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# Regulating Internet Platforms in the EU - The emergence of the 'Level Playing Field'

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## ABSTRACT

This paper analyses the European Union's regulatory policy on platforms. The first part of the paper looks at the how the EU formulates platform policy while the second analyses the proposed and existing laws that already cover them. The final part looks at the consequences of the level playing field as the guiding regulatory principle. The main argument is that EU regulatory intervention concerning platforms seeks to bring linear providers in line with platforms through the "level playing field" or, in other words, that the EU seeks to protect the incumbents and minimise disruption rather than enhance the value-creating potential of platforms.

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*Keywords:* EU IT Policy, EU Internet Law, Platforms, EU Telecoms Law

## 1 Introduction

### 1.1 The Platform Revolution

Few would disagree with the notion that Internet platforms<sup>1</sup> take a central place in the modern society. Whether they are search engines, social networks, user-generated websites, communication services, payments services or various cloud solutions, it is hard imagining the Internet without platforms. It is also clear that platforms are not just a distraction or amusement, but that they play an ever-increasing role in the modern economy, a role which arises out of their ability to improve the efficient use of available resources and their potential to facilitate cooperation between suppliers and customers by eliminating the middleman, which makes them desirable targets for regulatory intervention. At the

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<sup>1</sup> No common EU definition exists. In this paper we define platforms as multi-sided markets bringing different types of users together with a view to facilitate transactions between them.

same time, platforms are in control of staggering amounts of data, they make IP infringements easier than ever and they distribute illegal content with speed and efficiency, all of which makes them an easy target for lobbyists demanding swift regulatory solutions. The importance of platforms is not only the result of their present role but even more so of the role they begin to play in the economy of the future. In its highly influential *Wealth of Networks*,<sup>2</sup> Benkler talks about platform-driven social production transforming markets and freedoms and radically changing patterns of information production. In a 2016 paper,<sup>3</sup> Rifkin emphasises that Third Industrial Revolution will revolve around Internet technology and energy. That revolution will depend on the distributed manufacturing and the sharing economy. He too emphasises the importance of platforms in this process, seeing them as the key enabling factor. In *Platform Revolution*,<sup>4</sup> Parker, Van Alstyne and Choudary are emphasising that platforms are transforming the networked economy and that future businesses do not have a choice but to harness their power. In the *Fourth Industrial Revolution*, Klaus Schwab argues that “platform effect” is a significant part of the fourth industrial revolution whose benefits are as clear as its societal risks.<sup>5</sup>

These developments further increase the need for informed policy choices and better regulation. An efficient platform-driven economy is not a given fact but depends on good policy choices. Restrictive laws have a negative impact on platforms and decrease their potential as a motor for modern economy. But formulating good policy and writing good laws depends on understanding platforms. This, in turn, requires knowledge of not only the increasing role they play or the underlying economic principles but also the sheer diversity of different platforms and business models they use as well as the role they play in spurring innovation.

Although it is already common to see platforms as legitimate targets of policy and regulation - in other words, units which *ought to be* subject to regulation - this is relatively problematic both from the EU and from national perspective. A basic unit of IT regulation has never been a *platform* but information society service providers (ISSPs)<sup>6</sup> and telecoms networks and services. There is little doubt that platforms are already subject to regulation inasmuch as any corporate entity in the digital world is. The problem, however, is that access to electronic communications networks, compatibility, taxation, privacy and security and labour conditions, among others, are subject to legal intervention mainly, if not exclusively, designed for linear providers. The chief dilemmas that regulators face for those traditional models are not replicated for platforms. While experience already teaches us that applying

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<sup>2</sup> Yochai Benkler, *Wealth of Networks* (Yale University Press, New Heaven 2007)

<sup>3</sup> Jeremy Rifkin, “Smart Regions, Smart Cities: A Digitally Interconnected and Ecologically Sustainable Third Industrial Revolution Across the European Union”, available at <http://www.cor.europa.eu/BratislavaSummit/files/Smart-Regions-Smart-Cities.pdf>, accessed 01.06.2018.

<sup>4</sup> Geoffrey G Parker, Marshall W Van Alstyne, Sangeet Paul Choudary, *Platform Revolution: How Networked Markets Are Transforming the Economy and How to Make Them Work for You* (W. W. Norton & Company, 2016)

<sup>5</sup> Klaus Schwab, *The Fourth Industrial Revolution* (Penguin 2017), p. 13.

<sup>6</sup> In their role as sellers, posters of information, intermediaries, providers of telecoms infrastructure, etc.

linear models of regulation<sup>7</sup> to non-linear platforms is often difficult, we do not yet know if developing entirely new models is needed nor, indeed, if it is possible.<sup>8</sup>

As will be seen below,<sup>9</sup> subjecting platforms to regulation is neither self-evident nor necessarily good. In this paper, we argue that EU policy shift from intermediaries to platforms has already happened and we attempt to throw light on why we believe the new policy is going in the wrong direction - potentially inviting less investment in networks and less choice at higher prices in the services sector. We find that the reasons for this is that EU policy in both the carrier and the content layers<sup>10</sup> is increasingly based on the concept of “level playing field” - the need to give providers of services at different levels equal treatment. This policy began emerging in 2015, with the Digital Single Market Strategy (analysed in Section 2.1) and started to acquire a firmer shape in the 2016 Communication on Platforms (Section 2.2). Some elements of this policy are already being materialised in the new proposals on audio-video media services, telecommunications and copyright, which will be analysed in Section 3.

Resulting from the analysis of both the general EU policy documents and specific proposals, two claims are made in this paper.

The **first claim** is that the emerging EU policy on platforms is incoherent and occasionally in direct confrontation with the already-established and well-tested values arising from its regulation of information society services (Section 4.1). This lack of coherence arises from two mutually exclusive goals, both pursued at EU level. The first goal is the need to make platforms the powerhouses of the digital economy by “not weigh(ing) them down with unnecessary rules.”<sup>11</sup> This is the policy which contains both deregulation and simplification of the current laws and has already been pursued in the EU through the REFIT review process.<sup>12</sup> The second goal is the need to ensure “responsible behaviour”,<sup>13</sup> i.e. to make sure that platforms act responsibly towards all actors that use them. We find that it is impossible to effectively pursue both of these policy goals at the same time. The present EU ISSP-cantered Internet policy relies on the former. The new EU platform-based policy officially maintains the former but, in reality, introduces the latter. This creates a split which may have damaging effects on the media in the long run.

The **second claim** is that the underlying cause of the clash between the two policy goals arises from the introduction of the concept of level playing field as one of the new policy guidelines in key EU

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<sup>7</sup> Linear, in this context, refers to a broadcast or centrally distributed services. Non-linear refers to decentralized and on-demand.

<sup>8</sup> The CJEU *Uber* case has demonstrated this aptly. C- 435/15 *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, 20 December 2017, ECLI:EU:C:2017:981

<sup>9</sup> In particular see sections 1.2 and 4.1.

<sup>10</sup> The three layers that constitute the Internet are: the carrier layer (which conveys the signals), the middle layer (which comprises various interfaces and protocols) and the content layer (which represents Internet content: applications, text, images, etc.)

<sup>11</sup> Vice President Ansip, EU Commission Press Release, 25 May 2016, [http://europa.eu/rapid/press-release\\_IP-16-1873\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1873_en.htm), accessed 01.06.2018.

<sup>12</sup> On REFIT platform see [https://ec.europa.eu/info/law/law-making-process/overview-law-making-process/evaluating-and-improving-existing-laws/reducing-0\\_en](https://ec.europa.eu/info/law/law-making-process/overview-law-making-process/evaluating-and-improving-existing-laws/reducing-0_en)

<sup>13</sup> Commissioner Oettinger, *ibid*.

Internet law initiatives. We show that level playing field,<sup>14</sup> which has not been made part of the general Digital Single Market policy, has nevertheless made its way into a number of specific proposals tabled since 2016 and effectively imposed itself as one of the chief regulatory principles both in the carrier and content layers. This article claims that level playing field may indeed have specific regulatory uses but should not inform the EU platform policy on a more general level. This is because its use introduces the danger of particular industry sectors being artificially protected against disruption, while stifling innovation where it is needed.

## 1.2 What Are Platforms?

One of the major themes in the EU Digital Single Market law-making is the desire for the EU to become an advanced digital society. While many different ideas have been put forward as part of this effort, the red line connecting all is a high level of digitisation in the EU and high investment levels in the infrastructure and services that are needed to achieve this. In simple terms, the EU policy documents have traditionally emphasised the need for EU networks (both wired and wireless) to be more competitive compared to their American and East Asian counterparts, and for more services to be available for lower prices and to more users.

In order to achieve these goals, the EU had in the past two decades introduced a number of laws that apply to the Internet.<sup>15</sup> Significantly, until 2015, the EU regulation did not use the concept of ‘platform’ either in the *carrier* or the *content* layer of regulation. In the content layer, it operated with the definition of information society services (ISSs). These are defined in the EU as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”<sup>16</sup> As such, ISSs are subject to general laws that apply to the content layer, notably to Electronic Commerce Directive<sup>17</sup>, the Copyright Directive<sup>18</sup> and the General Data Protection Regulation<sup>19</sup>. Platforms do not feature in the *carrier* layer either. There, the Framework Directive<sup>20</sup> operates with the concept of “electronic communication networks” and “electronic communication services”, which refer to the networks conveying the signals and the services used to convey and route the signals.

Although the concept is intuitive and close to most Internet users, it is difficult to give a precise definition of platforms. In IT parlance, platforms normally mean hardware or software as a standard around which a system could be developed. More strictly, a platform is a system that can be programmed.<sup>21</sup> The EU itself does not attempt to provide a definition in any of the new policy documents discussed below but is satisfied to simply list what it believes are different types of

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<sup>14</sup> Level playing field, in simplest terms, is the idea that like services should be regulated alike.

<sup>15</sup> On various forms of this regulation see Savin, Andrej, *EU Internet Law* (2nd edition, Edward Elgar, Cheltenham 2017)

<sup>16</sup> Directive 98/34/EC amending Directive 98/48/EC, Article 1(2).

<sup>17</sup> Directive 2001/31/EC

<sup>18</sup> Directive 2001/29/EC

<sup>19</sup> Regulation (EU) 2016/679

<sup>20</sup> Directive 2002/21/EC

<sup>21</sup> Marc Andreessen, available at

[http://pmarchive.com/three\\_kinds\\_of\\_platforms\\_you\\_meet\\_on\\_the\\_internet.html](http://pmarchive.com/three_kinds_of_platforms_you_meet_on_the_internet.html), accessed, 01.06.2018.

platforms. More light is thrown on the issue in the 2016 Joint Research Centre’s technical report on the economics of platforms.<sup>22</sup> This document has some importance since it informed the Commission Staff Working Document and, through it, the 2016 Communication on Platforms (see section 2 below). In it, an economic definition is used: platforms are “two-sided” or “multi-sided” markets where “two or more types of users are brought together (...) to facilitate an exchange or a transaction”. Since this is closest to an operational definition, we will rely on it in this paper. In the 2016 Commission Staff Working Document accompanying the Communication on platforms,<sup>23</sup> and in line with an earlier attempt at a definition,<sup>24</sup> platforms are defined as “two-sided” or “multi-sided” markets “where users are brought together by a platform operator in order to facilitate a transaction”. This definition has been criticised,<sup>25</sup> since there are no obvious reasons why platforms must be two-sided or multi-sided. It is perfectly logical for a platform to facilitate communication and transaction *only* within members of one group (e.g. a gamers’ chat forum). As pointed out in the CERRE Report, this definition brings nothing distinct and gathers together a very large spectrum of disparate phenomena.

The importance of the two statements made above should not escape us: platforms are neither part of the extensive legislative body that otherwise covers the content and the carrier layers nor are they properly defined in the new policy instruments. The difficulties outlined above are not only semantic (i.e. disagreements concerning definition) but conceptual (disagreements concerning the subject of regulation). It is possible to defend the idea that the “Information Society Services”, presently already in wide use in EU directives, are more appropriate subjects of regulation. In that case, passing laws on platforms may be entirely misguided. It is, however, conceivable that there are reasons to consider “platforms” a better, more modern legislative tool that manages to capture the essence of the Internet better. At present, though, the practice as well as the academic community considers platforms simply to be one type of a much wider category of information society services.<sup>26</sup> This category sits at the application layer and includes such diverse types as social networks, cloud services, media sharing and publishing services.

As will be seen later, the question of whether platforms or ISSs ought to be the basic units of IT regulation is at the core of the problem which we describe here. In analysing this issue, we will first look at how general the EU policy on platforms has been in the latest policy documents, how that policy has been applied in specific proposals since 2016 and, finally, why we believe that approach to be misguided. We will, in each section, trace the level playing field as it appears.

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<sup>22</sup> Bertin Martens, JRC Technical Report, *An Economic Policy Perspective on Online Platforms* (2016), available at <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/economic-policy-perspective-online-platforms>, accessed 23.10.2016.

<sup>23</sup> European Commission, SWD(2016) 172

<sup>24</sup> Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, available at <https://ec.europa.eu/digital-single-market/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>, accessed 7.11.2016.

<sup>25</sup> de Streel, Alexandra and Larouche, Pierre, *An Integrated Regulatory Framework for Digital Networks and Services: A CERRE Report* (CERRE 2016), Section 4.3.3.

<sup>26</sup> See Riordan, Jaani, *The Liability of Internet Intermediaries* (OUP, Oxford 2016), p. 40-45

## 2. Formulating the EU Policy on Platforms

### 2.1 2015 Digital Single Market Strategy

In 2015, the European Commission initiated a thorough revision of its Internet policy. The resulting document, the 2015 Digital Single Market Strategy,<sup>27</sup> outlines the path to achieving a fully connected Digital Single Market.<sup>28</sup> This, in the Commission's view, is a necessity as the current market is "fragmented" and "incomplete". As part of its drive to create the "right conditions and level playing field" (Section 3), the Commission proposes "a fit for purpose regulatory environment for platforms and intermediaries" (Section 3.3). The Commission's view on this matter are condensed in little more than a page of text. The first part (3.3.1) simply reiterates the important role that platforms play in modern society. This is done without invoking present EU or national laws which cover the subject, without questioning the adequacy of such laws and without questioning whether it is even meaningful to talk about platforms as subjects of regulation. The text does not summarise the current regime, does not claim that it is in any way inadequate nor does it name individual directives which, in its view, ought to be subject to revision.

The second paragraph (3.3.2) is somewhat more illuminating. It begins with a statement supporting the present intermediary liability regime:

*[the principle that] Internet intermediary service providers should not be liable for the content that they transmit, store or host, as long as they act in a strictly passive manner has underpinned the development of the Internet in Europe.*

This refers to the general European regime for insulating intermediaries from liability. In 2000, the present Electronic Commerce Directive had been adopted. Following the trend in the United States,<sup>29</sup> this text adopts the general idea that passive intermediaries (those which do not exercise editorial control) should be insulated from liability for transient acts (Article 12), caching (Article 13) and hosting (Article 14) until the moment they are notified of the illegal nature of the content. Furthermore, Article 15 ensures that intermediaries are not required to actively monitor in pursuit of the illegal content. A *bona fide* intermediary is, thus, only liable *after* the notification and only if it fails to remove the incriminating content.

The rest of the short paragraph of DSM's Section 3.3 contains two important ideas. The first is that, where illegal content is identified, intermediaries ought to be *more* efficient in removing it. The second is that the overall level of protection from illegal material ought to be thoroughly examined with a view to potentially introducing new measures to tackle illegal content, while keeping the freedom of expression and freedom of information as fundamental rights. In the Commission's words,

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<sup>27</sup> European Commission, *A Digital Single Market Strategy for Europe*, Brussels, 6.5.2015 COM(2015) 192 final

<sup>28</sup> On the lack of coherence in the DSM see Savin, Andrej, "The 2015 EU Digital Single Market Strategy" 2016 Revision & Regnskabsvæsen, (Original Text in Danish), No. 10. Available at SSRN: <https://ssrn.com/abstract=2842327>

<sup>29</sup> Section 512 of the 1998 Digital Millennium Copyright Act (DMCA) for copyright violations and Section 230 of the 1996 Communication Decency Act (CDA) for all other issues.



intermediaries might have to exercise “greater responsibility and due diligence”. The Commission calls this “a duty of care”.

Finally, summarising its future actions, the Commission promises to launch an assessment which will cover i) transparency in search results, ii) platforms’ usage of data, iii) relations between platforms and suppliers, iv) inter-platform movement and v) illegal content. Other than point v), nothing said in the preceding paragraphs leads a reader to believe that actions quoted are in any way necessary.

In addition to the somewhat random selection of targets for analysis, both ideas on which Section 3.3 is based are highly questionable. First, the notion that intermediaries are not efficient *enough* in removing illegal content and that procedures are “slow and complicated” is not supported, either in respect of harmful content (e.g. child pornography, terrorism) or in respect of copyright violations. Google alone reports to have removed 887 million [sic] URLs in the year running from Oct 25, 2015 to Oct 25, 2016.<sup>30</sup> And, whereas an argument could be made that removal procedures could be made better in terms of targeting and efficiency as well as avoiding removal of legitimate sites, this is far from the Commission’s claim that not enough unwanted content is removed or that it is not removed fast enough.

The second idea - that of increasing intermediaries’ duty of care - is not new.<sup>31</sup> That idea, however, has not been effectively tested either in the United States or in any of the Member States. On the contrary, intermediary liability regime has never effectively been subject to serious questioning or suggestions of revision on either side of the Atlantic. Here, the Commission’s commitment to ISP liability looks merely like lip service. In fact, the document already suggests at least three new ways to undermine it. First, “assessment of online platforms” is proposed. Second, and in addition to the former, it is suggested that “new measures” may be needed (presumably, over and above what Articles 12-15 ECD allow). Third, it is suggested that ISPs may need to exercise a “duty of care”. This concept is not defined and neither is it part of the EU *acquis* on internet law. All three ideas are radically different than the present position arising from the E-Commerce Directive.

Finally, the Commission is conflating two concepts without truly explaining its position: platforms, to which the whole title is dedicated, and intermediaries, whose role and actions are discussed in the text. The reader is thus led to believe that all intermediaries are platforms or, at least, that it is self-evident that intermediaries are platforms. At least three possible policy positions could, in theory, be taken. First, intermediaries and platforms are, essentially, one and the same and ought to be treated as such. Dealing with platforms means dealing with intermediaries. Second, intermediaries and platforms are distinct and regulating the former need not mean regulating the latter. New laws should be possible which do not affect intermediaries at all. Third, since it is not yet clear to what extent these two concepts are interchangeable it is sensible to treat them jointly at least until a clearer picture emerges. This seems to be the position which the Commission presently takes, since it says that it will analyse platforms “in tandem” with any other measures to tackle illegal content that it may propose. This, at least, is understandable in that a lack of knowledge concerning platforms’ impact and operation

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<sup>30</sup> <https://www.google.com/transparencyreport/removals/copyright/>, accessed 25.10.2016.

<sup>31</sup> See Doug Lichtman and Eric P. Posner, “Holding Internet Service Providers Accountable”, in Mark F. Grady, Francesco Parisi (eds.) *The Law and Economics of Cybersecurity* (CUP, Cambridge 2008), p. 221. The argument here is that more stringent ISP liability may make sense on economic grounds.

warrants caution. On the other hand, if one removed the word “platforms” from Section 3.3, the remaining text could effectively be applied to intermediaries, prompting the question of the Commission’s level of understanding of this matter. The importance of this sleight of hand is in the fact that entirely new regulatory regime applied to *all* intermediaries is suggested *because*, the Commission believes, some platforms ought to be regulated.

## **2.2 2016 EU Communication on Platforms**

The 2016 Communication on Platforms<sup>32</sup> follows up on the Commission’s 2015 promise to reassess the role of platforms. Having first discussed the importance of platforms in rather general terms, the Communication introduces four guiding principles which are meant to serve as a basis both for further research and for future action. These are 1) creation of a level playing field for comparable digital services, 2) responsible behaviour of online platforms to protect core values, 3) transparency and fairness for maintaining user trust and safeguarding innovation and 4) open and non-discriminatory markets in a data-driven economy. Since these four policy goals each correspond to a specific legislative action, planned or contemplated, we will analyse them in turn. Only the first item falls squarely in the “carrier” field of regulation - the telecommunication rules that apply to the underlying wires. Items 2 to 4 belong to the “content” part of EU Internet regulation.

The creation of a **level playing field** has already been indicated in the 2015 DSM Strategy Document in the telecommunications context. There, rapid penetration of unregulated over-the-top (OTT) services (such as messaging or VOIP) has been labeled a threat to heavily regulated incumbent telecommunication operators. OTT companies benefit from the telecommunication services (fixed or wireless) into which they are not expected to invest. Traditional companies, on the other hand, are required to comply with a host of regulations (regarding e.g. pricing, interconnection or universal service) while suffering what they often call unfair competition from the OTTs. In the present Communication, still keeping the discussion within the telecommunications context, the Commission repeats its DSM position. That position is based on the recognition that OTT services are not only largely dominant in certain markets (that for messaging, for example) but also that they constitute a “functional substitute” for traditional telecommunication services. The Commission’s starting position is that any regulation should avoid putting a disproportionate burden on either new or traditional services. “As a general principle”, the Commission states, comparable services ought to be subject to the “same or similar rules” while reduction of present regulation should be “duly considered”.

The Commission’s proposal has two essential elements. First, it suggests to deregulate the existing telecommunication services as part of its 2016 proposal for revising telecommunication rules.<sup>33</sup> This would effectively completely remove some (although not all) rules that are presently only applicable to traditional services. The second element is an attempt to introduce a set of “limited” and “communication-specific” rules. These would be applicable to all comparable services, irrespective of

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<sup>32</sup> EU Commission, Communication: Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, Brussels, COM(2016) 288/2

<sup>33</sup> For an overview see [http://europa.eu/rapid/press-release\\_IP-16-3008\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3008_en.htm), accessed 01.06.2018. For the recast of present rules in the form of a Directive on the European Electronic Communication Code, see <https://ec.europa.eu/digital-single-market/en/news/proposed-directive-establishing-european-electronic-communications-code>, accessed 01.06.2018.

whether they are provided by OTT or traditional companies. This is a combined approach, blending deregulation with introducing special rules applicable to new services. As of 2018, some of the ideas have been put in place in the new proposals (see section 3.3 below) but the overall scope of the extension of regulation to OTTs has been limited.

The second guiding principle is to ensure that online platforms “**act responsibly**.” Here, the Commission believes the problems to fall into five conceptually distinct categories. The first one relates to the content harmful to minors and hate speech. Little is said about this approach, other than it is addressed through a proposal to amend the Audio-Visual Media Services Directive as sector-specific regulation.<sup>34</sup> That proposal does contain improved rules on the protection of minors as well as against incitement to hatred. The second part concerns allocation of revenues for copyright-protected content. The main concern here is that value generated by new forms of content distribution might not be equally distributed. The Commission then promises to address this through sector-specific copyright regulation, the proposal for which came later in 2016.<sup>35</sup> The proposals are not limited to this, however, and include an attempt to address fair remuneration of creators<sup>36</sup> and bring improvements to the enforcement regime. The final elements are voluntary cooperation mechanisms which the Commission promises to look into, with the aim of depriving those who engage in *commercial* infringements with their revenue streams in line with a “follow the money” approach. The latter is not explained in the document and neither are references made to other sources, leaving the readers to guess. The term is occasionally found in legal literature but its IP enforcement variant seems to have originated in the EU itself.<sup>37</sup> It is also to be found in a draft voluntary agreement on online advertising and IPR.<sup>38</sup>

The third part concerns possible voluntary measures which online platforms are encouraged to make in combatting terrorism, hate speech and child abuse.<sup>39</sup> The fourth issue is tightly connected with the previous one and addresses the platforms’ concern that any voluntary measures that they engage in might lead to loss of liability protection afforded by the Electronic Commerce Directive. The Commission promises to provide “more clarity” on what such measures might do to their liability but it does not reassure the potentially interested parties that their voluntary actions would preserve their protection. The final point concerns the efficiency of the notice-and-action procedures but here the Commission proposes to take no action before reviewing the AVMSD, copyright and voluntary initiatives. The Commission ends with a pledge not to change the present intermediary liability regime. It then promises:

- an updated AVMS Directive regime on protection of minors and hate speech applicable to video platforms,

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<sup>34</sup> The proposal has been made public in May 2016, 25.5.2016, COM/2016/0287 final,

<sup>35</sup> A proposal for a Directive on the copyright in the Digital Single Market had been published in September 2016, 14.9.2016., COM/2016/0593 final

<sup>36</sup> Already addressed in a 2015 Communication on a more modern copyright framework, COM(2015) 626 final.

<sup>37</sup> See EDRI’s overview of it at <https://edri.org/follow-money-copyright-infringements/>, accessed 01.06.2018.

<sup>38</sup> Draft voluntary agreement, available at [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8974&lang=en](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8974&lang=en), accessed 01.06.2018.

<sup>39</sup> See sections 3.1 and 3.2 below.

- a new copyright package affecting distribution of copyright content by online platforms,
- measures to encourage self-regulation by online platforms,
- possible guidance on platform liability in cases where they introduce voluntary good-faith measures.
- a review of the notice-and-action procedure.

The third guiding principle is that of fostering **trust, transparency and fairness**. It consists of two parts, one focusing on “citizens and consumers”, the other to “business environments”. The main part of the discussion in the section dedicated to citizens and consumers is taken up by the Commission’s concern that platforms’ current data collection practices require more transparency. Further to this, the Commission believes that online ratings need to be transparent and that consumer and marketing law, too, need to play a role in increased consumer transparency. In spite of its concern for data protection issues, the proposals listed at the end of the section concern mainly consumer issues. Here, the Commission promises a revised Regulation on Consumer Protection Cooperation,<sup>40</sup> as well as revised guidance on the Unfair Commercial Practices Directive.<sup>41</sup> The list of proposed actions ends with principles and guidance on eID interoperability, promised to appear in 2017 (for tabled and adopted proposals as of 2018, see Section 3 below) and a general encouragement to the industry to “step up” voluntary efforts.

The part on business environments concentrates on platforms’ role as entry points for many small and medium enterprises. Here, the businesses have notified a number of unfair commercial practices some of which are highlighted as “most common” in the text. The Commission sensibly points out that business models of large numbers of SMEs are reliant on a small number of online platforms but it promises only a fact-finding exercise concerning “B2B practices in the online platforms environment”, the purpose of which is to find if current regulation (including competition law) is adequate.

The promise had been followed up with a 2018 proposal for a Regulation on fairness and transparency for business users of platforms.<sup>42</sup> The Regulation would apply to online intermediaries and search engines which provide services to business users. While it is irrelevant whether the providing platforms are based in the EU, the Regulation would only apply to business established in the EU and targeting EU consumers that avail themselves of these platforms’ services. The proposed Regulation is designed to put intermediation services under a set of measures increasing transparency and fairness.

The main purpose of the measures is to increase transparency in all situations where platforms are tempted to use their position as intermediaries to their own advantage by, for example, unexplained changes in terms and conditions, delisting of goods without reason, unclear ranking criteria by both commercial websites and search engines. The Proposal does not prohibit the mentioned practices directly but aims, instead to make them more transparent. While the accent on increased transparency goes some way toward providing milder and more measured responses to the problems outlined in the article, the main objection – that disparate platforms are addressed in a single instrument – remains.

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<sup>40</sup> Proposal published in May 2016, 25.5.2016 COM(2016) 283 final

<sup>41</sup> Published in May 2016, 25.5.2016 SWD(2016) 163 final

<sup>42</sup> Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, 26.4.2018 COM(2018) 238 final

This is particularly obvious in the controversial move to demand that search engines disclose their ranking criteria (Article 5(2)), a move which will undoubtedly be fiercely debated in the Proposal's move through the legislative process.

The final principle concerns **switching and portability of data** among platforms. The concern here is that users could be tied to a platform simply because it is difficult to move to another one. In response to the public consultations, the stakeholders expressed desire for portability of data and common data transfer standards. The Commission promises, rather vaguely, to look into technical standards that might facilitate such portability. Separately, the Commission also promises to look into data ownership and usability of data.<sup>43</sup>

Looking past the platitudes concerning the importance of platforms and their role in the Digital Single Market, the Communication leaves a couple of impressions.

First, the Commission believes that securing the future of platforms involves legislation affecting both content *and* carrier layers. This is almost certainly true, since convergence between services that have previously been confined to separate layers requires a change of strategy. The Commission promises a revision of the telecommunications package, although the package proposed in September 2016 does not contain dramatic changes to the treatment of OTT players which are currently not subject to telecoms regulation. The only marked change is that OTTs which connect to a traditional network will be treated as voice telephony when they do so - a change not expected to affect their main function which is off the traditional voice telephony.<sup>44</sup> On the other hand, a suspicion is growing that the planned ePrivacy Directive revision,<sup>45</sup> might change that further in respect of privacy rules to which OTTs are subject.<sup>46</sup> Increasing the regulatory burden for OTTs coupled with limited deregulation may go some way towards creating a level playing field but it is hard to see a dramatic change in the present proposals for a new Telecoms regulatory framework or for a new ePrivacy Regulation.

Second, the Commission believes that policy approaches that “respond directly to the challenges, and which are flexible and future-proof” are needed, rather than overarching generalised intervention. This ought to be combined with self-regulation and co-regulation, where possible. It is possible to agree with this statement in principle. Experience has shown that regulatory restraint in uncertain situations makes more sense than sweeping intervention.<sup>47</sup> This declared intention, however, is in contrast with rather general and overarching proposals discussed in sections 3.1 and 3.2 below.

Third, the Communication does not overtly rely on economic evidence. The Commission's Joint Research Technical Report<sup>48</sup>, analysing key areas including search rankings, the use of data in

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<sup>43</sup> The GDPR formally introduces data portability in Article 20.

<sup>44</sup> See Proposed Directive establishing the European Electronic Communications Code, 12.10.2016., COM(2016)590.

<sup>45</sup> The proposal has been made public in January 2017: Proposal for a Regulation on Privacy and Electronic Communications, Brussels, 10.1.2017 COM(2017) 10 final. Although it does bring OTTs into the picture to a limited extent, this may be changed in either direction in the final version.

<sup>46</sup> See Wall Street Journal, “EU Looks to Level Regulatory Playing Field With Apps, Telecoms”, August 15, 2016, available at <http://www.wsj.com/articles/eu-looks-to-level-regulatory-playing-field-with-apps-telecoms-1471275483>, accessed 01.06.2018.

<sup>47</sup> See, in general, Chris Reed, *Making Laws for Cyberspace* (OUP, Oxford 2012)

<sup>48</sup> See footnote 22 above.

platforms and intermediary liability, is inconclusive on how platform economics affects policy choices. This is further reflected in the Commission Staff Working Document accompanying the communication on online platforms.<sup>49</sup> This paper, taking cue from the JRC Technical Report, emphasises platforms' increasing role, their diversity and the importance of promoting innovation but does not give hard evidence to support policy choices.

The final point concerns the level playing field itself. Two of the Commission's four guiding principles are based on level playing field - principles 1 (level playing field) and 2 (acting responsibly). These have already resulted in specific legislative proposals. As we will argue below, these proposals' use of level playing field can be questioned.

The 2016 Communication on Collaborative Economy,<sup>50</sup> drafted at the same time as the Communication on platforms and complementing it, gives a broad outline of Community policy in areas important for the collaborative economy. Interestingly, in the section on market access, the Communication takes a conservative approach to "collaborative platforms" in classifying them as ordinary information society services. Commenting on the liability regimes, Section 2.3 of the Communication repeats that online platforms are exempted from liability in their capacity as information society services, provided that they fulfil the criteria that Electronic Commerce Directive imposes on them. One notable element that can be discerned from the Communication is that the Commission states that the ISP liability regime can co-exist with other elements of platform regulation. This is apparent both in Section 2.2 of the Communication, where platforms are classified as ordinary ISSs and in Section 2.3, where they are exempted from ISP liability.

Unrelated to the Commission's Communications, the European Parliament issued a resolution on Online Platforms in June 2017.<sup>51</sup> The resolution, although without binding legal force, nevertheless contains vague references to the level playing field. Item 41 asks for the Commission to ensure a level playing field "between online platform service providers and other services with which they compete," including B2B and C2C platforms. No definition of the concept is given but a vague reference to "one size fits all" approach to regulation not being appropriate is made, suggesting that any solutions need to be "tailor-made". The Parliament suggests that measures should concentrate on harmonisation and reduction of fragmentation, although no references are made to the areas where the Parliament believes this fragmentation exists. The concept of technology neutrality is then referred to, without implying that it is equal to the idea of "level playing field" but while suggesting that it needs to be observed in any attempt to level the playing field. This is a surprising statement since technology neutrality usually acts in opposition to any attempt to achieve a level playing field. Technology neutrality as a principle acts to apply the *same* legislation to all services irrespective of any (dis)advantages that arise from the application of a particular technology and with a view to ensuring that legislation is not modified with each new technology change. Level playing field, on the other hand, asks for *sector-specific intervention* in order to overcome differences that exist in playing field: copyright laws which apply stricter standards to online video distribution platforms, media laws that apply differently to digital platforms, telecoms laws that only apply to OTT providers, etc. Item 45

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<sup>49</sup> European Commission, SWD(2016) 172

<sup>50</sup> European Commission, Communication, A European Agenda for Collaborative Economy, Brussels, 2.6.2016 COM(2016) 356 final

<sup>51</sup> 15 June 2017, 2016/2276(INI).

emphasises the importance of investment in telecoms infrastructure, which is an issue entirely within the scope of the legislation on the carrier layer and otherwise unconnected with the level-playing-field problem on platforms.<sup>52</sup> Finally, in the section on the EU's place in the world, the Resolution calls for the European institutions "to ensure a level playing field between EU and non-EU operators, for instance in respect of taxation and similar matters". The desire to achieve a level-playing-field here is as mystifying as it is vague. No explanation is given as to what a level playing field here might mean. Taxation is given as an example, without further references and no indication concerning "other similar matters" is given.

It is difficult to escape the feeling of confusion in various institutions' views on platforms. While the Commission's two documents show a difference in approach, the Parliament's Resolution demonstrates a lack of understanding of the underlying issues.

### ***2.3 The 2017 Communication and the 2018 Recommendation on Tackling Illegal Content Online***

On 28 September 2017, the Commission published its Communication on Tackling Illegal Content Online, with a subtitle "Towards an enhanced responsibility of online platforms".<sup>53</sup> The purpose of the Communication is to lay down the guidelines and principles for online platforms "to step up the fight against illegal content online". The Communication, which is not directly in response to the other documents discussed in this section, seems to have been driven by Parliament's resolution and an earlier promise to look into platforms made in the 2015 DSM document. The Communication does not make a direct reference to "level playing field" (the words do not even feature in the text itself) but there can be little doubt that is the ultimate intention, since the language matches those of earlier communications.

The purpose of the Communication is elaborated on in the final section, where the Commission refers to its letter of intent of 13 September 2017, announcing measures to ensure "swift and proactive" detection of illegal content inciting hatred, violence and terrorism. Although the Communication does not seem to be in any way limited to these areas, the impression given is that these and not copyright are the focus areas. The Communication warns in specific that it covers the "whole range of content" while allowing sector-specific differences.

The Communication begins by emphasising its commitment to the current general legal framework for removing content online - Articles 12-15 of the E-Commerce Directive. Surprisingly, however, the claim that a "harmonised and coherent" approach to removing illegal content does not exist at present in the EU is almost immediately made as is a call for a "more aligned approach" for content removal procedures. It is unclear what that approach might consist in.

Two groups of issues are of particular interests.

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<sup>52</sup> Since it is not platforms that engage in infrastructure-based competition but telecommunications networks and services providers which may be but usually are not platforms.

<sup>53</sup> 28.9.2017., COM(2017)555 final. See also Commission's follow-up recommendation, 1.3.2018 C(2018) 1177 final.

First, the Commission spends considerable effort clarifying the relationship between potential proactive measures which the platforms might take in ensuring its compliance with the guidelines and the liability which arises under Article 14 ECD for ISPs who possess “actual knowledge” of illegal activities. In particular the Commission seems interested in the use of advanced technologies to detect illegal content. A provider which had been pressured into proactive removal would, under the normal operation of Article 14 ECD, become knowledgeable and, by extension, responsible. It is unclear why the Commission then states that such proactive removals, which it also openly encourages, “do not in and of themselves lead to a loss of the liability exemption.” The Communication itself quotes CJEU’s *eBay* case,<sup>54</sup> which states precisely that they do lead to loss of liability:

*The situations thus covered include, in particular, that in which the operator of an online marketplace uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well as a situation in which the operator is notified of the existence of such an activity or such information.*

A proactive operator, therefore, loses the liability insulation from the moment the facts are uncovered. Such an operator has no incentive of engaging in monitoring activities and would not be persuaded by the Commission’s request that platforms should “detect, identify and remove” the content online.

Second, the Communication discusses safeguards against over-removal and abuse in a very vague fashion. This includes mechanisms for contesting a notice and against bad-faith notices. Both are brief and neither makes references to the balancing of fundamental rights which they inevitably entail. The section on the prevention of re-appearance (“take-down, stay-down”) are more detailed and require active measures preventing re-uploads.

The Communication suffers from a fundamental flaw - its guidelines refer to different types of platforms and different types of content that do not necessarily lend themselves to similar treatment. In spite of open references to the need for sector-specific differences to be considered, the notions about how different platforms might need to be treated differently are vague. While few would argue that platforms need to have efficient and swift mechanisms for the removal of child pornography or openly terrorist content, this is not so in respect of almost every other item the Commission mentions. The role that platforms need to play in the removal of hate speech, copyright violations or counterfeit goods was and remains contested. While it is not inconceivable that platforms may need to play a role there, this is not an issue that is easily dealt with through guidelines and soft law, particularly not in the presence of legislation that directly contradicts these guidelines. Equally worrying is the Commission’s guiding notion that “what is illegal offline is also illegal online”. This is manifestly untrue for at least intellectual property issues and free speech. Different jurisdictions have different legal standards and placing online the content potentially illegal in one state does not in and of itself render it illegal in another. Finally, the Commission’s document seems to be in favour of the volume of removals as opposed to a serious insight as to which of these removals are needed and how to

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<sup>54</sup> C-324/09 *L’Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L’Oréal (UK) Ltd v eBay International AG et al*, [2011](#) ECR I-06011



balance various fundamental rights (such as the freedom of information, freedom of expression or privacy).

The Recommendation issues an open threat (Preamble item 41) that, unless satisfactory results are achieved through voluntary measures, binding acts of Union law would be passed. While the EU lawmakers do occasionally resort to similar warnings, tend national ones even more so, the Commission has very rarely issued open threats in the past resorting, instead, to relatively vague statements about further action being evaluated. The change in language possibly signals a shift in determination.

### 3. Post-2015 Proposals

The policy documents discussed in the previous section do not give a clear impression that the Commission intends to make drastic changes. Not even the most dramatic statements (such as the indication in the 2015 Digital Single Market Strategy that intermediaries ought to do more to fight illegal content on the Internet) leave the impression that there is an imminent change in any of the framework directives. Quite the contrary, the Commission openly states not only that it does not intend to change the ISS liability regime but also that it does not intend to come up with a proposal for a Directive on platforms. A look at the fundamental changes proposed to variety of internet laws, however, give a completely different picture.

In December 2015, following on the pledges made in the 2015 DSM Strategy, the Commission submitted the first three of a number of proposals on reforming the Digital Single Market.<sup>55</sup> This was followed by more proposals in May 2016<sup>56</sup> and culminated in a call for the reform of copyright laws<sup>57</sup> and telecommunications laws<sup>58</sup> that came in September 2016. The whole process will continue throughout 2018. The essence of these proposals has already been suggested in the 2015 DSM Strategy: making the *carrier* layer more competitive (which was the target of the September 2016 reform) and completing the Digital Single Market in the *content* layer (which was the target of the December 2015 and the May and September 2016 reforms). In this section, we will analyse only those proposals from the current wave of cyberlaw reform which directly reflect the Commission's policy on platforms (as distinct from Information Society or telecoms services) and which are clearly guided by the desire to achieve level playing field. We will, in turn, look at platforms in the content layer (audiovisual sector and user-generated context) and platforms in the carrier layer (OTT services).

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<sup>55</sup> Proposed Directive on contracts for the supply of digital content (COM(2015) 634 final), Directive for sale of online and other distance goods (COM(2015) 635 final) and Regulation on cross-border portability of content (COM(2015) 627 final).

<sup>56</sup> This includes proposals on a Regulation on geo-blocking (COM(2016) 289 final), a Regulation on a cross-border parcel delivery (COM(2016) 285 final), a revised Regulation on consumer cooperation (COM(2016) 283 final), new guidance on the application of UCP Directive and a proposal for the new AVMS Directive (discussed in Section 3.1 below). Overview of proposals available here: [http://europa.eu/rapid/press-release\\_IP-16-1887\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1887_en.htm), accessed 01.06.2018.

<sup>57</sup> A summary available here: <https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules>, accessed 01.06.2018.

<sup>58</sup> A summary available here: [http://europa.eu/rapid/press-release\\_IP-16-3008\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3008_en.htm), accessed 01.06.2018.

Three separate regulatory frameworks at both national and EU level apply to Internet-related services and need to be examined. The electronic communications services (ECS) framework, covers the *carrier* layer. The ECS are, by definition, only those services which cover the conveyance of signals but not the content that these signals carry. The ECS are covered in what can best be described as telecommunications law.<sup>59</sup> Two frameworks apply to the *content* layer. The audio-video media services (AVMS), or broadcasting services, are those media services where the service exercises editorial control over content. This covers traditional television and broadcasting but also on-demand services.<sup>60</sup> Finally, all other electronic services which do not strictly fit within either of these two categories can be classified as information society services,<sup>61</sup> and are covered in the E-Commerce Directive. A service may, in fact, perform several functions and thus be subject to more than one framework at the same time.

### ***3.1 Level Playing Field on the Content Layer I - Platforms with Editorial Control***

The Audio Video Media Services (AVMS) Directive<sup>62</sup> provides EU-wide coordination of national laws in the audio-video sector. The main purpose of the Directive is the synchronization of national legislation on all audio and video media in a range of coordinated issues.<sup>63</sup> The basic provision of the Directive is the home country control principle, which requires the application of the law of the state of origin to all audio-video services otherwise not harmonized under EU law. In addition to that, the Directive brings minimum harmonisation of issues including incitement to hatred, disability access, broadcasting major events, promotion of EU works, commercial communications and protection of minors.

There are two remarks of importance. First, AVMS Directive is one of the two framework directives that cover the *content* layer (the other being the E-Commerce Directive). Some platforms are covered by both directives while other by one only. Second, the 2010 AVMS Directive applies, in principle, to both linear (traditional broadcasting) and non-linear (on-demand) services with some rules reserved for each of these categories. This means that all on-demand<sup>64</sup> broadcasting by providers with editorial responsibility falls within the scope of the Directive *and* is subject to rules of the home state. If, on the other hand, the provider does not act with editorial responsibility, the AVMS regime does not apply but the general intermediary liability exception of the E-Commerce Directive does.<sup>65</sup>

A proposal for a substantially amended Directive was submitted in May 2016<sup>66</sup> and will be subject to significant debate and probable amendments in its course to adoption. The Proposal brings three significant changes: first, it extends the scope of the present Directive to user-generated content

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<sup>59</sup> Although the technical term in the EU is electronic communications law.

<sup>60</sup> See Section 2 above.

<sup>61</sup> See Section 1 above.

<sup>62</sup> Directive 2010/13/EU

<sup>63</sup> This is different from Satellite and Cable Directive, the purpose of which is to clarify where and how satellite and cable providers should clear copyright, Directive 93/83/EC, OJ L 248, 6.10.1993.

<sup>64</sup> Which is in article 1(a)(g) defined as “*provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.*”

<sup>65</sup> Articles 12-15 ECD.

<sup>66</sup> 25.5.2016, COM(2016) 287 final, hereafter “Proposal”.

offered on video-sharing platforms (video-on-demand). Second, it demands that 20% of works provided on on-demand platforms now be of European origin and, finally, that countries of destination now may apply levies to video-on-demand services targeting their territories. We will analyse each in turn.

The **first change** is the extension of the scope of applicability to user-generated video platforms. The 2010 Directive Article 1(a)(i) clarifies that AVMS services are either a TV broadcast or an on-demand service. In either case, it is necessary that the service is “under the editorial responsibility of a media service provider.” If such responsibility is absent, the services are not subject to AVMS Directive, although they may be under the E-Commerce Directive. The Proposal adds a new category of video-sharing platform services in Article 1(aa). These services involve user-generated videos where the platform provider does *not* have editorial responsibility. The Directive classifies them as such if they store large amounts of programmes or user-generated materials for which there is no editorial responsibility, if the provider organises the material, if the purpose is viewing by the general public and if electronic communication networks are used. These services are, then, subject to AVMS rules, including the new rules analysed below. The final result of the Proposal would be that a service falls under the scope of AVMS Directive either when they are linear or non-linear (where there is editorial responsibility) or as user-generated services (where there is none).<sup>67</sup> This means a very significant extension of the material scope of directives to video platforms.

The **second change** is the requirement, introduced in the new Article 13(1) that

*providers of on-demand audiovisual media services under their jurisdiction secure at least a 20% share of European works in their catalogue and ensure prominence of these works.*

The requirement is not only that this content be carried but also that it is ensured prominence. The 2010 Directive already has a rule (Article 17) requiring that broadcasters reserve at least 10% of transmission time for EU works. Under Article 13, on-demand services are required to promote the production of and access to European work “where practicable”. The Impact Assessment document accompanying the proposal<sup>68</sup> also considered the option of giving more flexibility to providers in the way they implement the present provisions. In the public consultation on the Directive,<sup>69</sup> however, only 6 Member States and 3 national authorities were in favour of making the current rules for on-line providers more stringent whereas the majority was for maintaining the status quo. Explaining the decision to opt for what is now Article 13(1) in the Proposal,<sup>70</sup> the Commission seems to focus on the fact that maintaining the present rules has so far worked for linear broadcasters, but it does not give convincing reasons why on-demand broadcasters ought to be subject to such rules.

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<sup>67</sup> See, to this effect: ERGA Opinion on AVMSD Proposals, [ERGA \(2016\)09](https://ec.europa.eu/digital-single-market/en/news/erga-opinion-avmsd-proposal), 5 October 2016, available at <https://ec.europa.eu/digital-single-market/en/news/erga-opinion-avmsd-proposal>, accessed 01.06.2018.

<sup>68</sup> 25.5.2016 SWD(2016) 168 final

<sup>69</sup> Synopsis report of the Public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - A media framework for the 21st century, available at <https://ec.europa.eu/digital-single-market/en/news/report-public-consultation-review-audiovisual-media-services-directive-avmsd>, accessed 01.06.2018.

<sup>70</sup> See p. 31 of the Impact Assessment, op.cit.

The **third change** is the move from the principle of the country of origin to the country of destination for certain aspects of on-demand services. Recital 33 of the 2010 Directive introduces the country of origin principle and emphasises the central role it plays in AVM services:

*The country of origin principle should be regarded as the core of this Directive, as it is essential for the creation of an internal market. This principle should be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.*

Article 13(2) of the Proposal, however, says that states of origin may require AVM services “under their jurisdiction” to financially contribute to the production of European works. In addition to that, Member States may require providers of on-demand audiovisual media services “targeting audiences in their territories, but established in other Member States” to make financial contributions to the production of European works. Such contributions are to be based only on the revenues earned in the targeted Member State.

The majority of the stakeholders rejected the move to the state of destination.<sup>71</sup> It remains unclear what prompted the Commission’s partial move to the state-of-destination principle. The Impact Assessment document<sup>72</sup> as well as Preamble to the Proposal<sup>73</sup> emphasise that the current AVMSD foresees stricter requirements for TV broadcasters than for on-demand services. The Impact Assessment then proceeds to state that such a different treatment is no longer justified in view of changing consumer habits. The evidence quoted is mainly a general rise in on-demand services. But this, in and of itself, cannot be equated with a need to regulate two classes of services in a similar manner. On the contrary, Kenny & Suter<sup>74</sup> emphasise in their 2016 study of the Proposal that video-on-demand services have had very little impact on traditional distribution models. Not only is the overall share of these services low (remaining below 10%) but their impact on traditional services has remained minimal. While VOD services have grown, this growth has not happened at the expense of traditional TV. But, even if it had, it is not clear why disruption in this area should be followed by regulator’s attempt to bring the two at equal level.<sup>75</sup> Similarly puzzling is the absence of financial arguments for the introduction of the country of destination principle.

Overall, the Proposal tilts the playing field in favour of traditional linear media and against platforms without giving proper economic or social reasons. The extension of the field of application to on-

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<sup>71</sup> See Public consultation, op.cit., Section 5.

<sup>72</sup> Page 7, paragraph 2.2.2.1.

<sup>73</sup> Paragraph 32.

<sup>74</sup> Robert Kenny & Tim, “An unravelling of the Digital Single Market, A Review of the Proposed AVMSD” (Communications Chambers 2016), p. 14

<sup>75</sup> On the contrary, there is evidence that VOD should be supported in their fight *against* content monopolies. Susan Crawford, for example, argues in *Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age* (Yale University Press, Yale 2014) that telecommunications monopolies in broadband distribution in the USA have effectively minimised potential disruption coming from VOD services after their successful mergers with content producers.

demand platforms may make sense where these platforms perform a largely similar function as their linear counterparts and operate in the same market and where regulation favours them. While this may be occasionally true, a more thorough market analysis had not been conducted. The proposal, as it is, gives the impression that the reaction is not prompted by a specific need to react but a knee-jerk reaction to the threat of "over-the-top" providers to incumbents.

### ***3.2 Level Playing Field on the Content Layer II - Intermediaries as Platforms***

The EU Copyright Directive<sup>76</sup> has needed reform for a long period.<sup>77</sup> The Directive, while successful in principle, potentially no longer adequately answers to the challenges of modern digital society.<sup>78</sup> An important reform had been proposed in September 2016 in the form of a Directive on Copyright in the Digital Single Market,<sup>79</sup> a Regulation on Copyright in Online Broadcasting<sup>80</sup> and two proposals affecting disabled users. The Proposal is not a comprehensive reform of EU copyright laws (indeed, it leaves the InfoSoc Directive intact) but rather a gradual revision of the present regime.

The Proposed Directive on Copyright in the Digital Single Market affects platforms directly. Two articles, in particular, will have a significant impact on them, if adopted in their present form. The first, Article 11, concerns "protection of press publications" from digital use and applies to all those who link to news sites and show 'snippets' or previews of digital news articles. Since linking to news sources is one of the main activities on many platforms, this article might significantly alter the present situation. The second, Article 13, concerns uses of protected works on platforms that provide "large amounts" of user-generated works such as video platforms. These platforms are required to monitor and filter content in cooperation with the rightholders.

The main provision of Art. 11 of the Proposal is to grant "publishers of press publications" reproduction right and right of communication to the public<sup>81</sup> for the digital use of their publications and for the duration of 20 years from the date of publication. Press publications are defined as regularly updated periodicals such as newspapers or magazines. The article essentially creates a new neighbouring right the effect of which is to demand clearance for all rights to news sources that are not otherwise covered by copyright exceptions. This has proved very controversial with all but the publishers themselves,<sup>82</sup> since the range of situations in which news sites are used or linked to is wide.

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<sup>76</sup> Directive 2001/29

<sup>77</sup> The reform was initiated with a 2008 Green Paper and continued with a review in 2014.

<sup>78</sup> On various topics in need of reform see Stamatoudi, I. and Torremans, P., *EU Copyright Law, A Commentary* (Edward Elgar, Cheltenham 2015), Ch. 17

<sup>79</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593.

<sup>80</sup> Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes - COM(2016)594.

<sup>81</sup> Articles 2 and 3 of the InfoSoc Directive, respectively.

<sup>82</sup> See e.g. "Google tax" on snippets under serious consideration by European Commission, Ars Technica, 24.3.2016, available at <http://arstechnica.co.uk/tech-policy/2016/03/european-copyright-google-tax-on-snippets/>, accessed 01.06.2018.

The fear is that common practices, such as showing ‘snippets’ of news in search results or social media posts would have to be cleared, thus significantly eroding the usefulness of the Internet.

The difficulties with Article 11 arise from the sheer number of situations in which news articles could be used on the Internet and from the Article’s ability to catch even the most cursory uses and its refusal to recognise different contexts in which a news article could be used or linked to on the Internet. A typical example is hyperlinking which includes ‘snippets’ of information, usually constituting the title and the first couple of sentences of an article, such as might appear when a search engine is used. The Preamble (point 33) makes it clear that the new right “does not extend to acts of hyperlinking which do not constitute communication to the public”. The draft, however, does not define when a hyperlink is a communication to the public, leaving the problem of hyperlinking which includes ‘snippets’ of news open. The CJEU case law throws some light on this. In the *Svensson* case,<sup>83</sup> the Court said that “*the provision on a website of clickable links to works freely available on another website does not constitute an ‘act of communication to the public’*”. The case arose specifically in the context of news articles from one site being linked to from another. In *GS Media* case<sup>84</sup>, which is a continuation of *Svensson*, the Court said that hyperlinking to a work with the full knowledge of the lack of a rightholder’s consent, or by circumventing the protective measures, constitutes communication to the public, irrespective of whether hyperlinking is carried out for profit or not. A rebuttable presumption of knowledge is introduced for those who link for profit. That would mean that hyperlinking past a paywall would be illegal but that is not the context in which Article 11 would be relevant anyway.

Article 11, as informed by the CJEU case law would be difficult to apply to typical situations involving the use of news articles on the Internet. The most common of these involves the presentation of a ‘snippet’ of news. Applying the CJEU *Svensson* case might mean that such use is lawful, since the case is very clear on this. A contrary view would be that, while hyperlinking might not be an act of communication to the public, showing a preview of an article is. Such an interpretation would severely limit most platforms’ use of news articles, since social media and search engines typically present small previews. A different and more reasonable interpretation, on the other hand, would narrow the scope of application of Article 11 to those situations where a full news article is used (rather than just a hyperlink).

Art. 13 essentially creates an obligation for certain service providers to put in place appropriate technologies and demands the conclusion of agreements with rightholders. It introduces content filtering obligations for “information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users.” The Directive does not define what a provider storing a large amount is. While it is clear that typical user-generated sites such as Facebook or YouTube would fall within this definition, it is less clear if others would but, if one applies an analogy with the newly defined video-distribution platforms from the proposed new AVMS Directive, they probably would.

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<sup>83</sup> See cases C-466/12 *Svensson* and C-348/13 *BestWater*.

<sup>84</sup> C-160/15 *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker*, 8 September 2016, ECLI:EU:C:2016:644

The Article has two obligations. The first is to cooperate with the rightholders, making sure that the agreements concluded with them are functional and that works or other subject-matter identified by rightholders are removed. In order to do that - and this is the second obligation - the service providers need to apply appropriate measures, such as “use of effective content recognition technologies.” The service providers need to communicate the functioning and deployment of measures to the rightholders.

Through the second obligation, Article 13 effectively introduces filtering and monitoring requirements for platforms. Paragraph 38 of the Preamble suggests that licensing agreements would only be needed in respect of actions that do not fall within Article 14 exceptions. On the other hand, it suggests that “implementing effective technologies” of filtering and monitoring “should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.” Both monitoring and filtering are problematic in terms of current EU law. Article 15 of the E-Commerce Directive specifically prohibits general monitoring within the scope of issues covered by Articles 12-14. This means that an internet service provider is not meant to actively monitor traffic on its networks but is, instead, supposed to react to individual notifications of violations. Potential liability arises only upon a valid notification to a provider without actual knowledge being ignored.

In terms of filtering, the CJEU *SABAM* case,<sup>85</sup> interpreting the E-Commerce, InfoSoc and Copyright Enforcement Directives, stated that general obligation to filter would be illegal. In paragraph 38 of the *Scarlet Extended* judgment,<sup>86</sup> the Court was clear in terms of what it considered illegal general monitoring in terms of Article 15 of the E-Commerce Directive:

- first, that the ISP identify, within all of the electronic communications of all its customers, the files relating to peer-to-peer traffic;*
- secondly, that it identify, within that traffic, the files containing works in respect of which holders of intellectual-property rights claim to hold rights;*
- thirdly, that it determine which of those files are being shared unlawfully; and*
- fourthly, that it block file sharing that it considers to be unlawful.*

This fits remarkably well with what Article 13 attempts to introduce as a general obligation for platforms. All of this points to a simple and inevitable conclusion: Article 13 of the Proposal is incompatible with the rest of EU law applying to Digital Single Market. A conscientious observer of the developments would not be able to escape the feeling that news conglomerates in the first (Article 11), and large rightholders in the second (Article 13) have influenced the Commission towards introducing the provisions which would bring the playing field to a level.

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<sup>85</sup> C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, 16 February 2012, ECLI:EU:C:2012:85

<sup>86</sup> C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 24 November 2011, ECLI: :EU:C:2011:771

### ***3.3 Level Playing Field on the Carrier Layer - OTTs as Platforms***

A telecommunications operator is, as a rule, subject to telecoms laws. If the same operator is vertically integrated with a TV broadcaster or is in a contractual relationship to offer this broadcaster's programs as part of a package offered to consumer, such a provider will also be subject to AVMS framework. Finally, if the provider offers an Internet portal or engages in sales over the Internet, it will also be subject to ISS regulatory framework. It has been recognised in the EU as early as 1997<sup>87</sup> that the services represented by three regulatory frameworks are, in fact, converging. This means that technologies allow one and the same service to be provided over different networks, subject to different regulatory frameworks. Thus, a text message can be sent as a traditional SMS - subject to telecommunications laws, or as an instant message over an Internet service - subject to ISS framework. A video can be broadcast as a traditional program - subject to AVMS Directive, or it can be streamed over the Internet - subject to ISS framework.

The EU has no direct response to the challenge of convergence in spite of the issue being present in its policy debate for almost two decades. On the other hand, traditional telecommunications operators have in recent years been pointing out that over-the-top (OTT) services - which can be described as all services delivering content over the Internet but not involved in the carrier layer itself<sup>88</sup> - compete unfairly with traditional services. The claim is that telecommunications companies are subject to very stringent rules arising from the telecommunications layer - rules relating to interconnection, quality of service, privacy, conveyance of signals, consumer protection and others. At the same time, OTT services are only subject to the much less onerous rules arising from the AVMS and ISS frameworks. As users switch to OTT alternatives to regular telephony, messaging and other services, revenues of telecommunications companies decline.

This status of affairs has prompted calls from traditional telecommunications companies<sup>89</sup> to either deregulate telecommunications even further or to begin regulating OTT services. Such calls should not be dismissed lightly as data at EU level shows rapid decline in investment in telecommunications framework and services.<sup>90</sup> The fear is that OTT services have little to no incentive to invest in wired fibre networks or wireless 5G networks while telecommunications companies would but for the fact that stringent regulation and stiff and possibly unfair competition may prevent them from reaping the benefits from otherwise high-risk projects. There is a growing body of literature calling for a comprehensive revision of the three frameworks, which are increasingly seen as unfit to answer the demands of modern Internet services.<sup>91</sup>

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<sup>87</sup> Green Paper on the convergence of the telecommunications, media and information technology sectors and the implications for regulation - Towards an approach for the information society [COM\(97\) 623 final - Not published in the Official Journal](#)

<sup>88</sup> Examples of OTT services are numerous - VoIP telephony, instant messaging, video and music streaming and others.

<sup>89</sup> See, e.g. Anne-Marie Allouët, Sylvie Le Franc, Marie-Noémie Marques & Luisa Rossi, "Achieving a Level Playing Field between the Players of the Internet Value Chain" Digiworld Economic Journal, no. 93, 1st Q. 2014, p. 99.

<sup>90</sup> See, e.g. BEREC Opinion on the Review of the EU Electronic Communications Regulatory Framework, 10.12.2015, BoR (15) 206

<sup>91</sup> deStreel and Larouche, for example, call for abandonment of the present "silo" approach which divides telecommunications, linear and non-linear audiovideo services and information society services with a



The EU telecommunications framework, which covers the *carrier* layer, dates to 2009.<sup>92</sup> The reason for the Commission's intervention lies in systemic problems in the telecommunications sector: lack of investment, fierce competition between the incumbents and the disruptive OTTs, large discrepancies in Internet availability (both broadband and mobile), penetration and use in poorer parts of the EU and convergence between content and carrier. In September 2016, it proposed a fundamental change to the framework.<sup>93</sup> The Proposal merges the four out of the five existing directives<sup>94</sup> into a comprehensive European Electronic Communications Code (EECC)<sup>95</sup> but also changes the substance of regulated matter significantly. In the EECC Proposal, the Commission openly calls for a level playing field between traditional operators and the OTTs.<sup>96</sup> While the EECC Proposal is a complex document touching on many different areas of telecommunications law, it is possible to explain what role the level playing field plays in it.

The first important change is the redefinition of the term “electronic communication service”. The provision currently in force<sup>97</sup> defines electronic communications services as those which consist wholly or mainly in the transmission and routing of signals on electronic communications networks. Audio-video media and other *content* transmission is specifically excluded. Since OTT services are content and not carrier services, they do not fall under EU telecommunications laws. The Proposal, however, no longer covers just the conveyance of signals but also all internet access services and all “interpersonal communication services”.<sup>98</sup> The latter are defined<sup>99</sup> in the following paragraph as services

*normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s); it does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service;*

Interpersonal communication services are divided into number-based services and number-independent services (each of which is subject to some special rules in addition to those that apply to both categories). The distinction is made based on whether a service connects via a public telephone network (wired or wireless) or not. Services based on editorial control or content transmission only

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regulation based on horizontal layers with one each for infrastructure and digital services. See De Streel, A; P. Larouche, An integrated regulatory framework for digital networks and services, CERRE Policy Report, 27 January 2016

<sup>92</sup> Consolidated version available here: <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/Copy%20of%20Regulatory%20Framework%20for%20Electronic%20Communications%202013%20NO%20CROPS.pdf>, accessed 01.06.2018.

<sup>93</sup> A summary of the current ambitions is available at: [http://europa.eu/rapid/press-release\\_IP-16-3008\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3008_en.htm), accessed 01.06.2018.

<sup>94</sup> Framework (2002/21), Authorisation (2002/20), Universal Services (2002/22) and Access (2002/19) directives but not the ePrivacy Directive (2002/58).

<sup>95</sup> Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast) - COM(2016)590 and Annexes 1 to 11

<sup>96</sup> See Preamble points 3, 48 and 224.

<sup>97</sup> Framework Directive, Article 2(a).

<sup>98</sup> Article 2(4) of the Proposal.

<sup>99</sup> Article 2(5) and (6) of the Proposal,

remain excluded. The Proposal specifically excludes “linear broadcasting, video on demand, websites, social networks, blogs, or exchange of information between machines.”<sup>100</sup>

The overall result is that the scope of the Directive is extended to OTT services which, although not based on the conveyance of signals, do have the same effect. The Proposal does not automatically extend the applicability of its provisions to all “interpersonal communication services” but only does so in a targeted manner (e.g. emergency numbers). In other words, only a limited set of sector-specific rules are applied to interpersonal communications services. In addition to that, most rules that do apply to interpersonal communications service apply mainly or exclusively to number-based services. In the Proposal itself, this is true for “contract duration, transparency, information on quality of service, number portability led by the receiving provider, consumption monitoring tools, comparison tools for both prices and quality of service or switching rules for bundles to avoid lock-in effects.” Non-numbering services are exempt from the most onerous obligations applying to regular services. Most notably: they are exempt from the authorisation requirement (Article 12 EECC), out of court dispute resolution is not mandatory for them (Article 25 EECC) and information requirements for contracts are not applicable to them (Article 95 EECC). In some areas, however, regulation applies to all interpersonal communication services. The Proposal quotes “public policy interests, such as security” as the reason for this. Security provisions, such as Article 40 or Article 70, are specifically quoted as are threats to connectivity or interoperability under Article 59.

In addition to imposing these obligations on OTTs, the Commission is also pursuing the alternative path of deregulating all services (including those based only on signal conveyance or internet access). This is true of the Article 17 of the Universal Service Directive, which covers retail price regulation of operators having significant market power. Other provisions (such as contracts, transparency, equivalence of access by disabled users, directory services and interoperability of consumer digital television equipment) have been streamlined.

The overall result has been that OTT platforms are subject to a somewhat limited increase in obligations and this only where they are providing number-based services. While this has significantly less dramatic effect than the changes we have criticised in the preceding sections, it serves to demonstrate that level playing field can be applied in a targeted and informed manner.

#### **4. Critique and Conclusion**

In the preceding sections, we have explored two fundamental points about the EU’s policy on platforms. We have first established that EU does, indeed, have a policy on platforms. The second was that such a policy has, in fact, already been transcribed into specific proposals in 2016-2018 in the rather vague but potentially important form of “level playing field”. In this section, we will return to the issues which we indicated earlier as being the core of this problem: the regulatory shift from intermediaries, networks and services to platforms and the focus placed on level playing field as a regulatory principle.

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<sup>100</sup> Preamble, point 17,

#### 4.1 Information Society Services vs Platforms

As indicated in the earlier sections, there are three separate regulatory circles that apply to the digital world. We began our analysis by indicating that basic regulated unit in each of the three framework directives are not platforms. While the carrier layer concerns electronic *networks* and electronic *services*, the content layer concerns information society *services* (ISS) and audiovisual media *services*. ISSs have been inherited from earlier law and brought into the electronic commerce regulatory circle on the content layer, and audiovisual services are a concept defined in the precursors to the current directive. All have had a long history in EU law. They are also well-tested and stable: none of the proposals for reform<sup>101</sup> demand that the scope of regulation be modified so that platforms gain a separate status. The 2016 telecoms proposal does extend the scope of the framework but this is only the situation with some OTT undertakings where the services they provide are functionally equivalent to those provided by traditional telecoms and only in a very limited set of circumstances, leaving most of their activities outside the scope of the framework. The 2015 Digital Single Market Strategy had suggested that legislation on platforms might at some point be needed but this never happened.

What is apparent from the above is that, rather than attempt to promote platforms as separate subjects of EU framework laws, the lawmaker had only slightly adjusted the framework so that *some* platforms in the carrier layer and *some* platforms in the audiovisual layer are included in the scope *some of time*. No formal changes have been made in the electronic commerce regulatory circle and no official definitions on platforms have been proposed. At the same time, the lawmaker used a range of policy and legislative tools, outlined in sections 2 and 3 above, to effectively circumvent the framework directives and regulate platforms indirectly specifically with the aim of levelling the playing field. This effectively creates two layers of rules: the regular ones, applying to ISSs and telecoms networks & services, and the shadow ones, applying to platforms.

Although the EU two-tiered approach demonstrated above may seem unusual, some Member States' laws have already directly engaged with platforms. France's Digital Republic Law,<sup>102</sup> for example, defines platforms as:

*Art. L. 111-7. Natural or legal persons who provide a communication service to the public, whether for remuneration or not, based on:*

- 1. Classification or referencing, by virtue of digital algorithms, of contents or services provided or offered by the third parties*
- 2. Connecting different parties with a view to selling goods, providing services or exchanging or sharing content, goods or services,*

Platforms so defined are then subject to extra obligations in terms of providing consumers transparent information on, among other issues, terms & conditions and how good and services are references and

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<sup>101</sup> The 2016 proposal for a new regulatory framework for telecommunications or the 2017 proposal for a new AVSM Regulation.

<sup>102</sup> Art. L. 111-7, LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique

classified. Crucially, unlike EU documents discussed in sections 2 and 3 above, no attempt to impose level playing field is made.

Although the French definition is wide, the effect it produces is not. The EU laws, on the other hand, do not contain a workable definition but its effects are potentially much wider and open actors up to a variety of possible interventions. Further to that, while ISSs in the content world and networks and services in the carrier operate within well-defined boundaries, bringing with it a degree of certainty, platforms, as targeted in documents analysed above do not.

The EU seems clear in its desire to target platforms seemingly even in direct conflict with the existing rules on ISSs. In a letter to social media sent in November 2016, the EU consumer authorities focussed on platforms directly and demanded that Facebook, Twitter and Google address unfair terms and conditions and fraud and scams that misled consumers.<sup>103</sup> Although packaged in the form of a letter, in reality the paper is both a statement that EU consumer law applies to these platforms and an open threat that further enforcement action would be taken if the measures that the companies in question take are not deemed to be satisfactory. The 2016 letter is a symptom of the Commission's wider worry that platforms ought to do more to help enforce consumer protection and counter hate speech. In March 2018, the Commission produced Recommendation on tackling illegal content online<sup>104</sup> in which these threats have been further extended and where content monitoring, seemingly in conflict with Article 15 of the E-Commerce Directive, is suggested.

The Commission seems to prefer to work with platforms in its policy documents, while maintaining ISSs and networks & services as main regulatory units in its framework directives. This approach is fraught with danger for two reasons. First, the present policy papers are a blueprint for future legislation. A promise to pressure platforms into more action on illegal content, as demonstrated above, translates into a threat to legislate and then into legislation. Second, policy documents are no longer just that - they act as guidelines and recommendations that actively inform legal subjects and influence their actions.

We have not found compelling reasons why platforms should replace information society services as basic targets of regulation in the content field. No evidence has emerged, either in policy review papers or in the practice of CJEU or national courts, to support the claim that either ISSs or telecoms networks & services need to be reformed. Furthermore, we find that the Commission's declared reluctance to overburden platforms with unnecessary regulation is in direct conflict with its constant and well-documented drive to make platforms "more responsible".

#### ***4.2 Does 'Level Playing Field' Make sense?***

A regulatory "level playing field" is, in its essence, a non-discrimination principle which claims that all (electronic) products or services which are substitutable, ought to be subject to the same regulatory burden. This is often expressed in the form of "like services should be regulated alike" adage. Although it may be tempting to equate level playing field with non-discrimination or with general

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<sup>103</sup> The European Commission and Member States consumer authorities ask social media companies to comply with EU consumer rules, Brussels, 17 March 2017.

<sup>104</sup> See Section 2.5 above.

fairness, the concept is both inherently vague and difficult to define outside of the confines of very specific (and narrow) disciplines. Therein also lies the primary danger of using it: there is no agreement as to its contents, little support in legal theory as to its scope and even less understanding on how different agencies ought to enforce it. When applied to three regulatory layers of the Internet, the idea dissipates into confusion even further.

Level playing field is openly mentioned as an overarching regulatory principle both in the 2015 Strategy and the 2016 Communication on Platforms and mentioned in other documents discussed in Section 2 above. In none of these cases is a thorough explanation of the term given, nor are potential differences between it and non-discrimination and fairness discussed. In each of the individual proposals discussed in Section 3, level playing field is also openly mentioned as a guiding principle. Its influence on the individual changes suggested in each is easily traceable. Put in different terms, there is little doubt that EU lawmaker considers level playing field a guiding legislative aim from at least 2015. The use of the concept in each regulatory layer, as discussed above, may have detrimental effect.

Most of the carrier layer has been built around asymmetric *ex-ante* regulation. This is a system which is forward-looking but which deliberately imposes regulation on some undertakings only (those that have significant market power, usually the incumbents). In other words, the system is already built around the notion that undertakings are at different “levels” and it introduces relatively effective mechanisms for addressing this, with a view that playing field will, indeed, be level at some point in the future where only regular competition law would suffice to control the market. Since most of the telecoms laws are built around this idea, any extra intervention here would be largely superfluous and confusing. The Commission already seems to recognise this since it proposes to extend the scope of the framework to OTTs in an exceptionally limited set of circumstances only. In its report on OTT services<sup>105</sup> BEREC openly states that a preference for a level playing field can, indeed, be one of the considerations for the assessment of proportionality in the telecoms framework but that it is only one of many.

In the media part of the content layer, level-playing field is also of limited use. In their analysis of the AVMS Directive revision proposal, Kenny and Suter<sup>106</sup> suggest that the ‘level playing field’ argument only makes sense a) if the parties operate in the same market, b) if the regulation is actually burdensome on one but not on the other party, c) where the regulation as a whole favours one party but not the other and, finally, d) if the benefits of symmetric regulation actually outweigh the benefit of asymmetric. There is significant doubt whether linear and on-demand audio-video services fulfil these criteria.

In information-society services, the Commission’s aim of achieving level-playing field in comparable digital services makes equally little sense. Unjustified discrimination between platforms is already controlled under a number of EU rules. Among them are competition, consumer protection, Single Market and sector-specific rules. Looking at the problem of non-discrimination on internet platforms, Krämer and others conclude that a wide-*ex ante* non-discrimination should not be imposed on

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<sup>105</sup> BEREC, Report on OTT Services, BoR (16) 35, January 2016.

<sup>106</sup> Robert Kenny & Tim Suter, “An unravelling of the Digital Single Market, A Review of the Proposed AVMSD” (Communications Chambers 2016)

platforms.<sup>107</sup> In their view, effective enforcement and application of the existing rules coupled with added transparency obligation would perform the same function.

Judging from the above, level-playing field as an equalising principle has surprisingly few uses in the digital world, the core of which seems to be disruption. The main task of the EU lawmaker in the Digital Single Market should, consequently, be to make policy choices that adequately deal with disruption. Level playing field, in its simplest form, is the idea that everyone ought to be playing by the same rules and that legal intervention is justified to ensure this. Innovation, by its very definition disrupts and tilts the playing field in favour of the more innovative business models. The choice between innovation and level playing field must, therefore, ultimately be a policy choice and the negative effects of disruption need to be balanced against its benefits. It should not be the regulator's task, however, to ensure the existence of a level playing field where that policy choice had not been properly made and where little to no balancing is ensured. The most important conclusion that this paper comes to is that the 'level playing field' has come to represent the dominant paradigm in the Commission's regulation of platforms on the content layer from 2015 onwards. We have so far indicated that level-playing field is a problematic and poorly researched idea that embodies, through lobbying, the incumbents' desire to have the familiar environment in which they operate protected. The policy choice made so far at EU level is to protect the incumbents rather than to analyse deeper effects of disruption.

#### ***4.3 Concluding remarks and possible alternatives***

Platforms' main advantage over more traditional services is their ability to match providers and users, thus enabling value creation. Through network effects, platforms' clients gain competitive advantage. Platforms' ability to deliver those advantages are enabled by their architecture. Platforms can outcompete linear providers because of the value produced by positive network effects. These same effects create disruption and the corresponding calls to level the playing field.<sup>108</sup> New proposals make it difficult for platforms to launch and monetise. The new rules do not create value for the users and change the balance in the linear providers' favour. If regulation destroys the network effects, the most important advantage platforms have disappears. The level playing field is, in its essence, an idea designed to eliminate such advantages. In its three crucial proposals - the AVMSD, Telecoms and Copyright - as well as in the policy papers discussed above, the Commission's focus is not on supporting innovation – which is embedded in Article 3 TEU as one of the constitutional aims - but on reversing disruption created by innovative business models. No claim is made here that platforms should *a priori* never be subject to regulation. Such a suggestion would make little sense. We do, however, maintain that to regulate platforms *in order* to bring them to a level with linear actors is to remove their ability to transform information-intensive industries.

The idea that laws need to be made to expand opportunity, not to protect the incumbents' interests, is neither new nor particularly problematic in legal literature but neither is the idea that incumbent industries capture the regulatory process to their advantage. The regulatory capture theory dating to

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<sup>107</sup> See Jan Krämer et al. Internet Platforms and Non-discrimination, CERRE Report, 5 December 2017.

<sup>108</sup> See Regulating electronic communications A level playing field for telecoms and OTTs?, EU Parliament Briefing, September 2016

1971<sup>109</sup> can be defined in the simplest terms as the process whereby regulatory agencies become dominated by the same industries they were meant to regulate. The regulatory capture is evident in the platform world where linear providers exercise pressure on regulatory agencies to protect them from competitive pressure they face in the platform world. Lessig's idea dating to 1998 that laws, norms, architecture and markets are the tools of Internet governance is important here as well.<sup>110</sup> In this case, laws force the imposition of level playing field on what markets and architecture had put on different levels. Such laws not only take over the role of markets and architecture but force changes to architecture - changes which would otherwise not have happened.

In the platform world, regulators already intervene to control access to platforms, pricing, privacy and consumer issues, among others. The tools they use range from competition law, to e-commerce, telecoms, consumers and data protection laws. Modern platforms are, in other words, **already regulated**. Subjecting them to further regulation, in particular where such regulation is in the form of soft law, guidelines, recommendations, letters and similar undermines the stability of EU regulation on the content and carrier side of the digital world and ignores the fact that platforms are simply a means of achieving network effects. When such regulation is, furthermore, subject to level playing field as a guiding principle, the problems are compounded.

The level playing field, which is not a constitutional principle, should not be interpreted to mean that all comparable digital services are functionally equivalent nor that they should all be subject to the same set of rules but could, at best, be taken to mean that they should be treated fairly. **Fairness** in the digital world, however, cannot be achieved through a sweeping move towards level playing field but through the identification of situations where players are treated unfairly and through the application of tools (such as competition law) that can address the problem. The Commission's proposal for EECC is an example of an approach targeted towards and informed by specific instances of unfairness. The Commission's other proposal on transparency and fairness on platforms (see note 42 above) is another instance where fairness can be deployed to reach the same aim. The Commission's action on the content layer, on the other hand, is the opposite - generalised, lacking empirical data on instances of unfair treatment and geared toward protecting the incumbents' interests. In that sense, a simple application of the existing legal framework, consisting of e-commerce and competition law, adequately addresses at least the need to treat the actors fairly.

We suggest that the most important challenge the EU faces in the digital world is maintaining innovation, which platforms facilitate and enable, while protecting user interests that such platforms possibly endanger. Put differently, the regulator needs to protect the public interests endangered by **disruption**, without reducing the positive effects that such disruptive technologies bring. In the present setup, subjecting platforms to regulation indicates a *fear* of disruption while the concentration on the level playing field suggests an *a priori* demand for the similar services to be subject to similar levels of regulation. In such a setup, there is little to no sign of harnessing the positive effects of platforms' disruptive action.

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<sup>109</sup> George J. Stigler "The Theory of Economic Regulation" The Bell Journal of Economics and Management Science, Vol. 2, No. 1 (Spring, 1971), pp. 3-21

<sup>110</sup> Lessig, Lawrence (June 1, 1998). "The New Chicago School". The Journal of Legal Studies. 27 (S2): 661–691

We suggest instead that maintaining the innovation's constitutionally protected role as a motor for development, while introducing **transparency** where it does not exist and improving it where it does not function properly, should be the primary focus of the EU digital strategy. While the former harnesses the positive side of platform revolution, the latter minimizes the problems that potential unfair treatment can bring. While innovation supports the development of digital services, promoting transparency and fairness removes its negative effects more efficiently than the level playing field. In the traditional pre-digital economy, the need to regulate service providers was often a result of scarce information and a threat that this brought to consumers. In such a setup, governments impose conditions on authorization or operation to mitigate the negative effects of scarcity. The modern IT-intensive economy does not easily lend itself to such approaches. It has been successfully argued that that data-driven economy requires transparency and accountability<sup>111</sup> rather than regulation based on restricted access. A traditional regulator of a service would look at the conditions for its access and minimize the extent to which problematic providers can engage in service provision. It would control the provision of services of those providers who do obtain authorization. It would create monitoring and evaluation mechanisms. Such an approach is always designed to consider various interest, including those of the incumbent providers and the consumers. Modern digital societies, however, face unprecedented levels of disruption but also thrive and depend on it.

Arguing that problems inevitably occur where rules and policy developed for one communications paradigm encounter a new one, Harvey suggests that new regulation needs to go beyond the content/carrier model of regulation and engage with how technology actually works.<sup>112</sup> He suggests that functional equivalence – which is largely identical to level playing field – can be useful only in situations where valid comparisons can be made but does not remove the need to rethink the ways in which technology is used. The EU policymaker did not yet engage in that rethinking. At best, it identified pockets of disruption which it is trying to close, while keeping its legacy-minded digital paradigm intact. It needs to reverse the process: to rethink the framework directives and the policy they rest on. Ultimately, the level playing field is an EU policy choice and, like other such choices, rests on assumptions. In this case, the assumption is that disruption needs to be minimized. “Analogy”, “technological neutrality”, “functional equivalence” and “level playing field” are all instruments for minimizing disruption. Disruption, however, should not be minimized, it should be encouraged but proper balancing mechanisms should be introduced to minimize its possible damaging effects. Level playing field is not such a mechanism.

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<sup>111</sup> Nick Grossman "White Paper: Regulation, the Internet Way", April 8, 2015, available at <https://datasmart.ash.harvard.edu/news/article/white-paper-regulation-the-internet-way-660>

<sup>112</sup> David Harvey, *Collisions in the Digital Paradigm* (Bloomsbury 2017), Ch. 112