consensus on a single qualification is at all possible. The discussion on the qualification of social media platforms has taken away the focus on reaching a functioning framework for the opposition of normative decisions by social media platforms. Rather than finding a common framework,

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[17] Jacquelyn Burkell and others, 'Facebook: Public Space, or Private Space?' (2014) 17 Information, Communication & Society 974; Pamela L Morris and Susan H Sarapin, 'You Can't Block Me: When Social Media Spaces Are Public Forums' (2020) 54 First Amendment Studies 52; Margaret McCartney, 'Online Is Not a Private Space' (2011) 343 BMJ d7109.

[18] Mike S Schäfer, 'Digital Public Sphere', *The International Encyclopedia of Political Communication* (American Cancer Society 2016) <https://onlinelibrary.wiley.com/doi/abs/10.1002/9781118541555.wbiepc087> accessed 14 September 2021; Manuel Castells, 'The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance' (2008) 616 Annals of The American Academy of Political and Social Science, 78.

[19] Amélie Pia Heldt, 'Merging the "Social" and the "Public": How Social Media Platforms Could Be a New Public Forum' (Social Science Research Network 2019) SSRN Scholarly Paper 3460067 <https://papers.ssrn.com/abstract=3460067> accessed 22 April 2022; Micah Telegen, 'You Can't Say That!: Public Forum Doctrine and Viewpoint Discrimination in the Social Media Era' (2018) 52 University of Michigan Journal of Law Reform 235.

[20] Axel Bruns and Tim Highfield, 'Is Habermas on Twitter?: Social Media and the Public Sphere', *The Routledge Companion to Social Media and Politics* (Routledge 2015).

[21] José van Dijck, 'Governing Digital Societies: Private Platforms, Public Values' (2020) 36 Computer Law & Security Review 105377; Hilde Sakariassen, 'A Digital Public Sphere: Just in Theory or a Perceived Reality for Users of Social Network Sites?' (2020) 36 MedieKultur: Journal of media and communication research 126; Keller (n 9); Mike Ananny, 'From Noxious to Public? Tracing Ethical Dynamics of Social Media Platform Conversions' (2015) 1 Social Media + Society 2056305115578140.

[22] Rikke Frank Jørgensen and Lumi Zuleta, 'Private Governance of Freedom of Expression on Social Media Platforms: EU Content Regulation through the Lens of Human Rights Standards' (2020) 41 Nordicom Review 51.

[23] Susan Benesch, 'But Facebook's Not a Country: How to Interpret Human Rights Law for Social Media Companies' (*Yale Journal on Regulation*) <https://www.yalejreg.com/bulletin/but-facebooks-not-a-country-how-to-interpret-human-rights-law-for-social-media-companies/> accessed 13 September 2021; Natali Helberger, Jo Pierson and Thomas Poell, 'Governing Online Platforms: From Contested to Cooperative Responsibility' (2018) 34 The Information Society 1.

[24] John McMullan, 'A New Understanding of "New Media": Online Platforms as Digital Mediums' (2020) 26 Convergence 287.

[25] Human Rights Council (Advisory Committee), 'New and Emerging Digital Technologies and Human Rights. Study of the Human Rights Council Advisory Committee' (2021) A/HRC/AC/25/CRP.2.

[26] Andrea Buratti, 'Framing the Facebook Oversight Board: Rough Justice in the Wild Web?', 25 July 2022.

different legal fields (constitutional law, contract law, consumer protection law, and competition law) have seemingly gotten stuck on arguing how their very own field addresses access restriction problems best. Seemingly, a social media platform has elements of multiple of the above-mentioned qualifications, which would render an *outcome*-based approach to resolve access restriction issues more suitable than an *origin*-approach. Not the qualification of the platform, but the restricting outcome for platform users should be the focus point.

This study demonstrates in what way *all* the above-mentioned legal fields are involved in and applicable to different types of access restrictions, and how these fields *all* play their own part in solving the problem.

1.2. Striving towards a uniform approach on access restrictions

The main goal of this research is to frame *how* to think about social media's moderation problems, rather than solving individual problems. To streamline the outcome of access problems in the European Union, a common framework to address the different types of access restriction is highly needed. The right framework allows one to see potential solutions to problems and enables a transparent discussion on the future of content moderation and access restrictions. The development of the framework is founded on the observation that there is a lacking consensus on which law should be applied to resolve disputes between social media platforms and their users.

It is not my aim to provide a concluding answer to how individual discussions on access restrictions must be solved. Rather, the framework streamlines these discussions and pinpoints to research necessary to address them. As such, the various discussions are indicated and outlined whenever they appear, but the main aim is to contribute from a metalevel to the creation of a uniform and overarching approach to access restrictions. The framework guides lawyers, courts, legal scholars, internet users, and social media platforms through the overlapping legal orders and points in the direction of exactly which European or national laws must be applied to resolve the exact access restriction on a social media platform. The research contributes to the understanding of how the plural legal orders applicable to access restrictions of social media platforms interact, which laws safeguard users in which situations, and will pinpoint exactly where consensus is lacking. It paves the way for a discussion on the role social media platforms play in the creation of norms on the internet and allows for an answer to the question as to whether internet users in different European Member States have (equal) redress mechanisms to (re)claim access to a social media platform.

The above does not mean that the framework leads to *uniform outcomes* in the different Member States. The framework clarifies the interplay of European and national rules governing the user term-based relation between the user and the platform operator. Some access restrictions can only be resolved by applying Member States' national laws. Consequently, if these national laws vary, the outcome of the dispute will vary too. When resolving matters of content on the internet, taking into consideration these different national variations is inevitable and direly needed. Including them creates a roadmap that is future-proof and allows for (cultural) deviations in the Member States.

Lastly, it must be pinpointed that this project does not contribute to the discussion on whether specific types of content are, could, or should be illegal and removed. In this project, the point of reference to differentiate between illegal or legal content will be the qualification as prescribed by law in the given Member State.[27] Platform governance and platform regulation studies have focused substantially on the question who should remove illegal content and who is liable from exactly what point in time. These questions are assessed as part of the *triangulation* of the platform system: the platform operator, the user that posts the illegal content, and third parties that are harmed by the illegal content interact in a triangular relationship.[28] Rather, this project focuses on the less highlighted side of normative content removals.

1.2.1. The research questions

The development of a European common framework has two foundational parts: the identification of the different elements of the framework and their application to access problems of social media platforms. The study follows that distinction.

The central focus point is the identification of the framework's elements. This search for elements will be based on a technology-neutral approach and concretely consists of a comparison of the practice of must-carry and reinstatement claims in the Member States of the European Union as opposed to similar problems in the physical world, and a mapping of the pluralism of legal orders that are applicable to the relationship between a social media platform and its users on the other. It answers the following two research questions:

(i) Considering the case-law of four Member States (DE, DK, IT, NL), have access restrictions on social media platforms been resolved differently from those regarding physical places, and to what extent do the Member States differ in their approach?

(ii) Based on the analysis of the national case-law, which elements can serve to form a base for a European common framework on access rights?

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[27] Discussions on the justification, and/or desirability of the classifications of content are interesting and research into these factors is carried out mostly in relation to mis- and disinformation, harmful content, and rules in repressive regimes. This research will not dive into this discussion specifically, but the developments and findings of these discussions have nonetheless been followed and are referred to when coinciding with the restriction of legal content.

[28] Jack M Balkin, 'Free Speech Is a Triangle', *Columbia Law Review* <https://columbialawreview.org/content/free-speech-is-a-triangle/> accessed 1 June 2022; Robert Gorwa, 'The Platform Governance Triangle: Conceptualising the Informal Regulation of Online Content' (2019) 8 Internet Policy Review <https://policyreview.info/articles/analysis/platform-governance-triangle-conceptualising-informal-regulation-online-content> accessed 22 March 2022.

1.2.2. Methodology, hypotheses, and methods

The framework's different elements are identified through a two-folded comparative analysis. The choice to include comparative research methods to define the current state of user terms in the European Union has proven the most logical choice. European (private) law cannot develop independent of the legal systems in the Member States and on the other hand, the legal systems of the Member States are influenced by European law.[29] In this line, Lenaerts points to article 3(3) TFEU, stating that *"[the Union] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."* He refers furthermore to article 340 TFEU to underpin the importance of comparative law to fill any legal lacunae in European Law related to non-contractual liability.[30] In this sense, comparative analysis can serve two objectives: to regulate, and to harmonise the different legal systems in the EU. For the application of user terms on social media platforms, both objectives seem desirable. Firstly, social media platforms operate online in a space that is not bound by borders. Unity in the rules that are applied within the European Union creates legal certainty for platforms and simultaneously guarantees that all Union citizens have access to equal safeguards. Secondly, the comparative research shows whether a legal lacuna exist, and if yes, the rules of the different Member States can serve as inspiration for future norms. Consequently, the comparative research serves two purposes: to identify whether harmonisation is needed (do Member States differ in their rules on social media platforms' user terms?), and secondly, it exposes the different solutions in the respective Member States, which solutions subsequently can be assessed to determine which ones serve the objectives of European law best.[31]

The study is based on two hypotheses. These hypotheses have an internal (within one Member State) and an external (between Member States) component. An identical two-fold has been applied in the comparative analysis. I presume, firstly, that a discrepancy exists within the individual Member States regarding the way they address access restrictions imposed by social media platforms as opposed to non-platform actors. I suspect that this internal discrepancy is due to the Member States having difficulty weighing the overlapping legal orders. Secondly, I suspect the individual Member States to resolve conflicts with social media platforms' user terms differently from their fellow Member States, creating an external, European, discrepancy. This second discrepancy, I presume, is caused by a disagreement on the qualification of social media platforms. Therefore, after the initial comparative analysis of a potential *internal* discrepancy that will demonstrate how the individual Member States view social media platforms (as opposed to non-platforms), a second comparative analysis will be carried out to test whether an *external* discrepancy exists between the selected Member States.

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[29] Schwartze, 'Comparative Law' in Karl Riesenhuber and Fritz Thyssen-Stiftung (eds), *European legal methodology* (Intersentia 2017), p. 63.

[30] Lenaerts, Koen, 'The Court of Justice and the Comparative Law Method' (2016) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2016/K._Lenaerts_ELI_AC_2016.pdf> accessed 27 September 2021.

[31] See in this regard also Lenaerts, ibid, p. 12, where he describes that the CJEU not necessarily has to choose between (the lowest) common denominator of the Member States, but may opt for the one that serves the objectives of the Union best.

For the internal part, the legal framework applied by national courts to access restrictions to physical places (e.g., restaurants, bars, football stadiums) is compared to that of online places (social media platforms, chat boxes). The analysis includes the case-law of four European Member States: Denmark, Germany, Italy, and the Netherlands. The findings resulting from the internal comparative analysis will allow for several conclusions. Firstly, from this assessment it can be deducted *whether*, and if yes, *how*, the individual Member States resolve user term disputes when dealing with social media platforms as opposed to non-platform actors. It will show whether Member States apply different legal standards when dealing with social media platforms' user terms as opposed to the user terms from non-platform actors. If this is the case, the characteristics of social media platform seemingly play a significant role in determining whether the scope of user terms should be (entirely) left to a private party when legislation does not govern the matter. Determining whether the properties and characteristics of social media platforms play a role in the freedom to draft the scope of user terms will contribute to the justification of future platform-specific regulation. It can either show that social media platforms and non-platform actors have an equal margin of discretion to set their user terms, or that the margin is either wider or stricter for social media platforms.

However, one Member State displaying a uniform approach between social media platforms and non-platform actors does not allow a solid base for a common framework, it rather demonstrates how the national law in said Member States functions. Therefore, the internal comparison is followed by an external comparison of the practice in the four Member States to reveal any existing discrepancies. The external part of the comparison is meant to shed a light on current European trends by comparing the findings of the internal comparative analysis at a European level and to find out whether a common legal framework can be derived from the case-law in the Member States.

After the common elements have been identified, they will be structured in a framework. After the identification of the different types of access restrictions, the legal orders applicable to the individual access restriction categories are mapped. This leads to the final roadmap on the overlapping legal orders applicable to access restrictions.

1.2.3. The underlying theory: a technology-neutral approach

The assessment of internal discrepancy in the different Member States is based on a technology-neutral approach developed in platform regulation theory. The comparative study therefore separates the presumed legal issue and the (technological) change. I believe a broader context is more suitable and will prevents side-tracked solutions to solely technological problems that are also experienced outside of the technological field. Simultaneously it will prevent any proposals that will lead to a patchwork of legislation.

My underlying conception is that platforms should not be treated from a perspective of exceptionalism. Historically, technological developments have always taken place, and whilst some sector specific regulation is needed and even welcomed, it should be

reserved for those developments that are unable to be covered by existing principles. Therefore, I have chosen to address the issue from a technology-neutral perspective and to start the analysis of the problem from the point of view of access restrictions, rather than from the point of view of the platform – which for example could have been the existence of a gatekeeping function, or the norm-setting behaviour of large-scale platforms. That does not mean that these latter characteristics of platforms are left out of this study. The specific role of platforms and the influence of their characteristics pop-up naturally when assessing the case-law and when examining the qualification of social media platforms in the Member States. However, these characteristics are placed within and are compared to the existing legal framework applicable to platforms' physical counterparts.

The choice to frame the research as technology-neutral as possible – only referring to the role of platforms where it reflects a socio-technical change - has been based on legal theory regarding technology regulation as developed by Easterbrook, Bennett Moses, Dizon, and Cockfield & Pridmore. It departs from Easterbrook's call to study cyberspace through the lens of well-established, over-arching legal fields, rather than as an isolated topic, drifting away from the depth of the assessment.[32] It is further inspired and based on the reinforcement model and the theory of Bennet Moses' on how to address problems relating to emerging technology,[33] Cockfield and Pridmore's synthetic theory of law and technology,[34] and the third phase of Dizon's reinforcement model.[35]

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[32] Frank H Easterbrook, 'Cyberspace and the Law of the Horse' The University of Chicago Legal Forum 11. The main point Easterbrook makes in his article is that a specialized topic, such as horses, are best to be studied through the application of general rules. Rather than studying conflicts related to horses, such as the regulation of horse races, the selling of horses, horses kicking people, or horses winning prizes at horse shows, the different aspects should be studied through the legal field governing these overarching problems. Injury caused by horse kicks can be resolved by tort law, the sale of horses by property law, and so forth. A quarter century after Easterbrook published his article on Cyberspace and the Law of the Horse, his metaphor still seems to perfectly apply to emerging fields of regulation such as platform regulation.

[33] Lyria Bennett Moses, 'How to Think about Law, Regulation and Technology: Problems with "Technology" as a Regulatory Target' (2013) 5 Law, Innovation and Technology 1. In line with Easterbrook, Bennett Moses states that creating a 'law of the horse' will lead to duplicative and compartmentalised rules. Bennett Moses transferred and applied Easterbrook's thoughts to the field of technology regulation. A problem caused by a specific subject, whether horse, technology, or platform, could potentially be sufficiently governed by existing, more general regulatory regimes. Bennett Moses' interpretation of Easterbrook's proposal resulted in two questions that determine whether the object of study should be viewed through the specified lens of "technology regulation": *Does addressing issues related to technology through the lens of technology regulation allow one to say something about the regulation of technology in a general way?* and *Does the technology-aspect add a unique dimension to the existing problem that does not apply when considering the problem in a more general way?*

[34] Arthur Cockfield and Jason Pridmore, 'A Synthetic Theory of Law and Technology' (2007) 8 40.

[35] Michael Anthony C Dizon, 'From Regulating Technologies to Governing Society: Towards a Plural, Social and Interactive Conception of Law' (Social Science Research Network 2012) SSRN Scholarly Paper ID 2123105 <https://papers.ssrn.com/abstract=2123105> accessed 6 April 2021.

2. The two-folded comparative study

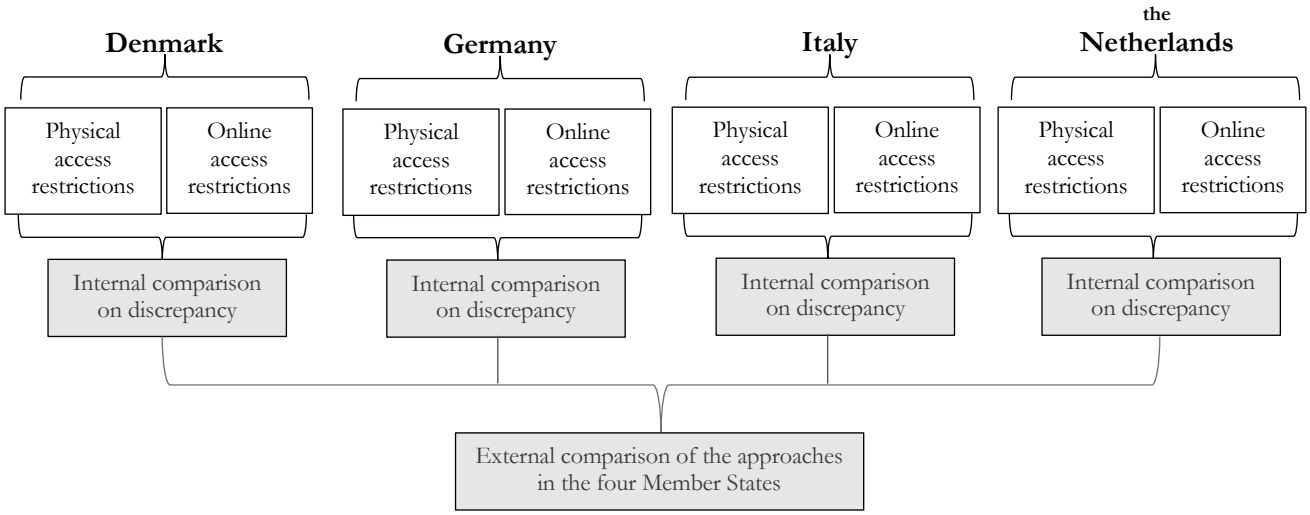
The internal comparison focuses on the differences between the way physical access restrictions are dealt with in national case-law as opposed to online access restrictions and tests whether a technology-neutral approach poses a viable solution to deal with access restrictions. This first internal part of the comparative study assesses whether an internal discrepancy exist between the way disputes regarding user terms by social media platforms are resolved as opposed to those by non-platform actors. It consists of three parts:

(i) a case-law analysis of non-platform actors' access restrictions.
(ii) a case-law analysis of social media platforms' access restrictions.
(iii) a comparison of the applied legal framework between (i) and (ii).

For this PLSC-version, only the comparison under (iii) has been included here. The case-law analyses of (i) and (ii) in the different Member States have been established during research stays in respectively The Netherlands and Italy, and their conclusions have been discussed with legal scholars from the respective jurisdictions.

Subsequently, the outcomes of the four Member States' internal comparisons on discrepancy will be compared to each other, resulting in an external comparison of the approaches in these Member States.

Table 1: Visual representation of the two-folded comparative study



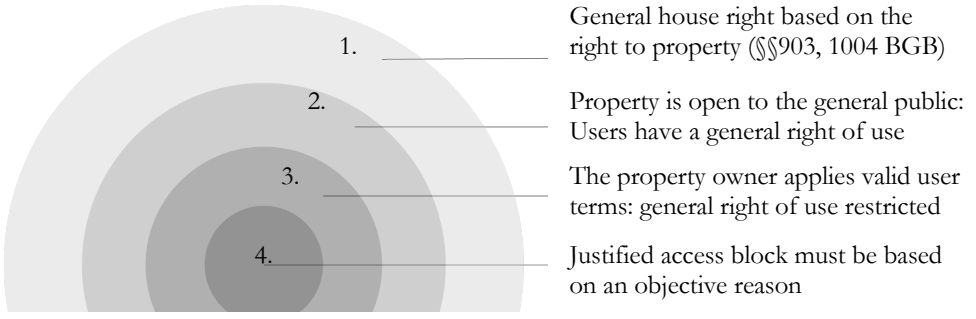
2.1. The conclusions of the *internal* comparative study

2.1.1. Germany

The case-law on access restrictions for physical places shows that the German case-law deals with physical access restrictions predominantly through a system of *Hausrecht* ('house right'). Several other categories referring to access restrictions (invalid user terms, equal treatment, termination) have been included in the system of house rights. Additionally, the anti-discrimination legislation based on Directives 2000/43/EC (racial and ethnic equal treatment) and 2004/113/EC (equality between men and women) are directly applicable.[36] Under German law, this includes discrimination on the grounds of race or ethnic origin, sex, religion, disability, age, or sexual orientation.

Based on the German case-law including the doctrine of house rights, four layers can be identified. The first layer covers the proprietor's right to property and the therewith intertwined right to refuse access (§§903 and 1004 BGB). These form the legal basis for the existence of both a house right and a house ban, which are referred to as, respectively, the positive and the negative aspects of the right to property. The second layer covers users' general right of use/access. Such a general right exists when the property is open to the general public. The third layer comes into consideration in case the proprietor, in the user terms, applies general restrictions to enter the property. These restrictions limit the general access right the users can claim under layer two. Fundamental rights *could* come into play to review the content of the user terms.[37] If no restrictions to the general access right exist, then the third layer can be omitted – in that case, the users have an *unlimited* general right of access/use. The fourth and last layer addresses whether other refusals of access can be justified, because despite the existence of a general right of access, the proprietor can use its house right to deny access to its property if an objective reason exists.

Figure 1: The different layers of the German Hausrecht



[36] General Act on Equal Treatment, section 19.

[37] See *Bundesverfassungsgericht (BVerfG zur Inhaltskontrolle von Bürgschaften einkommens- und vermögensloser Familienangehöriger)* [1993] 1 BvR 56789, concluding that civil courts, especially when interpreting open clauses such as §242 BGB, must take the fundamental right of private autonomy in art. 2 (1) Basic Law in consideration. According to the Court, "*this follows from their duty to review the content of contracts that place an unusually heavy burden on one of the two contracting parties and are the result of structurally unequal bargaining power*."

Comparing the practice in the case-law on physical places and online places, there is a seeming discrepancy in the legal basis granting the possibility to refuse access. Whereas house rights are based on the right to property, disputes regarding online restrictions are dealt with through contract law / law on agreements. This difference results from the facts that 'property' is interpreted strictly in Germany and only covers physical objects (§90 BGB). The opinions differ greatly as to whether soft- and hardware can be included in that sphere.[38]

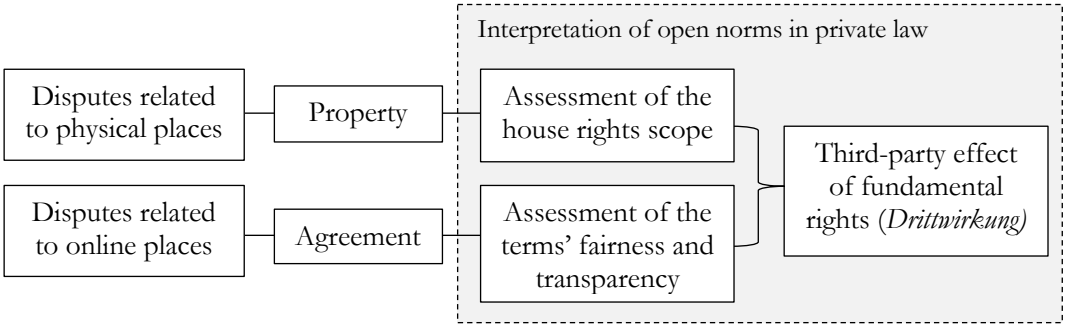
Despite the differences in the underlying legal basis to resolve disputes related to access restrictions, an overlap can be observed when looking more closely to the application of the two. Whereas the legal object differs, the scope of the restrictive powers that can be used to either protect (property) or define (agreement) the object are defined in a similar way. Both the house right and the fairness of the agreement are unspecific, open norms: their definition, interpretation and exact scope depends on the circumstances of the case. In German (case-)law, the interpretation of such open norms in private law has led to the rise of the third-party effect of constitutional rights (*Drittwirkung*). Third-party effect means that a constitutional right of either one of the parties can have an effect on the private relationship with another party – in this case to interpret the open norms related to the scope of the house right or the assessment of an agreement's fairness.

The criteria for third-party effect overlap for physical access restrictions and online access and content restrictions. This overlap consists of two elements: whether the place is 'open to the general public' and whether the refusal of access has a significant impact on the social life of the refused. Whether these elements are met depends on several

[38] Compare: Gabriella Piras, *Virtuelles Hausrecht?*, vol 7 (1st edn, Mohr Siebeck 2016); Götz Schulze, 'Das private Hausrecht. Schutzrecht für die Gebrauchsnutzung von Räumen' (2015) 70 JuristenZeitung 414; Lennart Elsaß, Jan-Hendrik Labusga and Rolf Tichy, 'Internet und E-Commerce. Löschungen und Sperrungen von Beiträgen und Nutzerprofilen durch die Betreiber sozialer Netzwerke' (2017) 33 Computer und Recht 234; Thorsten Feldmann and Joerg Heidrich, 'Rechtsfragen Des Ausschlusses von Usern Aus Internetforen' (2006) 22 Computer und Recht <https://www.degruyter.com/document/doi/10.9785/ovs-cr-2006-406/html> accessed 2 February 2022; Philipp Maume, 'Bestehen Und Grenzen Des Virtuellen Hausrechts' [2007] Multimedia und Recht Zeitschrift für Informations-, Telekommunikations- und Medienrecht 620. Piras argues that software can never be qualified as 'physical' property, and that a qualification of the server as physical property would lead to an impossible situation. *If* the server would be qualified as property, then any change to a file stored on the server would lead to an infringement of §1004 BGB. Arguably, even accessing a website would require changes in the server's data which could be prohibited as an infringement of §1004. However, Piras takes the server as a physical object as a starting point and concludes on the basis thereof that an online space (e.g. a social media platform) cannot be property as it solely consists of data *inside* actual property: the server. A server is not a 'space' but an 'object' that cannot be entered. Opposingly, it has been argued that an online space poses a virtual representation of a physical space and thus, consequently, a virtual house right should exist in line with a regular house right for physical spaces. That would create a 'general virtual house right' (Schulze). Less drastic is the argument that a virtual house right could be based on the hardware infrastructure of the platform, and that thus the criteria of 'physical property' are fulfilled (Elsaß et al). The same has been argued for software alone (Maume), and for the interplay between software and hardware (Kohl).

factors, such as the dominant position of the operator, the orientation of the platform, the degree of user dependence on the platform, and the affected interests of third parties.[39]

Table 2: Overlap in the scope of restrictive powers



If the interpretation of the open norms for either of the types of access restrictions is identical, then what is the practical consequence of the difference pointed out above on the differentiation in legal basis (property/agreement)?[40] The determination of the scope of these two open norms – the proprietor's scope to invoke its house right and the fairness of a user term – follow an identical pattern. If an online or physical place is not open to the general public, the provider/proprietor can refuse the access – either through user terms or by invoking its house right and providing an objective reason. If the place is open to the general public, which is assessed identically for physical places and social media platforms, and the provider has a significant decision-making power over the communicative space of its users, the provider is subjected to a special legal responsibility, meaning that it must weigh the interests of all the parties involved. The overlap in the application of this third-party effect demonstrates that the discrepancy found in regard to the legal basis dissolves when viewed from a metalevel.

2.1.2. Italy

The Italian case-law demonstrates that there is no discrepancy in resolving cases on physical access restrictions as opposed to online access restrictions. Rather, on the latter, the case-law demonstrates a normative choice on the qualification of social media platforms which has had an effect on the application of the law when dealing with access restrictions.

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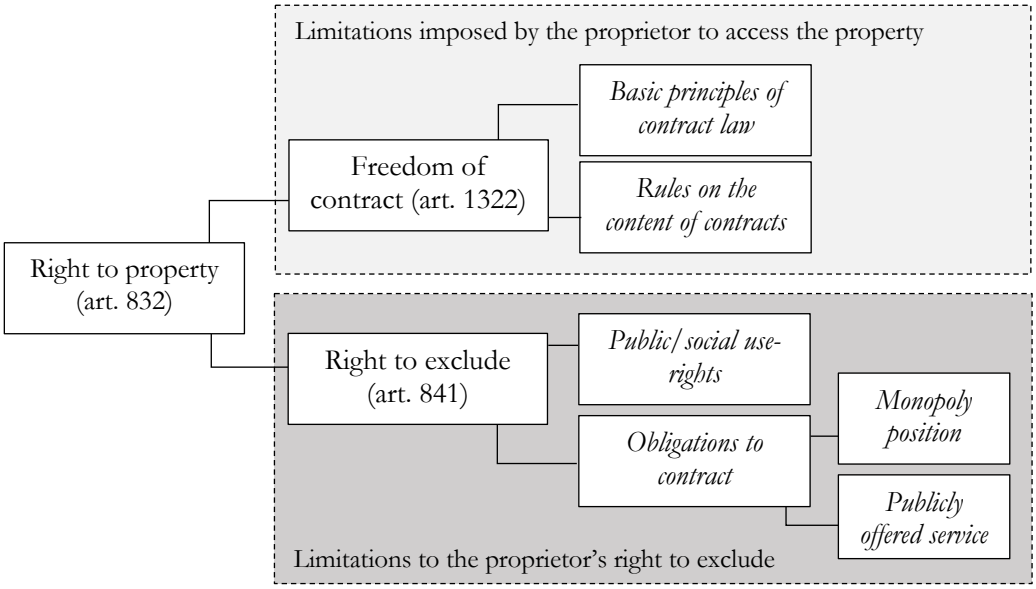
[39] *Bundesverfassungsgericht (der III Weg)* (2019) 1 BvQ 42/19, ECLI:DE:BVerfG:2019:qk20190522.1bvq004219, §15, and later confirmed in *Bundesgerichtshof (Inhaltesperrung)* (n 13); *Bundesgerichtshof (Kontosperrung)* (n 13).

[40] Already in 1951, Vinding Kruse concluded that this limitation in the German civil code is untenable and unnecessary, see Frederik Vinding Kruse, *Ejendomsretten* 3rd edition (1951) <https://jura.ku.dk/jurabog/pdf/juridiske-monografier/kruse_ejendomsretten_foerste_bind_3-udgave_1951.pdf> accessed 14 September 2022, p. 192ff. Vinding Kruse argues for a 'general right to property' as opposed to differentiating between material right to property and rights of resource ('*tingsretten*' and '*fordringsretten*').

The system of physical access restrictions is based on the right to property and the exclusive rights of the proprietor to choose to conditionally grant access to the property or to exclude access. The right to property is – equal to the German system – divided in a positive aspect of the right to property (the freedom of contract) and a negative aspect (the right to exclude the use of the property). The right to exclude access to the property – referred to as the *ius excludendi* – is not unlimited. A person can oppose the denial of access decision and claim access on the basis of either a public/social use-right or based on an obligation to contract. The latter is foreseen by law for either services offered by a monopolist or for a service that is offered to the general public.

Table 3: Physical access restrictions under Italian law



In online access restriction cases, it is noticeable that the courts addresses these issues as purely contractual problems, focusing on the validity of the contract in light of the basic principles of contract law (can a user 'pay' with personal data or not?[41]) and on the content of the user terms (are the user terms on social media platforms unfair?[42]). The courts therefore solely apply rules under the positive aspect of the right to property. Already this observation implies that courts believe the service offered by social media platforms do not fall within any of the limitations from the negative aspect of the right to property and thus a social media platform is (i) not a monopoly service, (ii) not a

[41] *Consiglio di Stato n 02631/2021 (Payment with personal data)* (2021) ECLI:IT:CDS:2021:2631SENT.

[42] *Provvedimento n 29976 - CV224 - TikTok* (Italian Competition Authority); *Provvedimento n 29818 - CV195 - Dropbox* (Italian Competition Authority); *Provvedimento n 29819 - CV196 - iCloud Apple* (Italian Competition Authority); *Provvedimento n 29817 - CV194 - Google Drive* (Italian Competition Authority); *Provvedimento n 26596 - CV154 - Whatsapp* (Italian Competition Authority); *Provvedimento n 26729 - CV157 - App Pokemon GO* (Italian Competition Authority).

publicly offered service, (iii) there is no individual need to access the property, nor (iv) does the service fall in the public domain.

Online access problems are addressed departing from the freedom of contract (art. 1322), therewith dismissing existence of a limitation to the platforms' right to exclude. More explicitly, several courts have argued for this normative stance. The *Tribunale di Milano* and the *Corte d'Appello di L'Aquila* both treated social media platforms' services as non-essential, fully contractually defined services.[43] In comparison, the Roman district court reached the conclusion in the earlier decision in *Casapound* that social media platforms cannot be compared to regular contractual relationships and consequently have the obligation to adhere to constitutional principles. The absence of a discrepancy lies exactly in this normative choice. Either normative choice (essential service or contractually defined service) fits within the system applied to physical access restrictions, whether the conclusion is that social media platforms' services are solely defined by their contracts, or opposingly, that the function of their services falls within the public domain. If platforms do not fulfil a public/social function and neither one of the obligations to contract applies, the platform has an unlimited right to exclude. Thus, the user terms are decisive for what can be posted and who should or should not have access to the service.

However, in light of the latter, it is important to note that the discussion on the qualification of platforms in Italy is not final. In numerous cases on (defamatory) content on social media platforms, Italian courts have reached the conclusion that social media platforms are *"able to reach an indeterminate or quantitively appreciable number of persons"*.[44] That corresponds to the first requirement for the existence of a public/social use-rights, the second one being whether the use of the property serves a general public interest. Thus, a normative choice that a social media platform's service fulfills some kind of general public interest (such as the Roman court argues), could impose a limitation on the platform's right to exclude access. This inconsistency on the qualification of social media platforms in Italy must be resolved to guarantee a foreseeable and uniform approach on access restrictions. After resolving this inconsistency, the system for physical access restrictions can sufficiently resolve any future problems – whether from the perspective of contractual law or the public/social function of the platforms' services.

2.1.3. The Netherlands

Both physical and online access restrictions are resolved by Dutch courts through the proprietor's right to property. The conclusion to resolve online access restrictions through the view of the social media platform's right to property has been explicitly argued in various cases: on the assessment of the fairness of online access restrictions, the Dutch courts explicitly refer to the decision of the ECtHR in *Appleby & others v.*

[43] *Tribunale di Milano (ByoBlu II)*; *Corte appello L'Aquila (Correggiari)* (n 11).

[44] Tribunale di Pavia , sez. III , 14/03/2019 , n. 468, Tribunale di Firenze , sez. II , 13/07/2021, n. 1916, Tribunale di Cassino, 09/07/2021, and n.506 Tribunale di Vicenza, 03/05/2021, n. 426.

United Kingdom,[45] a case on a physical access restriction to a shopping center.[46] The latter indicates a clear comparison to address online access restrictions in line with access restrictions to physical places – in this case a shopping center. The systems between online and physical access restrictions overlap therefore smoothly.

The case-law on both types of access restrictions addresses both the positive and the negative right to property and deal with, respectively, deciding to provide access and to exclude access. Initially, the cases on online access restrictions referred solely to the positive side. Social media platforms were allowed to define the rules on their platform. However, following the decision in *Van Haga/LinkedIn* and the articles 12-15 of the proposed Digital Services Act, the district court in Amsterdam applied procedural safeguards as a limitation to the free exercise of the *negative* right to property. Consequently, the court concluded that the right to refuse access to a platform is not absolute. If the transparency requirements are not met, a platform may be obliged to reinstate the user account.

In addition, one can observe a strict interpretation of the horizontal effect of fundamental and constitutional rights on the relationship between private parties in both the application of physical access refusals and online access refusals, which becomes evident when comparing the physical access restriction in the case *Toegangsverbod zorginstelling* with the cases on online access restrictions. In the first, an access ban was imposed on the brother of a patient in a private nursing home. Despite the fact that the brother was not allowed to enter the nursing home, meetings with his sister were still facilitated outside the premises. Therefore, the access ban did not impair his right to family life as it was not *fully* impaired. The same reasoning was applied in the online access restriction cases. If the user – despite the ban of the content or the account – remains to have a possibility to express opinions elsewhere (online), the right to freedom of expression is not fully impaired. In light of the latter, courts have referred to the possibility to create a website or to write a letter to a newspaper.

The above disproves the hypothesis that a discrepancy exists between the way Dutch courts resolve disputes on physical access restrictions as opposed to online access restrictions. The proprietor's protection under the right to property rules out a general right of access to both physical and online property. However, in case access to the property would prove to be the *only viable option* to exercise the protection of a fundamental right, access can be claimed. However, in the light of social media platforms, the Dutch courts find that unlikely. After all, there are plenty more ways to express oneself than through social media platforms alone, both on the internet and beyond.

[45] *Appl No 44306/98 (Appleby and Others/United Kingdom)* (2003) ECLI:CE:ECHR:2003:0506JUD004430698 (ECtHR).

[46] *Rechtbank Amsterdam (FvD/Google)* (2021) ECLI:NL:RBAMS:2021:5117; *BLCKBX/Google* (n 12).

2.1.4. Denmark

Opposed to the previous three Member States, Denmark proves a difficult fit. In the other Member States, the proprietor can derive both a positive and a negative right from the right to property. The proprietor can decide freely how to use its property (positive) or choose to exclude others from using it (negative). Contract law is used as a tool to govern the powers that derive from the positive aspect of the right to property. Denmark does not (explicitly) infer from the right to property a positive and negative right. The Danish constitution grants an inviolable right to property in §73,[47] where 'property' is interpreted broadly. The right protects anything from economic rights to physical objects, from both private individuals and businesses.[48] However, the protection has a narrow scope. The scope of protection under §73 is limited to expropriation by the State. As such, its protection has vertical effect only and does not affect the relationship between the (exclusion of) access to a private property between two private parties. Laws governing the *access* to private property do not qualify as expropriation.[49] These types of laws merely regulate the use of the property, and thus fall outside §73's protection.[50]

Due to the very limited number of Danish cases on access restrictions, the conclusion on an internal discrepancy between the handling of access restrictions in physical places as opposed to online places remains unclear, though some remarks can be made.

Firstly, so far, the Danish legislator has only intervened in physical property rights of physical parties. The Danish legislator has restricted both the owner's *own* access to the property (public safety) and the access rights between two private parties (public interest). However, due to the specificality of these limitations (access to one's own house, access to a forest) neither of these restrictions apply to online access restrictions.

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[47] Opposingly, §§72, 74 and 78 do explicitly not concern access restrictions to a property, see *Højesteret (Hells angels Rockerforbud)* (1999) I 248/1998-U.1999.1798H. (original text: *"For så vidt angår spørgsmålet om, hvorvidt der ved meddelelsen af forbudet er sket en krænkelse af sagsøgerens grundlovssikrede rettigheder, bemærkes, at hverken grundlovens § 72, § 74 eller §78 efter disse bestemmelsers ordlyd eller almindeligt anerkendte forståelse vedrører den omstændighed, at en person forbydes at opholde sig et bestemt sted.")*

[48] Folketinget, 'Grundlovens paragraf 73', https://www.ft.dk/da/dokumenter/bestil-publikationer/publikationer/mingrundlov/min-grundlov/kapitel-8/paragraf-73 (accessed 10 March 2022), Kommentar stk 1: '*de rettigheder, som er grundlaget for folks økonomiske eksistens*'.

[49] *Højesteret (Bandidos Rockerforbud) (2001) I 67/2000-U.2001.1057H: "*the law [the rocker law] concerns a general regulation of the use of property (..) the regulation solely concerns certain persons' prohibition to access the property. Even if a prohibition is imposed without any time limit, the prohibition must be expected to be lifted after a certain time (...) Prohibiting an owner from residing on the property does not entail any restriction on other powers of ownership, such as sale or letting." (translation by the author). See on this also Frederik Vinding Kruse, *Ejendomsretten*, 3th edition (1951), p. 257, where he defines the difference as 'a limitation of the right of disposal' versus 'transfer of ownership'.

[50] The discussion on which regulatory measures from the State fall within the scope of 'expropriation' is interesting from a compensational point of view. For the expropriation of property, the State must pay a reasonable compensation, whereas for the sole regulation of the use of property, no such duty exists.

That does not rule out any future interventions. The legal possibility to intervene in platforms' right to property exists. In the words of Vinding Kruse: *"It is a matter for legislators to give private property rights a free rein wherever they lead to valuable productive work, but to tighten the reins, i.e. to intervene with coercive rules, where production goes astray, leads to confusion and waste of values, and where private property rights, in short-sighted self-interest, prey on the interests of the general public and of future generations."*[51] Regarding the latter, one could highlight social media platforms' significant influence on children and teenagers concentration and self-esteem, the high consumption of their datacenter's electricity and the influence on the environment, or the exposure to disinformation and its effects on democracy. Arguments to intervene in the property rights of social media platforms are plenty. However, whether social media platforms have gone a bridge too far in favoring their own economic interests over the interests of the general public is a political discussion which unfortunately falls outside of the scope of the legal discussion addressed here.

Secondly, the only case-law available on access restrictions in Denmark relate to equality and non-discrimination cases. Equality laws are directly applicable to both types of access restrictions and therefore play a role in the assessment of both types. Access restrictions to both physical places and online platforms that possibly infringe equality laws can therefore be brought before the Danish Equal Treatment Board. Following the latter's case-law, there is a fine line between house rules and a breach of equality laws, as demonstrated by several cases on 'stiletto-discounts' in Copenhagen night clubs. (Male) visitors of the night clubs complained about events where persons wearing stilettos were given free/discounted entry and drinks, claiming that the discount was favouring women. The Board sided with the complainants, concluding that favouring stilettos is a disguised discrimination of men. Men are less likely to wear high heels despite them being produced in men's sizes.[52] The case was upheld by the Copenhagen City Court, concluding that stilettos were 'essentially targeting women' and 'the discrimination was not objectively justified by a legitimate aim nor that the means of achieving that aim were appropriate and necessary'.[53]

2.2. The conclusions of the *external* comparative study

The external comparative study focuses on comparing the internal discrepancies between online and physical access restrictions in Member States' case-law. From the internal comparative study, five points of reference have been identified:

i. the legal basis to address access restrictions
ii. obligations to contract and limitations to the right to property
iii. the influence of fundamental rights
iv. the existence of procedural safeguards
v. remedies for wrongful access restrictions

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[51] Frederik Vinding Kruse, *Ejendomsretten*, 3rd edition p. 331.

[52] *Ligebehandlingsnævn KEN nr 10007, 5 September 2012; Ligebehandlingsnævn KEN nr. 10024, 20 February 2013; Ligebehandlingsnævn KEN nr. 10032, 29 May 2013; Ligebehandlingsnævn KEN nr. 9404, 28 August 2013; Ligebehandlingsnævn KEN nr. 9792, 27 August 2014; Ligebehandlingsnævn KEN nr. 10011, 22 April 2015*. In all cases, the complainants were awarded 2.500DKK in compensation.

[53] Københavns Byret, January 2014, (*Olgun/Natklub Penthouse*).

Lastly, it became apparent from the case-law analysis that the different Member States have a different view on the service offered by social media platforms. These differences are discussed as a sixth point.

2.2.1. The legal basis to address access restrictions

The internal comparison shows the legal foundation that the national courts invoke or refer to when addressing access problems. The initial results of the study show that all four Member States have defined this legal foundation differently, as shown in the table below.

Table 4: Conclusions on the legal basis for access restrictions

The legal basis	*Physical access restrictions*	*Online access restrictions*
Germany	House rights / right to property	Freedom of contract
Italy	Right to property	Freedom of contract
The Netherlands	Right to property	Right to property / freedom of contract
Denmark	Freedom of contract	Inconclusive

However, when looking further into the theory underlying the right to property in the different Member States, a more homogenous framework appears. On a meta-level, Germany, Italy, and the Netherlands, despite not using the same terminology, base access restrictions on the positive and negative aspects of the right to property. These refer to, respectively, a proprietor's ability to freely make use of its property and the right to exclude anyone else from entering and/or using the property.

For physical access restrictions, both aspects of the right to property have been addressed (in)directly. The Italian legislation is the most clearly defined - both the positive and negative side of the right to property are included in the Italian civil code. The positive right and the therefrom emerging freedom of contract follow from art. 1322 and provide the legal basis to dictate the conditions to access. The negative right, referred to as the *ius excludendi* (art. 841), allows a proprietor to refuse access to private property. In Germany, the doctrine of house rights focuses on the balance between the negative and positive aspect of the right to property. It grants the proprietor a house right, which is similar to the Italian *ius excludendi*. The Dutch courts have explicitly referenced the right to property both for physical access restrictions and for online restrictions. Despite not referring explicitly to the positive and negative aspects of the right to property for online access restrictions, their line of reasoning - social media companies are private property and as such can dictate their terms of use - signals the courts implicit application of these two aspects of the right to property, namely, to decide who can access the property and, if decided that third parties can enter, to determine the terms of the contract.

The practice in Denmark is less clear. Due to the lack of case-law, the results for online access restrictions in the tables above have been marked as *inconclusive*. In addition to the

lacking case-law, the Danish legislative system complicates matters further. Danish law - and Nordic law in general for that matter - has a tradition of broad, unspecified legislation as compared to the other three Member States addressed in this study. It does not have a civil code, nor are principles such as the freedom of contract specifically defined anywhere. That allows for a broad interpretation and adaptation of the system to various legal problems, but it also causes legal uncertainty. In this case, it means that a conclusive answer on the legal basis to be invoked for access restrictions in Denmark cannot be provided at this point.[54]

Table 5: Consolidated outcome of the legal basis for access restrictions

The legal basis	*Physical access restrictions*	*Online access restrictions*
Germany *Italy* *The Netherlands*	Positive and negative aspect of the right to property	
Denmark	Freedom of contract	Inconclusive

The choice of reference in both Germany, Italy, and the Netherlands to only the positive aspect of the right to property (the freedom of contract) when dealing with online access restrictions allows for an interesting conclusion. The right to property, in all Member States, can be limited. That means that under certain circumstances, the proprietor's *ius excludendi*'s scope is limited, mainly for matters in the public interest or the individual social interest of the refused. The reference implicitly exposes that the courts handling the cases on online access restrictions did not see any indication that social media platforms' negative right to property should be limited. Rather, their power was solely reviewed in light of the positive aspect of the right to property.

Apart from this implicit reference to the legal foundation, the various courts have argued explicitly that social media platforms solely offer a contractual service. These arguments will be discussed further below.

2.2.2. Obligations to contract and limitations to the right to property

In neither of the examined Member States, the negative aspect of the right to property is absolute. The limitations result in an obligation to contract or an obligation to allow the free use of the property. Both of these types – obligation to contract and the obligation to allow free use – will be referred to as *forced access*. The different types of forced access can be grouped in three categories.

Firstly, in all Member States, due to the implementation of European directives 2000/43/EC and 2004/113/EC, equality/anti-discrimination laws are generally applicable to access restrictions to both online and physical places if their services are offered publicly. Secondly, overlap can be observed when looking at the *grounds* for forced access. All Member States limit the physical right to property in the interest of

[54] An answer could neither been found in 1953, when Vinding Kruse was discussing the difference between contract law (*aftaleretten*) and property law (*ejendomsretten*), see Vinding Kruse (n 40).

the public/society. Germany and Italy's systems add thereto an obligation to provide access to publicly offered services. The act to offer a service to the general public is conceived as an implicit waiver of the proprietor's right to exclude and thus, the proprietor cannot later invoke this right to deny access. Additionally, in Italy, the rules on forced access can also be based on a person's individual interest in accessing the property. Thirdly, apart from Germany, the Member States have limitations that are based on the *nature* of the property. Denmark has an exclusive list of certain types of property that fall in the public domain (e.g., privately owned forests over 5 ha). Italy and the Netherlands define the scope of public and social use rights by the nature of the public property and cover respectively forests, beaches, nursing homes, football stadiums, and houses of worship.

Internally, most differences follow from the unclarity regarding the qualification of social media platforms, especially concerning the applicability of public/social use rights as a limitation. Denmark, Italy, and the Netherlands offer a system of public/social rights to limit the right to property's right of exclusion. These systems are not generally applicable. In Denmark, these public/social use rights only apply to types of property that have been pre-defined in the law. Therefore, applicability to the realm of social media platforms is impossible without legal intervention. In Italy the threshold is high: social media platforms have to form part of the public domain to fall within the scope and the threshold to prove a personal interest imposing an obligation to contract is high. In the Netherlands, the practice follows from case-law, leaving room for the Dutch courts to include social media platforms in the scope of property with a *maatschappelijke functie* (social function).

2.2.3. The influence of fundamental rights

In two out of the four Member States, fundamental rights do not play a role in the assessment of both physical and online access restrictions. In Italy, fundamental rights are not included in the scope of access restrictions, neither in the discussion to freely provide entry nor when discussing the refusal of access. Fundamental rights have been included in one case regarding online content moderation (*Casapound*), but this line of reasoning by the preliminary court in Rome has not been followed by any subsequent decisions by other Italian courts. In Denmark, the influence of fundamental rights has not shown of importance from the limited cases available.

In Germany and the Netherlands, however, fundamental rights have had a significant influence on the assessment of the fairness of access restrictions. Both legal systems resemble each other, though there are some minor details in which the application of fundamental rights differs slightly. In both systems, fundamental rights are in principle not directly applicable to a relationship between private parties. Fundamental rights work vertically only and protect private parties against influence from the state. However, both the German and the Dutch civil code have open norms, such as for example the Dutch 'reasonableness and fairness', and the German 'objective reason'. It is through these open norms that, traditionally, fundamental rights find their way into private agreements. When defining whether a refusal of access is based on an objective reason, or whether the enforcement of certain house rules are reasonable and fair, fundamental rights can serve as normative principles.

Table 6: Conclusions on the influence of fundamental rights on access restrictions

Fundamental rights	*Physical access restrictions*	*Online access restrictions*
Germany	Through open norms in private law (*Drittwirkung)* if the place is open to the general public or access restriction has a significant impact on the social life.	
Italy	Seemingly not applicable to access restriction cases	Only applied in one preliminary request – otherwise not of influence
The Netherlands	Through open norms in private law *('reasonableness and fairness')* - strict application, only when right is *fully* impaired	
Denmark	Inconclusive	

Interestingly, in Germany, the application of these normative principles and their (potential) influence is virtually identical between online and physical access restrictions. The courts addressing online access problems refer specifically to the previous case-law on physical restrictions. In the Netherlands, the practical effect of fundamental rights on access restrictions has proven limited. The outcome of the balancing is uniform in all access cases, both online and physical: as long as the fundamental freedom is not *fully* impaired, the right to property prevails. For social media platform users, invoking the fundamental right to freedom of expression to oppose an access restriction will therefore not be of any help. Dutch courts, weighing the users' fundamental right to freedom of expression against the right to property of the platform owners, systematically conclude that users have other possibilities to express their thoughts or opinions – both online (websites, other platforms) as offline (newspapers).

The general influence of fundamental rights is therefore limited in all Member States, though there is one specific interpretation of 'third-party effect' (In German: *Drittwirkung*) of fundamental rights that leads to increased protection for users: the imposition of procedural safeguards to fulfil obligations under fundamental rights.

2.2.4. The existence of procedural safeguards

The practical consequence of the above described German *Drittwirkung* of constitutional rights is a shift towards procedural safeguards, both in an online and physical context. Following the development regarding the indirect application of fundamental rights, the fundamental rights of the involved parties can be used to fill in the open norm of 'unfairness'. Consequently, balancing different constitutional rights, the *Bundesgerichtshof* concludes that any clause in the terms of use that allows an access restriction without procedural safeguards is unfair. Decisions on access restrictions must be based on an objective reason, must be clearly communicated to allow the refused to appeal the decision, and may not be taken arbitrarily.

Similarly, also in the Italian case-law on online access restrictions a shift towards increased procedural safeguards can be observed. Like the German court, the Italian case-law shows that the basis for this shift is the interpretation of the Unfair Contract Terms Directive. The Italian Competition Authority - which has ex-officio competency

to assess any potential unfairness in user terms - has consistently held that clauses are unfair if they allow the termination of a user account without giving a reason and without notice. The decision must include the reasons for the decision and a time-notice before which the measure becomes effective, as well as an obligation to adhere to the principle of proportionality. The Italian argumentation for the unfairness is equal to the German: users must have an opportunity to appeal the decision and to make effective use of their rights.

In the Netherlands, procedural safeguards have been in place for physical access restrictions to property with a public or social function. For these types of property, the proprietor must give a reasonable ground for the refusal, which could be either a breach of the user terms or public safety. Access decisions must be reasonable and fair, and in order to assess this, the decision must include the facts and circumstances that have led to the refusal. For online access restrictions, procedural safeguards are introduced through the open norm of reasonableness and fairness. The court refers to the (at that time proposed) Digital Services Act and the fundamental principles underlying that proposed regulation to conclude on a necessity for procedural safeguards.

After the Digital Services Act comes into force, all Member States' courts will have to impose procedural safeguards for content moderation decisions according to articles 17 ('Statement of reasons') and 20 ('Internal complaint-handling system'). These requirements on statements of reasons and redress mechanisms apply to all hosting services (art. 17) and specifically to online platforms (art. 20). For three Member States in this study, this European regulation is merely the codification of already (partially) existing practice. For the fourth, Denmark, it was not possible to conclude on the existence of procedural safeguards.

2.2.5. Remedies for wrongful access restrictions

Wrongful access restrictions – restrictions that do not comply with the proprietors own user terms – have been addressed in the case-law of all four Member States. the proprietor has chosen to make use of its property and to agree with a third-party on the terms for access, so it must subsequently live-up to these conditions. Wrongful access restrictions result in a breach of contract. Due to the large sum of access decisions taken by social media platforms on a daily basis, wrongful access restrictions are mostly observed in the case-law on online access restrictions.

A case before the Danish Equality Board is the only occurrence of a wrongful access restriction concerning a physical place and concerned the grounds to refuse access to a night club.[55] Most likely, wrongful access restrictions occur as frequently in the physical world as in the online world, but the interface of the latter makes them more visible and their assessment easier.[56] In the other Member States, wrongful decisions have occurred

[55] A bouncer refused access to the night club on the basis of a wrong interpretation of the club's house rules. The case resulted in an infringement of the Danish equality law, *Ligebehandlingsnævn KEN nr 9853 (access to a night club).*

[56] This is only true for 'regular' access restrictions on social media platforms and does not apply to more opaque moderation measures taken by some platforms. This is for example the case

in relation to online access restriction. In all instances of wrongful decisions, users have successfully claimed a right to reinstatement – both of their content and their user account. In the Netherlands, when a user fears a potential wrongful access restriction, it can request a preliminary injunction to prevent the permanent removal of the data concerning the account or post to safeguard a future reinstatement. Italy has proven to impose the most far-reaching consequences for wrongful moderation decisions by social media platforms. Users have successfully claimed immaterial damages for the time their account (15.000 euro) or post (3.000 euro/post) has been unjustly blocked.

2.2.6. The service offered by social media platforms

Lastly, all Member States' specific assessments of online access restrictions have exposed a national normative stance on the way social media platforms' services are viewed. In the introduction, it was highlighted that a consensus on the qualification of social media platforms does not exist in the literature. From the case-law studies, however, a more uniform interpretation can be observed.

All national courts have opted for contract law to define the service offered by these platforms. German, Italian, and Dutch courts have explicitly rejected the notion that social media platforms are essential services or fulfil the role of a public forum. Rather, the terms of use between the platform and the user are the point of reference to define the scope of the service. The interpretation of what exactly is meant with the user terms of different platforms varies slightly from Member State to Member State. Italian and German courts have referred to a 'civil co-existential space' in which the platform is obliged to offer a communication platform in which their users can communicate freely.[57] The users are in turn obliged to observe the rights of other users. According to the German *Bundesgerichtshof*, social media platforms offer users a general service to contact and to exchange information with other users, but a platforms' service obligation does not include guaranteed access to the internet, nor does it have a monopoly or state-like position. The Italian courts take a more limited approach and conclude that platforms have not offered to host *all* content. They have offered to host the content that is allowed in the user terms. The German and Italian approach therefore differ in relation to the permissible normative restrictions.

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with shadow banning, a practice where a users' post is downgraded by the platform's algorithm and virtually deleted. Because the content has never been 'officially' deleted, it is hard to challenge and sustain and argument of wrongful moderation. With the new requirements of the Digital Services Act, this opaque downgrading will be made more visible.

[57] *Corte appello L'Aquila (Correggiari)* [2021] N 1659/2021, §9. Within that coexistence, a user is not fully free to post anything it wishes. Rather, *"the balance between the possibility for the user to express himself and share content deemed important and the harm that certain modes of expression or certain content may cause to the safety and well-being of others or to the integrity of the community itself, which is to say that those modes of expression are accepted insofar as they do not end up becoming an attack on the safety and well-being of other users and/or the integrity of the values of the community itself."* A breach of the principles underpinning this civil coexistence *"may well therefore be assessed as a breach of contract that, if it exists, entitles the other party* [the platform] *to suspend its own performance, removing or blocking the contents that violate these contractual provisions."*

Referring to the network effect of platforms and the resulting difficulty with which users can switch, the German court concludes that if a user is excluded from a large-scale social media platform, it does not have an equal alternative to voice an opinion. The stance of the Dutch courts has been the exact opposite: social media platforms form a limited part of the available (online) options to voice an opinion. A refusal of access does therefore not interfere with the freedom of expression. In Denmark, online access restrictions have not been addressed by a court, though the preparatory works for the 2022 proposed (and revoked) law on the regulation of social media show that the decision on how to interpret platforms' services is highly normative. In a matter of months, the Danish legislator has shifted from arguing that platforms function as public fora to arguing that the service offered by a platform is solely contractually defined.

2.3. Summary of the results of the comparative study

After concluding on the internal and external comparative analysis of the Member States' case-law, the first sub-question can be answered: *have access restrictions on social media platforms been resolved differently from those regarding physical places, and to what extent do the Member States differ in their approach?* The answer is summarized in three concluding statements, but firstly, the underlying hypotheses of the comparative study that were outlined in the introduction are revisited.

2.3.1. Revisiting the hypotheses of the comparative study

In the introduction, two hypotheses were outlined that underpinned this comparative study. Firstly, that a discrepancy exists within the individual Member States regarding the way they address access restrictions imposed by social media platforms as opposed to non-platform actors. I suspected this internal discrepancy to be caused by the Member States having difficulty weighing the overlapping legal orders. This hypothesis has been (partly) disproven. In the Member States where case-law was available on both types of access restrictions (all Member States, excluding Denmark), the two types of access restrictions were resolved in a similar way and from a similar legal foundation (the right to property). However, the national courts in the Member States nonetheless had difficulties weighing the overlapping legal orders. This has led to differences in language (freedom of contract/right to property), but not to any substantial differences in the way access restrictions have been resolved. Despite the national case-law of the Member States not showing an internal discrepancy, there were still differences to be observed between the four Member States.

I suspected, secondly, that the individual Member States resolved conflicts with social media platforms' user terms differently from their fellow Member States, creating an external discrepancy. I presumed this could be caused by a disagreement on the qualification of social media platforms. Contrarily, it follows from the findings of the comparative study that the individual Member States do not differ (much) in their qualification of social media platforms' services. They refer to these types of services as a contractual obligation, rather than an essential service with public interest.

2.3.2. Concluding statements on the comparative study

Following the disproval of both hypotheses, the comparative study's most important findings can be summarized in three concluding statements.

(i) The Member States base both online and physical access restrictions on the right to property

The case-law in Germany, Italy, and the Netherlands shows that the legal foundation for the proprietor's competence to impose access restrictions to physical and online places is the right to property. In these Member States, the right to property consists of two aspects. The negative aspect grants the proprietor a right of exclusion (*ius excludendi*). This right can be used to deny access to the property against any third party and is therewith in basis the core foundation of access restrictions in its purest form. It allows a proprietor to fully exclude the use of its property. The positive aspect allows the proprietor to make use of its property in the way they please. That includes opening the property fully (open access) or under certain conditions (conditional access). The latter part of the positive aspect of the right to property is what is commonly referred to when referencing the freedom of contract.

In Denmark, the only Member State in this study that had a differing legal foundation for access restrictions, the basis for physical access restrictions refers solely to the freedom of contract. Looking at the freedom of contract through the lens of the right to property, referring to the freedom of contract as the basis for access restrictions means that the proprietor applies its positive right to property to set the conditions for access and exclusion. Would proprietor's then not have any right of exclusion in Denmark? Presumably yes, but that aspect has, due to the legal tradition in Denmark and the Nordics, not been explicitly codified and has not (yet) led to any disputes.[58] In that sense, the extent to which the legal foundation for access restrictions differs in Denmark as opposed to the other three Member States seems limited.

The conclusion on the basis for access restrictions is important when digging deeper down into conditions for conditional access. Concluding that the right to exclude and the right to choose the conditions for conditional access form an intrinsic part of the right to property means that this competence *in itself* must be taken into consideration when balancing the different interests at stake. That means that a conclusion resulting in a user's right to access the property, an obligation to contract, or on mandatory provisions and conditions all constitute limitations of the proprietor's right to property.

[58] See on the matter Frederik Vinding Kruse, *Ejendomsretten*, p 134 (3rd edition,): "*Det er derfor meget forklarligt, at man tilsidst — som almindeligt i nordisk jura — opgiver at finde nogen enkelt eller enkelte beføjelser som karakteristiske for ejendomsretten og blot bestemmer denne som en almindelig beføjelse til at råde i enhver retning, hvor der ikke er hjemmel for særlige indskrænkninger til fordel for andre*".

(ii) The substantial influence of fundamental rights on access restrictions is limited in all Member States

Fundamental rights do not create any obligation to contract nor a general right of access in any of the Member States. Fundamental rights solely influence the conditions under which the proprietor can make use of its positive right to property. The practice to include fundamental rights to interpret open norms and as such play a role on the conditions for accessing has been observed in Germany and the Netherlands. The application of fundamental rights is indirectly included through the system of private law. In both Member States, fundamental principles and the balancing of the different rights are used to fill in open norms in private law. This development is not new and is by no means a specific trend related to social media platforms: it is similarly observed in the case-law on physical access restrictions in both Member States.

Fundamental rights do not play a role in the assessment of fairness in the other two Member States, but the influence of that difference seems negligible when looking at access restrictions. Despite Germany and Italy's differing application of fundamental rights in their interpretation of the open norm of 'unfairness' in light of the Unfair Contract Terms Directive, an equal conclusion on the unfairness of terms on social media platforms is reached based on identical argumentation. After balancing the fundamental rights of the platform and the users, the German *Bundesgerichtshof* concludes that user terms that allow unlimited discretionary powers to remove content or suspend users are unfair. The Italian Competition Authority reached that same conclusion without the inclusion of fundamental principles, concluding that without a provision of the reason(s) for termination or suspension, the users' right to defend themselves would be impaired as they would not have adequate possibilities to complain against the decision. The two systems result in the same procedural safeguards.

The inclusion of fundamental rights to fill in open norms makes visible which interests have been balanced in order to reach the conclusion on the open norm. That does not change the substantial position of a person to oppose a decision to refuse access, but it could procedurally help to challenge the decision. As the latter obligations will be mandatory legislation after the coming into force of the Digital Services Act, the influence of fundamental rights on access restrictions will lapse.

(iii) The normative qualification of the service offered by social media platforms obstructs a general right of access

Public or social use rights pose a potential ground for an online right to access. In Denmark, Italy, and the Netherlands public and/or social use rights have been applied as a limitation to the physical *ius excludendi*. If the property fulfils a public function, falls in the public domain, or the user has an individual pressing need to access the property, the proprietor's possibility to deny access is limited to the extent that virtually an obligation to contract is imposed.

The Member States differ in their application of the public interest-limitation, mainly due to the scope of property that falls within the qualification. The choice to include online platforms in the scope is normative. The Member States, however, have

unanimously rejected the idea that social media platforms offer anything substantially different from a general contractual service. The lock-in effect can have a substantial effect on the opportunity to contact other users and share information and opinions, but it does not render it impossible. There are other options available, both offline and on the internet.

However, a transparent discussion on the arguments underlying the conclusion that social media platforms do not fulfil a public or social function is necessary for legal clarity. The Member States could reach another conclusion based on their legal systems. The argument that there are other channels through which a user can be present on the internet is too shallow. Compare for example the types of properties that were found to have a social function in Dutch case-law (nursing home, football stadium, house of worship) to social media platforms. Arguably, social media platforms could fall in the scope of the latter. Looking at these different types of property, the common denominator is that the argument to visit these types of property is *specific to that individual property*. When visiting these properties, a person is usually only interested in visiting that exact property – the football stadium where their favourite team is playing, the nursing home where their family member is cared for, the house of worship they are affiliated with. There is no need in providing an alternative stadium or nursing house because the aim of visiting is not present elsewhere.

Neither of these properties are unique – other nursing homes, football stadiums, or houses of worship exist and thus the argument that other social media platforms exists seems insufficient to reach the decision that these platforms do not fulfil a social function. For social media platforms, due to the networking effect, the same could be argued. If all one's contacts are present on one social media platform, arguing that the person could simply voice an opinion elsewhere does not prove a sufficient alternative for the person's intended use. On the contrary, in light of these three examples it would make more sense to include social media platforms in the qualification, as either one of these examples has a 'lock-in' function similar to the one observed in social media platforms. A supporter of a certain football club will not be interested in watching matches of another football team in another stadium. A person that wants to visit a family member in a certain nursing home, will not go to another nursing home if their access was denied. Neither will a person that is involved in a religious circle necessarily be interested in visiting another house of worship. Despite there being other options, these are not viable alternatives. The network of persons that the refused searches for in the place are not present in the substitute property. The latter is true for these examples of physical property as well as for social media platforms.

A solution to this discussion is to match the argumentation of the only assessed Member State which does not have a public/social function limitation: Germany. Since there is no general system of public or social use rights, the German system has developed a similar system through case-law, with clear requirements and argumentation for it. The system of house rules applies to all properties that have been opened to the general public. If the property is open to the general public and a refusal would have impact on the refused person's social life, a general right of use exists. Consequently, the proprietor cannot simply refuse access without an objective reason.

These requirements would align with both the Dutch and the Italian system and allow for a structured assessment of refusals of access to social media platforms. It could simultaneously serve as a resourceful basis to increase the legislative basis for access rights in Denmark.

3. Identifying the elements of access restrictions

Building upon the conclusions from the comparative study, the elements for a framework on access restriction can be distilled. 'Elements' in this sense is understood as the different types of access restrictions as well as the plurality of legal orders used to address these types of restrictions. The elements that are discussed below therefore address and reflect both access restrictions to physical places and on online platforms. It does not yet take into consideration the specific characteristics of social media platforms' access restrictions.

Firstly, the three different layers through which access restriction issues can be resolved are discussed: the legal basis, the ex-ante access restrictions, and the ex-post content restrictions. Following this initial division, the various legal orders will be sorted in their respective layer. These two steps – the division in layers and the allocation of the plural legal orders - will lead to a blueprint of a common framework to uniformly address access restrictions.

3.1. Three layers to discuss access restrictions

The discussion on resolving access restrictions takes place on different levels depending on which legal aspect is the centre point of the debate. In short, these levels cover, firstly, the legal basis to impose access restrictions, and secondly, the access restrictions which can be subdivided in ex-ante access restrictions and ex-post content restrictions.

Starting from the top (the full framework is included on page 37), the *foundational* layer covers the (constitutional) basis to impose access restrictions. Building upon this foundation, the case-law has demonstrated three different ways to limit access to a platform. These access restrictions have been collected in an *access* layer. Thirdly, the permissible scope of the terms of service used to define the conditions to access will be discussed in the third layer. As this last layer focuses on the content of these terms, the layer is referred to as the *content* layer.

3.1.1. The foundational layer: the positive and negative right to property

The first distinct layer of discussion covers the foundational basis for imposing access restriction. This layer is referred to as the *foundational layer*. For access restrictions, the invoked legal basis for access restrictions in the European Member States is unanimously the right to property and its positive and negative aspect. Based on the latter, this layer covers the proprietor's freedom to use the property as pleased and the right to exclude (*ius excludendi*). Together, these two distinct property rights form the basis for access restrictions.

3.1.2. The access layer: forced, open, and conditional access

The second layer covers the outcome of the application of the property rights allocated in the foundational layer. Using either the freedom to use the property to (conditionally) open the property to third-parties or using the *ius excludendi* to exclude people from accessing will have an effect on the third-parties accessibility to the property. From the comparative study, it follows that three distinct types of access can be distinguished: *forced, open,* and *conditional* access. Additionally, there is one type of absolute refusal based on the proprietor's *ius excludendi*, which is referred to as 'access denied'.

To start with the last, access denied covers the situation where third parties are fully denied access to the property. This does not cover any individual party – *all* third-parties access or *all members* of a certain group's access is refused. From the point of view of the right to property, this is the purest application of the right to exclude. However, this right to exclude is not absolute. Under certain circumstances, the proprietor has an obligation to contract. Third parties' *forced access* is governed by competition law (dominant position, services of general economic interest, essential facilities), equality laws and anti-discrimination legislation, and by specific national legislation on public and social-use rights. Whether or not the claim is successful depends on the qualification of the proprietor's service.

On the opposite side of the access layer one can find a proprietor's choice to allow *open access*. These concern properties that have been opened for or services that are offered to the general public without any conditions. Potential customers do not need to accept any terms of service before entering. In the physical world, these cover for example supermarkets and other generally accessible stores. In the online world, platforms offering this type of access are scarce, but they do exist.[59] If a proprietor only wants to provide access under certain house rules or terms of service, the access is considered *conditional*. Only if a third-party fulfills the conditions set by the proprietor, it can access the property. For such conditional access, the contract between a platform and its users determines the platform's obligations to offer its services.

Access problems that are discussed as part of the *access layer* always concern an ex-ante restriction. The layer addressed third parties' possibility to gain access to a proprietor's property, or opposingly, to what extent a proprietor can deny access. The choice between an access denial, open access, and conditional access falls fully within the proprietor's right to property. Only when access is fully denied, certain obligations to contract can force a third party's right to access.

3.1.3. The content layer: defining the conditions of conditional access

When the third-party has been given access through one of the three access types, the content layer subsequently covers the specific types of behaviour/content that are allowed. Whereas the access layer concerns ex-ante restrictions to access the proprietor's property, the content layer covers ex-post restrictions.

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[59] Such as for example the open camera chatbox *Chatroulette*, which does not apply any general terms of conditions, apart from a (vague and non-binding) choice of jurisdiction. See <https://chatroulette.com/terms> (accessed 26 September 2022).

The content layer outlines the third-party's legal possibilities to oppose any of the restrictions imposed after accessing the property. Redress mechanisms can follow from either the law or the agreement between the proprietor and the third-party user. In case of an ex-post access restriction, the third party is or has been priorly accepted to the service and as such has access to the contractual redress mechanisms. For ex-ante restrictions in the access layer, only the limitations to proprietor's *ius excludendi* serve as possible grounds for an obligation to contract. Since there is no agreement between the user and the proprietor, there are no contractual redress mechanisms to invoke. For open access property, this difference is not important. If a platform is open to the general public without conditions, users have a general right of use. If any restriction on access or use is imposed, it must be based on an objective reason. The latter is interpreted through the indirect effect of fundamental rights or general private law principles.

When property is opened conditionally or forcefully, the subsequent agreement between the third-party and the proprietor must firstly comply with the basic principles of contract law. These cover the offer (access) and the accept (clicking 'I agree' or buying a ticket for a football stadium), and safeguard the parties' wish to be bound by an agreement (e.g., the validity of a 'payment' with personal data). If these principles are not fulfilled, the contract is invalid. Supposedly, for forced access cases, the invalidity will spark a new obligation to contract.

If the requirements following from the basic principles are met, the agreement between the two parties is, in principle, a valid agreement and the parties are bound by the offers they have made. However, that does not mean that all parts of the agreement are necessarily enforceable. Mandatory rules of public policy can dictate specific rules that cannot be derogated from by an agreement. These cover for example rules on consumer protection such as the black and grey lists on unfair terms, European guidelines on the hosting of certain types of content (e.g., the rules on covid-misinformation),[60] or specific national rules on the removal of access, such as the Network Enforcement Act in Germany. Following the assessment of whether the agreement has (not) incorporated mandatory rules, an assessment of the fairness/reasonableness of the terms is carried out. All Member States have open norms through which the agreement between proprietor and third-party can be reviewed. For Denmark, that is the unfairness test in §36 of the Agreement Act. Similar are the German test of reasonableness in §307 (for standard terms), the Dutch *redelijkheid en billijkheid* in 6:248, and the Italian *buona fede* in article 1375 of the Italian Civil Code. In Germany and the Netherlands, and arguably

[60] See the European Commission's '2022 Strengthened Code of Practice on Disinformation' at https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation, and previously the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Tackling online disinformation: a European Approach', (26 April 2018) COM(2018) 236 final, and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'On the European democracy action plan', (3 December 2020) COM/2020/790 final.

Italy,[61] to interpret these norms, the interests (including the fundamental rights) of all parties involved are weighed and balanced.

The assessment of the mandatory rules of public policy and the interpretation of the open norms of private law can lead to two conclusions. The user terms are either enforceable or unenforceable. User terms that are unenforceable do not have any legal effect and as such, an access decision based on an unenforceable user term is void. If the user term is enforceable, it forms a valid part of the agreement and has legal effect. An access decision can subsequently be based on this term.

However, access decisions do not always comply with the platform's user terms. That leads to a situation where the decision to restrict access is wrongful, even though it has been based on an enforceable user term. These types of access decisions cover for example the situations where a bouncer decides to refuse access on the basis of a property's house rules but interprets the rule wrongly. It also concerns situations where an online platform's algorithm wrongly flags and deletes content for breaching the user terms when in fact it does not. These wrongful moderation decisions constitute a simple breach of contract – the proprietor has offered to provide a service and does not live up to that promise.

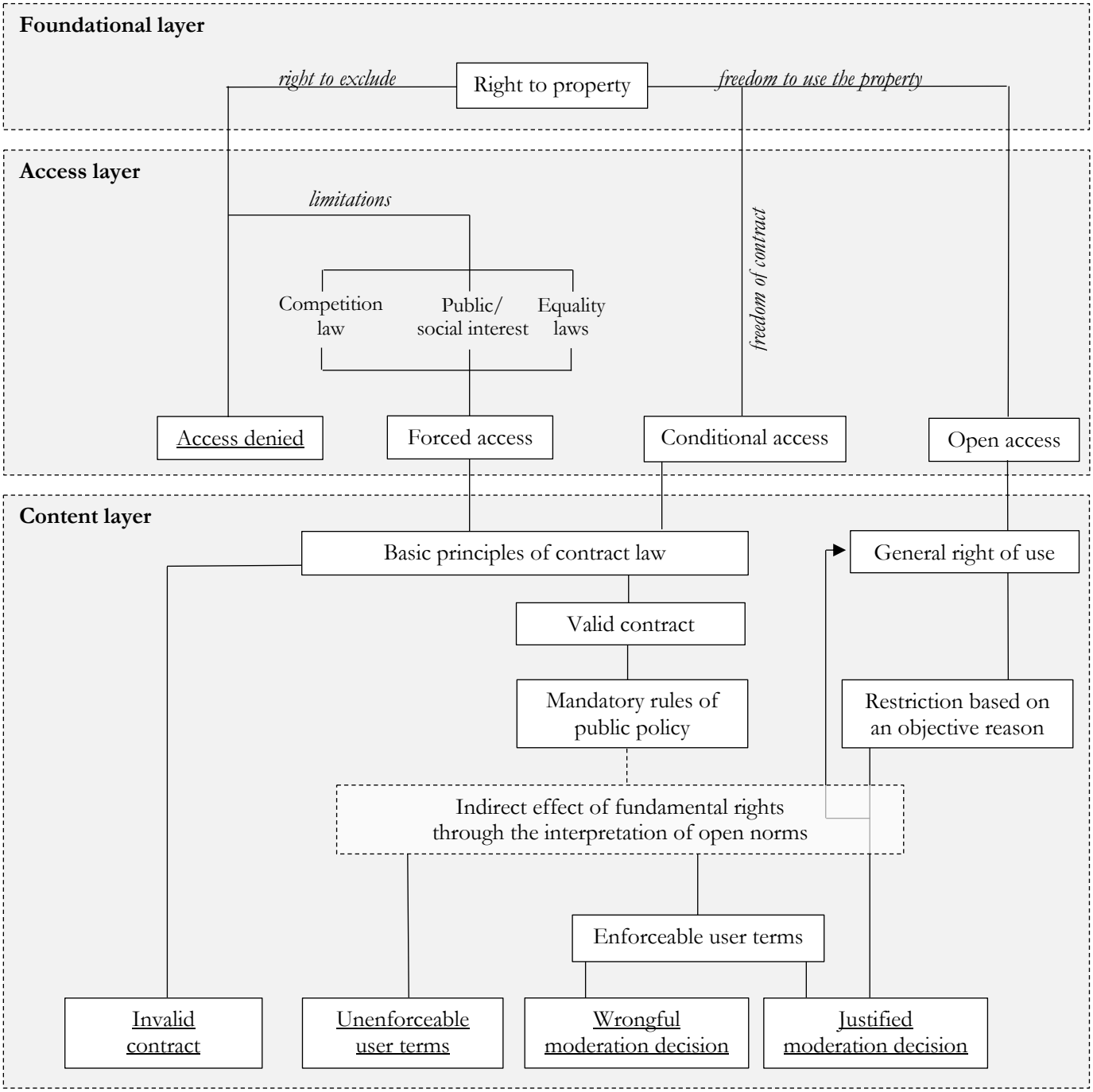
3.2. Drawing-up the common framework

The above allows for an answer to the second research question: *Based on the analysis of the national case-law, which elements can serve to form a base for a framework on access rights?* The framework is included on the following page.

The framework indicates the five outcomes of an access dispute (underlined in the framework): access denied, an invalid contract, enforceable or unenforceable user terms, and a wrongful moderation decision. It must be noted that this framework applies to access restrictions in general and does not yet take into consideration the specific characteristics of social media platforms' access restrictions.

[61] The effect of fundamental rights did not show from the comparative study on access restrictions, but has been argued on a more general level by Chantal Mak, in her book *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy, and England* (Kluwer Law International ; Sold and distributed in North, Central, and South America by Aspen 2008). Consequently, also in Italy, fundamental rights can come into play to fill the open norms of private law.

Table 7: The distilled elements of the framework divided into three layers



3.3. The dissertation's second part

The second part of the dissertation this PLSC-paper is based on continues with an in-depth doctrinal analysis of the various elements in the framework and adapts it specifically to access restrictions on social media platforms. To apply the common framework to access restrictions on social media platforms, the different elements are interpreted in the specific circumstances of the online interface. This is done through legal-dogmatic research. Despite it falling outside the scope of this PLSC-paper, the full framework for access restrictions on social media platforms is included on the next page as to indicate what the final result looks like.

The biggest differences between the initial framework distilled from the comparative study and the final framework relate to:

(a) the influence of the freedom to conduct a business on the foundational and access layer ('the freedom to exercise an economic activity' and 'the freedom to decide the terms of the agreement'). For the foundational layer, the fundamental right to property and the freedom to conduct a business in articles 16 and 17 of the Charter and the equivalent right to property in article P1-1 of the ECHR have been analysed to increase the understanding of their functioning in relation to access restrictions on social media platforms.

(b) the limitations following from the Charter's and the ECHR's right to property (the need for a general interest to restrict the right to property and 'the protection of the rights of others' as one of such general interests)

(c) the 'dotted line' towards competition law – following an analysis of the essential facilities doctrine and the CJEU's case-law, it follows that social media platforms do not fulfil the criteria. Though, through public intervention, social media platforms could be qualified as public utilities and as such, this limitation could be of influence again. The latter requires intervention by either the European or national legislator.

(d) the 'mandatory rules of public policy' in the general framework are filled in with the applicable rules for social media platforms – including the direct effect of fundamental rights following from the Digital Services Act's article 14 on the enforcement of terms and conditions.

Table 8: Common framework to resolve access restriction issues on social media platforms