FREEDOM OF CONSCIENCE AND EUROPEAN UNION LAW: LEGAL AMBIGUITY IN SERVICE OF IDEOLOGICAL CLARITY?

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Abstract

This paper examines the tension between the European Union's legal frameworks and the protection of freedom of conscience, particularly in the context of the Digital Services Act (DSA). It explores the EU's competence in regulating this fundamental right, highlighting the vagueness of legal definitions and the potential ideological influence behind interpretations. Concrete examples from the DSA illustrates how these ambiguities could threaten the right to freedom of conscience, with implications for personal and religious convictions beyond the EU's mandate.

Ambiguity can only be overcome to one's own detriment.

Cardinal de Retz (1613 -1679)

Key words

Freedom of conscience, European Union law, Digital Services Act, ideological influence, legal competence, religious freedom

1. INTRODUCTION

Freedom of conscience is one of the pivotal first-generation Human rights. Yet, listening to recent debates on hate crimes and the pervasive narrative of discrimination, it seems that this freedom is under threat – or at the very least, it is being eroded, particularly in its religious dimension. The European Union, for instance, and the laws derived from it, appear to favor certain notions at the expense of freedom of conscience, measured against ideological concepts.

The first question to consider is this: Does the EU have competence in this area? Has it been given a mandate by Member States, and does it exercise its prerogatives within the bounds of its own competence? The second question is whether the invocation of ambiguous, if not empty, legal notions give an excessive margin of interpretation to decision makers, enabling ideological interpretations to the detriment of both freedom of conscience and national prerogatives. With a recent example – the Digital Services Act (DSA) – we will offer some answers to these questions before addressing, in conclusion, the most important question: Is freedom of conscience at risk within the framework of European law?

2. FREEDOM OF CONSCIENCE AND EUROPEAN UNION LAW: IS IT THE EU'S BUSINESS?

2.1 Article 10 of the European Charter of Fundamental Rights and case law of the European Court of Justice

Freedom of conscience is explicitly addressed in EU law, specifically in Article 10, paragraph 1 of the European Charter of Fundamental Rights[1] (hereafter referred to as "the Charter"), which states: *"Everyone has the right to freedom of thought, conscience, and religion. This right includes freedom to change religion or belief, and freedom, either alone or in community with others, in public or in private, to manifest one's religion or belief, in worship, teaching, practice, and observance."* It is worth noting that this provision does not clearly distinguish between freedom of conscience and religious freedom, and its wording closely resembles that of Article 9 of the European Convention on Human Rights (ECHR)[2].

The European Court of Justice (ECJ) recently had the opportunity to interpret Article 10 of the Charter in the case of *Commune d'Ans*[3], involving an employee at a school who wished to wear an Islamic hijab, and the municipal authority, which opposed this on the grounds of secularism (*laïcité*). The Court ruled in favor of the latter, stating that "*an internal rule of a municipal authority prohibiting, in a general and indiscriminate manner, the members of that authority's staff from visibly wearing in the workplace any sign revealing, in particular, philosophical or religious beliefs may be justified by the desire of the said authority to establish [...] an entirely neutral administrative environment [...]."* For our analysis, the final judgment (the precedence of neutrality over religious expression) is less relevant than the question of the EU's competence in this field. In this specific case, the ECJ was interpreting an EU directive in light of the Charter, making the question of the EU's competence clear, as the directive serves as an evident link to the EU's scope of authority.

The problem is that the answer to this question is rarely as obvious as in the given case. On the contrary, debates about an "ultra vires" EU blithely legislating beyond its mandate is particularly vivid and raises concerns about encroachments on fundamental rights, such as freedom of conscience. In principle, Article 51, paragraph 2, of the Charter is adamant as is states that: *"The*

[1] Charter of Fundamental Rights of the European Union, 18 December 2000, 2000/C 364/01

[2] European Convention on Human Rights, Article 9, as amended by Protocols Nos. 11 and 14, ETS No. 5., 04 November 1950

[3] Court of Justice of the European Union, *OP v. Commune d'Ans*, judgment, 28 November 2023, CURIA Reports 2023

Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the

Treaties." Yet, since the question of the scope of the EU's competence remains unclear and leaves a significant margin of maneuverability (notably regarding the choice and interpretation of legal basis), Article 51 paragraph 2's straightforward wording might prove useless to limit an expansive legal approach to define, in ever growing fields, the boundaries of freedom of conscience.

3. LIMITS TO EU COMPETENCES: LEGAL VAGUENESS FOR IDEOLOGICAL GAIN?

"Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States." This is Article 5, paragraph 2, of the Treaty on the European Union[4], which I consider the golden rule of this organization, and it is broadly echoed in Article 51, paragraph 2, of the Charter. Is this respected to the letter in full, or is it ignored? This question is crucial because, beneath its technical appearance, it raises the issue of a possible illegitimate erosion of national sovereignty and the precedence of uncodified moral principles over the rules governing the allocation of competences between the EU and its Member States. Freedom of conscience provides a striking example of this controversy.

Four comments at this stage:

- First, the wording of Article 10 of the Charter is very general and leaves a wide margin for interpretation, which could be influenced by the judge or technocrat, potentially introducing ideological bias to either broaden or restrict its application;
- Second, distinguishing between an EU competence and a national competence can become an arbitrary exercise in interpretation, leading to an illegitimate expansion of European competences;
- Third, combining the previous two points, if, by taking advantage of a legal ambiguity, the EU extend its competences, it could end up interpreting broad concepts like freedom of conscience within vast fields of competences;

[4] Consolidated version of the Treaty on European Union, online available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT [last visit 08 November 2024].

- Finally, if this vast margin of interpretation is approached from a clearly ideological angle (e.g., the invocation of over-interpreted "common values"), we might be faced with an arbitrary mechanism, even in the matter of freedom of conscience.

Is this the case? A concrete example of the Digital Services Act could be enlightening in this respect.

4. THE DIGITAL SERVICES ACT: UNDERMINING FREEDOM OF CONSCIENCE?

The Digital Services Act (DSA)[5] is a landmark piece of European legislation that, among other aspects, imposes obligations on internet providers to make the internet safer and more trustworthy, with a particular focus on better protecting citizens' fundamental rights. More specifically, the regulation sets out detailed obligations, especially for very large online platforms and search engines.

The brevity of this analysis requires me to focus on a concrete and revealing example, namely Article 35 of the DSA, which stipulates the obligation to implement *"reasonable, proportionate, and effective mitigation measures, tailored to the specific systemic risks identified pursuant to Article 34."* This crucial article refers to a list of risks, including the dissemination of illegal content, negative effects on civic discourse, electoral processes, public security, gender-based violence, and mental health. Quite an extensive program… Furthermore, Article 34, paragraph 1(b) also addresses *"any real or foreseeable negative effects for the exercise of fundamental rights,"* specifically mentioning several rights, but omitting freedom of conscience. This is surprising, considering the inclusion of *"the fundamental right to a high level of consumer protection"* in the list.

In any case, this is a list of tasks that are difficult to grasp, and their implementation poses a real challenge for companies, especially with the upcoming European elections, as electoral processes are part of these systemic risks. This is why the Commission published *"guidelines under the DSA for the mitigation of systemic risks online for elections."*[6] Under section 3.2.3 on Fundamental Rights, the Commission explicitly states the following: *"[…] the Commission*

[5] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), available online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065 [last visit 08 November 2024].

[6] Communication from the Commission – Commission Guidelines for providers of Very Large Online Platforms and Very Large Online Search Engines on the mitigation of systemic risks for electoral processes pursuant to Article 35(3)

recommends that due regard is also given to the impact of measures to tackle illegal content […] in particular those affecting vulnerable groups or minorities. For example, forms of ***racism, or gendered disinformation*** *and gender-based violence online including in the context of violent extremist or terrorist ideology or* ***FIMI targeting the LGBTIQ+ community*** *[…].”*

These opaque acronyms require clarification, which is provided in a footnote referencing a report on *“Foreign Manipulation and Interference,”*[7] particularly targeting the “LGBTIQ+ community.” The following paragraph from the report is especially striking:

> *“While undermining LGBTIQ+ people was a common theme in many of the FIMI cases identified, the overarching narrative in many of them was that the West is in decline. By leveraging the narrative of decline, FIMI threat actors attempt to drive a* ***wedge between traditional values and democracies. They claim that children need to be protected from LGBTIQ+ people, that LGBTIQ+ people get preferential treatment in sports*** *and other fields - to the detriment of others - and that Western liberal organisations or political groups are demonstrably weak because they surrender to “LGBTIQ+ propaganda”.*

We are therefore faced with a highly revealing example: an EU regulation imposing vague obligations, which the European Commission interprets through the lens of a report from a militant organization, the scope of which represents an undeniable threat to freedom of conscience, even on a crucial issue like child protection. There is, therefore, a very high likelihood that an internet service provider seeking to comply with European legislation could trample on *“the freedom to manifest one’s religion or belief, either individually or collectively, in public or in private*” in order to comply with EU legal obligations. During an election campaign, would it now be possible to express on the internet the conviction that the innocence of children must be preserved, that they should not be exposed to sexual content or ideologies? Would it be possible to voice a conscientious objection regarding the mutilation of adolescents? Will it be permissible to remind others that there are only two sexes, and that they are biological realities?

None of those questions can be answered with a blunt “no.” Moreover, the perverse effect of self-censorship, driven by the desire to avoid potential legal infringements, will likely lead to a

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of Regulation (EU) 2022/2065, available online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024XC03014 [last visit 08 November 2024].

[7] FIMI targeting LGBTIQ+ people: Well-informed analysis to protect human rights and diversity, available online at https://www.eeas.europa.eu/sites/default/files/documents/2023/EEAS-LGBTQ-Report-03-Digital%201.pdf [last visit 08 November 2024].

serious limitation of freedom of conscience for internet users in the EU in the frame of an electoral campaign.

5. CONCLUSION

This is a very concrete example of the harmful consequences of combining vague concepts, unclear definitions of competences, and a framework of hegemonic ideology, which leads to an obvious violation of freedom of conscience concerning personal and religious convictions that extend well beyond the EU's mandate. The legal ambiguity at play serves only to violate the law and turn it into a tool to impose, with great clarity and without opposition, a very specific ideology. It, therefore, unquestionably constitutes a clear threat to freedom of conscience and confirms a broader trend to erode national competences and individual rights – without a mandate – through spurious and arbitrary legal reasonings. A trend that must be urgently reversed in order to thwart any autocratic behavior on behalf of the European Union.