

REFLECTIONS IN THE PERSPECTIVE OF THE EUROPEAN DIGITAL SERVICES ACT

(EXTENDED VERSION)

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INTRODUCTION

The e-commerce backbone – to use common terms in the vocabulary of electronic communications – has an external, visible side, i.e. the e-commerce Directive¹, and an internal, less visible side, the refusal to apply public utilities regulation techniques to online services.

Under the pressure of changing circumstances, resulting from the change in scale, nature and strategy of digital services, already amply described in another note of the Digital New Deal Foundation² on "Big Tech regulation", whose diagnosis is widely shared by other reports³, this backbone has endured serious disorders.

The cautious and indirect EU treatment that has been given since 2016, through new legislation and vigilant competition law enforcement is certainly noteworthy. But all things considered, it is only extra lumbar support. They are not enough on their own to straighten out and stretch the backbone and competition muscles of the e-commerce industry.

The announcement by the new President of the European Commission, Ursula von der Leyen, of a Digital Services Act by the end of 2020, is a potential vehicle for a larger-scale treatment aimed at restoring the ability of consumers and business users to exercise countervailing power that will restore inter-platform competition .

The legal avenues proposed by this note call for the removal of certain portions of the backbone, i.e. some of the provisions of the "e-commerce" Directive, which have become undesirable, for the addition of new bone grafts , coming from public utilities regulation techniques, and for the reconstruction of the entire legislative work undertaken by providing more effective, proportionate and dissuasive means of redress.

¹ Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

² *Big Tech Regulation: Empowering the Many by Regulating a Few*, Sept. 2019, Sébastien Soriano, with the participation of Barry Lynn, Mehdi Medjaoui, Stefano Quintarelli, Judith Rochfeld

³ European Commission, *Competition policy in a digital era*, April 2019, Yves Cremer, Jen-Yves de Montjoie, Heike Schweitzer (known as the Cremer report); United Kingdom, *Unlocking digital competition*, Report of the Digital Competition Expert Panel, March 2019 (known as the Furman Report); George J. Stigler Center for the Study of the Economy and the State, University of Chicago, *Market struc-*

ture and antitrust, subcommittee for the study of online platforms, July 2019; Competition Authority, 19 February 2020, Contribution to the debate on competition policy and digital issues; Opinion No. 18-A-03 of 6 March 2018 on the exploitation of data in the targeted internet advertising sector and Opinion No. 10-A-29 on the competitive functioning of online advertising; Council of State, annual study, *Public authority and digital platforms: supporting "uberisation"*, La Documentation française, 2017; Isabelle de Silva, *Assessing online platform mergers: Taking up the new challenges faced by the French Competition Authority in the digital economy*, Concurrences No. 2, 2018; OECD, *Rethinking Antitrust Tools for Multi-Sided Platforms*, Report, 2018; ACCC, *Digital Platforms Inquiry*, Final report, June 2019, page 30.

I

**THE SERIOUS DISORDERS OF THE
*"E-COMMERCE BACKBONE"***

The theoretical backbone of European legislation has partially lost its relevance; it has undergone significant disorders due to changing circumstances since its conception.

There was no intent from the European legislator to provide for the immunity of host providers in its current meaning, i.e. in a scope that encompasses online platforms. The application of this generous legal regime to platforms results merely from a combination of legal and factual circumstances which were unforeseeable at the date of adoption of the e-commerce Directive.

In addition, there is no longer any justification for exempting online services from certain regulatory techniques used towards public utilities.

The regulation of essential infrastructure is, in principle, intended to ensure the contestability of an emerging market, the emergence of which had hitherto been prohibited by the effect of a legal monopoly, overriding ordinary law, protecting the operation of an infrastructure financed by public funds.

It has hitherto been considered, with some reason, or at least to some extent, that there was no need to apply such control or regulatory techniques to services created in a free and competitive market. But this ignores the fact that the market power of some online platforms relies entirely on the aggregation of data collected in a particular context. Until very recently, consumers were totally unaware of the value of their data, which is clearly not zero, or of the circumstances in which they were collected, especially when they used free services for commercial purposes at the cost of privacy interference. Even less the ability, in practice, to express valid consent or opposition, so much so that one could even hesitate to describe these circumstances as the historical fruit of collective fraudulent misrepresentation or concealment. The word is extremely strong⁴. However, this is undoubtedly a form of vitiated consent, of which the outlines of principle are beginning to be sketched out by the soft law, in particular the G29 guidelines, and case law (see below). In these circumstances, to view the dominant position of online platforms as exclusively conquered on merit seems quite irenic. And since deprivation of access to these platforms has the effect of crowding out business users, there is no longer any reason today to delimit so strictly the scope of the essential infrastructure of network industries and that of online platforms.

⁴ Under the terms of Article 1137 of the new French Civil Code, stemming from Article 5 of Law No. 2018-287 of 20 April 2018: *"Fraud is the fact that one contracting party obtains the consent of the other party by ploys or lies./ The intentional concealment by one of the contracting parties of information which it knows to be decisive for the other party also constitutes fraud./ Nevertheless, it is not fraudulent for one party not to reveal to the other party its estimate of the performance value."* Fraudulent misrepresentation or concealment may be constituted by the silence of a party concealing from his co-contractor a fact which, if it had been known to him, would have prevented him from contracting (Cass. civ. 3^e, 15 Jan. 1971: Bull. civ. III, No. 38; RTD civ. 1971. 839, obs. Loussouarn) or the failure or breach of a pre-contractual duty of information. However, failure to comply with a pre-contractual duty to provide information cannot suffice to characterise fraudulent concealment, unless it is also established that

the failure was intentional and that it was caused by a decisive error (Cass. Com. 28 June 2005, No. 03-16.794 P: Dalloz 2006. 2774, note Chauvel). Fraud is a cause of nullity - the consequences of which would be very theoretical in such circumstances - as well as a civil wrong, which may give entitlement to compensation - a delicate procedure in the case of a free service and a wrong of an essentially moral and collective nature, in the form of a reduction of the right to privacy. It is doubtful, in these circumstances, whether a judge would ever come to have to make a legal qualification of such facts. For a complainant, it would be more efficient to rely on the GDPR (see below), the G29 having taken a position on the question of the methods for obtaining valid consent or perhaps, in the future, on what is known as the "e-privacy" Regulation.

1.1 The immunity of host providers provided by the e-commerce Directive has resulted in granting a selective advantage to the Big tech

Adopted twenty years ago, what is known as the "e-commerce" Directive is still the key backbone of European legislation of online services⁵. Proposed by the College of Commissioners in February 1999, it was the subject of political agreement in less than a year, which was notable at the time, with amendments of limited scope. It is therefore essential to understand the environment in which the European legislator gave its consent to this text.

By nature, back then the internet was only a fledgling communication interface⁶, clumsily duplicating "brick-and-mortar" commerce. The time it took to load a webpage was well over 20 seconds. Google was a new-born. Amazon was a bookseller. Steve Jobs made his comeback to Apple and had not yet marketed the iPod, let alone designed the iPhone and its app stores. Harvard University's rogue's gallery, Facebook, was created in 2004, two years after the deadline for transposing the e-commerce Directive in the Member States.

Back then, the business challenges of online services were dramatically different. Telecommunication operators had borne high infrastructure costs and were already subject to demanding sector regulation. To reap fruit from it, their aim was outreach new subscribers, cash in fees from content providers or even invest in their own for acquiring editing capacities. An ecosystem of subcontractors and content service providers was therefore necessary in order to enhance the attractiveness of the internet to users, which was far from being sufficient to arouse the interest of advertisers or to envisage the development of online commerce as we know it today.

The legal and political stakes consisted in minimising red tape to support the development of this ecosystem, without creating, *ex nihilo*, a "common internet law". The harmonisation technique ordinarily used to unify the internal market for goods was clearly not adapted to what were then known as "Information Society services".

In this context, the Directive was based on two main principles.

Firstly, the country-of-origin principle. Although it had already been sketched out for terrestrial broadcasting of audiovisual services, financial services and electronic signatures⁷, this was the first time that it had been applied independently and even as a substitute for harmonisation. This was therefore major innovation at the time⁸. Its scope, hitherto circumscribed, has applied for the first time to a vast scope, extending to all information society services.

⁵ For a broader but synthetic and recent overview, see: Francis Donnat, *Droit européen de l'internet*, LGDJ systèmes, 2018

⁶ Within the meaning of Regulation (EU) 2018/302 of the European Parliament and the Council of 28 February 2018 to counter unjustified geographic blocking and other forms of discrimination based on nationality, place of residence or place of establishment of customers in the internal market and amending Regulations (EC) Nos. 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC and the proposal for a Council Directive on the common system of taxation on digital advertising applicable to revenue from the supply of digital advertising services (included in the annexed proposed Directive).

⁷ Which is also known to have been provided for audiovisual media services since 1989, securities investment services since 1993 and electronic signatures since 1999.

⁸ Alexandre Cruquenaire and Christophe Lazaro, *La clause de marché intérieur: clef de voûte de la directive sur le commerce électronique*, in *Le commerce électronique européen sur les rails ? Analyse et propositions de mise en œuvre de la directive sur le commerce électronique*, pp. 41-94, Cahiers du CRID; No. 19, Bruylant, 2001; Marc Fallon and Johan Meeusen, *Le commerce électronique, la directive 2000/31/CE et le droit international privé*, (2002) 91 Rev. crit. DIP; Emmanuel Crabit, Jean Bergevin, *Le cadre réglementaire des services de la Société de l'Information : laboratoire pour un nouveau droit du marché intérieur*, Revue trimestrielle de droit économique européen, vol. 1995, no. 1, pp. 15-74

By virtue of this principle, the host provider is, in substance, subject only to the public law of its State of establishment⁹, the only reserve being that of the applicable law determined by private law contracts. The State of residence of the recipient of these services is thus allowed to take measures only in a very subsidiary manner, following a cumbersome mechanism of cooperation with the State of origin and the European Commission, in cases of urgency, and for reasons limited to public policy, consumer protection and human dignity (Article 3 of the Directive and Annex). In other words, this amounts to giving the law of a single Member State, determined according to its own interests and the balances of its internal policy, the capacity to become the common law of the whole European Union. This unilateral and unconditional delegation of power to such a vast field of an economic sector was unprecedented. It has not been repeated since. Article 16 of the initial proposal Directive on Services in the Internal Market¹⁰ has been very substantially amended by the European legislator. The country-of-origin principle of the "Television without Frontiers" Directive was subsequently recasted significantly (*see below*).

On the other hand, the Directive has, in a singular manner, exempted host providers from all liability for the content it disseminates (Articles 12 to 15 of the Directive). This principle was justified, in political terms, by the fact that digital service providers were deemed to merely store and transmit information of a "*purely technical, automatic and passive nature*", which is reflected in the recitals of the Directive¹¹. Accordingly, Member States were prohibited from imposing a general obligation to monitor the information disseminated or to search actively for facts or circumstances, even if they are manifestly unlawful¹².

Online platform and network services, which emerged after the adoption of the Directive¹³, free from any sector-specific regulation and from any practice of cooperation with the public authorities in the field of crime prevention, took advantage of this existing legal regime.

Since they do not define the content of the information they display or do not ensure full and systematic control of it¹⁴, they do not qualify as editors. Therefore, they necessarily qualify host providers, a bonanza regime for them.

The binary, and even Manichean, distinction between host providers and editors has lost all relevance with the emergence of online platforms capable of disseminating or making available, on a massive scale, goods and services edited by third parties. This change in scale is in response to a change in the nature of digital services since 2000.

The internet has become accessible at any time of day, almost instantaneously. Smartphones and tablets (or "terminal equipment")¹⁵ are now a preferred method of access. Today it accounts for

⁹ Allowing in particular, to a certain extent, the application of the law of the State of habitual residence of the consumer, in application of the rules of private international law. However, Article 6 of the subsequently adopted Regulation (EC) 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations, known as "Rome I", only ensures this protection if the consumer has not personally taken the initiative to conclude the contract. In this case, only the rules of public policy of his State of residence shall apply.

¹⁰ Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market

¹¹ (42) *The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies*

that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored. (43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission, as they do not alter the integrity of the information contained in the transmission.

¹² See in particular CJEU, 24 November 2011, *Scarlet Extended*, C-70/10 and 16 February 2012, *SABAM*, C-360/10

¹³ CJEU, gr. ch., July 12, 2011, *L'Oréal SA and others v. eBay International AG and others*, C-324/09

¹⁴ CJEU, supra, *L'Oréal v. E-bay*; gr. ch., 23 March 2010, *Google v. Louis Vuitton Malletier*, C-236/08.

¹⁵ See Article 1(l) of Commission Directive 2008/63/EC of 20 June 2008 on competition in the markets for telecommunications terminal equipment

almost 50% of internet traffic and their share is still growing rapidly¹⁶. One of the main reasons for connection today is now mainly the use of online platforms and networks, whose quantitative importance has increased, according to the OECD, by a factor of 1 to 14 between 2004 and 2017¹⁷.

Above all, the internet has become the melting pot of ecosystems that use powerful network effects and externalities and free-ride investment in brick-and-mortar commerce. Without even mentioning the legal texts that expressly recognise this free-riding phenomenon¹⁸, it is enough to observe, in everyday life, the decline in bank branches and the strategy of "pure players".

While, as a whole, these ecosystems certainly contribute to economic development, in particular by broadening SMEs' access to consumers and allowing a finer segmentation of demand, they also lock in their users into closed silos (application shops, smartphone operating systems, social networks highlighting information in response to the user's identified preferences).

This obviously conveys the advantage, for the silo organiser, to prevent revenue or data streams to flow to other hands, and to stifle inter-silo competition.

These online ecosystems no longer feature the objective characteristics of passivity that justified the host provider immunity regime in the first place, in perfect derogation from ordinary law. From now on, they play an active role in hyper-linking, selecting, referencing, labelling, ranking and classifying content, displaying, promoting content or managing advertising services.

Case law has begun to recognise this in specific areas, such as the processing of personal data. The Court of Justice of the European Union (CJEU) has thus held that a search engine must be deemed as a personal data controller when "*exploring the internet automatically, constantly and systematically*", "*in search of the information which is published there, subsequently 'retrieves' data, 'records' and 'organises' them within the framework of its indexing programmes, 'stores' on its servers and, as the case may be, 'makes available to' its users in the form of lists of search results*". The operator "determines", in fact "*the purposes and means of this activity*"¹⁹. The circumstances in which the operator does not modify information already published or in which the publishers themselves can influence the indexing by excluding some or all of the information is, in this respect, without influence²⁰.

The political circumstances that justified the exemption of online platforms from liability to business and end users have therefore vanished.

It is questionable why the passive nature of digital platforms has not been actively challenged. The underlying reason is simple. Under the current legal framework, the burden of proof of the active nature of a service lies with the person challenging it. However, the latter cannot reasonably be in possession of any evidence that the platforms' personal data processing activities are not subject to any obligation of transparency, even minimal, and that their algorithms constitute business secrets.

¹⁶ Google/OASTA Research study, February 2017: mentioned on <https://www.thinkwithgoogle.com/marketing-resources/data-measurement/mobile-page-speed-new-industry-benchmarks/>. According to the Digital Barometer 2018, 46% of French people connect mainly to the internet via a smartphone, compared to 35% via a personal computer and 7% via a tablet. In 2018, according to Criteo, nearly 30% of online purchases were made from smartphones, a figure that rose 43% over one year, while the number of online purchases made from personal computers decreased by 11% over the same period (Criteo, Global commerce review, France, 2nd quarter 2018). According to Fevad, mobile sales even accounted for 35% of e-commerce in the same year, up 22% over one year (Fevad, Bilan 2018 du e-commerce en France, 2019).

¹⁷ Alberto Bailin Rivares, Peter Gal, Valentine Millot and Stéphane Sorbe, *Like it or not? The impact of online platforms on productivity of incumbent services*, OECD Economics Department Working Papers No 1548, May 15, 2019

¹⁸ European Commission, *Guidelines on Vertical Restraints*, 10 May 2010, SEC(2010) 411 final, paragraphs 107, 203-208. Parasitism under French law, one of the branches of unfair competition, is, on the other hand, covered by a completely different definition

¹⁹ CJEU, gr. ch., 13 May 2014, *Google Spain*, C-131/12, paragraphs 26 to 33

²⁰ Same judgement, paragraphs 39 and 40

It is therefore still impossible in practice to demonstrate in law that a digital service does not meet the conditions of neutrality, technicality and passivity required in principle by the e-commerce Directive²¹.

This change in the nature of Information Society services is combined with a change in the scale of its main players in terms of their competitive position.

Some of them have acquired a dominant position which, in principle, calls for special responsibilities²², in particular the prohibition of certain behaviour that could drive out their competitors, current or potential, on the same or related markets. But even these operators are not subject to any *ex ante* regulation or minimum requirements.

This is an indirect consequence of the country-of-origin principle, applied indiscriminately to any Information Society service, regardless of its size or competitive position. The Member State in which the platforms are located has no interest of its own in regulating the economic activity of companies contributing to employment and the economic attractiveness of its territory. Moreover, the e-commerce Directive exempts them, to a very large extent, from all liability.

Dominant online platforms are thus placed in a much more favourable situation than the telecommunications operators which enjoy a so-called "significant market power", which should, in principle, be the only ones to benefit from the country of origin principle given their passive nature. The latter have long been subject to a body of specific acts²³ governing their legal organisation and market behaviour, particularly with regard to tariffs, and to an "asymmetrical" regulation in each of the market segments in which they have a significant market power²⁴. This legislation now even provides for ownership unbundling in case legal and accounting unbundling do not suffice to ensure a completion level-playing field.

Applying the favourable legal regime provided by the e-commerce Directive to online platforms irrespective of the change in the nature and scale of Information Society services, is now tantamount to giving the biggest players a selective advantage and has clear detrimental effects. Both from the point of view of freedom of expression and the competition level-playing field.

From the point of view of freedom of expression, the internet certainly offers unparalleled access to culture and knowledge. It allows everyone to express themselves and to disseminate their thoughts, opinions and creations to a global audience, by putting institutions and intermediaries, especially professionals, at a distance. These incomparable advantages necessarily have their counterpart. This means that comments may be broadcast, the facts of which have not been verified

²¹ It has been acknowledged that Uber goes so far as to "exercise decisive influence" on the "conditions of services", by defining "a maximum fare", "a certain control over quality" and "the conduct" of supposedly independent contributors (CJEU, gr. Ch., 20 December 2017, *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*, C-434/15, paragraphs 37 to 39). If, in the latter specific case, the e-commerce Directive does not apply, it is not because those suppliers do not meet those conditions of passivity, but solely because primary law exempts transport services, to which Uber's services have been assimilated by preference to the classification as information society services. Uber's services therefore fall outside the scope of the e-commerce Directive.

²² See, in this sense: ECJ, 13 February 1979, *Hoffmann-La Roche*, Case 85/76; 9 November 1983, *Michelin*, Case 322/81, paragraph 57; 2 April 2009, *France Télécom*, C-202/07 P, paragraph 105; CFI, 7 October 1999, *Irish Sugar*, T-228/97, paragraph 112; CJEU, 6 October 2015,

Post Danmark, C-23-14, paragraphs 70-74

²³ See Articles 63 to 70 of Directive (EU) 2018/1972 of 11 December 2018 of the European Parliament and the Council establishing the European Electronic Communications Code, replacing Directive 2002/19 of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the Access Directive), Article 6 of which authorises the implementation of asymmetrical regulation, to be lifted when the market analysis establishes the prospects for "effective competition on the markets" or the fulfilment of universal service obligations

²⁴ Guidelines 2002/C 165/03 of the Commission of the European Communities of 11 July 2002 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services

beforehand according to the standards of journalistic ethics, or even "hate" content (apologia of terrorism or crimes against humanity, incitement to hatred or discrimination, child pornography)²⁵.

Information *via* closed ecosystems may even come to stifle democratic pluralism or real public or adversarial debate. Indeed, selection biases based on algorithms identifying individual preferences, which are effective in targeting and segmenting a commercial clientele, can result in isolating individuals from learning about information that is not consistent with their historical preferences, without truly informed consent.

It can be noted, in this regard, that 42% of French people get their information via social networks, in preference to the written press, which only constitutes 18% of the sources²⁶. The consultation rate of smartphones and tablets is 78% when consulting the internet.

These silos may, under certain circumstances, become the channel for massive online disinformation strategies that have the capacity of undermining the integrity of electoral processes, as highlighted both by the United Nations and by studies by independent European regulatory authorities²⁷. According to a recent US survey²⁸, 48 million Twitter accounts worldwide, i.e. more than the number of the French population registered to vote in the April 2019 European elections, are managed by robots.

From a competition perspective, the strategies implemented to maximise network effects and the benefits of two-sided operation, already amply described in the Foundation's note and the above-mentioned reports, shelter the platforms that attract the most users from any countervailing power.

Business users have no incentive to switch platforms if they incur contractual penalties or retaliation, and if competing platforms offer access to fewer customers. They are thus deprived of the opportunity to spur inter-platform competition in comparing, the rate of commission fees, contractual terms and conditions, the level of freedom of commercial policy they can retain. Competition at this upfront level can play an important role in the competitive dynamics, as illustrated by the case of independent distributors, when, at the end of their affiliation or franchise agreement, they are able to choose a new reference trade name and central purchasing body²⁹.

As for consumers, due to the lack of platform interoperability and portability of the content used, they often remain loyal to their "incumbent" platform and rarely use several online service providers ("single-homing"), which further increases network effects³⁰.

²⁵ Although important, the issue of copyright is not addressed here, Directive No. 2019/790 of the European Parliament and the Council of 17 April 2019 on copyright and related rights in the Digital Single Market with its ink barely dried and the problem of finding a balance between remuneration of authors and more specific freedom of expression. Its Article 15 creates a related right for the benefit of the press, which Google has indicated that it does not wish to apply, while Articles 17 to 22 provide for obligations of means, to be assessed taking into account the number of protected files, the nature of the works and the site traffic and the best efforts to ensure the unavailability of works broadcast in violation of copyright. The issue of effectively sanctioning a failure in good faith in the implementation of best-efforts obligations by platforms remains.

²⁶ Reuters Institute, Digital News Report 2019; by Facebook at 49%, YouTube at 24%, Facebook Messenger at 13%, Twitter at 9%, Instagram and Whatsapp at 8% each

²⁷ See United Nations, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Freedom of Expression in the Digital Age*, Research paper, 1/19, June 2019 p. 11 "In the digital age, technological advances have enabled perpetrators to increase the scope and frequency of these attacks on

freedom of expression. One common practice involves the use of Distributed Denial of Service ("DDoS") attacks, where a network of online systems is compromised and directed to flood another online system with Internet traffic, effectively rendering the target inaccessible". Also see the work of the Italian Authority for the Guarantee of Freedom of Audiovisual Communications: AGCOM, *Online Disinformation Strategies and the Fake Content Supply Chain, Technical Roundtable for safeguarding News-Media Pluralism and Fairness in the online Platforms*, Deliberation No. 423/17/CONS, 2018 and Recommendation No. 2019-03 of 15 May 2019 of the French *Conseil supérieur de l'audiovisuel* to online platform operators within the scope of the duty to cooperate in the fight against the dissemination of false information ²⁸ <https://www.lesechos.fr/14/03/2017/lesechos.fr/0211878636882-48-millions-de-comptes-twitter-sont-geres-par-des-robots.htm>

²⁹ French Competition Authority, Opinion No. 10-A-26 of 7 December 2010 on affiliation agreements for independent shops and the terms and conditions for the acquisition of commercial property in the food distribution sector

³⁰ See in particular Nicolas Colin, Augustin Landier, Pierre Mohnen and Anne Perrot, *Digital Economy*, Notes from the *Conseil d'analyse économique*, 2015/7 (n° 26)

Moreover, platforms can nip potential competition in the bud, either through abuse of exploitation or foreclosure (*see below*), or through preventive acquisition of competitors that are mostly outside the scope of merger control given the current expression of the turnover thresholds for notification, thus neglecting the indirect commercial value of services that appear to be provided free of charge to the consumer³¹. They may also favour their own services or the application editors who offer them the most attractive rates of remuneration or who provide them with the most economically valuable data, which are, in general, free applications³².

Finally, the countervailing power of users and user companies is also hampered by locking users into closed ecosystems³³.

However, an extremely high concentration of platforms limits or even cancels out the total productivity gains resulting from their emergence³⁴.

The rigid application of the e-commerce Directive as it stands is likely to amplify these undesirable effects, without being necessary in all its aspects, given the maturity now acquired by online services.

1.2 No sound reason can be found to exempt the Big tech from public utilities regulation techniques

The other side of the current European doctrine, internal and implicit, is based on the essential infrastructure doctrine.

Forged by the competition authorities, under the supervision of the judge, consolidated and implemented by the European legislator, it provides the theoretical framework for opening former state monopolies in the fields of telecommunications, energy and transport to competition.

In competition law, classification as essential infrastructure is based on four cumulative criteria³⁵.

Firstly, the indispensability of the infrastructure³⁶ for an operating activity, for which there is potential demand, in a neighbouring or downstream or "connected" market. Parsimoniously, this criterion has been adapted to the intellectual property rights conditioning the development of a new product for which there is potential consumer demand, provided it satisfies an "innovation test": this product must not be a mere duplication of existing products or services³⁷.

Secondly, the lack of alternatives³⁸: there should be no actual or potential substitutes for the competitor to carry out its activities and the complainant cannot reasonably replicate the service or product itself.

³¹ See the above-mentioned Cremer report, pp. 44-47; Bundeskartellamt, *Market power of platforms and networks*, June 2016. Norway, Germany and Austria have thus changed their national examination thresholds. The draft law mentioned in footnote 31 also provides for this.

³² AGCOM, "Big data" study cited above, pp. 48-68

³³ European Commission, 18 July 2018, Google Android, AT40099, in particular pp. 53-72, 102-127; 142-159, 169-226; 251-268; Autorité de régulation des communications et des postes (ARCEP), *Smartphones, tablets, voice assistants... Are terminals the weakest link in the opening up of the Internet? public consultation*, December 2017; Senate, draft law to guarantee free consumer choice in cyberspace, registered on 10 October 2019; Council of State, Opinion on the draft law to guarantee free consumer choice in cyberspace, 19 December 2019

³⁴ See Alberto Bailin Rivas, Peter Gal, Valentine Millot and Sté-

phane Sorbe, *Like it or not? The impact of online platforms on productivity of incumbent services*, OECD Economics Department Working Papers, supra

³⁵ See, in particular, on the overall approach: Marty, Frédéric, and Julien Pillot. "Des critères d'application de la théorie des facilités essentielles dans le cadre de la politique de concurrence européenne", *Reflets et perspectives de la vie économique*, vol. I, no. 4, 2011, pp. 197-221.

³⁶ ECJ, 6 April 1995, *RTE and ITP v. Commission*, C-241/91 P and C-242/91 P, known as "Magill", paragraph 53

³⁷ 29 April 2004, *IMS Health*, C-418/01, paragraphs 38 and 49

³⁸ ECJ, 26 November 1998, *Bronner*, C-7/97, paragraph 46; *Magill*, cited above, paragraph 52; 29 April 2004, *IMS Health*, C-418/01, paragraph 29

Thirdly, the absence of objective justifications for the monopoly's refusal to make its infrastructure available or to provide an essential service³⁹.

Fourthly and finally, the elimination of any effective competition⁴⁰ as a result of this refusal.

These criteria are considered to be met with certainty only in the case of the large network industries already mentioned. They have only been applied very exceptionally and sparingly, with many reservations in principle, to the supply of so-called "primary" goods or services or, "in exceptional circumstances", to exclusive intellectual property rights⁴¹.

The combination of these criteria enables the competition law enforcer to firmly repress the practices of essential infrastructure operators who deny access to their downstream competitors or crowd them out through so-called "margin squeeze"⁴² pricing practices.

Where competition law enforcement, by its very nature repressive, is insufficient to restore a competitive dynamic, the legislator is generally prepared to take over more at source, in a preventive manner, through *ex ante* regulation, which defines specific obligations on infrastructure operators and vests powers onto independent administrative authorities to enforce them. It generally lays down an organisational framework for incumbent operators, playing on the range of different degrees of unbundling between infrastructure management and service operations - from accounting unbundling to functional and ownership unbundling requiring to spinning off into subsidiaries - as well as the terms and conditions under which competitors can freely access the infrastructure, at cost-oriented tariffs. The "second telecom package" or the third and fourth energy "packages" are illustrations of this.

Applying this doctrine, in all its rigour, to online platforms is a challenge.

These services have a number of specific features in relation to the traditional system of infrastructure (upstream market at the interplay between the incumbent operator and its competitors) and service operation (downstream market at the interplay between the incumbent operator and its business or residential customers). The strategy of the platforms is to develop indeed over a complete value chain.

Apple entered the market with handsets (the iPhone, the iPod), and then developed commercial platforms and services (sale of musical works, software, management of application shops). Google's strategy is mirrored: relying on a wide range of internet referencing services (from natural search engines, creating a call effect, to specialised search engines involving advertisers) before launching handset operating systems. Amazon, on the other hand, has developed on other bases, while also growing rapidly. Engaging in an ever more in-depth distribution strategy (which today includes forays into the logistics and postal sector), it has diversified a whole range of products and services, before entering the content (videograms, musical works) and terminal equipment markets (Kindle, Stick Fire TV, etc.).

³⁹ *Magill* judgement cited above, paragraph 55

⁴⁰ *Bronner* judgement cited above, paragraph 38, *Magill* judgement cited above, paragraph 56, *IMS Health* judgement cited above, paragraph 38; CFI (gr. ch.), *Microsoft*, 17 September 2007, T-201/04, paragraphs 332 and 335, 563 and 564 (on the complaint of refusal to supply the information necessary for the interoperability of client and work group server operating systems, separate from the tying complaint); CFI, 9 September 2009, *Clearstream*, Case T-301/04, paragraphs 148-152

⁴¹ ECJ, 5 October 1988, *Volvo*, Case 238/87; *Magill* judgement cited

above, paragraph 54; *Microsoft* judgement cited above, paragraphs 334 and 647-648

⁴² The Court of First Instance has held that '*the practices pursued, referred to by the term 'margin squeeze', consist, for a generally vertically integrated operator, in fixing both the retail tariffs on a market and the tariff for a service necessary for access to the retail market, not leaving between the two a sufficient gap for the coverage of the other costs incurred in providing the retail service*' (Court of First Instance of the European Communities, *Deutsche Telekom v. Commission*, T-271/03). The Court of Justice confirmed this judgement (Court of Justice of the European Union, 15 October 2010, C-208/08 P)

In such a context, digital services are moving away from the traditional pattern of linking an upstream infrastructure with a downstream service operator. Competitors of the platforms are generally not in a downstream market, but in a part of the market occupied by the platforms themselves. The first condition of the critical infrastructure doctrine will therefore be particularly difficult to meet in such markets.

The second, the absence of any alternative is very difficult to prove, as the standard of review by the judge is particularly high, as illustrated by the *Bronner case*⁴³.

As for the satisfaction of the fourth, it presupposes, by construction, particularly in the digital sector, where consumers are quick to censor a defaulting operator, that it is already too late to act; the competitor temporarily deprived of access to the platform, usually an SME, permanently loses all access to its customers. Moreover, digital service platforms will cleverly prefer to degrade the service provided to the competitor user rather than refuse to provide a service⁴⁴, and will cunningly provide justifications independent of its status as a current or potential competitor.

The adaptation of the theory of essential infrastructure⁴⁵ would require a long period of time, that of bold implementation by the European Commission, validated by the General Court of the European Union and the Court of Justice of the European Union. Under these circumstances, it is easy to understand why no competition authority in the world has qualified the service provided by an online platform as an essential infrastructure or has considered, even in a sector study, that a database, personal or otherwise, belonging to such a platform should be shared with competitors⁴⁶. It is also true that the enforcement of such an injunction against a digital service provider directed from a third State of the European Union would remain particularly difficult to monitor, in law and in practice. For these reasons, the European Commission seems to favour the development of rules for the circulation and sharing of private sector data through a Data Act, announced for 2021⁴⁷ as a complement to the Digital Services Act.

⁴³ The Court had to determine whether the fact that a newspaper company, which has a very large share of the market for daily newspapers in a Member State and which operates the only nationwide system of home delivery of newspapers existing in that Member State, refuses access to that system, in return for appropriate remuneration, to the publisher of a competing daily newspaper which, because of the latter's small circulation, is not in a position to set up and operate, under economically reasonable conditions, alone or in collaboration with other publishers, its own home delivery system constitutes an abuse of a dominant position. It replied in the negative, although the carrying system in question was then unique. The Court held that distribution by post and sale in shops and kiosks, even if less advantageous for the distribution of some of them, were substitutes. By this yardstick, in concrete terms, Yahoo would still be the equivalent of Google. It also noted that there were no technical, regulatory or even economic obstacles that would make it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to set up, alone or in cooperation with other publishers, its own nationwide home delivery system and to use it for the distribution of its own daily newspapers (paragraphs 43 to 47).

⁴⁴ For example, by indexing it less favourably, by restricting business relations on grounds presented as objective and independent of the competitive pressure it exerts...

⁴⁵ Competition Authority, 19 February 2020, Contribution to the debate on competition policy and digital issues; Frédéric Marty, "The unspeakable one : de l'activation de la théorie des infrastructures essentielles dans l'économie numérique", GREDEG Working Papers Series No. 2018-27

⁴⁶ In a more traditional area of network industries, it can thus be

noted that the French Competition Authority has innovatively sanctioned Engie for abusing its dominant position on the gas markets by using the customer database at the regulated sales tariffs, which it holds because of its historical monopoly, in order to encourage its customers to switch to its gas and electricity market offers on the competitive market (Decision No. 17-D-06 of 21 March 2017 on practices implemented in the natural gas, electricity and energy services supply sector)

⁴⁷ Announced for the last quarter of the year 2021. European Commission, 19 February 2020, *A European strategy for data*, COM (2020)66 final, pp. 15, 17 and 23. In particular, see p. 15: "Third, the Commission will explore the need for legislative action on issues that affect relations between actors in the data-agile economy to provide incentives for horizontal data sharing across sectors (complementing data sharing within sectors as described in the appendix)). One or more of the following issues could be taken forward in a **Data Act (2021)**:(...)/ -support business-to-business data sharing, in particular addressing issues related to usage rights for co-generated data (such as IoT data in industrial settings), typically laid down in private contracts. The Commission will also seek to identify and address any undue existing hurdles hindering data sharing and to clarify rules for the responsible use of data (such as legal liability). The general principle shall be to facilitate voluntary data sharing. /- only where specific circumstances so dictate³⁹, access to data should be made compulsory, where appropriate under fair, transparent, reasonable, proportionate and/or non-discriminatory conditions⁴⁰// - evaluating the IPR framework with a view to further enhance data access and use (including a possible revision of the Database Directive⁴¹ and a possible clarification of the application of the Trade Secrets Protection Directive⁴² as an enabling framework)."

The extension of the theory of essential infrastructure to online services could also come up against a political and legal obstacle, namely the fear of transatlantic divergence, which has already been strong since the *Trinko* judgement was handed down 15 years ago⁴⁸. However, its significance should not be overestimated. US case law is traditionally more reserved on access to essential facilities, since it considers competitive regulation to be superfluous when the refusal of access is the result not of a concerted practice but of a unilateral practice, and when sector-specific regulation is already in place. This is an element known and assumed by the European institutions, since European case law and the priorities for implementing the prohibition of abuse are clearly oriented in a different direction⁴⁹. Moreover, the abstention of the US authorities to take legal action against Google, despite the fact that they had received complaints similar to those lodged with the European Commission, did not prevent the Commission from taking action in areas other than critical infrastructure.

It could still be objected that it is precisely not necessary to rely on the essential infrastructure theory to combat abuse. Essential infrastructure theory itself is not essential, one might say.

Indeed, many decisions have already been taken by the Commission and the national competition authorities on other legal grounds.

These authorities have entered into commitments to put an end to practices that are likely to be anti-competitive or have already sanctioned practices with established exclusionary effects on various grounds: exclusivity clauses⁵⁰, tied sales⁵¹, abrupt termination of established commercial relations without objective justification⁵², and discrimination.

Discriminatory anti-competitive practices are varied in nature: they may be based on the place of establishment of customers⁵³, a more favourable treatment of "in-house" services compared with competing services (*Google shopping*⁵⁴ case), the enactment opaque, ambiguous and whose application is unpredictable and discriminatory⁵⁵, or so-called "parity" clauses. The latter, under cover of the objective of guaranteeing the best price to the consumer, in reality have the effect of "locking in" business users, i.e. preventing them from switching platforms or multi-homing (the

⁴⁸ US Supreme Court, *Verizon Communications inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 2004. Competition law was created in the United States almost two centuries ago in the context of an already largely integrated internal market and little public interventionism, the main concern being to prevent the creation of private monopolies and to define the right balance between innovation and public regulation. The influence of the Chicago School reflects judicial confidence in the economy's ability to self-regulate, given open and efficient economic financing structures, a strong ability of competitors to adapt to changes in their rivals' economic strategies, low barriers to entry, a relatively fluid labour market, and bankruptcy law that is conducive to the continuation of economic activity and the recovery of assets. European competitive regulation is much more recent, marked by the post-war economic context characterised by a strong state presence and by the yet to be implemented project of a single market.

⁴⁹ Guidance on the Commission's priorities for the application of Article 82 of the EC Treaty to abusive exclusionary conduct by dominant companies, 24 February 2009

⁵⁰ European Commission, 20 March 2019, *Google Search (AdSense)*, COMP/AT.40411

⁵¹ See in particular ECJ, 2 March 1994, *Hilti*, Case C-53/92 P and the *Microsoft* judgement cited above; European Commission, 18 July 2018, *Google Android*, COMP/AT.40099, cited above

⁵² Competition Authority, decision No. 10-MC-01 of 30 June 2010

relating to the request for protective measures presented by Navx and decision No. 10-D-30 of 28 October 2010 relating to practices implemented in the internet advertising sector. In the Commercial Solvents case (ECJ, 6 March 1974, *Istituto chemioterapico and Commercial Solvents*, cases 6/73 and 7/73) CSC, the undertaking in a dominant position had suddenly and totally ceased supplies of raw materials without objective justification. In the *United Brands* case (ECJ, 14 February 1978, Case 27/76), the Court ruled that an undertaking may not, without abusing its dominant position, stop deliveries to a long-standing customer in accordance with commercial practice where that customer's orders are not abnormal and charge discriminatory prices. In the BPB (CFI, 1 April 1993, *BPB Industries and British Gypsum*, Case T-65/89) and *Lelos Kai Sia (C-468/06)* judgements, the Court authorised the definition of priority criteria for the satisfaction of orders in times of shortage or even parallel import quotas likely to involve parasitic effects, provided that the criteria were objective, non-discriminatory and objectively justified

⁵³ See e.g. ECJ, 2 March 1983, *GVL*, Case 7/82; *Corsica Ferries Italia*, 17 May 1994, Case C-18/93

⁵⁴ European Commission, 27 June 2017, *Google Search*, COMP/AT.39740

⁵⁵ Competition Authority, Decision No. 19-D-26 of 19 December 2019 (under publication)

Booking and *Amazon* cases)⁵⁶. The European Commission is investigating a complaint from the music streaming site Spotify, concerning alleged discrimination in access to third party App Store app stores compared to those of Apple Music.

Competition law enforcement is vigilant and gets excellent results, without the need to classify online platforms as essential infrastructures. But at the cost, however, of investigation procedures that are so long, cumbersome and complex that they may lose their deterrent effect, and of major litigation risks.

The competition law toolkit, however flexible it may be, remains in relatively uncultivated terrain⁵⁷, and on which the standard of proof is extremely high, even though there is an urgent need to act in a market where the effects of foreclosure are swift and lethal.

And with risks of the emergence of new practices that are similar in their effect but escape the risk of penalty for reiteration, which is assessed strictly.

Google's abuse of its dominant position in the referencing of its competitors on its Google Shopping service was heavily fined eventually, but seven years after the opening of the procedure, the case is still pending before the General Court of the European Union⁵⁸, in particular on the question of the delineation of the relevant market. Even where the statutory law of a Member State confers on the competition authority the power to order provisional measures, which should become the norm⁵⁹, their use must necessarily remain prudent with regard to the judicial standard of review⁶⁰ and requires that foreclosure effects are already sufficiently established.

It is therefore necessary, in order to restore countervailing power on the part of business users and end consumers, to ensure that competition law enforcement and *ex ante* regulation, defined at European level and proportionate to the issues at stake, work in synergy, hand in hand.

This approach has been that of the regulation of essential infrastructures in the telecommunications, energy and transport sectors.

There is no need to fulfil the essential infrastructure legal qualification in order to establish *ex ante* regulation, as this is only required in competition law enforcement matters. The requirements on the legislator are more limited.

⁵⁶ Competition Authority, Decision No. 15-D-06 of 21 April 2015 on the practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel reservation sector; Evaluation report of the Belgian, British, Czech, Dutch, French, German, Hungarian, Italian, Irish and Swedish competition authorities and the European Commission's DG Competition on the online hotel reservation sector, 2016; European Commission, 4 May 2017, *e-book MFNs and related matters*, AT.40153 (Amazon)

⁵⁷ Thus, the borderline between abuse of exploitation and abuse of foreclosure is still widely debated in doctrine and before national courts. See Frédéric Marty, *Plateformes de commerce en ligne et abus de position dominante, Réflexions sur les possibilités d'abus d'exploitation et de dépendance économique*, OFCE Working paper No. 31; Walid Chaiehloudj, *Abuse of dominance and big tech: An Apple Store case after the Google Android case?*, *Concurrences*, No. 4-2018. See also CAA Paris, November 14, 2019, *Société Sanicorse ea*, No. 18/23992

⁵⁸ Case T-612/17. For an overview of the scope of the grievances, see the summary on the Curia site of the appeal: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=196224&-pageIndex=0&doclang=fr&mode=lst&dir=&occ=first&part=1&-cid=5954912> or the 105-page hearing report posted online in February 2020: https://eulawlive.com/app/uploads/t_612_17_report_for_the_hearing_1581528569.pdf

⁵⁹ See Article 11 of Directive (EU) 2019/1 of the European Parliament and the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, which must be transposed by 4 February 2021 at the latest: at least "serious and irreparable harm" to competition must be established "on the basis of a *prima facie* finding of an infringement"

⁶⁰ Bruno Lasserre, *Concilier le temps de la régulation et le temps économique : bilan et nouveaux défis de la pratique française des mesures conservatoires*, *Concurrences*, No. 2, May 2012

For basing an EU Directive or regulation on Article 114 of the Treaty on the Functioning of the European Union, it suffices that the act at hand aims at improving the functioning of the internal market, in particular in order to eliminate distortions of competition⁶¹ or at preventing the probable emergence of obstacles to trade resulting from the heterogeneous development of national laws⁶². In the present case, it would be difficult to argue that these conditions are not met in the context already described.

No profound difference in nature justifies, from the point of view of the legislator, treating differently, on the one hand, former state monopolies in network industries and, on the other, monopolies, certainly private ones, but which may also play on scale and network effects, based on the acquisition of personal or non-personal data under specific conditions.

The fact that no exclusive State rights have been granted to online platforms does not exempt them from liability. While they have acquired their market power partly on their own merits, in particular an effort of innovation supported by continuous investment, the acquisition of this position is also – and even more importantly – based on the lack of awareness of the value of users' personal data.

These platforms have collected personal data through a form of vitiated consent, recognised in principle by the G29⁶³, and outlined by the case law of the CJEU⁶⁴. Moreover, it did not necessarily end with the mere adherence to general terms and conditions of sale, having regard to the provisions of Article 7(4) of the General Data Protection Regulation (GDPR)⁶⁵.

Beyond personal data, the platforms also collect non-personal data and use metadata, the status of which is indeterminate between pseudonymisation and anonymisation, without any real supervision. This issue, which concerns other categories of operators, is now at the heart of the discussion on the *e-privacy* regulation⁶⁶, and in particular Article 6(2) thereof.

⁶¹ ECJ, 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, paragraph 60.

⁶² ECJ, 8 June 2008, *Vodafone and Others/Secretary of State for Business, Enterprise and Regulatory Reform*, C-58/08, paragraph 33, on Regulation No. 717/2007 on roaming on public mobile telephone networks within the Community; 12 July 2005, *Alliance for Natural Health and others*, C-154/04 and C-155/04, paragraph 29; 14 December 2004, *Arnold André*, C-210/03, paragraph 31; same day, *Swedish Match*, C-434/02, paragraph 30; 5 October 2000, *Germany/Parliament and Council*, C-376/98, paragraph 86.

⁶³ See G29, Opinion on the concept of legitimate interest pursued by the data controller within the meaning of Article 7 of Directive 95/46/EC, p. 40; Guidelines on Consent within the meaning of Regulation 2016/679, April 2017, pp. 6-10, in particular Example 1 p. 6: "A mobile app for photo editing asks its users to have their GPS localisation activated for the use of its services. The app also tells its users it will use the collected data for behavioural advertising purposes. Neither geolocalisation or online behavioural advertising are necessary for the provision of the photo editing service and go beyond the delivery of the core service provided. Since users cannot use the app without consenting to these purposes, the consent cannot be considered as being freely given." See also p. 9: "Article 7(4) GDPR indicates that, *inter alia*, the situation of "bundling" consent with acceptance of terms or conditions, or "tying" the provision of a contract or a service to a request for consent to process personal data that are not necessary for the performance of that contract or service, is considered highly undesirable. If consent is given in this situation, it is presumed to be not freely given (recital 43). Article 7(4) seeks to ensure that the purpose of personal data processing is not disguised nor bundled with the provision of a contract of a service for which these personal data

are not necessary. In doing so, the GDPR ensures that the processing of personal data for which consent is sought cannot become directly or indirectly the counter-performance of a contract. The two lawful bases for the lawful processing of personal data, i.e. consent and contract cannot be merged and blurred" and p. 10: "In any event, the burden of proof in Article 7(4) is on the controller"

⁶⁴ With regard to cookies, the CJEU, in analysing the economics of Directives 95/46/EC, 2002/58/EC, 2009/136/EC and the GDPR and their genesis, considered that the requirement of a "manifestation" of the will of the data subject clearly evokes active and not passive behaviour, and ruled out that consent is regarded as active when an internet user ticks a box by default. The latter must be provided with information that is clearly understandable and sufficiently detailed to enable him/her to understand how the cookies that are used work, how long they last and how they are used by third parties. (CJEU, 1 Oct. 2019, *Planet 49*, C-673/17, paragraphs 50 to 65 and 72 to 81). The CNIL guidelines require purpose by purpose of (deliberation No. 2019-093 of 4 July 2019 adopting guidelines on the application of Article 82 of the amended Act of 6 January 1978 to reading or writing operations in a user's terminal (in particular cookies and other tracers)

⁶⁵ Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC

⁶⁶ Proposal for Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on privacy and electronic communications), COM/2017/010 final - 2017/03 (COD)

The use value of this data set⁶⁷ cannot, at individual level, be estimated by the average consumer or compared in the current state of the market, as evidenced by both theoretical⁶⁸ and empirical studies. Some, conducted in the United States and Singapore and cited in the work of the French *Conseil supérieur de l'audiovisuel*, indicate that the protection of personal data against errors, unauthorised access or misappropriation would be valued at between \$30 and \$45 per individual, but that a difference of \$2 on an acquisition card may seem sufficient to a majority of them to compensate for a loss of anonymity in online transactions⁶⁹. A fortiori, their overall value is immeasurable and explains the unprecedented market valuation of the largest digital platforms on the markets open to trading. Thus, a few dozen "likes" allow us to predict, with a probability of 85%, the political sensitivity of an individual, 82% his religion, 93% his gender⁷⁰.

By their aggregation, these data make it possible, through the play of artificial intelligence, even after anonymisation, to identify profiles of commercial and personal preferences in order to effectively target advertising, to make links between preferences for different categories of products and services, and even to predict market trends, human movements, the spread of diseases, the ability to repay loans and the propensity to spend.

The time it takes for competing services to appear, marking their difference in terms of privacy, the time it takes for the methods for collecting consent to be specified, explained and effectively sanctioned, the time it takes for everyone to become aware of the commercial value of secondary processing of data, whether personal or not, is long. In the meantime, the digital platform that massively collects such data is gaining in relevance, and therefore in volume of traffic. It is building scale, network and reputation effects that give it unquestionable market power.

The collection of a huge database, if not through fraudulent concealment, at least at the cost of a lack of valid collective consent, justifies, in due course, the emergence of *ex ante* regulation, specific to the platforms that exercise the most significant market power, inspired by the regulations of the network industries. And it can only be done at European level.

In any event, the combination of competition law enforcement and *ex ante* regulation is not specific to network industries and incumbent monopolies.

It is also found in oligopolistic sectors that have long been open to competition and have not been characterised by former legal monopolies such as, at European level, retail financial services⁷¹ or, at national level, food retail distribution or the health sector.

The *ex ante* regulation thus envisaged is not stigmatising with regard to digital services. Moreover, it in no way amounts to assimilating them to network industries, which are subject to much more comprehensive, detailed and binding regulation, which generally includes a tariff framework and accounting, functional or structural unbundling.

⁶⁷ See, on this subject: AGCOM (*Autorità per le garanzie nelle comunicazioni*), "Big data", Interim report in the context of the joint inquiry on 'big data' launched by the AGCOM deliberation No. 217/17/CONS, pp. 33-35

⁶⁸ Susan Athey, Christian Catalini, Catherine Tucker, *The Digital Privacy Paradox: Small Money, Small Costs, Small Talk*, NBER Working Paper No. 23488, June 2017

⁶⁹ French audiovisual regulator (Conseil supérieur de l'audiovisuel), CSA Lab, *Le rôle des données et des algorithmes dans l'accès aux contenus*, Yann Bonnet, Nicolas Curien and Francesca Musiani, January 2017; Alessandro Acquisti, Laura Brandimarte, George

Loewenstein, *Privacy and human behavior in the age of information*, Science 30 January 2015, vol. 345, no. 6221, pp. 509-514

⁷⁰ Italian Audiovisual regulator (*Autorità per le garanzie nelle comunicazioni*), "Big data", Interim report in the context of the joint inquiry on 'big data' launched by the AGCOM deliberation No. 217/17/CONS, pp. 41-42

⁷¹ Directive (EU) 2015/2366 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, and repealing Directive 2007/64/EC and delegated Regulation (EU) 2018/389 of the European Commission; Articles L. 312-1-7 and R. 312-4-4 of the French Monetary and Financial Code

Specific EU legislation designed to ensure effective competition is also necessary to preserve the unity of the internal market at a time when, in view of strong political demand which the European Commission can no longer ignore, national legislators have intervened in many Member States, particularly in Germany, France and Italy, to respond to the public interest issues raised by the mass distribution of hate content or of disinformation strategies aimed at altering the results of an election process. The same States are also concerned about the insufficient economic regulation of online services.

In other words, the unilateral delegation of power to the home Member State, which pursues its own national interests, is not sufficient to achieve objectives which are in the common interest of the European Union as a whole.

It is up to the European legislator, who has a wide margin of discretion in pursuing such objectives⁷², to ensure that the new requirements he imposes on operators are proportionate⁷³ to the objectives he pursues, in particular by taking account of the specific situation of SMEs. The proposals outlined below are intended to incorporate these parameters.

Without going as far as accounting, functional or structural unbundling, this *ex ante* regulation may be based on other levers, such as the prohibition of certain contractual or unilateral restrictions vis-à-vis consumers or professionals whose object or effect is to keep them artificially dependent on a service provider and the recognition of the consumer's right to self-determination, i.e. to choose without constraint the service provider best suited to meet his/her needs. The *Data Act* announced as a complement to the *Digital Services Act* will provide the most appropriate legal framework to address issues related to algorithms and data sharing between operators, including, where appropriate, sector-specific variations.

These do's and don'ts would be defined in a harmonised European corpus and implemented by regulatory authorities independent of any national interest, whether in the States of origin or in the States where the digital presence of operators is actually deployed.

⁷² CJEU, 4 May 2016, Poland v. European Parliament and Council of the European Union, C-358/14, paragraphs 37-38 and 67, see also Germany v. Parliament and Council, cited above, paragraph 42, and United Kingdom v. Parliament and Council, paragraph 102.

⁷³ See the judgements in *Arnold André*, paragraph 34; *Swedish Match*, paragraph 33, and *Germany v. Parliament and Council*, paragraph 41

II

**A WELCOME, BUT STILL INSUFFICIENT
LEGISLATIVE TREATMENT**

The European Union institutions have recently realised the importance of adapting European regulation to the fundamental changes in digital services over the last twenty years. The resulting recent advances are admittedly notable. However, these prudent operations are not yet sufficient in view of the ample need for *ex ante* economic regulation.

2.1 Though some consumer lock-in effects have been treated and minimum loyalty obligations set up, those indirect changes to the "e-commerce" Directive are not sufficient alone

The right to portability: a major step forward, to be further developed to allow all users to switch platforms

Article 20 of the GDPR provides for the right of any person to receive the personal data he or she has supplied in a structured, commonly used and machine-readable format and to transfer those data to another controller without the initial recipient being able to object. The exercise of this option is, pursuant to Article 12 of the same Regulation, free of charge, the platform being required to reply within one month and to give reasons for any refusal. In principle, this is a major step forward, similar to the provision of a "robot" API (application programming interface), giving a user leverage to ensure data portability.

This right applies to personal data, i.e. data that enable a person⁷⁴ to be identified (name, pseudonym, e-mail, telephone number, age, date of birth, etc.) processed automatically. It also covers data which are not directly of a personal nature within the meaning of the Regulation but which are processed on the basis of the performance of a contract to which the data subject is party (contact lists, purchase and film consultation records, music, etc.).

However, this right does not apply to files, to data which may affect third parties and data which do not meet the definition of personal data and which are not exchanged for the performance of a contract. Nor does the Regulation apply to applications downloaded from internet access terminal equipments⁷⁵.

Furthermore, the portability request does not automatically trigger the deletion of data or the portability request under sectoral legislation⁷⁶, such as bank statements⁷⁷, and remains a one-off right, without allowing continuous interoperability, like an API.

While this is a significant first step, these provisions alone are not enough to put an end to lock-in effects and to allow "multihoming", which are the only effective ways to spur inter-platform competition. Therefore they only imperfectly empower consumers to switch platforms or to use multiple platforms depending of their respective performance, in monetary or non-monetary terms. They therefore still need to be complemented.

⁷⁴ Or, under Article 4(1) of the Regulation: "any information relating to an identified or identifiable natural person" "directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person"

⁷⁵ Regulation (EU) 2015/2120 of the European Parliament and the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No. 531/2012 on

roaming on public mobile communications networks within the Union concern only physical networks and consumer choice of terminal, but not the content and applications that consumers download to a mobile communication terminal

⁷⁶ See G29, Guidelines on the *Right to Data Portability*, 16/FRWP 242 rev.01, adopted on 13 December 2006 and revised on 5 April 2017

⁷⁷ Articles 66 and 67 of Directive (EU) 2015/2366 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, and repealing Directive 2007/64/EC and delegated Regulation No. (EU) 2018/389 of the European Commission

Minimum loyalty obligations: a welcome initiative, to be supplemented by giving effective means of redress to business users

The "*Platform-to-business*" Regulation⁷⁸, which entered into force in July 2019, provides for the first time a framework for relations between platforms and user companies. It provides for transparency of the general terms and conditions, a minimum notice period of 15 days in the event of their modification and an obligation to state the reasons for the decision to restrict or suspend the provision of services.

Inter alia, the general terms and conditions must specify, without revealing the algorithm, the main parameters which, individually or collectively, play the most decisive role in the ranking as well as the weighting of each of them, specifying in particular the influence of any remuneration and the motivation for any differentiated treatment of certain advertisements. Downgrades in classification resulting from the knowledge of facts reported by a third party oblige the platform to communicate their content to the company in question.

The recognition of these new rights perpetuates the effects of the decisions of competition authorities at the European level, but also at the national level (France, Italy) and broadens their scope of application.

The sanction for failure to comply with the obligations thus instituted is based on mechanisms for handling complaints within the platforms, an *ad hoc* mediation process and injunctions or representative actions (Articles 11 to 14).

However, no fine is foreseen, even for the most serious infringements of the Regulation, which contrasts with the rules for implementation of the *Platform-to-Consumer* Directive, currently being published⁷⁹. The latter requires platforms to clearly inform consumers of the main parameters determining the ranking of the various offers, in particular the receipt of payments in return for a listing or the inclusion of certain information⁸⁰, and to inform the consumer contracting party, on the basis of the elements indicated by the other party, of the latter's status (professional or private individual), the law applicable to the contract and the identity of the person able to respond to his requests based on consumer law, if the contracting party is a professional (right of withdrawal, the right to replacement or repair of non-compliant goods, etc.)⁸¹. Failure to comply with these obligations is punishable by a heavy administrative fine.

There is little reason not to adopt a similar mechanism in the relations between platforms and business users, which are also usually weak parties. As has already been pointed out, competition law alone, without the support of sector-specific regulation based on the law on restrictive practices, is not sufficient to deter lucrative exclusionary conduct vis-à-vis user companies.

More deterrent enforcement mechanisms are therefore needed to ensure the proper application of the Platform-to-business Regulation. Secondary legislation now frequently provides for the

⁷⁸ Regulation (EU) No. 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services

⁷⁹ Proposal for a Directive amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and the Council, Directive 2005/29/EC of the European Parliament and the Council and Directive 2011/83/EU of the European Parliament and

the Council on better enforcement and modernisation of EU consumer protection rules, 2018/0090(COD)

⁸⁰ Article 6 of the e-commerce Directive only provides for an obligation of fairness and consumer information with regard to 'commercial communications'

⁸¹ PBy inserting an Article 6a in the above-mentioned Directive No. 2011/83

imposition of an administrative fine of up to 4% of worldwide turnover, which must be determined taking into account, inter alia, the duration, gravity of the infringement and undue profit. However, as this is a material field which does not fall within the competence of an independent administrative authority recognised at European level, it is preferable to provide for a mechanism providing for the imposition of civil fines rather than administrative fines. It would thus be up to the administrative authorities responsible for ensuring the proper application of the Directive on unfair commercial practices⁸² to bring cases before the courts when a Member State's market is affected⁸³.

2.2 As it stands, the e-commerce Directive may hinder legitimate and ECHR compliant responses to the widespread dissemination of hate speech and to massive online disinformation strategies

The e-commerce Directive already envisages, in principle, the removal of manifestly illegal content, for reasons derived *"in particular"* from *"the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity"*, by authorising injunctions, even of worldwide scope, aimed at preventing the reappearance of equivalent content⁸⁴.

But it proceeds in such an unbalanced way that in practice it almost deprives the public authorities of any interest in its handling and exposes them to litigation.

Only one recital, without any autonomous normative scope, provides that the host must act promptly to withdraw the information concerned or make access to it impossible, after balancing it against the principle of freedom of expression and in accordance with non-harmonised procedures and without setting any criteria, even indicative ones. As for the Directive itself, while it provides that Member States may introduce an obligation to inform the competent public authorities promptly of alleged unlawful activities carried out by the recipients of their services or of alleged unlawful information provided by them, this is without penalty and is in counterpoint to the prohibition on creating a general obligation of supervision.

A cooperation procedure with the State of establishment in which the platform is established shall in any event be required before the Member State in which the recipient of the information wishes to take action⁸⁵, the proportionality of the measure having to be clearly established in the light of the grounds, limited to manifestly unlawful acts and serious breaches of public policy, concepts which are generally understood in a strict manner⁸⁶. Finally, it is relatively easy for the editor to avoid an injunction by moving the content to a new site.

It is therefore legally risky to attempt to implement the non-binding recommendation⁸⁷ adopted by the European Commission in order to respond insufficiently to the strong political demand expressed by the Member States.

⁸² Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council

⁸³ This mechanism is inspired by Article L. 442-6, section III of the French Commercial Code. It is assumed that these authorities would intervene only in the event of a significant concern, either by the number of companies affected or the seriousness of the practices.

⁸⁴ CJEU, 3 October 2019, *Eva Glawischnig-Piesczek v. Facebook Ireland*, C-18/18; *SABAM v. Netlog*, cited above

⁸⁵ Recital 46, Article 15(2), Article 3(4)

⁸⁶ Understood as a *"real and sufficiently serious threat, affecting a fundamental interest of society"*, which cannot be unilaterally defined by a Member State (ECJ, 27 October 1977, *Regina v. Bouchereau*, Case 30/77; 19 January 1999, *Calfa*, C-348/96), this threat must be current (CJEU, 15 February 2016, N., C-601/15 PPU)

⁸⁷ Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online

Admittedly, the new Audiovisual Media Services Directive⁸⁸ introduces significant amendments to the country of origin principle. But these remain limited in scope and, especially confined to the audiovisual media. The provisions in question do not extend to videogram sharing platforms, nor to other platforms, which remain governed by the e-commerce Directive, subject "only" to an obligation on the part of the country of origin, in the case of the former, to provide for precautionary measures to protect minors or the general public from what is referred to as hate content⁸⁹. The bulk of audiovisual content distribution, which is expected to account for 80% of traffic by 2022, i.e. social networks and search, remain out of its scope.

Finally, while reputational issues may convince online services to engage in cooperation with public authorities, the lack of a harmonised and binding framework naturally limits the scope of these efforts, which imply the implementation of means that can be used more profitably.

European legislation is therefore notoriously inadequate on these issues. It has so far proved less demanding than for copyright protection, where the injunction mechanisms and cooperation obligations of the platforms are organised in a clear and harmonised manner by secondary legislation.

Even more disturbing, up to now, the e-commerce Directive is likely, if applied too rigorously and mechanically, to hinder national initiatives of legitimate political inspiration, be it the German law known as *NetzDG* of 1 September 2017 or two French initiatives, the draft law to combat hatred on the internet known as "Avia"⁹⁰ and the organic⁹¹ and ordinary⁹² laws on combating the manipulation of information. These latter concerns are not specific to national legislators in the European Union⁹³ and are emerging in the United States, with the bipartisan *Honest Ads Act*⁹⁴, and in the United Kingdom, with a future *Online Harms Act*⁹⁵.

It is therefore proposed, in the absence of a harmonised mechanism, to adapt the e-commerce Directive. The only attempt to adopt a harmonised mechanism, even though focused on preventing the dissemination of terrorist content online⁹⁶, does not give cause for optimism.

⁸⁸ Articles 2 to 4 of Directive 2010/13/EU of the European Parliament and the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services

⁸⁹ Article 28a of Directive 2010/13, created by Directive (EU) 2018/1808

⁹⁰ Bill adopted by the National Assembly aimed at combating hateful content on the internet, no. 645; text modified by the Senate on 17 December 2019. Council of State, opinion of 16 May 2019 on the bill aiming to fight against hatred on the internet

⁹¹ Organic Law No. 2018-1201 of 22 December 2018 relating to the fight against the manipulation of information

⁹² Law No. 2018-1202 of 22 December 2018 relating to the fight against the manipulation of information. Council of State, 19 April 2018, opinion on the draft laws on the fight against false information

⁹³ The European Commission could only act in a very targeted man-

ner on this sensitive subject in the light of the principle of subsidiarity on the basis of Article 114 TFEU. However, discussions are under way. See European Commission, *A multi-dimensional approach to disinformation, Independent high level group on fake news and on-line disinformation*, March 2018. No regulatory proposal has been made, although the Group is calling for a review by the next College of Commissioners.

⁹⁴ <https://www.congress.gov/115/bills/s1989/BILLS-115s1989is.xml>. It proposes to extend to platforms the requirements applicable to the media, including the obligation to provide information to the electoral commission on the identity of persons behind political advertising and the implementation of "reasonable efforts" to ensure that such advertising is not financed, directly or indirectly, by foreign countries. Also see, for an overview of recent interferences in electoral processes in France, the United Kingdom and the United States: Atlantic Council of the United States, Scowcroft Center for Security and Strategy, *Defining Russian Interference, An analysis of Select 2014 to 2018 Cyber Enabled Incidents*, Issue Brief, September 2018, Laura Galante and Shaun Ee

⁹⁵ See the white paper: <https://www.gov.uk/government/consultations/online-harms-white-paper>

⁹⁶ Procedural reference: 2018/0331(COD)

This proposal for a Regulation requires platforms to designate a contact point in the European Union⁹⁷, to withdraw content reported by a Member State or Europol's dedicated unit as terrorist within 24 hours, on pain of a fine, to identify content likely to glorify or promote terrorist activities and to prevent their reappearance (referred to as "proactive" or "specific" measures in the European Parliament's version).

However, there was a wide divergence of views between the Council of the European Union and the European Parliament, which met in plenary session on 17 April 2019, particularly as regards the linkage of the proposal with the e-commerce Directive, content filtering obligations, reporting procedures and the issuing of withdrawal measures.

It is up to the College that has just taken office to decide whether the Commission should send the institutions an amended proposal likely to reach a compromise in the new legislature, which would be appropriate and quicker, or whether it should instead fall back on a less ambitious arrangement, expressly allowing Member States to act without contravening the Directive on electronic commerce. It is this second-best solution that is considered below on an exploratory basis.

⁹⁷ Also see, for operators of critical services, Article 18 of Directive (EU) 2016/1148 of the European Parliament and the Council of 6 July

2016 concerning measures for a high common level of security of network and information systems across the Union, known as "NIS"

III

**RECOMMENDATIONS
IN THE PERSPECTIVE OF A FUTURE
DIGITAL SERVICES ACT**

To address the shortcomings thus identified and restore the ability of stakeholders - competitors, customers and consumers - to discipline dominant players, the *Digital Services Act* offers a unique opportunity to bring *ex ante* regulation. The wording proposed to this effect is contained in the annex to this note.

It is structured around three main lines: the recast of the "e-commerce" directive (restriction of the scope of the status of hosting provider, introduction of a duty of care), the creation of an *ex ante* regulation, whose enforcement would remain in the hands of independent administrative authorities or courts (greater portability and interoperability for the benefit of consumers, prohibition of certain practices vis-à-vis business users) and the effective means of redress for violations of the new rights and obligations introduced by the *Digital Services Act* and of recent European legislation (merger control thresholds of acquisitions by platforms enjoying significant market power, effective sanctioning of breaches).

3.1 Recasting the e-commerce Directive

Restricting the scope of the immunity of host providers

The most radical option would be to restrict the legal immunity of host providers to what it was originally intended to cover, for instance only purely passive intermediaries among the "online interfaces"⁹⁸ and those who do not direct their activities towards the territory of the European Union⁹⁹.

The provisions of Articles 3 (country-of-origin principle) and 15(1) (prohibition of a general obligation of supervision) of the Directive would therefore apply only to telecommunications operators. However, from a date to be defined, digital services pursuing other purposes, even on an ancillary basis, would no longer benefit from it.

A recital would specify that platforms ensuring the placement of targeted advertising on a digital interface, the provision of a multi-faceted digital interface to users or the sale of data collected about users and generated from their activities on digital interfaces would henceforth be excluded from the scope of the Directive. These concepts are already defined in Union law in the above-mentioned texts.

No provision of primary law would preclude that, as the directive is in no way indispensable to the exercise of the freedom to provide services. The activities of the platforms concerned would in any event fall within the scope of the Directive on services in the internal market, and in particular of the principle of the freedom to provide services guaranteed by Article 16 thereof.

These provisions would also be without prejudice to the obligation to notify the European Commission and the Member States of any measure affecting Information Society services¹⁰⁰. This procedure would make it possible to check that it does not unduly impede the internal market, in particular through any discriminatory effects.

⁹⁸ See footnote 6

⁹⁹ See recital 11 of the above-mentioned proposal for a Regulation on the prevention of the dissemination of terrorist content online

¹⁰⁰ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services

A more balanced option would be to withdraw the benefit of the origin principle only from platforms whose size gives rise to a presumption of dominance that calls for "special responsibilities not to impede" "effective and undistorted competition in the internal market of the Union"¹⁰¹ and which do not engage in purely passive activities.

The advantage of such thresholds would naturally lie in the fact that it would be no more necessary to delineate a relevant market, which is inevitably subject to protracted litigation on a case-by-case basis, especially where those players know all the dodges to the traditional competition law toolkit. However, it would still be possible for the service in question to demonstrate that it meets the conditions of passivity required to benefit from the host provider legal status, or that the conditions of effective competition have now been restored. This rule of devolving the burden of proof is much better suited to the availability of the data in question, which only that operator is likely to hold.

The benefit of the above-mentioned provisions of the Directive could be maintained below the thresholds currently set by the draft tax on digital services¹⁰² in terms of sales or significant digital presence¹⁰³. In other words, today the GAFAM and (N)A(T)U, tomorrow the BATX¹⁰⁴.

In the interests of proportionality, it would remain possible for the undertakings concerned, after an initial period of five years of application of the Directive, to demonstrate to the European Commission, after consultation with the data protection authorities, the European Data Protection Supervisor and the Body of European Regulators for Electronic Communications, and following an open internet consultation, that they do not exercise a dominant position or that the prohibition of certain practices is no longer justified, taking into account the existence of sufficient effective competition. But this would reverse the burden of proof.

In addition, the European Commission could propose, on its own initiative or upon proposal from a Member State regulatory authority, to subject other service providers to the ex ante regulation mechanism provided for in the *Digital Services Act*, if it considers that they are "dominant operators" meeting the threshold conditions set by other secondary legislation (e.g. the Copyright Directive¹⁰⁵ or the platforms responsible for implementing a complaints mechanism under the *Platform-to-business Regulation*)¹⁰⁶.

To set up such a positive list, more sophisticated criteria can also be envisaged in the framework of European and national lists based on a broader dominance criterion¹⁰⁷, or taking into account the societal or systemic impact of the platforms¹⁰⁸.

Here it is proposed to combine the two approaches: reversal of the burden of proof in favour of the European Commission for operators exceeding the "GAFA tax" thresholds and terminal equipments above a certain usage threshold and a list more focused on the traditional criteria of dominance for other platforms and terminals, maintaining the burden of proof on the EU institutions.

¹⁰¹ See to that effect: ECJ, 13 February 1979, *Hoffmann-La Roche*, Case 85/76; 9 November 1983, *Michelin*, Case 322/81, paragraph 57; 2 April 2009, *France Télécom*, C-202/07 P, paragraph 105; CFI, 7 October 1999, *Irish Sugar*, T-228/97, paragraph 112

¹⁰² Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 2018/0073(CNS), Presidency of the Council of the European Union, General approach, 29 November 2018, No. 14886/18; see also OECD, Consultation Paper, Comprehensive proposal to combat erosion of the tax base, Pillar 2, 9 December 2019

¹⁰³ Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM/2018/0147 final - 2018/072 (CNS)

¹⁰⁴ Google, Apple, Facebook, Amazon, Microsoft; AirBnB, Uber (but not Netflix and Tesla, up to now outside the scope, the former being a publisher, the latter a manufacturer); Baidu, Alibaba, Tencent and

Xiaomi

¹⁰⁵ EUR 10 million in Article 17(6) of the aforementioned Copyright Directive

¹⁰⁶ See the platforms subject to the obligation to operate an internal complaints-handling system under the above-mentioned Platform-to-business Regulation, Article 11(5), with reference to the definition of small enterprises in the Annex to Recommendation 2003/361/EC. The same reference was made in the Regulation on the prevention of the dissemination of terrorist content online

¹⁰⁷ Competition Authority, 19 February 2020, Contribution to the debate on competition policy and digital issues; see also the joint studies with the Bundeskartellamt on big data (May 2016) and algorithms (November 2019)

¹⁰⁸ See, for example: ARCEP, *plateformes numériques structurantes, éléments de réflexion relatifs à leur caractérisation*, December 2019.

Setting up a duty of care at European and national level

Article 15 of the e-commerce Directive needs to be clarified and supplemented in order to harmonise the procedures by which Member States may require online services to withdraw information, to introduce a duty of care and to authorise Member States to legislate at national level to ensure the integrity of their electoral processes, in accordance with common EU guidelines.

A few introductory reminders are also indispensable given the lively public debate on this subject, partly due to the confusion deliberately maintained by certain stakeholders.

Firstly, it should be recalled that injunction mechanisms at the initiative of third parties, in particular public authorities, are completely independent of the potential liability of the platforms and their role, whether passive or active. In the field of copyright, these principles are clearly established by secondary legislation¹⁰⁹ and the case law of the Court of Justice of the European Union¹¹⁰.

Secondly, even in its current wording, Article 15 of the e-commerce Directive does not preclude the establishment of targeted obligations to withdraw content and to exercise vigilance, provided that it is an obligation of means leaving the recipient a certain margin of manoeuvre in its execution¹¹¹, in order to *"put in place measures which are best adapted to the resources and abilities available to him and which are compatible with the other obligations and challenges which he will encounter in the exercise of his activity"*, and to prevent new infringements¹¹². There is therefore no diminution of freedom of expression on these specific points. On the contrary, it is a matter of making public and controllable a mechanism which today, in practice, relies essentially on withdrawal mechanisms managed by digital service providers alone, largely hidden from the public eye, political authorities and even supervisory authorities.

Thirdly, withdrawal obligations are fully compatible with the freedom of expression guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as long as the injunction, except in cases of particular urgency, is issued by a judge or an independent administrative authority¹¹³, which has weighed up and targeted its intervention so that it remains proportionate. Speech that is *"clearly unlawful and constitutes hate speech or incitement to violence"* does not fall, at any rate, within the scope of the freedom protected by Article 10 of the Convention¹¹⁵. Furthermore, while *"users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others"*¹¹⁶.

¹⁰⁹ Directive 2001/29/EC, Article 8(3) and recital 59; Directive 2004/48/EC, Article 11 and recital 23

¹¹⁰ CJEU, 12 July 2011, *L'Oréal SA and others v. eBay International AG and others*, C-324/09

¹¹¹ CJEU, 27 March 2014, *UPC Telekabel*, C-314/12

¹¹² CJEU, 12 July 2011, *L'Oréal SA and others v. eBay International AG and others*, C-324/09

¹¹³ European Court of Human Rights, gr ch, 14 September 2010, *Sanoma Uitgevers BV v. The Netherlands*, no. 38224/03; 17 July 2001,

Association Ekin v. France, No. 39288/98, § 58; 5 May 2011, *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*, No. 33014/05, § 55

¹¹⁴ European Court of Human Rights, 18 December 2012, *Yildirim v. Turkey*, No. 3111/10

¹¹⁵ European Court of Human Rights, gr ch, 16 September 2015, *Delfi v. Estonia*, No. 64569/09

¹¹⁶ European Court of Human Rights, 2008, *K.U. v. Finland*, No. 2872/02, para. 49 European Court of Human Rights, 2008, *K.U. v. Finland*, No. 2872/02, para. 49

In these circumstances, EU primary law would not preclude that the *Digital Services Act*:

- imposes the designation of a contact point in the European Union for all platforms above a *de minimis* threshold;
- takes over, if necessary, the main elements of the Regulation on the prevention of the dissemination of terrorist content online, which is currently being negotiated, or authorise Member States to take action to that end and to request the withdrawal of "hate" content, while being exempt from the prior cooperation procedure with the State of establishment provided for in Article 3(4) to (6) of the commerce Directive;
- authorises Member States, under the same conditions, to combat the manipulation of information in order to protect the integrity of their electoral procedures, in particular by imposing an obligation to enter into cooperation agreements in good faith to identify large-scale dissemination of information and interference from foreign countries. It would also require online services that disseminate information, subject to a *de minimis* threshold, to take effective and resource-proportionate measures to identify and remove bot accounts;
- allows Member States to provide independent regulatory authorities to impose, with due respect for business secrecy, transparency of algorithms for highlighting general information and moderating content placed online, to issue guidelines for duty of care obligations concerning the largest players and to certify internal content moderation arrangements. Discussions, initiated in France following an agreement between the CEO of Facebook and the President of the French Republic, have highlighted the importance of supplementing European and national legislation on the withdrawal of content with a "duty of care" obligation, "self-regulation regulation" and a more targeted range of tools (quarantine, deceleration, demonetisation, targeted pedagogy, etc.)¹¹⁷.

The same work underlines the value of national regulation within a common European framework. On the one hand, the definition of odious or hateful content depends on the specific historical, cultural, legislative and jurisprudential characteristics of each State. On the other, regulation at this level has the advantage of reconciling the place where the harm occurs and the place where the regulation is implemented.

However, a common European framework is also needed to guarantee the independence of regulators and to provide a common and coherent framework. EU common guidelines could thus be established by the Commission, after consultation with BEREC and the European Regulators Group for Audiovisual Media Services (ERGA), as the number of national regulatory authorities participating in these two bodies is set to grow. The mechanism for notifying the European Commission and the Member States of any measure affecting Information Society services would also¹¹⁸ remain applicable here.

3.2 Setting up an *ex ante* regulation for the benefit of consumers and business users

Giving consumers a pivotal role in inter-platform competition

Some of the online service providers (online marketplaces, online search engines, interfaces and package internet service offers in which the telecommunications aspect is ancillary and secondary)

¹¹⁷ Mission "Régulation des réseaux sociaux - Expérimentation Facebook", headed by Frédéric Potier and Serge Abiteboul, "Créer un cadre français de responsabilisation des réseaux sociaux : agir en France avec une ambition européenne", May 2019.

¹¹⁸ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services

meeting the highest threshold conditions (see above) could be required, in addition to the one-off right to portability resulting from Article 20 of the GDPR, to open up a continuous right to interoperability.

At the request of a consumer, such providers would be required to provide, in the form of a dynamic programming interface, for re-use, all actively supplied non-personal data and metadata associated with the IP addresses he/she mentions, to him/herself or to any person he/she designates¹¹⁹.

It could require such data to be provided to it in accordance with a protocol defined by a delegated Regulation of the European Commission, and any provider may request the Commission that a protocol be referred to in that act.

Where electronic communications terminal equipments giving access to the internet and software reaching a certain threshold of use (different from the one mentioned above, which only concerns platforms), the consumer could claim a right to defragmentation or uninstallation and, conversely, to the installation of digital applications or browsers, unless there are objective justifications based on the security, integrity or proper functioning of the operating system. From a date set by the Directive, suppliers with significant market power could be required to market "scalable" terminals.

Beyond that, the concept of net neutrality could be extended to terminal equipments, prohibiting the introduction of unjustified differences in the configuration or operation of the operating system between content, applications and services, for example by excessively restricting or favouring access to some of them (e.g. by restricting the possibility to download applications not available on the integrated search engine) or by degrading their functionality (e.g. background operation, integrated payment mechanism).

In both cases, the national regulatory authority responsible for electronic communications could have additional powers to collect the data, act for dispute resolution purposes and impose administrative sanctions (see also *in fine*) in the event of failure to comply with these obligations.

In addition, taking into account the specificities of the sector, it could be required, under the same modalities as those defined by Articles 12 and 20 of the GDPR, be it on an *ad hoc* and one-off basis, the transfer of any file and metadata, even if not exchanged for the use of a contract.

Finally, on an bi-annual basis, every interface would be required to inform the consumer of:

- the scope of the principle of terminal neutrality;
- his rights to portability, interoperability and fragmentation;
- his new right to be informed of all categories of metadata on the basis of IP addresses provided by the applicant; it is paradoxical that rights have been granted in this respect to business users under Article 9 of the Platform-to-business Regulation and not to consumers;
- his new right to be informed of any interoperability agreement concluded with a third party concerning the user's personal data and metadata¹²⁰.

The implementation of the latter right could be monitored by the national data protection authorities, given their experience in dealing with complaints affecting the individual rights of individuals.

¹¹⁹ These provisions are convergent with those of the European Commission's proposal concerning the respect for private life and the protection of personal data in electronic communications and re-pealing Directive 2002/58/EC (e-privacy regulation), which however

has a much wider scope and serves other purposes

¹²⁰ For example, an agreement between Facebook and Cambridge Analytica

The Regulation could make provision for exchanges of information between these two categories of independent administrative authorities and for inspections at the request of the authority of another Member State.

These provisions, organising a right to portability and interoperability would be proportionate and targeted. In particular in the light of the proposal, which some have put forward, of the recognition of a property right on personal data and metadata, which would constitute a real obstacle to any innovation of on-line services.

The right to defragmentation and installation would not amount to any third-party access to the network since it would depend not on a request from the publisher of the software or application, but on the individual consumer.

An application by a software publisher would still be subject to the conditions laid down in the case law on abuse of a dominant position¹²¹ and vertical restraints, as current competition law allows for an easier delineation of the relevant market and market power in this sector.

Prohibiting certain practices and clauses imposed on business users

Online services with significant market power could be prohibited from engaging into any practice or imposing any stipulation having the object or effect of:

- restricting the possibility for a consumer, contributor or user undertaking to conclude contracts with other online interfaces;
- limiting the right to portability or interoperability (see above);
- imposing a specified price on a user business or an independent contributor, or a maximum price;
- prohibiting the latter from freely determining prices and quantities sold through their own distribution channels, whether online or offline,
- obliging them to a parity of business models (prices, conditions or quantities) vis-à-vis other online interfaces or other distribution channels, online or offline.

These clauses or practices have a well-documented anti-competitive effect when implemented by operators with significant market power (see above)¹²².

3.3 Giving consumers and business users more effective means of redress

Updating merger notification criteria

The French Competition Authority notes that, since 2008, Google has acquired 168 companies, many of which were potential competitors (Waze for navigation services, YouTube for videos, DoubleClick and AdMob in online advertising), Facebook 71 (among the largest, Instagram in 2012 and WhatsApp in 2014).

It believes that *"These acquisitions most often enable the business of young start-ups to be integrated*

¹²¹ CJEU, 16 July 2015, *Huawei Technologies*, C-170/13

¹²² The French Competition Authority proposed an even broader list

in its above-mentioned contribution of 19 February 2020, with certain practices depending on more sophisticated market analyses

into the acquirer's ecosystem. They may also be aimed at acquiring a community of potential users (Facebook/WhatsApp) or scarce technical or human skills. These acquisitions can thus have the effect, if not the objective, then at least of drying up the labour market when the expert human resources available are often scarce and invaluable. Through this very intensive acquisition policy, some players could effectively curb the emergence of potential competitors who could have offered the consumer an alternative. These acquisition transactions carried out "below the thresholds" may give rise to fears that the appropriation of innovation by certain dominant players could be harmful to the economy, due to the lack of effective control by the competition authorities. (...)

In many cases, the acquirer does not "kill" the target, as in the case of killer acquisitions, but on the contrary retains it and strongly develops its business: the examples of WhatsApp and Instagram acquired by Facebook, or Double Click and YouTube acquired by Google, are particularly telling in this respect, as these entities have developed significantly after their acquisition, and contribute very significantly to the success of their acquirers.

There may therefore be several different configurations: the acquisition of a competitor in order to eliminate or silence it, or the acquisition of a business that strengthens the position of the acquirer in the same or neighbouring markets. Today, these acquisition policies, which are subject to virtually no control, allow certain players to increase their market positions: we can speak of "consolidating" or "encompassing" acquisitions. These acquisitions may enable them to strengthen their dominance in their core market and/or a neighbouring market."

In view of the risk of acquisitions that are predatory or harmful to innovation and the difficulties in measuring this risk within the current thresholds set by the Merger Regulation¹²³, as set forth in the aforementioned contributions of the French Competition Authority and in the *Stigler*, *Cremer* and *Furman* reports, online services enjoying significant market power could be subject to a specific requirement to notify the European Commission and the national competition authorities of any merger with an undertaking directing its activities towards the European Union, by way of derogation from the thresholds set forth in Articles 1 and 5 of the Regulation, and to comply with a standstill period.

The Commission, on its own initiative or at the request of an NCA, by means of a reasoned submission, could "initiate proceedings" within a maximum of ninety working days or require an undertaking to notify a concentration.

The necessary legislative provisions could probably be taken by the Council alone, by qualified majority, on a proposal from the European Commission based on Article 1(5) of the above-mentioned Regulation.

In the event of failure to notify or of the providing of misleading information, the sanctions provided for in Article 14 of the Merger Regulation would apply. They have already been implemented to a significant extent, within the legal framework in force, in the Facebook/Whatsapp case¹²⁴, which was notified to the European Commission only because of a referral under Article 22 of the Merger Regulation from countries whose national merger control notification thresholds were met (Spain, Cyprus, United Kingdom).

It would be up to the national legislators, if necessary, to supplement their control mechanism, below the European thresholds, in a coordinated manner. Germany, Austria and France have started work in this direction.

¹²³ Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings

¹²⁴ European Commission, 3 October 2014, Facebook/Whatsapp, COMP/M.7217

Establishing effective and deterrent fines

The introduction of all the other new obligations mentioned above calls for an effective and deterrent sanctioning mechanism.

To this end, it is proposed to rely, as far as possible, on the independent administrative authorities or national competition authorities and to replicate the administrative sanction mechanisms allowing a fine to be imposed which takes account of the duration, gravity and profit-making nature of the infringement, up to an amount representing 4% of the worldwide turnover of the undertaking or group.

The sanction of nullity may also be effective in business-to-platform relations.

In addition, the mechanisms of injunctions and representative action open to consumers should be extended to ensure the proper application of the new rights granted to business users.

CONCLUSION

An outline of the key elements of the Digital Services Act based on these main thrusts is presented in the annex. The wording is largely inspired by instruments related to Union law cited in this note. Article 114 of the Treaty on the Functioning of the European Union would provide an appropriate legal basis, with the exception of the provisions on merger control, for the reasons already set out, which should, in principle, only be adopted by the Council of the European Union¹²⁵.

These proposals are intended to stimulate a debate that is bound to last.

Indeed, the European Commission has announced consultations in the spring of 2020, before drawing up, by the end of this year, a legislative proposal accompanied by an impact assessment, which will, of course, be submitted to the European Parliament and the Council.

Moreover, important though the Digital Services Act is, it is only one of the many dimensions of a national and European policy in favour of digital technology or even the regulation of digital services, which involves many levers, regulatory or otherwise.

Legal or financial support for innovation, venture capital and development capital, the common commercial policy, financial and prudential regulation, in particular of cryptocurrency, the definition of a minimum level of working conditions for the benefit of the natural persons contributing to the platforms, the implementation of new related rights for the benefit of the press, the GDPR or the Audiovisual Media Services Directive, the adaptation of taxation to the specific nature of the economic models of the digital sector, the challenges of artificial intelligence¹²⁶ and sharing of data collected by the private sector¹²⁷, the deployment of 5G and cyber-security are all new subjects to be examined in greater depth at European and national level.

Digital education, vocational training, the study of the impact of legislative proposals on SMEs in the digital sector, particularly with regard to taxation, and the digitisation of public services under satisfactory conditions of privacy and security, which fall exclusively within the competence of the Member States, are also future challenges for the "Digital New Deal".

¹²⁵ It was not considered useful to draft a proposal on this point, the latter being purely technical and not opening up a wide range of options

¹²⁶ See in particular on this point: Céline Castets-Renard, Professor, University of Ottawa, Chairholder of the "Law, Accountability and Social Trust in AI", Comment construire une intelligence artificielle responsable et inclusive, Recueil Dalloz 2020 p.225 as well as the aforementioned report of the mission "créer un cadre français de

responsabilisation des réseaux sociaux : agir en France avec une ambition européenne", pp. 25-26

¹²⁷ To this end, the European Commission has announced a Data Act for the year 2021. European Commission, 19 February 2020, A European strategy for data, COM (2020)66 final; White Paper On Artificial Intelligence – a European approach to excellence and trust, COM(2020)65 final

APPENDIX

Proposal for a Directive on digital online interfaces and services

Having regard to the Treaty on the Functioning of the European Union, and in particular
Article 114 thereof, (...)

(recitals...)

TITLE 1

GENERAL PROVISIONS

Article 1

Subject

1. The purpose of this Directive is to contribute to the proper functioning of the internal market by laying down rules to ensure that consumers and business users of online services are able to exercise their free choice of services that they consider to be the most advantageous and that they are granted appropriate transparency, fairness and effective means of redress.

2. This Directive does not apply to:

- activities carried out by public authorities, in particular for the prevention, detection, investigation and prosecution of criminal offences or the execution of criminal sanctions, including protection against threats to public security and preventing such threats.
- the activities referred to in Article 1(5) of Directive 2000/31/EC;
- audiovisual media delivery services;
- copyright and related rights, unless otherwise specified in this Directive;
- financial services, including online payment services;
- water, gas, electricity and district heating services;
- package offers, the exclusive purpose of which is to provide electronic communications services;
- online advertising tools and online advertising exchanges which are not offered with a view to facilitating direct transactions and which do not involve a contractual relationship with consumers;
- free software development and sharing platforms;
- business-to-business and cloud services that allow users to upload content for their own use.

3. This Directive is without prejudice to the application of European Union law and national rules which, in accordance with Union law:

- protect the interests of consumers;
- prohibit or punish agreements, unilateral conduct or unfair trade practices;
- order, with due respect for the rights guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 11 of the Charter of Fundamental Rights, the removal of content that infringes intellectual property rights, public policy, human dignity or the honour and reputation of others;
- promote cultural and linguistic diversity and ensure the defence of pluralism.

4. This Directive is without prejudice to national civil law, in particular contract law, such as rules on the validity, formation, effects or termination of a contract, in so far as the rules of national civil law are in conformity with Union law and the relevant aspects are not governed by this Regulation.

5. This Directive does not apply to:

- micro and small enterprises as defined in Commission Recommendation 2003/361/EC;
- operators of services not established in the European Union that do not target their activities at users in one or more Member States within the meaning of Article 17(1)(c) of Regulation (EU) No 1215/2012.

6. This Directive is without prejudice to the application of other instruments of European Union law, in particular of:

- Directive 2006/123/EC on services in the internal market;
- Regulation (EU) No 2015/2120 of the European Parliament and the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union;
- Regulation (EU) No 2019/1150 of the European Parliament and the Council on promoting fairness and transparency for business users of online intermediation services;
- Directive No xxxx/EU of the European Parliament and the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and the Council, Directive 2005/29/EC of the European Parliament and the Council and Directive 2011/83/EU of the European Parliament and the Council.

Article 2 **Definitions**

For the purposes of this Directive:

1. "online services": means services provided on the internet or on an electronic network, the nature of which renders their provision largely automated, with minimal human intervention, and impossible to provide in the absence of information technology, including in particular:

- (a) the supply of digitised products generally, including changes to or upgrades of software and modifications or updates thereof;
- (b) services consisting of providing or supporting the presence of businesses or individuals on an electronic network, such as a website or web page;
- (c) services automatically generated from a computer via the internet or on an electronic network, in response to a specific data input entered by the recipient;
- (d) the transfer for consideration of the right to put goods or services up for sale on an internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer;
- (e) internet service packages (ISPs) in which the telecommunications aspect is ancillary and secondary, in other words packages which go beyond simple internet access and include other elements such as content pages providing access to news, weather or tourist information, playgrounds, web hosting, access to online debates or any other similar element;
- (f) the services listed in Annex 1.

2. "online interface": means any software, including a website or part thereof, and any application, including mobile applications, accessible by users;

3. "user": means any individual or company;

4. "consumer", means any natural person acting for purposes unrelated to his/her trade, business, industry, craft or profession;

5. "online marketplace": means a digital service which enables consumers and/or traders within the meaning of Article 4(1)(a) or (b) respectively of Directive (EU) 2013/11 of the European Parliament

and the Council to conclude online sales or service contracts with traders either on the website of the online marketplace or on the website of a trader using the IT services provided by the online marketplace;

6. "online search engine": means a digital service which allows users to search, in principle, all websites or websites in a given language, on the basis of a query on any subject in the form of a keyword, phrase or other entry, and which returns links from which it is possible to find information related to the requested content;

7. "associated enterprise": means an entity that is related to the particular entity in question in one or more of the following ways:

- (a) one of them participates in the management of the other by being able to exercise significant influence over the other;
- (b) one of them participates in the control of the other by means of a holding, directly or indirectly, in the other which exceeds 20% of the voting rights;
- (c) one of them participates in the capital of the other by means of a right of ownership, directly or indirectly, in the other that exceeds 20% of the capital;

If more than one entity participates in the management, control or capital of the same entity in one or more of the ways set out in points (a) to (c), all those entities shall also be regarded as associated enterprises of each other.

If the same entity participates in the management, control or capital of more than one entity in one or more of the ways set out in points (a) to (c), all those entities shall also be regarded as associated enterprises of each other.

In the case of indirect shareholdings, compliance with the criteria set out in points (b) and (c) shall be determined by multiplying the holding percentage rates successively at the different levels. An entity holding more than 50% of the voting rights is deemed to hold 100% of those rights.

8. "group": means any entity comprising a parent undertaking and all its subsidiary undertakings within the meaning of Article 2(11) of Directive (EU) 2013/34 of the European Parliament and the Council;

9. "terminal equipment": means any equipment meeting the conditions laid down in Article 1(1) of Commission Directive 2008/63/EC;

10. "IP (Internet Protocol) address": means a series of numbers assigned to networked devices to enable them to communicate with each other over the internet;

11. "dynamic data": means documents in digital form and subject to frequent or real-time updates, in particular because of their volatility or rapid obsolescence;

12. "metadata": means data processed in an electronic communications network for the purpose of the transmission, distribution or exchange of the content of electronic communications, including data allowing the tracing of a communication and the determination of its origin and destination as well as location data generated in connection with the provision of electronic communications services, and the date, time, duration and type of the communication;

TITLE 2

POWERFUL DIGITAL SERVICE OPERATORS

Article 3

Service providers or online interfaces with significant market power

1. For the purposes of applying Articles 6 to 12, an online service provider or online interface with significant market power shall mean any enterprise or group or associated enterprise of that enterprise or group where that enterprise or group meets either of the two conditions:

(a) The total amount of its gross revenue, excluding value added tax, declared at worldwide level for the last financial year for which the accounts have been closed exceeds EUR 750 million and the total amount of revenue generated within the Union during the last financial year for which the accounts have been closed exceeds EUR 50 million;

(b) one or more of the following conditions are met with regard to the provision of such services by the entity performing that activity, considered in conjunction with the provision of such services through a digital interface by each of the associated enterprises of that entity at consolidated level:

(i) the proportion of the total revenues derived during the financial year ending and resulting from the provision of those digital services to users located in that Member State during that period exceeds EUR 7 million;

(ii) the number of users of one or more of those digital services located in that Member State during the last financial year ended exceeds 100,000;

(iii) the number of commercial contracts for the provision of such digital services that were concluded in the last financial year ended by users located in that Member State exceeds 3,000.

2. The economically significant activities carried out by the significant digital presence through an online interface include, inter alia, the following activities:

(a) the collection, storage, processing, analysis, deployment and sale of data at user level;

(b) the collection, storage, processing and display of user-generated content;

(c) the sale of online advertising space;

(d) the provision of content created by third parties in a digital marketplace;

(e) the provision of any digital service not listed in points (a) to (d), including online market place or online search engine services.

3. With regard to the use of digital services, a user shall be deemed to be located in the European Union during a financial year if the user uses a device in that Member State during that period to access the digital interface through which the digital services are provided.

4. With regard to display advertising, the user shall be deemed to be in a Member State during a financial year if the advertisement appears on the user's device at a time when the device is used in the Member State concerned during that period to access a digital interface.

5. With regard to the conclusion of contracts for the provision of digital services:

(a) a contract is considered to be a commercial contract if the user concludes a contract during the performance of an activity;

(b) a user shall be deemed to be located in a Member State during a financial year:

- (i) in the case of a natural person, if he or she has his or her habitual residence;
- (ii) if it concerns a legal person, if it has a permanent establishment there or if it is resident for tax purposes in a Member State of the European Union;
- (iii) in either case, the person shall also be deemed to be located in a Member State if the address indicated when concluding a service for the provision of access to electronic communications or the IP (Internet Protocol) address of the device or a contract is located in the territory of the European Union. If it is more accurate, any other geolocation method that can locate the person within that territory can be used.

6. The share of total revenues referred to in paragraph 1(b) shall be determined by reference to the number of times these devices are used during that tax period by users located anywhere in the world to access the digital interface through which digital services are provided.

7. In determining the revenues attributable under paragraph 1, the enterprise shall use the profit-sharing method unless it proves that another method based on internationally accepted principles is more appropriate having regard to the results of the functional analysis. Sharing factors may include expenditure on research, development and marketing, as well as the number of users and data collected per Member State.

8. The provisions of this Article may be amended by a decision of the European Commission in order to bring them into line with those implemented for the purposes of establishing a tax on digital services at the level of the Organisation for Economic Co-operation and Development or pursuant to an act of law of the European Union.

9. Any undertaking or group falling within the scope of this Article may, starting from 5 years after the deadline for transposition of this Directive, may request to no longer be considered as an online service provider or interface with significant market power. It shall accompany its application with an analysis of the structure of supply and demand.

If the Commission, after consulting the European Data Protection Board established under Article 68 of Regulation (EU) 2016/679 of the European Parliament and the Council and the Body of European Regulators for Electronic Communications provided for in Regulation (EU) 2018/1971, and following an open consultation on the internet, considers that it is no longer necessary, for the purpose of achieving the aim of this Directive, to consider that undertaking or group as having significant market power, it shall deliver a reasoned opinion, which will be published in the Official Journal of the European Union.

It may adopt an implementing act in accordance with the procedure laid down in Article 5 of Regulation (EU) No. 182/2011. This act may not be adopted unless an opinion is delivered.

10. By way of derogation from the preceding provisions, an implementing act, adopted in accordance with the procedure laid down in Article 5 of Regulation (EU) No. 182/2011, may make a company or group of companies subject to the application of Articles 6 to 12 of this Directive by reason of its or their dominant position in a market concerned.

The Commission may propose such an act on its own initiative or upon reasoned request from a competition authority of a Member State, a regulatory authority referred to in Directive (EU) 2018/1972 of 11 December 2018 of the European Parliament and the Council establishing the European Electronic Communications Code or in Regulation (EU) 2016/679.

Article 4

Terminal equipments and softwares with significant market power

For the purposes of applying Article 10, a terminal, operating system or software shall be deemed to exert a significant market power if the number of users located in a Member State during the last calendar year exceeds 100,000 and if the total amount of revenues generated within the Union during that year exceeds EUR 50,000,000.

TITLE 3

LIABILITY AND OBLIGATIONS OF DIGITAL SERVICE OPERATORS

Article 5

Representative

1. Each Member State shall ensure that any online service provider, online interface, online marketplace or online search engine covered by this Directive which is not established in the Union appoints a representative to the public authorities of the Member States. The representative shall be established in one of the Member States in which the services are provided.
2. The appointment of a representative shall be without prejudice to any legal action that may be brought against the provider itself and to the competence of Member States to take action against that operator.

Article 6

Public Statement

1. Member States shall ensure that any undertaking falling within the scope of Article 3 files with each of the Member States concerned, in respect of each financial year, a public statement of the data referred to in that Article within 90 days of the end of the financial year of the undertaking or group.
2. The Commission may adopt implementing acts to define a common reporting format following the procedure laid down in Article 5 of Regulation (EU) No 182/2011.
3. The provisions of Article 1 of this Article may be amended by a decision of the European Commission in order to bring them, where appropriate, into line with the institution of the tax referred to in Article 3(9).

Article 7

Liability

1. Article 3 of Directive 2000/31/EC of the European Parliament and the Council shall no longer apply to companies falling within the scope of Article 3 as from ... (date).

These provisions are without prejudice to the application of Directive 2006/123/EC on services in the internal market.

2. Article 3(4) to (6) of Directive 2000/31/EC of the European Parliament and the Council shall no longer apply from ... (date to be fixed):

(a) to the measures taken by the Member States, in accordance with other provisions of European Union law, to combat illegal content online in their respective territories, in particular in the area covered by Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online;

(b) to measures taken by Member States to empower the national regulatory authority provided for in Regulation (EU) 2018/1971 or Directive (EU) 2018/1808 of the European Parliament and the Council:

- (i) to require providers of online services covered by Articles 3 and 4 of this Directive to publish the main parameters determining, individually or collectively, the selection of a press publication, topical information, the placing of content online and its notification to the user, as well as the reasons justifying the relative importance of those main parameters in relation to the other parameters, in the general conditions and in other media, formulated in a clear and comprehensible manner for the average consumer;
- (ii) to certify content moderation mechanisms of online service providers to combat illegal content online;
- (iii) to publish good practices and recommendations for interested companies.

(c) to measures taken by member states to preserve the integrity of their electoral processes.

To this end, Member States may, in particular, impose an obligation to implement targeted proactive measures to identify large-scale dissemination of information, robot accounts and interference from foreign countries.

3. Measures taken by Member States pursuant to paragraph 2 shall be effective and proportionate. In assessing their proportionality, the following elements shall, inter alia, be taken into account:

- (a) the type, audience and size of the service, as well as the type of content uploaded by users of the service;
- (b) the availability of appropriate and efficient means and their cost to service providers

4. Proactive measures to prevent the reappearance of blocked content cannot be required of service operators with an average monthly unique visitor count of less than 5 million. This figure is calculated on the basis of the previous calendar year.

5. Operators cannot be held liable if they demonstrate that:

- (a) they made their best efforts to implement the requested proactive measures in accordance with the industry's high standards of professional diligence,
- (b) they acted promptly, upon receipt of a sufficiently reasoned notification from a public authority, to block access to the content,
- (c) made their best efforts to prevent the same content from being made available online again.

6. Measures taken by Member States pursuant to paragraph 2 shall be notified to the Commission and other States pursuant to Directive (EU) 2015/1535 of the European Parliament and of the Council.

They shall take into account the impact of the measures concerned on the fundamental rights of users and the fundamental importance of freedom of expression. The decision is addressed to the freedom to receive and impart information and ideas in an open and democratic society.

7. Providers of online intermediation services and providers of online search engines shall not be

required to disclose their algorithms where they comply with the requirements referred to in this Article.

8. Article 15(1) of Directive 2000/31/EC of the European Parliament and of the Council does not obstruct:

- the application of the provisions of this Directive;
- the measures referred to in paragraph 2 of this Article.

9. The Commission may adopt recommendations or guidelines on the measures referred to in paragraph 2.

It consults in advance with the Body of European Regulators for Electronic Communications under Regulation (EU) 2018/1971 and the European Regulators Group for Audiovisual Media Services established by Directive (EU) 2018/1808 of the European Parliament and the Council.

TITLE 4 CONSUMER RIGHTS

Article 8 **Right to mobility and portability**

1. Member States shall ensure that every consumer has the right to receive, in a structured, commonly used and machine-readable format, for re-use, all or part of the data, whether personal or non-personal, which he/she has entered in the digital interface or service, as well as his/her metadata and the files associated with his/her user account, identifier or IP address. It shall designate, where appropriate, the third party authorised to receive such data.

Member States shall also ensure that the consumer may request to receive such data, as from a date to be determined by the Member State, in a dynamic form, by means of an application program interface (API), and that the operator may refuse to grant such a request only on grounds relating to the integrity of its service, its proper functioning or its safety. Such a refusal may not be exercised where the consumer relies on an interoperability protocol referred to in the implementing act referred to in paragraph 5.

Member States shall ensure that, where the provider refuses to do so, said provider shall make good faith efforts to provide an interface that allows the consumer's request to be met. This procedure must not lead to disproportionate burdens.

The rights referred to in the preceding paragraphs shall be exercised in accordance with the conditions laid down in Articles 12 and 20 of Regulation (EU) 2016/679 of the European Parliament and the Council.

Member States may not make the exercise of these rights subject to the existence of a contractual relationship between the provider and the person designated by the consumer to receive the data.

2. Member States shall ensure that service providers meeting the conditions set out in Article 3 offer to consumers, free of charge, an application program interface for the dynamic transmission of the data referred to in paragraph 1 by means of a secure API.

3. Member States shall ensure that the national regulatory authorities referred to in Directive (EU) 2018/1808 of 11 December 2018 of the European Parliament and the Council establishing the European Electronic Communications Code have sufficient powers and resources to ensure dispute resolution and to impose, where appropriate, measures on the providers concerned, as well as appropriate, proportionate and dissuasive administrative sanctions, in accordance with Article 15.

4. The European Commission shall adopt, in the framework of the procedure laid down in Article 4 of Regulation (EU) No. 182/2011, a list of standards or technical specifications for the interoperability of data and protocols that are presumed to be reliable, which digital service providers may not reject on the grounds of a risk to the integrity, proper functioning or security of their own services. It shall review this list annually. It shall adopt a position, within six months at the latest, on the request that a new Protocol be included in that list.

5. Neither Article 6 of Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001, nor any intellectual property right guaranteed by the law of the European Union or the law of the Member States in conformity with the law of the European Union, nor business secrecy within the meaning of Directive (EU) 2016/943 of the European Parliament and the Council of 8 June 2016 may prevent the application of the preceding paragraphs.

Article 9

Right to information, opposition and erasure

1. Member States shall ensure that every consumer has the right to receive information from his/her digital service provider on:

- the existence of an interoperability agreement concluded between the provider and a third party allowing access to the above-mentioned data or to his/her personal data and the main conditions applicable, in particular the level of aggregation of the data in question.
- the nature and purpose of the processing and reprocessing operations carried out on the data entered, whether or not for the purpose of performance of a contract, and of the files uploaded, including where they do not constitute personal data within the meaning of Article 4(1) of Regulation (EU) 2016/679 of the European Parliament and the Council. This requirement relates only to the purposes of such processing and reprocessing beyond what is necessary to ensure the communication, for the time necessary for that purpose, or to maintain or restore the security of electronic communications networks and services or to detect technical failures and/or errors in the transmission of electronic communications, for the time necessary for that purpose.

2. Member States shall ensure that any consumer has the possibility at any time:

- to prevent the metadata relating to the use of digital services from being reprocessed or redistributed to a third party by means of an interoperability agreement, under the conditions laid down in Article 21 of Regulation (EU) 2016/679 of the European Parliament and the Council;
- to request the deletion of its metadata under the conditions set out in Article 17 of the same Regulation.

3. Member States shall ensure that the authorities responsible for ensuring compliance by the providers concerned with the obligations laid down in this Article have the necessary resources and powers to collect the information from the providers concerned and to impose, where necessary, appropriate, proportionate and dissuasive measures and administrative penalties in accordance with Article 15.

Article 10

Right to defragmentation

1. Member States shall ensure that any provider of a terminal equipment or service referred to in Article 4 does not restrict the rights of consumers:

- to access the digital applications, services and content of their choice, regardless of where they are located, and regardless of the location, origin or destination of the information, content, application or service concerned;
- to use and provide applications and services.

This right may include uninstalling or installing an application or software.

However, Member States may restrict this right in order to ensure the implementation of obligations in conformity with Union law, to allow the provider to ensure the security or proper functioning of the terminal and the integrity of its content and data.

Member States shall ensure that the provider may not charge the consumer exercising this right a price exceeding the cost of the transaction and that it informs the consumer in advance of this cost.

Member States may not make the exercise of these rights subject to the existence of a contractual relationship between the provider and the person designated by the consumer to receive the data.

2. Member States shall ensure that, at the latest from (date ...) the offer of terminal equipment marketed by the providers referred to in Article 4 allows:

- (a) to uninstall the applications, services and digital content sold with the terminal or linked to the operating software;
- (b) to install, at the consumer's expense and risk, operating software, search engine or application store from another provider. The provider may only exclude from this possibility services that are included in a list of providers or States established by the national regulatory authority referred to in Directive (EU) 2018/1972 of 11 December 2018 of the European Parliament and the Council or by the Body of European Regulators for Electronic Communications established by Regulation (EU) 2018/1971 of the European Parliament and the Council.

3. Member States shall ensure the designation of an independent supervisory authority responsible for ensuring the application by the providers concerned of the obligations set out in the preceding paragraphs, giving preference to the competition authorities of the Member States or the national regulatory authorities referred to in Directive (EU) 2018/1972 of the European Parliament and of the Council.

Member States shall ensure that these authorities are given sufficient powers and resources, in particular to collect the necessary information, to ensure dispute settlement and to impose, where appropriate, measures on the providers concerned, as well as appropriate, proportionate and dissuasive administrative sanctions, in accordance with Article 15.

Article 11

Consumer information

Member States shall ensure that providers of services covered by this Directive inform consumers, in so far as they are concerned, of the rights set out in Articles 8 to 10, on a half-yearly basis, in clear

and comprehensible language accessible to the average consumer.

TITLE 5 **RELATIONS BETWEEN PLATFORM AND USERS**

Article 12 **Prohibited restrictions**

1. Member States shall ensure that any practice or clause in a contract concluded between an online interface referred to in Article 3 and a business user, which has as its object or effect:

- (a) to impose, directly or indirectly, to a business user the resale price of a good or service, or a maximum price;
- (b) to restrict the possibility for a business user to conclude contracts with other online interfaces;
- (c) to limit the rights set out in Articles 8 to 10;
- (d) to automatically benefit from more favourable conditions granted to competing online interfaces on the part of a business user;
- (e) to impose on a business user a selling or wholesale price or promotion dependent on the selling or wholesale price or promotion granted to another online interface or another distributor, whether online or offline;
- (f) to impose on a user a price revision clause depending on public indexes or reference prices unrelated to the item or service offered for sale;
- (g) to benefit automatically from a business user parity of price or quantities offered for sale on competing online interfaces;
- (h) to limit the right of a business user to freely determine prices and quantities sold through its own distribution channels, whether online or offline;
- (i) to require a business user to inform it if it offers different business models, availability dates, wholesale prices or selling prices or promotions to other distributors.

2. Member States shall ensure that an online interface is held liable when it imposes on a user company:

- (a) to grant an advantage which does not correspond to any commercial service actually provided or is manifestly disproportionate in relation to the value of the service provided;
- (b) to subject it to penalties for late delivery in the event of force majeure.

TITLE 6 **IMPLEMENTATION OF RIGHTS**

Article 13 **Imperative nature of the Directive**

If the law applicable to the contract is the law of a Member State, the user of the online service may not waive the rights conferred on him/her by the national provisions transposing this Directive.

Any contractual term which directly or indirectly excludes or limits the rights arising from this Directive shall not be binding on the consumer or business user.

Article 14

Actions for injunctions and representative actions

1. Member States shall ensure that the national provisions adopted for the transposition of Directive 2009/22/EC of the European Parliament and the Council extend to infringements of the rights established by Articles 8 and 10 of this Directive.

The scope of Regulation (EC) No xxx of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC shall be extended to the rights established by Articles 8 and 10 of this Directive:

- on the date of entry into force of that Regulation, if that date is later than the deadline date for transposition of this Directive;
- on the deadline date for transposition of this Directive, if that date is later than the date of entry into force of this Regulation. In this case, Member States shall not be obliged to apply the first paragraph.

2. Member States shall ensure that Articles 12 to 14 of Regulation 2019/1150 of the European Parliament and the Council are applicable to infringements of the rights established by Article 12 of this Directive.

3. The actions referred to in this Article shall be brought by the user before the competent court under the rules laid down in Regulation (EU) No 1215/2012. This court may order, if necessary by way of a penalty payment, any interim measure.

Article 15

Administrative fines for violations of consumer rights

1. Member States shall designate one or more independent authorities to examine consumer complaints relating to the application of Articles 8 to 11 of this Directive. Member States shall also ensure that those authorities may take up on their own initiative the investigation of practices which may be contrary to these same provisions.

The independent authority to which the complaint has been submitted shall inform the complainant of the progress and outcome of its investigation.

The complaint shall be lodged with the independent authority of the consumer's habitual place of residence.

2. Each independent authority shall ensure that fines imposed under this Article for infringements are, in each case, effective, proportionate and dissuasive.

In deciding whether to impose an administrative fine and in deciding the amount thereof, due account shall be taken, in each individual case, of the following elements:

- (a) the nature, seriousness and duration of the violation, including the number of persons affected;
- (b) any previous violations;
- (c) any other aggravating or mitigating circumstances applicable to the circumstances of the case, such as the financial benefits obtained or losses avoided, directly or indirectly, as a result of the violation.

Fines may amount to up to 4% of the total annual worldwide turnover of the previous financial year.

3. The exercise by the supervisory authority of the powers conferred on it by this Article shall be subject to appropriate procedural safeguards in accordance with Union law and the law of the Member States, including effective judicial review and due process.

4. If the legal system of a Member State does not provide for administrative fines, this Article may be applied in such a way that the fine is determined by the competent supervisory authority and imposed by the competent national courts, while ensuring that such remedies are effective and have an effect equivalent to administrative fines imposed by supervisory authorities. In any event, the fines imposed shall be effective, proportionate and dissuasive. The Member States concerned shall notify the Commission of the legal provisions they adopt pursuant to this paragraph by xxx at the latest and shall notify it without delay of any subsequent legal provisions or amendments thereto.

Article 16

Civil penalties for violations of the rights of business users

1. Member States shall ensure that the authorities competent to decide on complaints or to initiate appropriate legal proceedings for the application of Directive 2005/29/EC of the European Parliament and the Council may, where their market is affected by practices contrary to Article 21 of this Directive or Regulation 2019/1150 of the European Parliament and the Council, apply to a court in the same Member State for the imposition of a civil penalty.

2. The courts of the Member States may exchange any evidence between themselves for the purposes of applying this Directive under the same conditions as those laid down in Council Regulation No. 1206/2001 of 28 May 2001.

3. Where appropriate, the court shall impose a civil penalty within the parameters set out in Article 15(2).

Article 17

European cooperation of independent authorities of Member States

1. The European Competition Network provided for in Regulation (EC) No. 1/2003 of the European Parliament and the Council, the European Data Protection Board established under Article 68 of Regulation (EU) 2016/679 of the European Parliament and the Council and the Body of European Regulators for Electronic Communications provided for in Regulation (EU) 2018/1971 of the European Parliament and the Council shall each be competent, as far as they are concerned, to ensure the consistent application of this Directive.

They can, for example:

- advise the Commission on any proposed amendments to this Directive;
- examine, on their own initiative, at the request of one of their members or at the request of the Commission, any question relating to the application of this Directive, and publish guidelines, recommendations and good practices to promote its consistent application.

2. Each independent authority shall contribute to the consistent application of this Directive throughout the Union. It shall notify the European Commission and the independent authorities of the other Member States of its decisions to initiate the investigation of a complaint or to take up

on its own initiative practices falling within the scope of this Directive and of any decision taken pursuant to the provisions of this Directive.

3. Each independent authority may, for the purposes of the application of this Directive, exchange confidential information under the same conditions as those laid down in Article 22 of Regulation (EC) No. 1/2003, Chapter VII of Regulation (EU) 2016/679 or Article 40 of Regulation (EU) 2018/1971, as appropriate.

4. Each independent authority shall be required to carry out on its territory any inspection or other investigative measure under its national law in the name and on behalf of the authority of another Member State in order to establish an infringement of the provisions of Articles 8 to 11 of this Directive.

Where appropriate, the information collected may be used only for the purposes of applying this Directive or Articles 101 or 102 of the Treaty.

TITLE 7 FINAL CLAUSES

Article 18 Transposition

1. Member States shall adopt and publish, by xxx at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately inform the Commission thereof.

They shall apply these provisions as from xxx.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 19 Recipients

This Directive is addressed to the Member States.

ANNEX 1

- (a) supply and hosting of websites;
- (b) automated program maintenance, remote and online;
- (c) remote systems administration;
- (d) online data warehousing, allowing the storage and retrieval of specific data electronically;
- (e) online supply of disk space on request;
- (f) software used online or downloaded (e.g. procurement/accounting programs, anti-virus software) and their updates;
- (g) software used to prevent the appearance of banner ads, also known as banner filters;
- (h) downloadable drivers, such as software for interconnecting a computer with peripherals (such as printers);
- (i) automated online installation of filters on websites;
- (j) automated online firewall installation;
- (k) viewing or downloading items to customise the computer's "desktop";
- (l) viewing or downloading photos, images or screensavers;
- (m) digitised content of books and other electronic publications;
- (n) subscription to online newspapers and periodicals;
- (o) blogs and website traffic statistics;
- (p) online information, traffic information and weather reports;
- (q) online information automatically generated by software, based on data entered by the customer, such as legal or financial data (in particular, stock market prices in real time);
- (r) provision of advertising space, including banners on a website or web page;
- (s) use of internet search engines and directories;
- (t) consulting or downloading music on computers and mobile phones;
- (u) consultation or downloading of sonals, extracts, ringtones or other sounds;
- (v) consultation or downloading of films;
- (w) downloading games to computers and mobile phones;
- (x) access to automated online games that are dependent on the internet or similar electronic networks and where the different players are geographically distant from each other;
- (y) automated distance learning which is dependent on the internet or similar electronic network and which requires little or no human intervention in its provision, including virtual classrooms, except where the internet or similar electronic network is used as a mere means of communication between teacher and student;
- (z) workbooks completed online by students, with automatic grading requiring no human intervention.

DIGITAL NEW DEAL

THE NEW DEAL THINK TANK

The aim of the Digital New Deal think tank is to shed as much light as possible on the developments at work within the phenomenon of "digitalisation" (in the widest sense of the word) and to develop concrete courses of action for French and European companies and decision-makers. With the expertise of the various contributors and their insertion in the public debate, the work of the think tank will be able to play a part in the development of a French and European understanding of digital regulation supporting the implementation of a balanced and sustainable framework.

The Board of Directors

The members of the Digital New Deal Board of Directors are all founding members. They come from various backgrounds while having direct contact with the digital transformation of companies and organisations. Given their shared interest in digital issues, they decided to deepen their debate by creating a formal framework for production and publication within which they can dedicate their complementary experience to serve public and political debate. They're personally involved in the life of Digital New Deal.

Arno Pons, executive officer, is responsible for strategic steering with Olivier Sichel, founder and chairman, and supervises a project manager that coordinates all the think tank's daily activities.

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