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Articles 40-41 GDPR: A New Approach to Using Codes of Conduct in EU Law?

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Articles 40-41 GDPR: A New Approach to Using Codes of Conduct in EU Law?

Carl Vander Maelen¹

Summary

In the wake of the ‘new governance’ school of thought, the EU has increasingly relied on soft law instruments that include a large number of (non-political) stakeholders into the policy process. Codes of conduct are such instruments. They have traditionally been used in EU law in a wide but inconsistent variety of ways. This makes it hard to summarise their legal characteristics. However, a clearer picture emerges in the sub-field of EU personal data protection. The question then becomes whether the use of codes in articles 40-41 GDPR presents a paradigm shift in how codes are used in EU law. Although embedding codes within the EU’s hard law instruments is not new, this contribution argues that GDPR codes display unique features across their functional dimensions (implementation, accountability, and enforcement) and the dimensions of legalisation (obligation, precision, and delegation). The paper ends by framing these findings within the larger context of increasingly ‘hard’ EU soft law and the specific phenomenon of ‘GDPR mimesis’ in the EU’s ICT policy.

Keywords

Codes of conduct; Article 40 GDPR; Article 41 GDPR; Soft law; Audiovisual Media Services Directive; Digital Services Act; Artificial Intelligence Act

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Table of Contents

| | |
|---|-----------|
| 1. INTRODUCTION | 2 |
| 2. WHAT IS UNDERSTOOD BY ‘CODES OF CONDUCT’ IN RECENT EU REGULATION? | 5 |
| 2.1 THE THEORETICAL POSITION OF CODES IN EU LAW..... | 5 |
| 2.2 THE TRADITIONAL USE OF CODES IN EU LAW: A FRAGMENTED LANDSCAPE | 6 |
| 2.3 THE FIELD OF DATA PROTECTION AS A SPECIFIC PERSPECTIVE..... | 10 |
| 3. DO ARTICLES 40-41 GDPR PRESENT A NEW APPROACH TO THE USE OF CODES IN EU LAW?..... | 12 |
| 3.1 EMBEDDING CODES IN HARD LAW: NOT A NEW PHENOMENON..... | 12 |
| 3.2 THE UNIQUE DIMENSIONS OF CODES IN THE GDPR..... | 13 |
| 3.2.A <i>Three functional dimensions: implementation, accountability, enforcement</i> | 13 |
| 3.2.B <i>Three dimensions of legalisation: obligation, precision, delegation</i> | 15 |
| 4. CONCLUSION: A WIDER TREND TOWARDS ‘HARD’ CODES OF CONDUCT? | 18 |

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1. Introduction

Throughout its existence, the economic, social and political integration process of the EU has been achieved through legal means, namely the progressive development of common rules and enforcement procedures.² The early treaties that established sectoral cooperation between individual nations were followed up by attempts at economic integration. This led to a process of ‘constitutionalisation’ through the judgments of the Court of Justice of the European Union (CJEU) via powerful integration tools such as the doctrines of direct effect, primacy, ‘effet utile’, implied powers and more.³ Empowered by these developments and the entries into force of the Single European Act (1987) and the landmark Treaties of Maastricht (1992) and Nice (2001), the EU has produced a wide array of directives and regulations.

During the 1990s, the EU began evaluating the impact and effectiveness of its legislation⁴ as part of the ‘Simplification of Legislation in the Internal Market (SLIM) programme’.⁵ The influence of the ‘new governance’ approach⁶ and recommendations from studies such as the so-called ‘Molitor Report’⁷ led to the growing involvement of a large number of (non-political) actors and stakeholders such as experts and civil servants.⁸ As Curtin observes, the EU’s ‘grand treaties’ that were essentially “law with politics” started making way for ‘informal governance’ or “non-law with non-politics”.⁹ The elements to this approach are collectively called the Better Regulation Agenda and scholars consider it a dynamic phenomenon that changes along with evolving political circumstances.¹⁰

A wealth of EU documents followed that propagate this idea of ‘better regulation’. The 2001 White Paper on Governance states that the EU should take less of a top-down approach and should complement policy tools more effectively with non-legislative instruments to improve the quality and reduce the quantity of rulemaking.¹¹ The 2002 Action Plan ‘Simplifying and improving the regulatory environment’¹² contains the statement that ‘alternatives’ to legislation can be used to achieve Treaty objectives while simplifying law-making activities and

² Deirdre Curtin, ‘European Legal Integration: Paradise Lost?’ in Deirdre M Curtin and others, *European Integration and Law: four contributions on the interplay between European integration and European and national law to celebrate the 25th anniversary of Maastricht University’s Faculty of Law* (Intersentia 2006).

³ Franz C Mayer and Simon P Thies, ‘European Union, Historical Evolution’, *Max Planck Encyclopedia of Public International Law* (2019) paras 2–9.

⁴ Commission of the European Communities, ‘Reinforcing the Effectiveness of the Internal Market - Working Document of the Commission on a Strategic Programme on the Internal Market (COM (93) 256 Final)’ (2 June 1993). See in particular pages 22-24.

⁵ Colin Scott, ‘Integrating Regulatory Governance and Better Regulation as Reflexive Governance’ in Sasha Garben and Inge Govaere, *The EU Better Regulation Agenda: A Critical Assessment* (Hart Publishing 2018) 13.

⁶ Neil Gunningham and Joseph Rees, ‘Industry Self-Regulation: An Institutional Perspective’ (1997) 19 *Law & Policy* 363; Wolfgang Streeck and Philippe C Schmitter, ‘Community, Market, State-and Associations? The Prospective Contribution of Interest Governance to Social Order’ (1985) 1 *European Sociological Review* 119.

⁷ Commission of the European Communities, ‘Report of the Group of Independent Experts on Legislative and Administrative Simplification (COM(95) 288 Final)’ (21 June 1995).

⁸ Curtin (n 2) 5.

⁹ *ibid.*

¹⁰ Sasha Garben and Inge Govaere, ‘The Multi-Faceted Nature of Better Regulation’ in Sacha Garben and Inge Govaere, *The EU better regulation agenda: a critical assessment* (Hart Publishing 2018) 3.

¹¹ European Commission, ‘European Governance: A White Paper’ (25 July 2001) 4.

¹² European Commission, ‘Action Plan “Simplifying and Improving the Regulatory Environment”’ (5 June 2002).

legislation.¹³ One of those ‘alternatives’ is self-regulation, which the Action Plan describes as “a large number of practices, common rules, codes of conduct and voluntary agreements which economic actors, social players, NGOs and organised groups establish themselves on a voluntary basis in order to regulate and organise their activities”.¹⁴ The Inter-Institutional Agreement on Better Law-Making from 2003 proposes the use of ‘alternative regulation mechanisms’ in ‘suitable cases’ or where the use of a legal instrument is not specifically required, and where this represents “added value for the general interest”.¹⁵ The Communication on ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’ guided the Commission to launch a process “to develop a code of good practice for self- and co-regulation exercises”.¹⁶ This plan birthed the ‘Principles for Better Self- and Co-regulation’,¹⁷ offering best practices for the conception and implementation phases of self- and co-regulatory constructions. A ‘Community of practice for better self- and co-regulation’ was also set up.¹⁸ This group gathers practitioners of soft law tools and according to Senden it “stimulates a maturing debate, where the articulation and complementarity between hard regulation, on the one hand, and self- and co-regulation, on the other is explored in various ways”.¹⁹ Finally, the 2016 Interinstitutional Agreement on Better Law-Making declares that consultation with the public and with stakeholders, ex-post evaluation of legislation, and impact assessment before new initiatives are adopted can help achieve “the objective” of Better Law-Making.²⁰

The aforementioned terms ‘self-regulation’ and ‘co-regulation’ have been coined to describe the involvement of non-state actors in the regulatory process. Self-regulation is understood as the creation and implementation of rules to constrain the conduct of a set of private actors, with these actors themselves shaping the procedures, rules and norms,²¹ with minimal or no intervention by the state.²² Co-regulation is different in that it encompasses constructions that link non-state regulatory systems to state regulation,²³ by relying on private entities to perform a variety of government functions while state authorities provide oversight and enforcement.²⁴

¹³ *ibid* 11.

¹⁴ *ibid*.

¹⁵ European Parliament, Council of the European Union and Commission of the European Communities, ‘Interinstitutional Agreement on Better Law-Making (2003/C 321/01)’ (31 December 2003) para 17.

¹⁶ European Commission, ‘Communication: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility’ COM(2011) 681 Final’ (25 October 2011) 10.

¹⁷ European Commission, ‘Principles for Better Self- and Co-Regulation’ (11 February 2013).

¹⁸ European Commission, ‘The Community of Practice for Better Self- and Co-Regulation’ (26 February 2015).

¹⁹ Linda Senden and others, ‘Mapping Self- and Co-Regulation Approaches in the EU Context’ - Explorative Study for the European Commission, DG Connect’ (Utrecht University - RENFORCE 2015) 11.

²⁰ See recital 6 of: European Parliament, Council of the European Union and Commission of the European Communities, ‘Interinstitutional Agreement on Better Law-Making of 13 April 2016’ (13 April 2016).

²¹ Tony Porter and Karsten Ronit, ‘Self-Regulation as Policy Process: The Multiple and Criss-Crossing Stages of Private Rule-Making’ (2006) 39 *Policy Sciences* 41, 43.

²² Eva Lievens, *Protecting Children in the Digital Era: The Use of Alternative Regulatory Instruments* (Martinus Nijhoff Publishers 2010).

²³ Hans Bredow Institute, ‘Final Report – Study on Co-Regulation Measures in the Media Sector (Study for the European Commission)’ (European Commission 2006).

²⁴ Ira Rubinstein, ‘Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes’ (2010) 6 *I/S: A Journal of Law and Policy for the Information Society* 356.

Instruments produced by this approach can be labelled as ‘soft law’ instruments.²⁵ Although there is no consensus among scholars on the exact conditions for an instrument to qualify as being either hard or soft, the most streamlined and generally accepted statement would be that hard law imposes binding obligations whereas soft law does not.²⁶ Soft law, then, has a certain normative content and generates practical effects,²⁷ although it does so through factors other than legally binding force.²⁸

The key trigger for this research is the prominent role that several recent pieces of EU legislation award to a specific soft law instrument: codes of conduct. Particularly EU instruments that lay down the Union’s policy on information and communication technology (ICT) have emphasised the use of codes. For example, the Audiovisual Media Services Directive (AVMSD) in its 2018 amendment placed codes firmly in the limelight through the new articles 4a.1 and 28b, explaining that codes can help protect minors and prevent the dissemination of hate speech. A second example of a high-profile ICT instrument is the General Data Protection Regulation²⁹ (GDPR). It encourages the development of codes by private actors “to contribute to the proper application of this Regulation” (art. 40.1 GDPR), which serves “the purpose of specifying the application of this Regulation” (art. 40.2 GDPR). Proposed instruments such as the Digital Services Act³⁰ and the Artificial Intelligence Act³¹ contain similar passages on codes that frame them as important tools to achieve the objectives of the instruments they are embedded in.

Problematically, however, there is little to no research on codes of conduct in the field of EU law, nor in the sub-field of the EU’s data protection policy. This is remarkable since it has been well-established in scholarly literature that the EU employs a multi-level and multi-actor harmonization-oriented regulatory strategy,³² making soft law instruments an important aspect of any study relating to the EU’s regulatory clout. This becomes all the more important when regulating digital spaces where “states are not able to rely on traditional patterns of territorial

²⁵ Note that ‘soft law’ is a term traditionally used in international law to describe legal sources that are not binding, but regulatory studies have also embraced the terms ‘soft law’ and ‘hard law’ in the context of regulatory systems.

²⁶ Dinah Shelton, ‘Introduction: Law, Non-Law and the Problem of “Soft Law”’, *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press 2003); see also the interpretation by Marchant and Allenby that soft law not only consists of nonbinding norms, but also of techniques for implementing them. Gary E Marchant and Braden Allenby, ‘Soft Law: New Tools for Governing Emerging Technologies’ (2017) 73 *Bulletin of the Atomic Scientists* 108.

²⁷ European Parliament, ‘Better Regulation and the Improvement of EU Regulatory Environment: Institutional and Legal Implications of the Use of “soft Law” Instruments’ (Directorate-General Internal Policies: Policy Department C (Citizens Rights and Constitutional Affairs), March 2007) 3.

²⁸ Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 104.

²⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

³⁰ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC (COM(2020) 825 Final) (2020/0361 (COD))’ (15 December 2020).

³¹ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Laying down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (COM(2021) 206 Final)’ (21 April 2021).

³² Ramses A Wessel and Jan Wouters, ‘The Phenomenon of Multilevel Regulation: Interactions between Global, EU, and National Regulatory Spheres’ (2007) 2 *International Organizations Law Review* 257.

sovereignty and depend more strongly on private actors”.³³ The European Commission has also pointed out that aspects of codes under the GDPR necessitate further research.³⁴

This contribution therefore sets out to answer two research questions. First, what should be understood by the mentions of ‘codes of conduct’ in these recent EU instruments (section 2)? This will be answered by discussing the theoretical position of codes of conduct in EU law, how the EU has traditionally used them in practice, and the specific perspective offered by the sub-field of personal data protection. The second research question seeks to answer whether the GDPR’s use of codes of conduct represents a new trend for how codes are used in EU law. It will be argued that embedding codes of conduct in hard law instruments to influence the conduct of private actors is not a new approach ‘per se’, but that GDPR codes showcase features across three functional dimensions and the three dimensions of legalisation that make them unique. The phenomenon of ‘GDPR mimesis’ makes it likely that codes will indeed be used in a new way – at least in the context of the EU’s ICT policy. By making these arguments, the contribution hopes to stimulate further legal scholarship on codes of conduct.

This contribution employs a traditional legal doctrinal research methodology. European Union documents such as white papers, inter-institutional agreements, directives and regulations are identified as positive statements of norms.³⁵ It is then examined how the norms outlined in those documents are applied to codes as a specific regulatory tool, employing a method of deductive and explanatory legal reasoning.³⁶ In this way, an internal legal methodology is used: legal principles, doctrines and concepts are used to build critical reasoning around authoritative texts.³⁷ By systematically exposing and applying the rules governing codes to the field of EU law, an analysis is made of the applicable rules, areas of difficulty and possible normative developments.³⁸

2. What is understood by ‘codes of conduct’ in recent EU regulation?

2.1 The theoretical position of codes in EU law

The legal acts that the European Union can take are listed in article 288 of the Treaty on the Functioning of the European Union (TFEU). Although the only soft law tools mentioned here are recommendations and opinions, the list in article 288 TFEU is not exhaustive.³⁹ Scholars

³³ Oskar Josef Gstrein and Andrej Janko Zwitter, ‘Extraterritorial Application of the GDPR: Promoting European Values or Power?’ (2021) 10 *Internet Policy Review* 22
<<https://policyreview.info/articles/analysis/extraterritorial-application-gdpr-promoting-european-values-or-power>> accessed 26 January 2022.

³⁴ European Commission, ‘Communication: Data Protection as a Pillar of Citizens’ Empowerment and the EU’s Approach to the Digital Transition - Two Years of Application of the General Data Protection Regulation’ (26 June 2020) 11–12.

³⁵ Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 *Deakin Law Review* 83, 110.

³⁶ John Hynes Farrar, *Legal Reasoning* (Lawbook Company 2010) 91; Hutchinson and Duncan (n 35) 111.

³⁷ Christopher McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 *Law Quarterly Review* 632, 633; Nigel E Simmonds, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester University Press 1984) 1.

³⁸ Terry CM Hutchinson, *Researching and Writing in Law* (Thomson Reuters/Lawbook Company 2010) 7.

³⁹ Mariola Seeruthun-Kowalczyk, ‘Hard Law and Soft Law Interactions in EU Corporate Tax Regulation: Exploration and Lessons for the Future’ (University of Edinburgh 2012) 26.

have sorted the wide array of EU soft law instruments into three categories.⁴⁰ First, there are the ‘preparatory and informative instruments’. Examples thereof are the EU’s ‘Green Papers’, ‘White Papers’, action programmes and informative communications. Their main goal is facilitating future legislation and policy action through providing a new – or increasing an existing – basis of support. As dubbed by McLure, such instruments fulfil a ‘pre-law function’.⁴¹ Second, there are ‘interpretative and decisional instruments’. These provide guidance to the interpretation and application of existing EU law with a view to enhancing legal certainty, equality and transparency.⁴² Finally, ‘steering instruments’ establish or give further effect to “EU objectives and policy or related policy areas”,⁴³ with the end goal often being to achieve closer cooperation or even harmonisation between member states. Recommendations, resolutions and codes of conduct are cited as instruments used typically for this goal.⁴⁴

Senden calls EU law codes of conduct⁴⁵ “non-formal instruments, in the sense that they occur only in daily practice” and sees them as often having a para-law function.⁴⁶ This para-law function of codes of conduct covers three possible functions: they could be a temporary alternative to legislation until they are later replaced by legislation; they can also be a permanent alternative to legislation if legislation is seen as an option in the case of unsatisfactory compliance or non-compliance with the code; or they can have the earlier-mentioned pre-law function where they facilitate the future adoption of legislation by providing or increasing support for the rules.⁴⁷

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

Nonetheless, when taking a look at how the EU has traditionally used codes of conduct, a very fragmented landscape emerges. The EU labels a variety of instruments to be ‘codes of conduct’, with great differences in who they are aimed at, their material scope, their legal effect, and more. This makes it difficult to determine a coherent set of characteristics that neatly groups them under ‘steering instruments’ as mentioned before.

A first group of instruments called ‘codes of conduct’ relate to the behaviour of EU institutions.⁴⁸ These are akin to other codes found in international organizations and governmental authorities that stipulate the behaviour among civil servants and in the

⁴⁰ Linda AJ Senden, ‘Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?’ (2005) 9.1 *Electronic Journal of Comparative Law* 23–24
<<https://research.tilburguniversity.edu/en/publications/soft-law-self-regulation-and-co-regulation-in-european-law-where->> accessed 18 September 2020; European Parliament, ‘Better Regulation and the Improvement of EU Regulatory Environment: Institutional and Legal Implications of the Use of “soft Law” Instruments’ (n 27) 5–10; For Gribnau’s application, see: Hans Gribnau, ‘The Code of Conduct for Business Taxation: An Evaluation of an EU Soft-Law Instrument’ in Dennis Weber, *Traditional and Alternative Routes to European Tax Integration: Primary Law, Secondary Law, Soft Law, Coordination, Comitology and Their Relationship* (IBFD 2010) 80–86.

⁴¹ Charles E McLure, ‘Legislative, Judicial, and Soft Law Approaches to Harmonizing Corporate Income Taxes in the US and the EU’ (2008) 14 *Columbia Journal of European Law* 377.

⁴² Gribnau (n 40) 83.

⁴³ *ibid* 84.

⁴⁴ Senden (n 40) 24.

⁴⁵ Senden discusses both resolutions and codes of conduct together.

⁴⁶ Senden (n 40) 24.

⁴⁷ *ibid*.

⁴⁸ Seeruthun-Kowalczyk (n 39) 168.

relationship between civil servants and citizens.⁴⁹ For that reason, we can call these ‘internal’ codes.⁵⁰ For example, there is a code of conduct for members of the European Commission that sets out principles regarding conflicts of interest, discretion and integrity.⁵¹ The European Parliament also has a code of conduct regarding financial interests and potential conflicts of interest.⁵² The European Data Protection Supervisor (EDPS) also has a dedicated code of conduct.⁵³ These do not at all correspond to the idea of codes as steering instruments.

A second group of ‘codes’ is situated on the level where the Union and the Member States interact. Seeruthun-Kowalczyk calls these ‘external’ codes: codes that aim to guide the behaviour of EU member states.⁵⁴ They fit into the earlier categorization as steering instruments:⁵⁵ instruments with the goal of establishing or giving further effect to EU objectives and (related) policy.⁵⁶ Senden describes these codes as being “structured in several respects in a comparable way to legal rules meaning that various principles of law can be applied to them by analogy”.⁵⁷ They are easier to conclude than hard law instruments and imply lower bureaucratic transaction costs.⁵⁸

An example of such an external code is the ‘Code of Conduct on Arms Exports’. Introduced in 1998, it left the power to make decisions on arms exports with the EU member states, but contained criteria that form grounds for refusal with the ultimate aim of harmonizing practices across the EU.⁵⁹ Ten years later, the code was replaced by a binding instrument.⁶⁰ Another example is the ‘Code of Conduct on Business Taxation’. Taxation is traditionally a sensitive topic, directly linked to a state’s sovereignty and its attractiveness for investment. The use of a code of conduct proved sufficiently politically digestible while also achieving normative, external effects.⁶¹ Interestingly, the code is contained in a Resolution adopted as a joint decision

⁴⁹ Stuart C Gilman, ‘Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons’ (PREM (People’s Rural Education Movement) and the World Bank 2005).

⁵⁰ Seeruthun-Kowalczyk (n 39) 168.

⁵¹ European Commission, ‘Commission Decision on a Code of Conduct for the Members of the European Commission (2018/C 65/06)’ (31 January 2018).

⁵² European Parliament, ‘Decision Amending the Rules of Procedure Relating to a Code of Conduct for Members of the European Parliament with Respect to Financial Interests and Conflicts of Interest (2011/2174(REG))’ (1 December 2011) <https://www.europarl.europa.eu/doceo/document/TA-7-2011-0540_EN.html>.

⁵³ European Data Protection Supervisor, ‘Code of Conduct’ (December 2019).

⁵⁴ Seeruthun-Kowalczyk (n 39) 168.

⁵⁵ Senden (n 40) 24.

⁵⁶ Gribnau (n 40) 84.

⁵⁷ Daniel Thürer, ‘The Role of Soft Law in the Actual Process of European Integration’ in Olivier Jacot-Guillarmod and Pierre Pescatore, *L’avenir du libre-échange en Europe. Vers un espace économique européen?* (Zürich Schulthess Polygraphischer Verlag 1990) 131.

⁵⁸ Fabien Terpan, ‘Soft Law in the European Union - The Changing Nature of EU Law’ (2015) 21 *European Law Journal* 68, 89.

⁵⁹ Christian Egenhofer and others, ‘Policy Coherence for Development in the EU Council: Strategies for the Way Forward’ (Centre for European Policy Studies (CEPS) 2006) 98.

⁶⁰ Council of the European Union, ‘Council Common Position 2008/944/CFSP Defining Common Rules Governing Control of Exports of Military Technology and Equipment (Official Journal of the European Union, L335/99)’ (8 December 2008) 944.

⁶¹ Martijn F Nouwen, ‘Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition’ (PhD thesis, Universiteit van Amsterdam 2020) 45.

by the Council and the Representatives of the Governments of the Member States ('RGM').⁶² Such a joint act by these two institutions is known as a 'mixed act'.⁶³ While Nouwen argues that a decision adopted by the RGM alone is at the very least an intergovernmental act – and possibly an international treaty – he reasons that mixed acts such as the code in question are an EU-specific instrument.⁶⁴

A third group of codes of conduct in EU law can be situated in the direct relationship between the EU and private actors. The 'Inter Institutional Agreement Annex 3 Code of Conduct' (IIAA3 Code of Conduct) is an example thereof. In 2011, the European Parliament and the European Commission set up a Joint Transparency Register meant to collect the information of lobbying groups. Interest groups that register themselves must subsequently also obey the code of conduct included in annex 3 of the agreement. Although it is voluntary to join the register, the European institutions have provided several incentives that make it de facto impossible to carry out lobbying activities without registration (e.g. only registered groups can meet with Commissioners and the Director-General, can be eligible to speak during public hearings of the European Parliament's committees, and more). There is a system of regular reports and quality checks thereof, third-party alerts on the veracity of those reports, and the possibility for third parties to file complaints on non-compliance with the code – with the possibility of an interest group being removed from the register and losing the privileges associated with the registration.⁶⁵ It is difficult to fit this code in with the aforementioned idea of 'steering instruments'.

A fourth group of codes in EU law is situated in the horizontal relationship between private actors, with direct and indirect interactions with the EU institutions. These codes are either the product of an individual company, or of an industry association that represents the interests of corporations within the same sector. Some EU legislative instruments acknowledge those tools developed by private stakeholders and (as a result of the 'new governance' school of thought) seeks to harness these private interests to achieve policy objectives. See, for example, the EU's 'Regulation 2018/1807 on a framework for the free flow of non-personal data in the European Union'⁶⁶ that calls for the use of codes of conduct to sort out issues of liability⁶⁷ and to provide detailed information, operational requirements and even model terms and conditions for data porting.⁶⁸ The EU Code of Conduct on Agricultural Data Sharing by Contractual Agreement is

⁶² Council of the European Union and the Representatives of the Governments of the Member States, 'Resolution of the Council and the Representatives of the Governments of the Member States, Meeting within the Council of 1 December 1997 on a Code of Conduct for Business Taxation' (1 December 1997).

⁶³ Senden (n 28) 218.

⁶⁴ Nouwen (n 61) 46.

⁶⁵ Maria Cristina Antonucci and Nicola Scocchi, 'Codes of Conduct and Practical Recommendations as Tools for Self-Regulation and Soft Regulation in EU Public Affairs' (2018) 18 *Journal of Public Affairs* 1, 4–5.

⁶⁶ European Parliament and European Council, 'Regulation (EU) 2018/1807 on a Framework for the Free Flow of Non-Personal Data in the European Union' (14 November 2018) 18.

⁶⁷ European Parliament and European Council, 'Regulation (EU) 2018/1807 on a Framework for the Free Flow of Non-Personal Data in the European Union' (n 66) Preamble 1.

⁶⁸ *ibid* Preamble 30.

a code specifically developed to answer this call, developed by a coalition of associations in the EU agri-food sector.⁶⁹

A fifth group of codes seems to exist that is still situated in the horizontal relationship between private actors, but with a higher level of involvement by the European Union. For example, reports declare that the 2016 ‘Code of conduct on countering illegal hate speech online’ was developed “at the behest of the European Commission under the threat of introducing statutory regulation” with extremely limited involvement of the Member States and the ‘systematic exclusion’ of civil society groups.⁷⁰ Similarly, the status of the 2018 ‘Code of practice on disinformation’ as a self-regulatory instrument was called into question; it has been labelled a “government-initiated ‘self-regulatory’ instrument”⁷¹ with the goal of getting IT companies to ‘sign on’ to the content.⁷² Although they do have the over-arching goal of helping achieve EU policy and objectives, their design (heavily driven by an EU institution, aimed at private actors) is very different from most of the other codes discussed – including what is generally expected from a steering instrument.

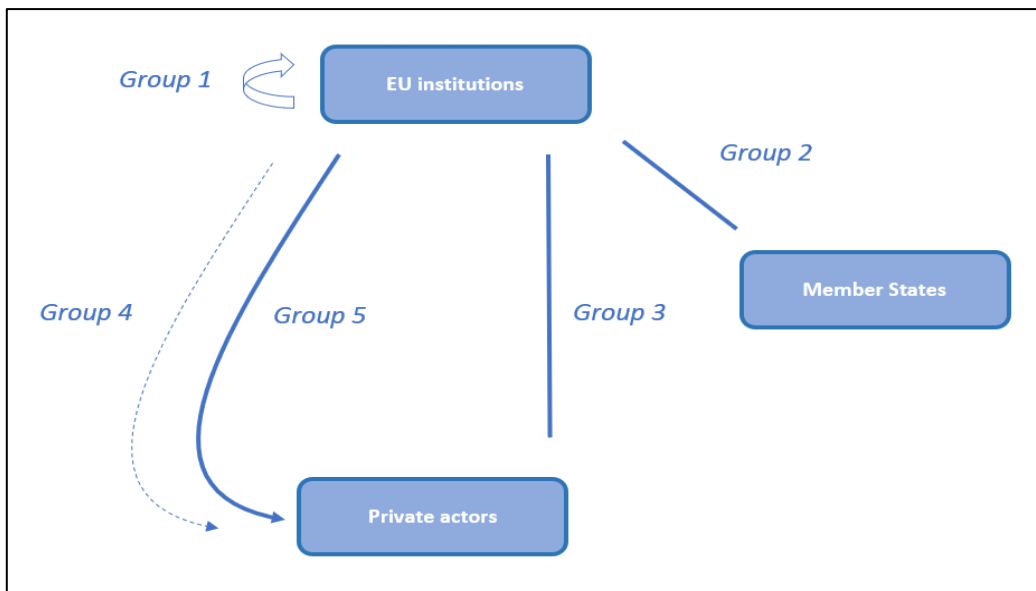


Fig. 1. A schematic overview of codes of conduct under EU law.

⁶⁹ COPA COGECA et al., ‘Press Release (CDP(18)5022:1)’ (26 June 2018); Simone van der Burg, Leanne Wiseman and Jovana Krkeljas, ‘Trust in Farm Data Sharing: Reflections on the EU Code of Conduct for Agricultural Data Sharing’ (2021) 23 *Ethics and Information Technology* 185, 188.

⁷⁰ Barbora Bukovská, ‘The European Commission’s Code of Conduct for Countering Illegal Hate Speech Online: An Analysis of Freedom of Expression Implications’ (Transatlantic High Level Working Group on Content Moderation Online and Freedom of Expression, 7 May 2019) 3–4; see also similar comments in: Natalie Alkiviadou, ‘Hate Speech on Social Media Networks: Towards a Regulatory Framework?’ (2019) 28 *Information & Communications Technology Law* 19, 31.

⁷¹ Peter H Chase, ‘The EU Code of Practice on Disinformation: The Difficulty of Regulating a Nebulous Problem’ (Transatlantic Working Group on Content Moderation Online and Freedom of Expression, 29 August 2019) 1. See also pages 5 and 9.

⁷² Teresa Quintel and Carsten Ullrich, ‘Self-Regulation of Fundamental Rights? The EU Code of Conduct on Hate Speech, Related Initiatives and Beyond’ in Bilyana Petkova and Tuomas Ojanen (eds), *Fundamental Rights Protection Online* (Edward Elgar Publishing 2020).

The aforementioned examples of codes of conduct in EU law make it difficult to pinpoint precise characteristics that connect all of them. Although some remain close to the idea of a ‘steering instrument’, their material scope, the actors targeted, and processes through which these codes were developed can all vary drastically. In some cases, it can even be considered that they have outgrown their origins as soft law instrument (see the discussion on the ‘Code of Conduct on Business Taxation’ below). The use of the term ‘code of conduct’ therefore does not easily point to one specific type of instrument.

2.3 The field of data protection as a specific perspective

However, a clearer image emerges if we focus on the specific field of the EU’s personal data protection policy. Codes have a rich history in this area. In the wake of the rapid advances in computation technology that took place in the 1970s, regulators in several European countries adopted domestic regulation on data protection – with some immediately outlining the use of codes of conduct in data protection legislation.⁷³ In 1978, the UK Lindop Committee also issued the guidance that general data protection principles should be accompanied by statutory codes of practice⁷⁴ and that a data protection authority should prepare such codes of practice “defining in detail the rules applicable to any system used for collecting, processing, or storing personal data on computers”.⁷⁵ The Organisation for Economic Co-Operation and Development (OECD) adopted the ‘Guidelines on the Protection of Privacy and Transborder Flows of Personal Data’ in 1980 and noted that states “should in particular endeavour to [...] encourage and support self-regulation, whether in the form of codes of conduct or otherwise” and that such codes could also provide accountability.⁷⁶

The presence of codes in so many data protection instruments – including very early ones – is notable. As theorized by some authors, this may be due to the necessarily general wording of data protection principles,⁷⁷ but simultaneously the need for sector-specific guidelines.⁷⁸ Therefore, codes can be seen as bookends for personal data protection principles: *ex ante*, their specificity for individual sectors raised the need for the development of more abstract, generalizable principles; but these principles are now so general in nature that they necessitate *ex post* guidance to translate their general ideas into specific practices.

The European Union proposed a Directive on data protection in 1990 but disagreements among the Member States caused the directive to only be finalized in 1995.⁷⁹ ‘Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free

⁷³ Francesca Bignami, ‘Cooperative Legalism and the Non-Americanization of European Regulatory Styles: The Case of Data Privacy’ (2011) 59 *The American Journal of Comparative Law* 411, 436.

⁷⁴ Norman Lindop, *Report of the Committee on Data Protection (Cmnd 7341)* (Her Majesty’s Stationery Office 1978) para 13.26.

⁷⁵ Colin J Bennett, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States* (Cornell University Press 2018) 89.

⁷⁶ Organisation for Economic Co-operation and Development, ‘Guidelines on the Protection of Privacy and Transborder Flows of Personal Data’ (23 September 1980) <<https://perma.cc/9CRF-4NPW>> accessed 9 December 2021 See Part 4 and Paragraph 14.

⁷⁷ Ian J Lloyd, *Information Technology Law* (Oxford University Press 2011) 120.

⁷⁸ Bennett (n 75) 96–101.

⁷⁹ Thomas Streinz, *The Evolution of European Data Law* (Paul Craig and Gráinne de Búrca eds, 3rd edn, Oxford University Press 2021) 906.

movement of such data’⁸⁰ (also known as the 1995 Data Protection Directive or DPD) encouraged in its article 27 “the drawing up of codes of conduct intended to contribute to the proper implementation of the national provisions adopted by the Member States pursuant to this Directive”. The actors meant to draw up such codes are “trade associations and other bodies representing other categories of controllers” (article 27.1 DPD). The Directive thus encourages self-regulation by industry players.

Nonetheless, codes under the 1995 Directive were somewhat contradictory tools. On the one hand, they are purely self-regulatory: the codes were meant to be developed by industry actors with no input from data protection authorities or other regulatory authorities, and there was no obligation to submit codes to the data protection authorities for approval.⁸¹ On the other hand, industry actors could submit their codes to the relevant data protection authorities, with approval being presented as a binary ‘yes / no’ scenario.⁸² There were no explicit procedures in place to encourage dialogue or iterative development, leading to widely diverging practices among national data protection authorities that made the development of codes much more self-regulatory or much more co-regulatory (to the point of obligatory) depending on the Member State.⁸³

Fifteen years after the entry into force of the Directive, the European Commission noted that “provisions on self-regulation in the Data Protection Directive, namely the scope for drawing up Codes of Conduct, have rarely been used so far and are not considered satisfactory by private stakeholders”.⁸⁴ Besides the contradictory nature of the development process, the other reasons for this failure have been discussed in literature.⁸⁵

Codes of conduct in the GDPR remain relatively close to how they were incorporated in the 1995 Directive. They are “intended to contribute to the proper application” of the GDPR (article 40.1 GDPR) and have “the purpose of specifying the application” of the GDPR (article 40.2 GDPR). They are therefore clearly posited as secondary instruments vis-à-vis the GDPR as the primary instrument (see below for a deeper discussion).

However, codes under the GDPR are markedly less self-regulatory. The submission of draft codes has now become mandatory: article 40 obliges the submission of draft national codes to the relevant national SA (paragraph 5) and of codes relating to processing activities in several Member States to the European Data Protection Board (paragraph 7). Nonetheless, as made

⁸⁰ European Parliament and the Council, ‘Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data’ (23 November 1995).

⁸¹ See the wording in article 27.2 DPD that code developers are “able to submit [codes] to the opinion of the national authority” in the case of national codes, and the wording in article 27.3 DPD that drafts of EU-wide codes “may be submitted” to the Article 29 Working Party.

⁸² Do note the mentions in article 27 that the authorities could seek “the views of data subjects” in their decision-making.

⁸³ Douwe Korff, ‘EC Study on the Implementation of Data Protection Directive - Report on the Findings of the Study’ (2002) 202.

⁸⁴ European Commission, ‘Communication on a Comprehensive Approach on Personal Data Protection in the European Union (COM(2010) 609 Final)’ (4 November 2010) 12.

⁸⁵ Carl Vander Maelen, ‘Codes of (Mis)Conduct? An Appraisal of Articles 40-41 GDPR in View of the 1995 Data Protection Directive and Its Shortcomings’ (2020) 6 *European Data Protection Law Review* 231; Korff (n 83) 202; Neil Robinson and others, ‘Review of the European Data Protection Directive’ (RAND Europe 2009) 37.

clear in the GDPR (see article 40 paragraphs 5, 7 and 8) and in the guidance issued by the European Data Protection Board Board⁸⁶ (the EU body established to supervise the consistent application of the GDPR) the development of codes is now a more dialectic process whereby the supervisory authorities deliver opinions that can be used to iteratively develop a code.

As an interim conclusion, it can be summarised that codes under the GDPR align with what was identified earlier in this contribution as a ‘fourth group’ of codes of conduct. These can be considered a form of steering instruments since they give further effect to EU objectives and policy⁸⁷ (i.e. the successful implementation of the GDPR) by encouraging private actors to develop codes as soft law tools. GDPR codes also fit into the Better Regulation Agenda and its objective of achieving a lower quantity of legislation. They may also result in higher quality rulemaking since they take advantage of the diversity in perspectives, resources, standard operating procedures and incentives that enterprises possess.⁸⁸ This is particularly important in a technical, complex field such as the ICT sector.⁸⁹

Nonetheless, the next section will argue that codes of conduct under the GDPR are not simply a continuation of established strategies under EU law. In fact, it will be argued that these codes display unique features that seem to have triggered a new ‘trend’ in how the EU approaches its ICT policy.

3. Do articles 40-41 GDPR present a new approach to the use of codes in EU law?

3.1 Embedding codes in hard law: not a new phenomenon

As stated before, this research originated from the prominent role awarded to codes of conduct in the General Data Protection Regulation. Its articles 40 and 41 encourage the development of codes by private actors “to contribute to the proper application of this Regulation” (art. 40.1 GDPR), which serves “the purpose of specifying the application of this Regulation” (art. 40.2 GDPR). Codes as soft law tools are thus embedded into a hard law instrument.

This embedding of soft law in hard law fits in with scholars’ observations that EU law almost always displays “some form of relationship between binding legislation and voluntary agreements in a particular area”.⁹⁰ Gribnau goes further and states that “[s]oft law exists only in a broader setting of – primary and secondary – European legislation”.⁹¹ In the 2003 Interinstitutional Agreement, it was explicated that “the mechanism whereby a Community

⁸⁶ European Data Protection Board, ‘Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under Regulation 2016/679 - Version 2.0 (Version Adopted after Public Consultation)’ (4 June 2019); European Data Protection Board, ‘Guidelines 04/2021 on Codes of Conduct as Tools for Transfers - Version 2.0’ (22 February 2022).

⁸⁷ Gribnau (n 40) 84.

⁸⁸ Christopher Marsden and others, ‘D4.1 Outline Overviews of Tasks R4.1-R4.4: Regulatory and Governance Methodologies’ (European Commission 2013) 20; Lester Salamon, ‘The New Governance and the Tools of Public Action: An Introduction’ (2011) 28 *Fordham Urban Law Journal* 1611, 1627.

⁸⁹ Jonathan Cave, Chris Marsden and Steve Simmons, ‘Options for and Effectiveness of Internet Self- and Co-Regulation’ (RAND Santa Monica 2008); Nathan Cortez, ‘Regulating Disruptive Innovation’ (2014) 29 *Berkeley Technology Law Journal* 175.

⁹⁰ Edward Best, ‘Alternative Regulations or Complementary Methods? Evolving Options in European Governance’ (2003) 1 *EIPASCOPE* 1, 3.

⁹¹ Gribnau (n 40) 77.

legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field [...] may be used on the basis of criteria defined in the legislative act so as to enable the legislation to be adapted to the problems and sectors concerned, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned”.⁹² Scott also noted that one of the strategies of the European regulator is to first enact broad and imprecisely defined framework norms, that are then followed up by calls aimed at private actors to develop codes that can aid in the implementation of policy goals.⁹³

The 1995 Data Protection Directive for example called in its article 27 for the development of codes by private actors “to contribute to the proper implementation of the national provisions adopted by the Member States pursuant to this Directive”. Article 16 of the 2000 e-Commerce Directive⁹⁴ similarly called for codes to harmonise the national provisions on information society services relating to the internal market. The 2005 Unfair Commercial Practices Directive (UCPD)⁹⁵ states that “[i]t is appropriate to provide a role for codes of conduct, which enable traders to apply the principles of this Directive effectively”⁹⁶ (although it is implied these codes may have already existed or would have been developed even in the absence of the Directive). Noteworthy are the determinations in article 6.2 UCPD that a commercial practice can be regarded as misleading if one of the elements in a transaction is the “non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound” in certain circumstances, or Annex I UCPD that declares claiming to be a signatory when a trader in reality is not, is a misleading commercial practice.

3.2 The unique dimensions of codes in the GDPR

While these provisions may seem ‘prima facie’ to be similar to the GDPR, this contribution proposes that GDPR codes nonetheless display unique features across two dimensions: their functional dimensions, and the dimensions of legalization that they display.

3.2.A Three functional dimensions: implementation, accountability, enforcement

The first main function of codes in the GDPR can be described as an *implementation function*. Codes are embedded within the GDPR to aid the further implementation of the hard law instrument itself. It states in its article 40.1 that codes are “intended to contribute to the proper application” of the GDPR. This is followed up by article 40.2 which states that codes are expected to specify the application of the Regulation. This paragraph suggests a wide arrange

⁹² European Parliament, Council of the European Union and Commission of the European Communities (n 15) para 18.

⁹³ Joanne Scott, ‘In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law’ (2011) 48 Common Market Law Review 329, 330.

⁹⁴ European Parliament and European Council, ‘Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (‘Directive on Electronic Commerce’) OJ L 178, 1–16’ (8 June 2000).

⁹⁵ European Parliament and European Council, ‘Directive 2005/29/EC Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) OJ L 149, 22–39’ (11 May 2005).

⁹⁶ Recital 20 UCPD.

of topics relating to the application of the GDPR: fair and transparent processing; the legitimate interests pursued by controllers in specific contexts; the pseudonymisation of personal data; and more. The list is non-exhaustive (as can be gleaned from the phrasing ‘such as’). Throughout the GDPR, many more references can be found to an implementation function for codes, including the suggestion that they should provide “[g]uidance on the implementation of appropriate measures and on the demonstration of compliance by the controller or the processor, especially as regards the identification of the risk related to the processing, their assessment in terms of origin, nature, likelihood and severity, and the identification of best practices to mitigate the risk”.⁹⁷

Codes are thus presented as secondary instruments that can make the abstract principles of the primary instrument (here: the GDPR) more concrete. Other codes such as the ones in the 1995 Data Protection Directive and 2000 e-Commerce Directive also had this implementation function, but they were framed as tools for facilitating the harmonisation of national provisions that transposed the Directive’s rules. The GDPR as a Regulation does not require any further steps by the Member States, meaning its codes directly help implement EU-wide rules.⁹⁸

Codes of conduct in the GDPR are also uniquely aimed at helping small-to-medium enterprises (SMEs) and micro-enterprise businesses implement the rules of the GDPR.⁹⁹ The GDPR has the general goal of stimulating “economic growth by cutting costs and red tape (...) especially for small and medium enterprises”.¹⁰⁰ By using codes, the abstract rules of the Regulation can be translated to practical guidelines that are particularly cost-effective for SMEs,¹⁰¹ tailoring the rules to specific contexts.¹⁰²

Second, GDPR codes have an *accountability function*: the European legislator determines that actors subject to the GDPR may use codes (as secondary instruments) to demonstrate compliance with the provisions of GDPR (as the primary instrument). This logically builds on the previous function: if a code has correctly specified the abstract provisions of the main instrument, then adherence to the code can demonstrate compliance with the main instrument (or at least the specific provisions the code specifies).

The GDPR’s articles 24.3 and 28.5 determine that “[a]dherence to approved codes of conduct” may be used “as an element by which to demonstrate compliance with the obligations”.¹⁰³ Codes may also be used to demonstrate that appropriate technical and organisational measures

⁹⁷ Recital 77 GDPR.

⁹⁸ There are some exceptions where Member States do have leeway, such as the age limit mentioned in article 8 GDPR. Here, codes can indeed fulfil the function of harmonisation tool between different national rules. This function is also recognised by the European Data Protection Board. See: European Data Protection Board, ‘Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under Regulation 2016/679 - Version 2.0 (Version Adopted after Public Consultation)’ (n 86) 5 at footnote 5.

⁹⁹ See recitals 13, 98, 132, 167 and articles 40 and 42 of the GDPR.

¹⁰⁰ European Commission, ‘Fact Sheet: Stronger Data Protection Rules for Europe’ (15 June 2015) <https://europa.eu/rapid/press-release_MEMO-15-5170_en.htm>.

¹⁰¹ European Data Protection Board, ‘Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under Regulation 2016/679 - Version 2.0 (Version Adopted after Public Consultation)’ (4 June 2019) 8; Paul Voigt and Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017) 73.

¹⁰² Neil Robinson and others, ‘Review of the European Data Protection Directive’ (RAND Europe 2009) 52.

¹⁰³ These articles apply respectively to controllers and processors. See article 4 paragraphs 7 and 8 GDPR for more information.

were taken to ensure a level of security appropriate to the risk (article 32.3 GDPR). And codes will also be taken into account when assessing the impact of data processing operations (article 35.8 GDPR). Scholars have noted that this function too can be of particular importance for SMEs as they navigate their obligations under the GDPR.¹⁰⁴

Additionally, codes of conduct have an important transnational accountability function. Personal data can be transferred from an actor subject to the GDPR (the ‘exporter’) to an actor not subject to the GDPR (the ‘importer’). However, the European legislator wants to safeguard that the level of protection of natural persons ensured in the EU is not undermined when the data leaves the EU’s jurisdiction.¹⁰⁵ The exporter can use adherence to a code as an ‘appropriate safeguard’ together with binding and enforceable commitments in the third country to allow such a transfer of data to take place (article 46.2.e GDPR).¹⁰⁶

Finally, codes also have an *enforcement function*. The GDPR determines that codes of conduct can play a role during enforcement procedures linked to the provisions of the main instrument. Every code of conduct must have a ‘monitoring body’ assigned to it before it can be approved (see article 41 GDPR). This monitoring body must take “appropriate action in cases of infringement of the code [...] including suspension or exclusion [...]. It shall inform the competent supervisory authority of such actions and the reasons for taking them” (article 41.4 GDPR). The GDPR codes thereby creates a fascinating co-regulatory system: a private body must monitor compliance with the rules and take enforcement action where needed, but under the supervision of the national supervisory authorities who can also revoke the body’s power and take action on their own discretion (see article 41.5 juncto article 41.4 GDPR).

Additionally, article 83 para. 2 (j) GDPR stipulates that “[w]hen deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each individual case due regard shall be given to (...) adherence to approved codes of conduct pursuant to Article 40”. Adherence to a code can thus influence both the height of a potential fine, and the fact of whether it is even imposed or not. Codes thereby function as a liability reduction mechanisms: by participating in a code, an enterprise obtains a lower risk of fines, or at least lower fines.

3.2.B Three dimensions of legalisation: obligation, precision, delegation

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

Scholars have observed that “formally non-binding agreements can gradually become politically, socially and morally binding for the actors involved”.¹⁰⁷ Some scholars speak of a

¹⁰⁴ Eric Lachaud, ‘Adhering to GDPR Codes of Conduct: A Possible Option for SMEs to GDPR Certification’ (2019) 3 Journal of Data Protection & Privacy 1.

¹⁰⁵ See Recital 101 GDPR.

¹⁰⁶ For further guidance on the practical implementation, see: European Data Protection Board, ‘Guidelines 04/2021 on Codes of Conduct as Tools for Transfers - Version 2.0’ (n 86).

¹⁰⁷ Kerstin Jacobsson, ‘Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy’ (2004) 14 Journal of European Social Policy 355, 359.

‘hardening’ of soft law instruments¹⁰⁸ or ‘juridification’.¹⁰⁹ The terms ‘judicialisation’ and ‘legalisation’ have also been used to describe this phenomenon.¹¹⁰ It is important to note that this contribution follows the broad view taken by Terpan who describes that this process can concern “the transformation of non-legal norms into soft law (limited legalization) or hard law (complete legalization), as well as the hardening of soft law (soft law becoming hard law)”.¹¹¹

To theoretically underpin how soft law can become ‘hardened’, Herberg describes a three level-structure that is not necessarily dependent on the content of the provisions itself, but rather on the supporting features that render the contents operational.¹¹² Teubner not only agrees with this theory, but interprets it as an application of Hart’s classic conceptualization of law as the combination of primary and secondary rules:¹¹³ it is through the institutionalization of secondary norm-formation processes that soft law can become hard law.¹¹⁴ The influential work of Abbott and Keohane joins those findings as the final piece of the puzzle. They identify three dimensions that determine the legal nature of instruments: obligation (actors are bound by a rule or commitment and their behaviour is scrutinized), precision (the required, authorized or proscribed conduct is unambiguously defined) and delegation (third parties have been granted authority to implement, interpret, and apply the rules, to resolve disputes, and possibly to create further rules). The more maximised each dimension, the ‘harder’ an instrument.

First, we can inspect the *dimension of obligation* of GDPR codes. Codes are traditionally voluntary rulesets; they set out non-binding standards and principles.¹¹⁵ As a result, it remains up to each individual enterprise in a sector whether or not it wishes to commit to the rules laid out in a code. However, GDPR codes contain accountability and enforcement functions within the broader context of the hard law instrument they are nestled in. By reframing codes as a means to demonstrate compliance with the hard law they are encapsulated in and as liability reduction mechanisms (to influence the amount or even the very imposition of fines), corporations are faced with a strong *de facto* obligation to participate in codes. Otherwise, the enterprise exposes itself to a higher risk of fines *or* a risk of higher fines.

¹⁰⁸ Edoardo Traversa and Alessandra Flamini, ‘Fighting Harmful Tax Competition through EU State Aid Law: Will the Hardening of Soft Law Suffice?’ (2015) 14 *European State Aid Law Quarterly* 323.

¹⁰⁹ Anna Beckers, ‘The Creeping Juridification of the Code of Conduct for Business Taxation: How EU Codes of Conduct Become Hard Law’ (2018) 37 *Yearbook of European Law* 569.

¹¹⁰ In particular, they find that 5 different concepts are generally referred to: norms constitutive for a political order are established or changed to add competencies to the legal system (constitutive juridification); law’s expansion and differentiation; increased conflict solving by or with reference to law; the increase of power for the legal system and legal profession; and the increasing tendency for individuals to consider themselves and others as legal subjects (legal framing). See: Lars Chr Blichner and Anders Molander, ‘What Is Juridification?’ [2005] University of Oslo - Arena Centre for European Studies Working Paper (no. 14) 5.

¹¹¹ Terpan (n 58).

¹¹² Martin Herberg, ‘Private Authority, Global Governance, and the Law’ in Gerd Winter, *Multilevel Governance of Global Environmental Change - Perspectives from Science, Sociology and the Law* (Cambridge University Press 2006).

¹¹³ Herbert Lionel Adolphus Hart, *The Concept of Law* (Clarendon Press 1961).

¹¹⁴ Gunther Teubner, ‘The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination’ in Rainer Nickel, *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (Intersentia 2009).

¹¹⁵ Helen Keller, ‘Corporate Codes of Conduct and Their Implementation: The Question of Legitimacy’ in Rüdiger Wolfrum and Rübén Volker, *Legitimacy in International Law* (Springer 2008) 221–222; Robinson and others (n 102) 8.

Companies will thus no longer participate in codes for traditional reasons such as demonstrating goodwill to regulators¹¹⁶ and pre-empting binding legislation.¹¹⁷ Rather, they will be involved in codes because codes are directly linked to punitive hard law provisions. This technique is undoubtedly a response to the EU's previous finding that "[t]he absence of genuinely dissuasive and punitive sanctions" is a major weak point of codes.¹¹⁸ However, the fact that compliance is presented as a condition to receive a legal benefit¹¹⁹ places a financial and punitive pressure on corporations that raises questions about whether or not the EU is overstepping its powers or violating the rights of business.

The *dimension of precision* also sees a marked hardening. Codes of conduct are traditionally carriers of 'open' norms, i.e. imprecise broad goals that offer corporations discretion in how to implement them.¹²⁰ As described before regarding the implementation function, the opposite holds true for the GDPR's approach: it posits broad hard law provisions and determines that codes are meant to specify those provisions by offering prescriptive and specific solutions that can result in compliance. Recital 98 GDPR stipulates that codes of conduct should be used "so as to facilitate the effective application of this Regulation ... In particular, such codes of conduct could calibrate the obligations of controllers and processors". Article 40 paragraph 2 is even more explicit, determining that codes may be created "for the purpose of specifying the application of this Regulation" and subsequently offering a non-exhaustive list of topics and principles that are the subject of the GDPR's main provisions. In its guidelines on codes, the European Data Protection Board (EDPB) further states that codes should "codify how the GDPR shall apply in a specific, practical and precise manner. The agreed standards and rules will need to be unambiguous, concrete, attainable and enforceable".¹²¹

By embedding codes of conduct directly into hard law provisions and considering them a tool to specify its binding obligations, they are used in the opposite way of their original function as a means of expressing broad and open-ended intentions.¹²² Once again, a hardening of codes of conduct can be perceived, this time along the dimension of precision.

Lastly, there is the *dimension of delegation*. As described by Abbott et al., this dimension entails that third parties are given authority to implement and enforce a rule, for example when administrative and judicial authorities interpret and extend broad principles.¹²³ This is how hard

¹¹⁶ Kenneth Abbott, Gary E Marchant and Elizabeth A Corley, 'Soft Law Oversight Mechanisms for Nanotechnology' (2012) 52 *Jurimetrics* 279.

¹¹⁷ Dennis Hirsch, 'The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation?' (2011) 34 *Seattle University Law Review* 439, 460–464; Nina Ascoly and Ineke Zeldenrust, 'Codes of Conduct for Transnational Corporations: An Overview' (1998) 45; Ira S Rubinstein, 'The Future of Self-Regulation Is Co-Regulation', *The Cambridge Handbook of Consumer Privacy* (Cambridge University Press 2018) 3.

¹¹⁸ Working Party on the Protection of Individuals with regard to the Processing of Personal Data, 'Judging Industry Self-Regulation: When Does It Make a Meaningful Contribution to the Level of Data Protection in a Third Country?' (14 January 1998) 4.

¹¹⁹ Beckers (n 109) 576.

¹²⁰ Douglas Michael, 'Cooperative Implementation of Federal Regulations' (1996) 13 *Yale Journal on Regulation* 535, 544.

¹²¹ European Data Protection Board, 'Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under Regulation 2016/679 - Version 2.0 (Version Adopted after Public Consultation)' (n 101) 15.

¹²² Rubinstein (n 117) 505.

¹²³ Kenneth Abbott and others, 'The Concept of Legalization' [2000] *International Organization* 401, 408; Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421, 433.

law traditionally functions: an instrument sets out legal principles, which are then interpreted, implemented and enforced by a range of authorities. This stands in contrast to the typical reliance of codes of conduct on non-judicial monitoring mechanisms that offer advice or make non-binding decisions.

This too changes under the GDPR. Firstly, the submission procedure that was optional for EU-wide codes under the text of the DPD has now been made obligatory by article 40 paragraph 7 for codes relating to processing activities in several Member States. A national authority must be chosen by the code owner, which then triggers the obligation for this authority to elect two co-reviewing supervisory authorities (SAs). Additionally, an approved draft must also await the opinion of the European Data Protection Board (the so-called ‘consistency opinion’)¹²⁴ before the national authority can decide whether or not approval is ultimately granted. Moreover, articles 64 and 65 GDPR set out the authoritative status of the Board’s opinion, the need for the original SA to explain why they would diverge from the Board’s opinion, and a dispute resolution procedure by the Board.

The delegation techniques do not end there. Article 41 GDPR foresees the mandatory presence of a monitoring body to a code, including stipulations on the procedures and structures of those monitoring bodies. Regarding codes on a national level, finally, paragraphs 5 through 9 of article 40 concern the role of the national supervisory authorities, who are tasked with the approval and registration of codes, possess the power to accredit monitoring bodies or revoke such accreditation, and decide on the suspension or exclusion of participants to a code (article 41 GDPR, paragraphs 3 through 5). The GDPR thus engages in delegation, which diminishes the decentralised, non-governmental nature of codes and their cooperative character.¹²⁵

4. Conclusion: a wider trend towards ‘hard’ codes of conduct?

The figure representing the use of codes in EU law can now be updated with our findings on the unique characteristics of GDPR codes of conduct.

¹²⁴ European Data Protection Board, ‘First Overview on the Implementation of the GDPR and the Roles and Means of the National Supervisory Authorities’ (26 February 2019) 6.

¹²⁵ Michael (n 120) 541–542.

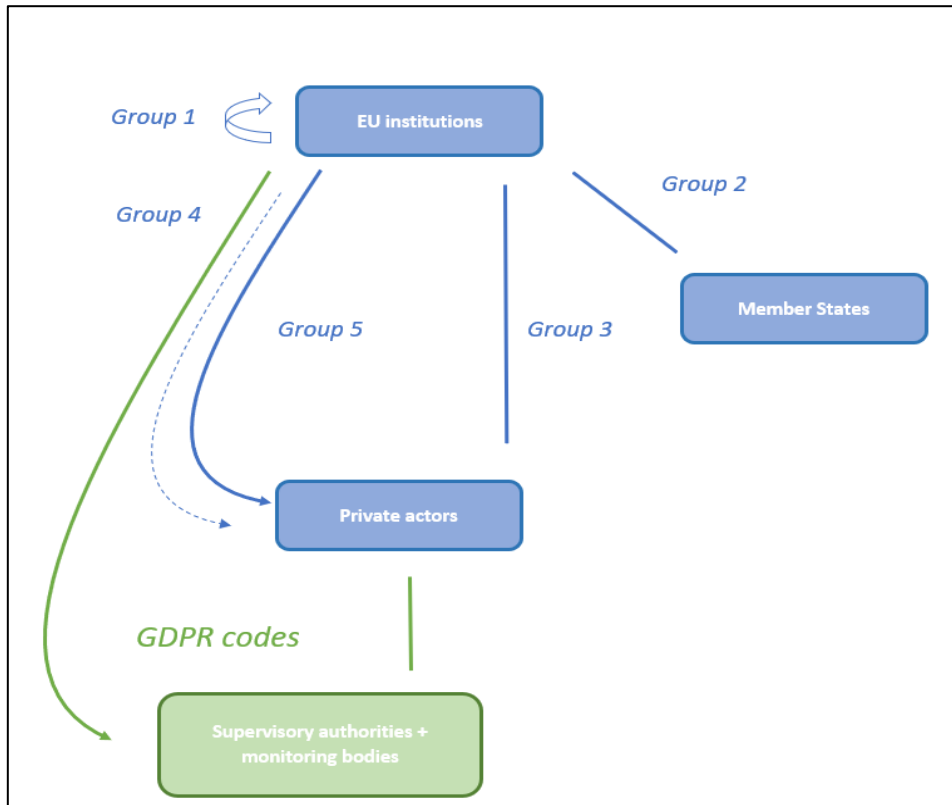


Fig. 2. A schematic overview of codes of conduct under EU law, including GDPR codes.

The technique of embedding codes of conduct into hard law instruments seems to fit into a broader ongoing pattern whereby the EU increasingly interconnects hard and soft norms.¹²⁶ There are several possible explanations why the EU is ‘hardening’ soft instruments. As explained before, alternative forms of regulation have struggled with questions regarding effective accountability due to the lack of a central authority with a hierarchical position,¹²⁷ legal certainty,¹²⁸ and their democratic value.¹²⁹ Soft EU law specifically has struggled with effectiveness.¹³⁰ Hard law instruments, on the other hand, have generally worked well to achieve the EU’s policy goals.¹³¹ It would therefore be a logical step for the European legislator to wish to combine the inclusiveness and flexibility of codes of conduct with the uniformity and rigidity of hard law instruments to achieve the ‘best of both worlds’. Preparatory documents of the GDPR certainly point in this direction. The impact assessment accompanying the proposal for the GDPR speaks of “[g]oing a step further in co-regulation, by providing for the

¹²⁶ Terpan (n 58) 88.

¹²⁷ Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 *Regulation & Governance* 137, 140–141.

¹²⁸ Ariel Dora Stern, ‘Innovation from Regulatory Uncertainty: Evidence from Medical Technology’ (2016) 145 *Journal of Public Economics* 181.

¹²⁹ Black (n 127) 141.

¹³⁰ Terpan (n 58) 93.

¹³¹ *ibid* 94.

possibility for the Commission to give general validity within the Union”.¹³² While the meaning of ‘general validity’ will be discussed later, it suffices for now to note the choice for the phrasing “going a step further in co-regulation”. The European Parliament also seemed to believe that codes of conduct should be nudged toward a ‘harder’ direction, since it added after the first reading of the proposal that “codes of conduct drawn up by a supervisory authority” can also be adopted by private actors.¹³³ This did not make it into the final version of the GDPR, but demonstrates that the EU institutions considered a much more top-down interpretation of how codes should function.

Nonetheless, the EU institutions used to hold the belief that alternative regulatory instruments should not be used where fundamental rights or important political options are at stake or where the rules must be applied in a uniform fashion in all Member States.¹³⁴ This policy now seems completely abandoned, since Regulations are per definition meant to apply rules in a uniform fashion in all member states but also seem to be the prime tool wherein the EU now embeds codes of conduct.

Such an ambiguous stance towards codes of conduct is not new in the EU. Over time, the EU institutions have mentioned codes as being self-regulatory tools,¹³⁵ either self-regulatory or co-regulatory tools,¹³⁶ implying that they are not self-regulatory tools,¹³⁷ or explicitly calling them co-regulatory tools.¹³⁸ Under the 1995 Data Protection Directive, codes had been called completely self-regulatory, but as Korff notes in his 2002 report on the 1995 Data Protection Directive “self-regulation increasingly takes place in a legal framework which allows for, or indeed requires, the assessment and/or approval of soi-disant “voluntary” codes, while State regulation may involve the drawing up of rules in consultation with (or even by) sectoral

¹³² European Commission, ‘Commission Staff Working Paper: Impact Assessment Accompanying the Document ‘Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) and Directive of the European Parliament and of the Council on the Prosecution of Criminal Offences or the Execution of Criminal Penalties, and the Free Movement of Such Data’ (20 January 2012) 47.

¹³³ European Parliament, ‘Position of the European Parliament Adopted at First Reading on 12 March 2014 with a View to the Adoption of Regulation (EU) No .../2014 of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)’ (12 March 2014) 205.

¹³⁴ European Parliament, Council of the European Union and Commission of the European Communities (n 15) para 17.

¹³⁵ European Commission, ‘Action Plan “Simplifying and Improving the Regulatory Environment”’ (n 12) 11.

¹³⁶ European Commission, ‘Commission Staff Working Document: Instruments for a Modernised Single Market Policy - Accompanying Document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Single Market for 21st Century Europe’ (n 93) 11–13. In the span of three pages, codes of conduct are confusingly treated as either self-regulatory or co-regulatory, or completely the former.

¹³⁷ European Commission, ‘Commission Staff Working Document Accompanying the Document Communication from the Commission to the European Parliament and the Council: Data Protection as a Pillar of Citizens’ Empowerment and the EU’s Approach to the Digital Transition - Two Years of Application of the General Data Protection Regulation’ (24 June 2020) 25.

¹³⁸ European Commission, ‘Commission Staff Working Paper: Impact Assessment Accompanying the Document ‘Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) and Directive of the European Parliament and of the Council on the Prosecution of Criminal Offences or the Execution of Criminal Penalties, and the Free Movement of Such Data’ (n 132) 47.

organisations. The stipulations in the Directive confirm this trend towards what one may call quasi self-regulation”.¹³⁹

There are existing examples of codes in the EU and in international law that have undergone legalization processes. Crucial to understanding this is the concept of ‘estoppel’ in public international law that protects the legitimate expectations of states that are induced by the conduct of another state.¹⁴⁰ In particular, it prevents actors from contesting situations “contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself”.¹⁴¹ The currently prevailing viewpoint in international law is that estoppel must be interpreted rather restrictively since an overly broad interpretation would – ironically – be detrimental to the predictability of international relations.¹⁴²

Although ‘estoppel’ is a common law term, we can find a similar concept in EU law: the principle ‘(nemo potest) venire contra factum proprium’. It has been recognized as a legal principle of EU law in the case law of the European Court of Justice (CJEU).¹⁴³ The purpose and conditions for this principle are the same as for estoppel: it is meant to stop actors from contravening promises or legitimately expected behaviour if the actor induced the expectation of compliance and sanctions in the event of non-compliance, while this expectation is also of benefit to this actor. In recent years, the principle was brought up in *Ireland and Aughinish Alumina v Commission*¹⁴⁴ and *Regione autonoma della Sardegna v Commission*.¹⁴⁵

The most widely-known and extensively-discussed ‘hardened’ EU code is the ‘Code of Conduct on Business Taxation’. As the EU became increasingly integrated, it became clear that significant member state differences in business taxation caused distortions to the functioning of the ‘single market’ and caused certain member states to incur significant tax revenue losses and tax burdens on labor.¹⁴⁶ Nonetheless, major differences between member states’ viewpoints meant that there was not enough support for EU legislation on the topic. Instead, the choice was made to adopt a code of conduct in the form of a “non-legally binding instrument that engages Member States at a political level to respect principles of fair competition, and to refrain

¹³⁹ Douwe Korff, ‘EC Study on the Implementation of Data Protection Directive - Report on the Findings of the Study’ (2002) 185.

¹⁴⁰ Thomas Cottier and Jörg Paul Müller, ‘Estoppel’, *Max Planck Encyclopedia of Public International Law* (2007).

¹⁴¹ *Case concerning the Temple of Preah Vihear [Cambodia v Thailand] [Merits] [Dissenting Opinion of Sir Percy Spender]* (International Court of Justice) 143–144.

¹⁴² Cottier and Paul Müller (n 140).

¹⁴³ *C-108/63 Officine elettromeccaniche A Merline v High Authority of the European Coal and Steel Community* (EU:C:1965:4); *C-14/61 Koninklijke Nederlandsche Hoogovens en Staalfabrieken NV v High Authority of the European Coal and Steel Community* (EU:C:1962:28).

¹⁴⁴ *Ireland and Aughinish Alumina v Commission* (EU:T:2016:227) [2016] [192–200]. Here, the CJEU describes the principle as: “a person may not dispute what he has previously accepted”.

¹⁴⁵ *Regione autonoma della Sardegna v Commission* (EU:T:2017:266) [2017] [63]. In this case, the CJEU describes the principle as: “no one may set himself in contradiction to his own previous conduct”.

¹⁴⁶ European Commission, ‘Towards Tax Co-Ordination in the European Union: A Package to Tackle Harmful Tax Competition (COM(97) 495 Final)’ (1 October 1997) para 2.

from tax measures that are harmful”.¹⁴⁷ The explicit nature of the code as a soft instrument made it easier for member states to accept.

However, in the years following the adoption of the code, two intriguing processes took place that have been the subject of much scholarly analysis. First, internally, tax measures were reviewed by an expert group (the ‘Primarolo Group’) established by the Member States, using the provisions of the code as a threshold. Member states reacted harshly when their national tax measures were deemed ‘potentially harmful’, showing that the code and its implementation through the Primarolo Group was taken very seriously.¹⁴⁸ Additionally, member states were subjected to strict deadlines to roll back tax measures deemed ‘harmful’ and formal extensions had to be requested if a member state wished more time.¹⁴⁹

The second, and most drastic development, took place externally. As the EU approached its enlargement from 15 member states to 27, the existing 15 members presented the Code of Conduct on Business Taxation as much more than a mere political commitment: it was presented as part of the legal ‘acquis communautaire’ of the European Union that new Member States must accept to enter the Union.¹⁵⁰ As scholarly work strikingly puts it: “What was soft law for the old EU-15 states became hard law for the accession states”.¹⁵¹ When looking at documents in the context of accession negotiations with Croatia in 2008, any and all references to the original political character of the code of conduct have disappeared completely.¹⁵² Adherence to the code is presented as an unconditional obligation.

Terpan believes that legalization might simply be inevitable within the EU. He argues that the EU is driven by integrative dynamics more than any other international organization. This integrated system of governance would naturally nudge towards the use of hard instruments, which in turn influences soft law to evolve towards a harder interpretation.¹⁵³

This raises important questions for the future of codes of conduct in EU legislation – in particular those aimed at ICT policy. After all, scholars have noted that in the wake of the GDPR, other EU regulation regarding the tech industry has used the GDPR as a sort of template – a phenomenon dubbed ‘GDPR mimesis’.¹⁵⁴ Proposed instruments such as the Digital Services

¹⁴⁷ *ibid* 14.

¹⁴⁸ Seeruthun-Kowalczyk (n 39) 214.

¹⁴⁹ Beckers (n 109) 580.

¹⁵⁰ Council of the European Union, ‘Code of Conduct for Business Taxation-Harmful Tax Measures in the Accessing States and Commitments for Rollback (13213/03)’ (6 October 2003); Beckers (n 109) 581.

¹⁵¹ Philipp Genschel, Achim Kemmerling and Eric Seils, ‘Accelerating Downhill: How the EU Shapes Corporate Tax Competition in the Single Market’ (2011) 49 *JCMS: Journal of Common Market Studies* 585, 597.

¹⁵² Council of the European Union, ‘2008/119/EC: Council Decision of 12 February 2008 on the Principles, Priorities and Conditions Contained in the Accession Partnership with Croatia and Repealing Decision 2006/145/EC (2008/119/EC)’ (12 February 2008).

¹⁵³ Terpan (n 58) 94–95.

¹⁵⁴ Vagelis Papakonstantinou and Paul De Hert, ‘Post GDPR EU Laws and Their GDPR Mimesis. DGA, DSA, DMA and the EU Regulation of AI’ (*European Law Blog*, 1 April 2021)

<<https://europeanlawblog.eu/2021/04/01/post-gdpr-eu-laws-and-their-gdpr-mimesis-dga-dsa-dma-and-the-eu-regulation-of-ai/>> accessed 18 January 2022.

Act (DSA)¹⁵⁵ and the Artificial Intelligence Act¹⁵⁶ contain similar passages on codes, also framing them as secondary instruments to the legislation they are embedded in. This implies that the earlier discussed functional dimensions and dimensions of legalisation found in GDPR codes may also appear in these versions of codes.

¹⁵⁵ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC (COM(2020) 825 Final (2020/0361 (COD))’ (n 30).

¹⁵⁶ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Laying down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (COM(2021) 206 Final)’ (n 31).