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Scalable Fairness

The legal tool against power

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Abstract

Can we consider the “fairness” principle a scalable tool for imposing the enforcement of fundamental rights horizontally on Big Techs? How can we really operationalise the direct proportionality between power imbalance and fairness duties in informational capitalism? This paper critically examines the evolving concept of fairness in privacy legal discourse, particularly in the realm of digital platform regulation and human rights enforcement, where the power of a few private entities has reached the level of quasi-states, creating immense dependence of users, customers, and citizens. This paper argues that being powerful (especially in the digital economy) can be defined as being in the position of a *gatekeeper* of the fundamental rights of other people (users, consumers, citizens).

The legal concept of fairness, a principle traditionally limited to implementing other legal principles (transparency, lawfulness) in specific contexts, is a critical yet underexplored tool in the context of privacy, data protection law, and the digital economy. The paper scrutinises the integration of fairness within the EU data protection framework, particularly underlining its explicit mention in Article 8 of the Charter of Fundamental Rights and its pivotal role as a guiding principle in the GDPR, as seen in Article 5(1). The study further extends to the US, where the principle of fairness, along with adjacent concepts like loyalty, forms an integral part of the privacy discourse. According to this paper, however, fairness should extend to the preservation of dignity in counterparty interactions to encompass a broader role in mitigating power imbalances in digital contexts.

In this paper, power imbalance (combining the theory of vulnerability of Martha Fineman and Martha Nussbaum’s theories of capabilities) is defined as the ability to satisfy/enable/deny other people’s fundamental needs and fundamental rights in an exclusive or quasi-exclusive way. The power imbalance can be measured, in other words, on the level of dependence that a powerless party has on a powerful counterparty. Central to the paper’s thesis is the argument that fairness should counterbalance power imbalance, especially in protecting the vulnerable party in a transaction. This concept is articulated through a ‘concentric layers of power’ model, wherein the obligations of fairness increase with the power imbalance, from mere “do no harm” to active fiduciary duties. In

basic peer-to-peer transactions (layer one), fairness is akin to good faith and to the principle of ‘do no harm’. As this balance shifts, such as in consumer-professional relationships (layer two), fairness demands a proactive stance against indirect harms, including deceptive practices, in line with the EU’s Unfair Commercial Practices Directive or Fair Information Practices. The discourse intensifies when examining situations of significant power asymmetry, such as in oligopolistic or quasi-monopolistic scenarios (layer three). Here, fairness assumes a more substantial role, not only in negating harm but in proactively ensuring access to fundamental rights. This transition is crucial in contexts where essential needs or rights depend significantly on a single contractual relationship or social contact. The analysis reaches its zenith with the State’s role (layer four), where its immense power necessitates an active approach to enforcing fundamental rights. A critical part of the discussion is the changing landscape of social media and Big Techs, which are moving from a powerful market position to a role akin to gatekeepers of fundamental rights (from layer three to layer four). This transition is particularly relevant in how these platforms influence fundamental rights, e.g., privacy and data protection, freedom of speech, thought, expression, and the general flourishing of our identity. This paradigm shift necessitates a re-evaluation of fairness, not just as a component of contractual dealings but as an essential mechanism for the horizontal application of human rights in scenarios where entities exert significant influence. In conclusion, the paper advocates for a more dynamic interpretation of fairness, one that scales in response to the level of power imbalance and embeds empathy. The paper calls for a reimagined legal framework that embraces this scalable fairness, ensuring that rights and dignity are upheld across all levels of power dynamics.

CCS Concepts

• Artificial Intelligence; • Law and Policy; • Power Imbalances;

Keywords

Fairness, Power imbalance, GDPR, Consumer Protection, AI, empathy

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1 Introduction or why fairness again?

Why fairness again? What else can fairness give us? There can be different parallel answers, but the crucial argument is that the

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fairness principle is as vague as powerful, as flexible as sharpened. As this paper will try to prove, its huge potential lies in the fluidity of the concept, which can be the real hammer with which regulators (under the EU digital rulebook but also *mutatis mutandis* in the US and other systems) can deal with Big Tech's monopolization of our fundamental rights.

John Rawls affirmed that all obligations arise from the principle of fairness.[1, p. 301] This paper will prove that this statement is not only correct but validated by the dynamic evolution of EU law and, in particular, confirmed by the recently enriched EU Digital Rulebook. Tracing the genesis, development, and consolidation of the principle of fairness – from a small revolution in contract private law to a *welfare* tool –, this paper will try to demonstrate that fairness is a scalable tool intrinsically aimed to act as a counterbalance to increasing forms of power imbalance between individuals and their diverse counterparties in the offline and online society.

In the digital age, a bunch of private entities—Big Tech platforms—have accumulated unprecedented power over the lives of individuals, extending far beyond the realms of commerce.[2], [3] This concentration of power creates significant dependencies, making individuals vulnerable to the decisions of corporations that often prioritize profit over fundamental rights [4], [5], [6]. As a result, the regulatory landscape faces a pressing challenge: how can the legal framework address this power imbalance while safeguarding the dignity and fundamental rights of individuals? [7], [8], [9]

The principle of fairness has long played a key role in data protection law scholarship, serving as a mechanism to uphold transparency, lawfulness, and accountability but also showing the potential to have an independent substantive value.[10], [11], [12], [13] Interestingly, the fairness principle can be found in several other EU legal fields, from consumer protection to competition law.[14], [15] Fairness is also one of the key principles (of the European Commission High-Level Expert Group) that inspires the interpretation of the EU AI Act (see recital 27) and is also a promising principle in the Data Governance Act and the Data Act.[16] The term “fairness” is also going to name one of the most promising possible additions to the EU digital Rulebook, the Digital *Fairness* Act.

Connecting the dots across these pieces of legislation, can fairness be used as a scalable legal tool to address the significant power imbalances in the digital economy? If so – as this paper argues –, how can this principle be operationalized to ensure fundamental rights are protected in a world where a few corporations exert outsized influence?

This article argues that fairness is not simply *relevant* but *essential* in mitigating the harmful effects of power imbalances in the digital age. We can go beyond that: fairness can be a transversal *escalator* that regulates every form of power dynamics in interpersonal relationships. Every human interference can qualify for a specific quantum of fairness. It is, however, important to remark that power is not purely interpersonal but also reflects structural, socio-political-economical factors.[17]

In sum, as the following Sections argue, fairness should be viewed as a scalable tool—one that adjusts in response to the growing contextual power of the counterparty (especially the digital platforms). The concept of scalable fairness involves progressively

increasing obligations on entities with greater power over the counterparty (contractors, consumers, users, citizens). In this framework, fairness duties expand from basic principles of “do no harm” in accidental (non-contractual) human encounters [18] to a more robust set of obligations for dominant digital platforms, where the preservation of fundamental rights and freedoms becomes paramount.

To build this argument, the article first examines the historical and evolving role of fairness in the digital law discourse, particularly in the European Union's General Data Protection Regulation (GDPR). It then explores the concept of power imbalance, drawing on theories of vulnerability, domination, and capabilities to conceptualise the uneven power dynamics between individuals and Big Tech. Finally, the article presents a model of scalable fairness, which imposes increasing responsibilities on more powerful entities, culminating in the proactive enforcement of fundamental rights. These layers of fairness are exemplified in 5 layers of fairness: indifference fairness, good faith fairness, fiduciary fairness, dignity fairness, and care fairness. These layers are qualified by the type of relationship between the parties (the powerful and the powerless) and are proportional to the level of power imbalance between them. The relevant layer for dominant big tech is “dignity fairness”. The use of empathy here is innovative, but as the last Section will prove, it can well describe the level of substantive fairness required for dominant (and quasi-state) entities in the digital market.

2 Before Fairness, power

Let's start with the motivation: power. I care about fairness as a scalable and powerful tool because the challenges of power imbalances in the digital ecosystem have become unprecedented and enormous. But what is power, and how can we define it?

The analysis of power reveals its complex and contested nature, particularly regarding its role in processes of social change and innovation.[19] Avelino outlines several points of contestation in power theory, including *power over* versus *power to*, centered versus diffused power, and empowerment versus disempowerment. These distinctions help clarify the different ways in which power is manifested and mobilized in societal transformations. A central focus is on power's dual nature: it can be both constraining and enabling. Power often operates through complex relationships, where one group may be constrained while another is enabled by the same structures.[19] These reflections resonate with non-domination theories of neo-republicanism,[20] which have also been applied in the privacy legal scholarship.[21]

Big Tech's infrastructural power can be viewed as a significant force in shaping the conditions under which individuals interact with the digital economy. Said differently, being powerful (especially in the digital economy) can be defined as being in the position of a *gatekeeper of the fundamental rights of other people* (users, consumers, citizens). It is however important to remark that the powerless-powerful dynamics is not a purely one-to-one interpersonal phenomenon, but it mirrors many components based on the social, historical, political, economic, and technological elements of a certain “encounter” between two entities.[4]

This is a form of “framing power,” as described by Mireille Hildebrandt, whereby tech platforms configure the architecture of

choices presented to users, steering them toward decisions that align with the interests of the platforms themselves.[22] This power goes beyond the provision of services—it manipulates the very landscape in which users make choices. Often, this involves creating unfair or coercive choice architectures where users are nudged into accepting terms or conditions that they would typically avoid but which they feel compelled to accept to access necessary services or mitigate vulnerabilities.

The definition of power here expands beyond brute force, encompassing the ability to shape preferences, expectations, and actions. As Hildebrandt notes, Big Tech's power lies in its capacity to reconfigure digital environments in ways that benefit those who control the platforms—typically, the companies that design and pay for these systems.[22] This understanding mirrors how power is understood in EU consumer law, where it's not merely about direct compulsion but also about influencing behaviour through subtle or indirect means. Rational choice theory suggests that individuals act based on the perceived costs and benefits of available actions within a given "choice set." [23] Big Tech, through its design of digital environments, controls these incentive structures, subtly guiding users toward choices that serve corporate interests while leaving users feeling they have no viable alternatives.

Julie Cohen's analysis of infrastructural power further illuminates the dynamics at play here.[24], [25] Cohen explains that Big Tech's power manifests through several mechanisms, including algorithmic optimisation, software developer kits (SDKs), and advertising dashboards. In each case, these platforms generate dependencies that extend across various sectors, making individuals, businesses, and institutions reliant on Big Tech's infrastructure to conduct everyday activities.[21]

With algorithmic optimization, platforms like social media curate content in personalized ways that encourage addictive behaviors and dependency. Not only do these algorithms influence what individuals see, but they also control how non-tech businesses—such as media companies or retailers—interact with consumers. In this way, Big Tech doesn't just manage content; it determines the flow of information, filtering and shaping user experiences to serve both corporate and business-to-business interests. This creates a direct dependency on the platform for both users and content providers.

The use of SDKs is another layer of this power dynamic. By offering essential infrastructure to non-tech entities, such as employers, healthcare providers, or banks, Big Tech positions itself as the gatekeeper to critical societal functions. For example, employers may use Big Tech's infrastructure to manage internal communication or process employee data, which creates a secondary dependency: employees rely on their employers, who in turn are reliant on Big Tech's services to manage their business. This layered dependency shows how deeply Big Tech's power is embedded in socio-economic systems.

Moreover, advertising dashboards allow platforms to exploit users' personal data for profit but also enable third parties—such as advertisers and businesses—to target users with precision, further manipulating consumer behaviour. In this context, users are not only subject to Big Tech's influence but also become targets for businesses that seek to exploit the same systems for commercial gain. The combination of these systems reinforces the self-reinforcing

loop of dependency described by Carissa Véliz,[26] where users' engagement with the platform generates more data, which is then used to further refine the user experience in ways that make it harder to leave the platform or resist its influence. Max Weber's definition of power as the ability "to carry out one's own will despite resistance" [27, p. 53] aptly describes how, even without physical coercion, the architecture of these platforms pushes users to act in ways that serve the platforms' interests. For instance, users may feel compelled to accept undesirable terms to access these virtual spaces, which have become integral to their personal and professional lives.

Vulnerabilities are further amplified by AI-driven systems that can track and exploit users' emotional states, behaviours, and preferences. As highlighted in previous research, the use of technologies such as emotion recognition and behavioural surveillance poses particular risks to vulnerable groups, including children and individuals with cognitive impairments.[4] The platforms' ability to manipulate emotions in real-time further entrenches users in these systems, making it increasingly difficult to exercise autonomy or resist the pull of these digital environments.

Ultimately, Big Tech's infrastructural power extends beyond simply offering services—it shapes the incentive structures and choice architectures that define the digital economy. By controlling the spaces in which users interact, Big Tech companies hold unparalleled power over not just the economic behaviours of individuals but also their social and emotional lives.

Over the last two decades, Big Tech companies have evolved into *quasi-state actors*, wielding enormous influence over not just the digital economy but over fundamental rights and freedoms. [28] Companies like Meta, Alphabet, and Amazon now control vital platforms for communication, commerce, and information exchange, placing them in a position where their decisions directly impact societal norms and democratic processes.[29] The extent of their power is so vast that their policies and algorithms can dictate what content is visible online, which ideas gain traction, and who has access to public discourse. This control has led to growing concerns that these platforms are not merely market actors but gatekeepers of fundamental human rights.

For instance, these companies influence how privacy is conceptualised and implemented in digital interactions, often setting terms that favour their own economic interests. Big Tech's role in controlling freedom of speech is another critical issue. Social media platforms now act as the *de facto* public square, where political discourse, activism, and social movements occur. However, these platforms also control the algorithms that prioritise certain voices over others, effectively determining whose speech is amplified and whose is silenced. This quasi-state function positions Big Tech as arbiters of public discourse, raising profound questions about fairness, accountability, and democratic participation.

3 The concept of fairness in the legal discourse

What legal tools do we have to face these unprecedented threats to our fundamental rights? Fairness is a promising answer. This section will analyze its value in the legal traditions and its renewed importance in the Digital Rulebook.

There are three main components of legal fairness from contract law to data protection law, from consumer protection law to the AI regulation: 1) respecting the legal procedures regulating a certain social/legal contact without any abuse of the law; 2) respecting the expectations of the counterparty; 3) assessing (and mitigating the adverse) impact of the social relationship on the counterparty. See, e.g., [11]. Interestingly, in cases of minimum social contact between the parties (two randoms people on the street), fairness is reduced to point 1, especially to respect the road rules, property rules, criminal law prohibitions, etc. (in sum: doing no harm and follow the basic solidarity rules). In case of a more significant power imbalance, the law puts a bigger burden on the expectations of the counterparty proportional to the power asymmetry (e.g., in peer-to-peer contract law, fairness as good faith is a respect of the parties' expectations, while in B2C contracts also, even the hidden or implicit expectations are important). As this section will prove, in cases of major power imbalances, point 3 comes into play: the assessment and mitigation of adverse impacts are also part of the fairness duties of the more powerful party.

3.1 Fairness in Private Law

Even before consumer protection law, fairness (or one of its conceptual twins, like loyalty or good faith) has always been part of contract law traditions,[30] acquiring an important role also in EU contract law.[31] In particular, fairness often intersects with the principle of good faith, a concept rooted in the civil law tradition, which requires parties to act honestly and fairly during the negotiation and performance of contracts.[32] The legal value of fairness in contract law has progressively emerged as a consequence of a more justice-oriented approach to contract law in the last centuries in Western legal traditions,[33] shifting the attention of the law from the procedures to the *content* of the contract, especially connected to the idea of power asymmetries and possible risks for the weaker party.[34]

The Draft Common Frame of Reference, the most meaningful scholarly effort towards the (never realized) dream of an EU Civil Code,[35, Bks 1, Chapter 9, Section 4.] portrays the importance of fairness in European legal traditions in private law, already indicating its scalable value. In particular, Paragraph II, 9:406 mentions the “unfair terms” and states two different standards of unfairness. In the case of “peer-to-peer” relationships between non-business parties, non-negotiated clauses are unfair just if they are “part of standard terms supplied by one party and significantly disadvantage the other party.” On the contrary, in the case of business-to-consumer relationships, every non-negotiated contractual clause introduced by the business is unfair if it significantly disadvantages the consumer. The stricter parameter of fairness in B2C contracts reveals the core concept of this paper: *the bigger the power imbalance, the bigger the fairness duties*.

That is why the emergence of consumer law (a special sector of private law aimed at protecting weaker parties in the modern age of commercial relationships) has witnessed such an added emphasis on the concept of fairness. It is no surprise that the concept of fairness is in the title of two of the most relevant pieces of legislation of EU Consumer protection law, the *Unfair Terms Directive* and the *Unfair Commercial Practice Directive*.

The Unfair Terms Directive (93/13/EEC) protects consumers from unfair terms in contracts that create a significant imbalance between the rights and obligations of the parties.[15] That directive is the first one to introduce a clear link between (un)fairness and significant power *imbalance* in the body of the law (See Article 3.1 “A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer” (italics added).

Furthermore, the Unfair Commercial Practices Directive prohibits misleading and aggressive commercial practices, which are seen as unfair because they distort the economic behaviour of the average consumer. Again, the concept of unfairness here can be inferred from the prohibited practices of sellers: every form of misleading or aggressive and manipulative communication qualifies as an expression of unfairness.[36] Furthermore, fairness can be qualified here as a duty to ensure the autonomy and, broadly speaking, the economic welfare of consumers[37] through the imposition of loyal communications from the seller to the consumer, removing even indirect or hidden forms of deception or manipulative influence.

3.2 Fairness in Data Protection Law

These broader conceptions of fairness in contract and consumer protection law offer a useful comparative framework for understanding fairness in data protection law, particularly as they share the common goal of addressing power imbalances between stronger and weaker parties. The GDPR’s fairness principle is closely linked to these ideas, particularly in Recital 42, which explicitly refers to the Unfair Terms Directive as a framework for assessing the fairness of pre-formulated consent declarations in the context of data processing agreements.[15]

The key difference, however, lies in the legal foundations and policy objectives of these frameworks. While consumer protection law primarily aims to protect consumers in the marketplace by ensuring that contractual terms are not exploitative, the fairness principle in the GDPR is more rooted in fundamental rights, particularly the right to data protection under Article 8 of the Charter of Fundamental Rights of the European Union. This rights-based foundation means that fairness in data protection law has an additional and stronger qualification. It is a tool for power imbalance (as well as in the EU consumer protection acquis) but aimed at protecting fundamental rights (including privacy, data protection, autonomy, and non-discrimination), going beyond mere economic considerations. In other terms, while the concept of fairness in consumer protection and contract law provides important procedural and substantive safeguards against power imbalances, fairness in data protection law takes on a broader role by incorporating a fundamental rights dimension.

Zooming into the GPDR, fairness is a central principle embedded in Article 5(1)(a).[10] However, despite its prominence, the GDPR does not offer a concrete definition of fairness, leaving its interpretation open to legal discourse.[12], [13] Historically, fairness in data protection has been understood primarily through a procedural lens. This procedural focus emphasises transparency, lawfulness,

and the compliance of data controllers with formal requirements, such as obtaining consent or providing data subjects with information about how their data is processed. While this procedural approach ensures that data processing is lawful and transparent, it does not necessarily ensure that the outcomes of such processing are fair to individuals.[13] Consequently, a broader understanding of fairness, which encompasses substantive fairness, is required to fully protect data subjects under the GDPR.

Clifford and Ausloos were among the first to point out the ambiguity surrounding the concept of fairness within the GDPR.[10] They highlighted that while fairness is often invoked as a critical component of data protection law, its precise role remains unclear. They argued that fairness should be understood as an overarching principle that underpins not only the transparency and lawfulness of data processing but also the broader implications for individuals whose data is being processed. This interpretation moves beyond procedural fairness, which focuses on compliance with formal rules, and instead incorporates substantive fairness, which considers the impact of data processing on individuals' rights and interests. Clifford and Ausloos thus called for a more expansive view of fairness in the GDPR.

In a previous article, the author had the opportunity to further develop this argument, advocating for an understanding of substantive fairness that is more effect-based, focusing on mitigating power imbalances between data controllers and data subjects.[12] Accordingly, the GDPR fairness should not be limited to the respect of the procedures in good faith (procedural fairness) but should also account for the expectations of the data subjects and an analysis of the adverse impacts that the data processing activity can bring to the data subjects, particularly in cases where vulnerable individuals or groups are disproportionately affected.[4, Ch. 3] According to that interpretation, fairness in the GDPR should serve as a tool to prevent the exploitation of power imbalances, ensuring that the outcomes of data processing do not unduly harm or disadvantage certain individuals.

Hauselmann and Custers recently provided further clarity on the distinction between procedural and substantive fairness within the GDPR framework.[13] They argued that while the GDPR primarily focuses on procedural fairness, substantive fairness is equally crucial in ensuring that data processing activities do not result in unfair outcomes, even if all procedural requirements are met. In their view, substantive fairness is necessary to address the power imbalances that often exist between data controllers and data subjects, particularly in situations where data controllers hold significant power over the collection, processing, and use of personal data. Drawing on principles from EU consumer protection and competition law, they identified key elements of substantive fairness, including good faith, the absence of detrimental effects, and the protection of individual autonomy.[13]

In the journey from private law fairness to data protection fairness, we observe a key difference: in data protection law, the power imbalance between data controllers and data subjects involves the fundamental rights of the data subject (privacy, data protection, autonomy, non-discrimination) and is potentially more impactful than B2C contracts. That is why the GDPR imposes even a duty to conduct impact assessments. The higher power imbalance can lead to higher data protection risks, and in cases of higher risks, the

GDPR imposes higher duties on the data controller (including the duty to conduct a DPIA).[38], [39], [40] Fairness is not static in this mechanism. Higher risks and higher duties imply higher scrutiny of all the components of data protection fairness (procedural compliance, respecting data subjects' expectations and managing adverse impacts for data subjects). In other terms, the obligation to conduct a DPIA is in direct contact with the principle of fairness, being both aimed at an impact-mitigation strategy in cases of higher power imbalances.[41]

The link between impact assessments and more severe power imbalances is also evident in the Digital Services Act, where Very Large Online Platforms have a duty to conduct a risk assessment on Fundamental Rights,[42] and in the AI Act, where AI deployers in cases of high-risk AI practices need to perform a Fundamental Rights Impact Assessments (in addition to the risk assessment that AI providers need to conduct).[43]

To simplify, if the law constantly sets an explicit duty to assess the impact of a social/legal contact (commercial contracts, data processing activity, AI-driven practices) on the weaker counterparty in cases of more impactful power imbalances. Accordingly, we could infer that when the law sets an explicit duty to assess the impact of a social/legal contact (commercial contracts, data processing activity, AI-driven practices) on the weaker counterparty, it means that the fairness principle in that legal context is not merely *negative* fairness (e.g., do not violate procedures, expectations and do no harms) but a *proactive* duty to assess the respect of fundamental rights and freedoms of the weaker counterparty in a given context.

In several national translations of the GDPR, the principle of fairness is translated with a term that semantically corresponds to loyalty (*loyauté* in French, *lealtà* in Italian, *lealtade* in Spanish).[12] The concept of loyalty, legally connected to the idea of fairness, resonates with the good faith principle in contract law but is also an important comparative element in the dialogue between the two sides of the Atlantic. In particular, Richards and Hartzog have developed a robust scholarship to promote the principle of *data loyalty* as an overarching concept that lawmakers in the US could and should adopt in privacy laws.[44], [45], [46], [47] As they define it, according to the data loyalty principle, "organizations should not process data or design technologies that conflict with the best interests of trusting parties".[46] Interestingly, Richards and Hartzog propose two dimensions of loyalty: a negative one (that they call "proscriptive", i.e. no conflict rules) and a positive one (that they call "prescriptive", including transparency duties and invalidation of attempted waivers).[44, pp. 998–999] In addition, similarly to the fairness principle described above, they also identify loyalty as a direct function of power imbalance.[44, p. 1006]: 'A duty of loyalty would be sensitive to people's vulnerabilities due to their exposure. The more vulnerable people become due to invited trusts, the greater loyalty the law would demand from trusted parties. Looking to vulnerabilities focuses on potential outcomes for the weaker party in modern information relationships'. They explicitly connect the magnitude of loyalty duties to the data subject's vulnerabilities. In sum, when comparing (US) loyalty with (EU) fairness, we should be aware of the different binding values of the two principles given that fairness is an institutionalized concept in the GDPR, while loyalty is a more flexible standard for potential future data privacy laws in the US; but we observe

interesting convergences. Both fairness and loyalty recognise the significant asymmetries of power between data controllers and data subjects and seek to mitigate the risks posed by these imbalances; both principles are directly proportional to the magnitude of the power imbalance between data subjects and data controllers and demand that, at the highest levels of risks and power asymmetry, an ex-ante evaluation of the data subject's vulnerability should inform the loyalty/fairness duties of the data controller towards the data subject. This analysis confirms the scalable and power-related nature of the fairness principle.

3.3 AI Fairness

Several scholars have recently tackled the growing challenge of ensuring that artificial intelligence (AI) systems make decisions that align with human conceptions of fairness.[11], [41], [48], [49] Reed's approach to AI fairness is deeply regulatory, acknowledging that while fairness is essential, traditional regulatory frameworks may fall short in addressing the unique complexities AI introduces. One of Reed's key arguments is that fairness in AI decision-making is inherently contextual and often emotional, meaning that achieving it cannot be reduced to rigid technical solutions alone. Instead, Reed suggests that regulation should compel AI developers and users to explain their understanding of fairness and justify how their AI systems align with that explanation in practice. These reflections interestingly lead us to connect fairness to empathy (See section below).

A significant point Reed raises is the mismatch between how technologists, on the one hand, and the public and regulators, on the other, conceptualize fairness. This gap between the technical and human perspectives poses one of the biggest regulatory challenges. Reed critiques current regulatory models, which often struggle with the nuance and adaptability needed to manage AI fairness effectively. In sum, the proposal is that regulators should demand that those developing and deploying AI not only design systems that claim to be fair but also provide transparent, context-specific justifications for how their AI systems implement fairness. [50], [48] This model ensures a flexible yet accountable approach, where AI systems are assessed based on how well they address the fairness risks they pose rather than through one-size-fits-all rules.

The Artificial Intelligence Act (AI Act) introduces fairness as a core principle that is crucial for ensuring the responsible development, deployment, and regulation of AI systems. While fairness is not explicitly defined within the text of the Act, its role emerges in several key provisions, particularly in addressing power imbalances and ensuring the protection of fundamental rights. Fairness in the AI Act has both substantive and procedural dimensions, reflecting the broader understanding of fairness found in EU law. The substantive aspect focuses on ensuring that AI systems do not create or perpetuate inequalities, prevent unfair bias, and promote non-discrimination and equal access to (AI-driven) services. This aligns with Recital 27 of the AI Act, which mentions fairness in relation to diversity and inclusivity and calls for AI systems to be designed in ways that avoid discriminatory outcomes. This requires developers to ensure that AI systems are fair not only in terms of how they are designed but also in how they impact different groups within society. This substantive fairness is grounded in promoting

equality of opportunity and ensuring that vulnerable populations are not disproportionately harmed by AI systems. Following the reflections above and the essential link between fairness duties and impact assessment duties, we can affirm that fairness is also embodied in provisions that promote accountability and transparency, particularly regarding high-risk AI systems. For example, Article 27 of the AI Act introduces a requirement for deployers of high-risk AI systems to perform Fundamental Rights Impact Assessments (FRIAs), ensuring that potential harms to fundamental rights are assessed before these systems are put into use. This anticipatory form of fairness is crucial in mitigating potential harm and protecting the dignity of individuals who are subject to AI-driven decision-making.

3.4 Fairness and Power in the EU digital platform regulations

Recent EU digital legislation reinforces the scalable logic of fairness by imposing differentiated obligations on dominant digital actors. The Digital Services Act (DSA) and Digital Markets Act (DMA) exemplify this approach. For instance, the DSA introduces heightened obligations for *Very Large Online Platforms* (VLOPs), including duties to conduct systemic risk assessments and adopt mitigation measures for adverse impacts on fundamental rights (Art. 34–35 DSA). Similarly, the DMA imposes tailored obligations on designated gatekeepers to prevent unfair practices and ensure contestability (Art. 3–6 DMA). These instruments reflect an emerging legal recognition that certain actors—due to their infrastructural role and societal reach—bear proportionately greater responsibilities.

The concept of scalable fairness builds on this legal intuition but pushes it further. Unlike the DSA and DMA, which apply only to specific market-based contexts, scalable fairness offers a general framework grounded in fundamental rights and relational vulnerability. It enables legal obligations to escalate across diverse domains—public, private, commercial, and interpersonal—based on power differentials, rather than institutional status alone. In this way, scalable fairness generalises the logic of asymmetric regulation beyond the market to capture the full ecosystem of digital dependency.

Existing legal doctrines, such as asymmetric regulation in economic law and the concept of abuse of dominance in competition law, already reflect a sensitivity to power imbalances. For example, the EU's Digital Markets Act (DMA) and Digital Services Act (DSA) impose enhanced obligations on dominant platforms, particularly Very Large Online Platforms (VLOPs), recognising their infrastructural power and societal influence. These obligations—ranging from heightened transparency to mandatory fundamental rights risk assessments—embody a differentiated regulatory approach based on power [62]. The model of scalable fairness proposed in this paper draws inspiration from, but also expands upon, this logic. Unlike sector-specific asymmetric regulation, scalable fairness is a cross-cutting principle grounded in fundamental rights that applies to both commercial and non-commercial relationships. It introduces a structured, tiered model of fairness that responds dynamically to different levels of dependency and vulnerability, not

only in economic terms but also in terms of relational dignity and autonomy.

This approach resonates with emerging scholarship on data power. Lyskey has articulated the normative imperative to address digital asymmetries not just through market correction but also by embedding rights-based constraints on dominant actors [60]. Similarly, recent scholarship by the author and Davola has explored how the DMA operationalises the concept of “data power” in legal form, providing a fertile ground for extending fairness as a guiding regulatory logic across digital ecosystems [61].

4 SCALABLE FAIRNESS: A MODEL OF PROGRESSIVE OBLIGATIONS

The concept of scalable fairness introduces a framework where fairness obligations increase in direct proportion to the power imbalance between interacting parties. The more power an entity holds in a relationship, the greater its responsibility to act fairly and protect the vulnerable party. This model is structured around five concentric layers, each representing a different level of relational power dynamics, vulnerability, and legal obligations. This is not a new policy proposal but a reorganization of the existing legal reality and an interpretational principle for future jobs.

4.1 Why these parameters?

The table below represents the layers of fairness and is qualified on the basis of different elements: type of counterparty, relational power dynamics, vulnerability level, and legal field relevant to qualify that layer of fairness. The first parameter, *type of counterparty*, is crucial because the nature of the party you’re interacting with largely determines the degree of fairness required. For instance, the expectations of fairness differ significantly when interacting with random individuals as opposed to professionals or large corporations. The second parameter, *relational power dynamics*, refers to the balance (or imbalance) of power within a relationship. When two individuals are relatively independent from each other, the fairness duties are limited. However, when one party becomes highly dependent on the other, the more powerful entity’s responsibilities increase substantially. The third parameter, *vulnerability level*, reflects the degree to which one party is susceptible to harm or exploitation. As vulnerability increases, fairness obligations must shift from avoiding harm to actively preventing exploitation. The fourth parameter is the *legal field* in which fairness applies, such as criminal law, consumer protection law, or data protection law. Finally, the *meaning of fairness* varies across these fields, from the prevention of harm to the proactive protection of fundamental rights.

4.2 The five layers of scalable fairness

In the outermost layer, labeled *Indifference Fairness*, the relationship involves random individuals with no established power imbalance or dependency (e.g., two pedestrians walking on the same sidewalk). The fairness obligation here is simple: “Do no harm”.[18] I call it “indifference” fairness because there is no meaningful link between the two people at stake, and so there is no specific relational power to notice, i.e., the parties are in a situation of independence.

In this case, the fairness principle would refer to a mere prohibition of interference. If such interference had to happen and if it produced quantifiable harm, both criminal law and private law (non-contractual liability or tort law) might play a role, depending on the context. In sum, fairness at this level is limited to respecting others’ basic autonomy and rights and ensuring that one’s actions do not interfere with another person’s freedom. It is, however, important to remember that even a random pedestrian on the street might have a role for fellow pedestrians in a vulnerable position, as imposed by the solidarity principle in different legal systems and at different legal levels.[51]

Moving inward to the next layer, we encounter *Good Faith Fairness*, which applies to interactions between peer-to-peer contractors. In these relationships, there is a degree of mutual interdependence, though the power imbalance remains low. The vulnerability in this context is also minimal, as both parties have relatively equal bargaining power. In such cases, fairness involves acting in good faith and respecting the mutual expectations that arise from the contractual relationship. This is a principle found in many civil codes, where contractual fairness ensures that neither party takes advantage of the other through deception or dishonesty.[31] The idea of good faith fairness is particularly important in the context of formal agreements, where the risk of exploitation is low but still present.

As we move to the third layer, *Fiduciary Fairness* comes into play, which governs interactions between consumers and professionals or suppliers. The concept of fiduciary comes from the fiduciary duties of all individual professionals towards weaker counterparties in different legal systems See, e.g., [52]. In these scenarios, the power imbalance increases, with the professional holding a position of authority or expertise over the consumer. Relational vulnerability also grows as consumers rely on professionals for essential services or goods. Fairness in this context involves ensuring that the professional or supplier does not engage in misleading, manipulative, or discriminatory practices. This principle is embodied in consumer protection laws and the GDPR, which mandate that businesses must not deceive consumers or exploit their position of trust. At this level, fairness requires transparency and a duty of care that extends beyond the contractual terms, ensuring that consumers are not taken advantage of due to their lack of expertise or bargaining power.

The fourth layer, *Dignity Fairness*, applies to dominant market players like Big Tech platforms, where the power imbalance becomes much more pronounced. The Section below further explains better why I called this layer “empathy” and what the role of empathy might be here. Here, users are highly dependent on the platform for access to essential services, such as communication, social interaction, or even economic participation.[21] The level of vulnerability in these relationships is significant, as users have little ability to negotiate with or escape from these dominant entities. In such cases, fairness goes beyond the principles of good faith or fiduciary duties—it extends to the protection of fundamental rights. Dominant platforms are responsible for ensuring that users’ rights to privacy, freedom of speech, and autonomy are not violated. The Digital Services Act (DSA) and Digital Markets Act (DMA) reflect these fairness principles, particularly for Very Large Online Platforms (VLOPs), which have a duty to prevent harm not only in

Table 1: Analysis of the different “layers” of Fairness, considering the type of relational power dynamics, the consequent vulnerability level, and the legal significance of fairness in those power-imbalanced contexts.

Layers	Name	Type of Counterparty	Relational Power dynamics level	Vulnerability level	Legal field in which fairness acts in this context	Meaning of fairness in this context
1	Indifference Fairness	Random person (e.g., another pedestrian on the same street)	Independence, indifference (no imbalance)	No relational vulnerability	Criminal law or tort law (non-contractual civil liability) in case of invasion, interference	Do no harm (do not attack other people on the street, do not invade their space, etc.)
2	Good faith Fairness	Peer-to-peer contractor	Interdependency (mutual dependence) (low imbalance)	Low relational vulnerability	Contractual fairness (Civil codes)	Act in good faith, respecting the mutual expectations in a contract or social contact
3	(Professional)Fiduciary Fairness	Seller/professional/supplier	Low Dependency (medium imbalance)	Intermediate relational vulnerability	Consumer protection fairness or GDPR fairness	Don't be misleading, not aggressive, no manipulation, no discrimination
4	Dignity Fairness	Dominant market players	High Dependency (high imbalance)	High relational vulnerability	DSA (VLOPs) – DMA fairness	Fundamental Rights online should not be violated also in third parties interaction on the platform, etc.
5	Social justice “fairness”	The State	Very High Dependency (maximum imbalance)	Very High relational vulnerability	Social justice and welfare – public administration	There must be a proactive enforcement of Fundamental Rights.

direct interactions but also in the actions of third parties on their platforms.

At the centre of the model lies *Social Justice Fairness*, the highest form of fairness, which applies to the state. In this context, the state wields the greatest power, and individuals are in positions of very high dependency on essential services such as welfare, healthcare, and public administration.[53] Fairness here is framed in terms of social justice, where the state must proactively ensure that vulnerable groups are protected and that their fundamental rights are enforced. The state's obligations extend beyond avoiding harm or exploitation—it must take active measures to promote the well-being and dignity of its citizens, particularly those who are most vulnerable.

Examining these five layers of scalable fairness makes it clear that fairness is not a static concept. Instead, it evolves in response to the changing power dynamics between the parties involved. From minimal obligations in random interactions to the proactive enforcement of rights by the State, fairness must be tailored to the specific context in which it operates. The more power one party holds, the greater their responsibility to act fairly, ensuring that the weaker or more vulnerable party is protected from harm, exploitation, and injustice.

5 FAIRNESS AND THE ROLE OF DIGNITY: A FRAMEWORK FOR ADDRESSING POWER IMBALANCES

The concept of fairness in legal discourse is often tied to objective standards of lawfulness, transparency, and the protection of fundamental rights. However, as the power imbalances between individuals and powerful entities like states or corporations deepen in the digital age, there is an increasing call for the integration of empathy into the frameworks that govern these relationships. Empathy, understood as the ability to see things from another's perspective and to be attuned to their specific cultural and social contexts, offers a profound mechanism for addressing vulnerability and mitigating the effects of inequality. In this chapter, we explore the role of empathy in law, with a focus on the concept of Dignity Fairness as it relates to power dynamics, particularly in the business-to-consumer and AI-provider-to-user relationships.

5.1 Empathy in legal discourse and its link with Fairness

Empathy has been explored in various legal fields as a tool to address vulnerability and power imbalances, especially in state-to-individual relationships. Scholars like Sofia Ranchordas and Malou Beck have argued that empathy can play a critical role in public administration, ensuring that decisions consider the specific vulnerabilities of individuals affected by public services.[54], [55] Similarly, studies in policing have shown that empathetic approaches can reduce discrimination and foster better relations with marginalised communities.[56] In these contexts, empathy functions as a corrective mechanism, addressing the inherent power imbalance between state actors and vulnerable individuals by making the system more responsive to the needs and experiences of those it serves.

However, the application of empathy in legal discourse has traditionally been fragmented and limited to certain contexts, such as researcher-to-subject dynamics or state-to-individual interactions. Rarely has empathy been considered in business-to-consumer relationships or the interactions between AI developers/providers and end-users, even though these relationships increasingly shape how individuals experience their fundamental rights in the digital age. The first scholar to indirectly link fairness to empathy is Reed affirming that fairness in AI decision-making (where power imbalance and literacy asymmetry is very significant) is inherently contextual and often emotional, meaning that achieving it cannot be reduced to rigid technical solutions alone.[48, p. 194]

This chapter argues that the concept of Dignity Fairness, where empathy is systematically integrated into legal frameworks, can address these neglected areas and provide a more flexible, nuanced approach to fairness.

Rather than expecting emotional resonance, Dignity Fairness demands anticipatory institutional design that systematically mitigates foreseeable harms and safeguards users' autonomy and fundamental rights. As digital platforms and AI systems become deeply embedded in our daily lives, the relationships between dominant market players and consumers exhibit profound power imbalances. In the Dignity Fairness layer, these powerful entities—like Big Tech platforms or AI service providers—hold immense control over users' personal data, online experiences, and even access to critical social, economic, and political rights. This power imbalance creates a context where users are especially vulnerable to exploitation and where fairness, as traditionally conceived, may be insufficient to protect their rights and dignity. Interestingly, in most of these cases, the new European Digital Rulebook foresees the duties of Fundamental Rights Impact Assessment (Art. 35 GDPR, Art. 34 DSA, Art. 27 AI Act).[42], [43], [57] The fact that in these contexts of higher power imbalance (and risks to fundamental rights), the EU law sets obligations to conduct impact assessments on fundamental rights helps us confirm that fairness is directly proportional to power. Accordingly, in these cases, fairness is a broader principle that involves not only mere contractual good faith or fiduciary duties but also an effort towards guaranteeing that all fundamental rights are respected on that platform/environment.

Empathy offers a way to humanise these relationships and move beyond the narrow confines of procedural fairness, such as transparency and lawfulness.[13] It introduces the possibility of *anticipatory governance*, where powerful entities take proactive steps to understand the vulnerabilities of their users and incorporate this understanding into their design and implementation of systems and services. By imagining oneself in the position of a vulnerable user and understanding the cultural, social, and psychological contexts in which they live, companies and regulators can anticipate the potential harms of their systems and adjust their practices to mitigate these risks.

For example, when designing an AI system that processes sensitive personal data, an empathy-based approach would require the developer to consider not only the legality of the data processing but also how the system might affect vulnerable groups, such as children, the elderly, or people with cognitive impairments. This perspective-taking can inform decisions about the system's transparency, consent mechanisms, and its safeguards against manipulation or discrimination.

Empathy should not only be seen as a moral virtue but as a practical legal tool. The project of introducing empathy into legal frameworks is still in its infancy, and existing scholarship often addresses empathy in field-specific applications without developing a systematic approach. One promising area where empathy could be formalized is in the realm of ex-ante legal assessments, such as Fundamental Rights Impact Assessments (FRIAs). In these assessments, empathy could play a pivotal role in identifying potential harms to fundamental rights before they occur by anticipating how certain policies or technologies might impact vulnerable groups. This anticipatory function of empathy could be key in regulating AI systems, where the effects on users are often complex, indirect, and difficult to foresee using traditional regulatory tools. Empathy has two core components: perspective-taking (imagining oneself in another's position) and considering the other's cultural and social context. Both aspects are necessary for creating a holistic understanding of the emotional and social dimensions of rights violations and for addressing the kinds of vulnerabilities that arise in the modern digital economy. As AI systems become more capable of personalizing user experiences, they also become more capable of exploiting individual vulnerabilities. Empathy offers a way to recognize and pre-emptively address these dangers.

While empathy can be a valuable heuristic to understand the lived experiences of vulnerable users, it functions here as a possible practical application of a broader normative principle—Dignity Fairness. This form of fairness entails proactive duties to respect, protect and facilitate the conditions for human dignity in asymmetrical digital environments.

6 CONCLUSIVE REMARKS: THE INCREASING QUANTUM OF FAIRNESS DEPENDING ON THE POWER IMBALANCES

This paper does not aim to propose an entirely new legal framework that would revolutionize how we address power imbalances in the digital age. Instead, it emphasizes that the tool we need is already embedded within our legal systems: fairness. This principle is not a novel concept but one that has been underutilized and vaguely

applied in both law and policy, particularly in the digital sphere. The goal of this paper is to highlight the untapped potential of fairness as a tool for addressing power imbalances and the vulnerabilities they create, particularly within the framework of EU digital law.

Fairness is a concept that is already proportional to power imbalances and the vulnerabilities of those involved in the relationship. From contract law to consumer protection law, data protection law, and beyond, fairness has always been about ensuring that the stronger party does not exploit its position to the detriment of the weaker party. However, as this paper demonstrates, fairness has been treated as an afterthought or a secondary principle in many legal contexts, particularly when it comes to digital platforms and the large-scale power dynamics they control. By underscoring how scalable fairness can act as a leverage point, this article suggests that fairness can and should be a keystone for mitigating the risks posed by dominant platforms and their outsized influence over individuals' digital lives.

Rather than requiring an entirely new legal mechanism, this paper argues that fairness is already embedded within existing laws—it is mentioned in various regulations, including the GDPR, the Digital Services Act, and the Digital Markets Act. However, it has often been applied narrowly without fully recognizing its potential to scale proportionally to the power imbalance in the relationship at hand. For example, fairness in the GDPR is often discussed in terms of transparency and lawfulness, but it can be expanded to demand proactive protections from dominant platforms that wield significant control over personal data. The same is true for consumer protection law, where fairness can be used to curb manipulative business practices and ensure that consumers, particularly vulnerable ones, are not exploited by unfair terms or algorithms that manipulate their choices.

This paper also connects fairness to the evolving U.S. discourse on data loyalty, as proposed by Richards and Hartzog. The idea of data loyalty suggests that platforms have a fiduciary-like duty to act in the best interests of their users beyond mere compliance with transparency requirements. While the concept of loyalty is still emerging in the U.S., it aligns with the scalable fairness framework presented in this article. Both concepts recognise that platforms, due to their power and control over data, must adopt higher ethical responsibilities. However, while data loyalty is still largely normative, scalable fairness can be readily leveraged within the existing legal framework in the EU, where the principle of fairness already exists but needs to be applied more rigorously and systematically.

The policy implications of this perspective are clear: fairness should be recognised as a dynamic and flexible tool capable of addressing the vulnerabilities of users, particularly in asymmetric digital relationships. Policymakers should focus on how fairness can be scaled according to the power dynamics between digital platforms and their users. This can be done by reinforcing the application of fairness within existing regulations, ensuring that dominant market players are held to higher standards of fairness, and incorporating fairness into ex-ante regulatory mechanisms such as Fundamental Rights Impact Assessments (FRIAs).

In conclusion, fairness is not merely an abstract concept but a pragmatic tool for protecting individuals from exploitation in the digital age. By recognising its inherent scalability, legal systems

can address power imbalances and ensure that fairness serves as the cornerstone of vulnerability-aware digital law. Rather than reinventing the wheel, the solution lies in fully utilising the potential of fairness within the frameworks that already exist—allowing it to evolve alongside the complexities of the digital economy and offering a more equitable and just application of law in a rapidly changing world.

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