



EU Regulatory Models for Platforms on the
Content and Carrier Layers: Convergence and
Changing Policy Patterns

Andrej Savin*

* Associate Professor, Copenhagen Business School.

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ABSTRACT

Digital “intermediaries” have been the subject of the lawmakers’ interest both in the EU and elsewhere for at least two decades now. In recent years, however, and coinciding with the introduction of the new Digital Single Market Strategy in 2015, “platforms” in specific - rather than “intermediaries”, “information society services (ISSs)” or “networks” - have increasingly been the target of EU regulators’ attention. This article traces the EU’s increased focus on platforms and argues that its source can be found in a desire to respond to technology convergence. The first part of the article looks at why convergence and the emerging platform regulation stand in a relationship and attempts to outline the boundaries of that relationship. The second part argues that the EU has already undergone a regulatory shift from “services” to “platforms” and traces this idea from its 2015 DSM Strategy origins to several other documents, including the 2016 Communication on Platforms. The third part looks at how the emergence of the idea and its elevation to a policy goal has already prompted changes in each of the three regulatory layers. The concluding part establishes that the EU policy shift from ISSs, networks and services as main regulatory units to platforms is sector-specific and prompted by attempts to address convergence. I argue that this approach may not necessarily be beneficial and look into alternatives involving a rethink of platform regulation *across* rather than *within* different layers.

1. INTRODUCTION: TECHNOLOGICAL CONVERGENCE & ITS CHALLENGES

In 1997, the EU issued a Green Paper on the convergence of telecoms, media and IT technologies and its implication for regulation.¹ In it, the Commission stated that the “convergence is occurring at the technological level.” Summarising the phenomenon, the document defined it as the ability of both new and traditional communications services (voice, data, sound and pictures) to be conveyed over many different networks or, in other words, the ability of different networks to carry similar services. Rather than each requiring own infrastructure, the technology has enabled all converged services to be provided over the Internet. While there is increasing confusion over the meaning of the

¹ European Commission, Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation, 3. 12. 1997., COM(97)623 (1997 Green Paper).

term convergence,² scholars are in agreement on its main feature: the blurring of the boundaries between telecommunications, broadcasting and the information society services. This, in turn, opens up the question of whether the sharp dividing lines between telecommunications, media and ISS policies also need to be gradually erased. The 1997 paper signified the launch of a convergence strategy at the EU level and the arousing of EU interest in the implications of converged technologies on regulation.

Today, convergence is both still relevant and more manifest than before: the majority of telecoms, media and IT services are provided exclusively over the Internet. While traditional television and radio are still in existence, they are being threatened by streaming services, VoIP telephone has largely replaced the fixed one, newspapers in print are being digitised and SMS messaging is being pushed out by its digital counterparts. The implications of this should be clear - economies based on knowledge and innovation depend on services and these are delivered at decreasing prices and increasing efficiency - thanks to convergence. But, to what extent have converged services really resulted in converged policies in the follow-up to the 1997 paper? In this paper I will argue that the most manifest policy change in recent years has been a shift in regulation from services to platforms and that, rather than being a natural way to address convergence, this attempt subjects new phenomena to old laws.

The title of the 1997 Green Paper already suggested that EU was acutely aware that convergence must have some impact on regulation. It postulated that regulatory barriers at different levels of the market can hinder the development of new services. The rules defined for “national, analogue and mono-media environment” are claimed not to be suitable for the converged ones and new models are explored. The Green Paper itself suggests that three such potential regulatory models might be possible. The first would maintain legacy regulation³ without substantive modification. This model had not been used in EU IT regulation. The second model would carve out new regulation but only where needed and largely within the existing regulatory and enforcement structures. This has been the regulatory model impliedly adopted and most of EU laws in the digital world still use it in some form or another. The third model would radically reassess the way new converged services need to

² See Michael Latzer, “Convergence, Co-evolution and Complexity in European Communications Policy”, in K. Donders et al. (eds.) *The Palgrave Handbook of European Media Policy* (Palgrave Macmillan 2014).

³ By legacy regulation we mean laws that applied to pre-Internet networks and services.

be regulated, abandon the existing laws and write completely new ones, based on converged services. This is, I will argue in Section 4, the model that needs to be applied to platforms in the future but has not been hitherto.

While the 1997 document may suggest that convergence already plays its firmly-established role in EU policy, this is not the case. There are two signs testifying to the fact that a comprehensive EU policy in this field does not exist yet.⁴ First, for such a policy to exist, policy-making would have to shift from separate policies to a converged one. Although the 1997 document might imply that this has already happened (or is about to), this is not the case. The Green Paper had only been a recognition of the realities of convergence and an invitation to a debate. A look at documents in the three regulatory layers⁵ reveals the existence of non-converged policies. In the latest wave of reforms of digital laws, prompted by the 2015 Digital Single Market Strategy,⁶ each of the three layers (ISSs, audio-video and telecoms) have separate policy goals and principles and are equipped with different tools to achieve them. This confirms the view that Member States are reluctant to abandon the legacy policies which have, after all, been a long time in the development and required substantial political compromise. Second, a comprehensive approach to convergence would also imply that regulatory and enforcement structures have shifted from vertical to horizontal. This has not happened either. In telecommunications, national regulatory authorities are charged with enforcement of telecoms policies.⁷ In the ISS world, this is the case with business authorities, consumer protection agencies, data protection authorities and others. In audio-video world, the enforcement is in the hands of broadcasting and other agencies. There are no regulatory authorities in charge of converged "platforms".

⁴ For an overview of EU regulatory reaction to convergence in the earlier parts of the century see Pablo Ibáñez Colomo, *European Communications Law and Technological Convergence: Deregulation, re-regulation and regulatory convergence in television and telecommunications* (Kluwer 2012).

⁵ The digital world, as will be seen in Section 2 below, is subject to three separate policy and regulatory "circles", which co-exist with each other and which - each from their own perspective - regulate intermediaries as and when needed. The first, telecoms framework, applies to the carriage of signals. The second covers information society services (ISSs) and the third audio-video media services (AVMS) - both on the content layer.

⁶ 6.5.2015 COM(2015) 192 final.

⁷ The idea of a single EU agency has been flashed but never adopted due to high resistance from Member States. The ultimate goal of moving from ex ante to competition regulation of telecoms, however, would confirm the declared desire to match convergence in the real world with convergence in regulation.

Based on the developments above, a preliminary conclusion could be drawn: the EU lawmaker seems to believe that the fact that the same services are delivered over different networks does not make these services the same nor does it necessarily imply that they should be regulated through a single regulatory framework. But this does not mean that EU does not regulate platforms. On the contrary. As will be demonstrated in Section 3, new laws specifically targeting platforms have been proposed since 2015. This leads to another observation which is crucial in this paper: the EU regulator feels prompted to regulate platforms resulting from converged services by simply translating the legacy regulatory objectives to them. This statement, as will be discussed in Section 4 below, informs the EU's regulatory approach to convergence and to platforms from 2015 up to the present moment. I will argue that this approach already is and will continue to be the source of considerable conflict in the future because legacy tools may not be capable of addressing horizontal services.

Two main claims are made in this paper. The first is that convergence forced the EU to think about platforms and move from its decades-old approach to IT regulation. The second is that the EU's model for platform regulation is not based on a thorough rethink of the role of converged platforms but attempts to translate the regulatory aims and principles of the pre-platform era.

The first claim is that converging technologies and the emergence of platforms stand in a relationship. This relationship had already been indicated in the 90s. The most prescient statement in the 1997 Green Paper is that converging technologies lead to "platform independence" and it is the implication of this statement for the regulation of modern digital economy that is the subject of this paper. Rather than rely on single networks (usually proprietary, sometimes government-owned but often government-controlled), platforms can choose the one that best suits their own and the needs of their clients, thus making them independent and, by analogy, more efficient. While I am not claiming that convergence has been the only cause of the emergence of platforms,⁸ I maintain that it has been one of the main causes, since network effects stand both as the main consequence of convergence and as the trigger for platform deployment. Put in different words, convergence has created network effects by making services more accessible and cheaper. This, in turn, enabled business models based on

⁸ There is as yet insufficient research to explain the rise of platform-economy.

platforms - which only work where there are network effects - to flourish.

More than 20 years after the EU Green Paper, the digital economy is the economy of platform independence.⁹ The transformative power of converged platforms arises from the ability to connect market actors in unprecedented ways, eliminating the gatekeepers and lowering transaction costs, thus opening possibilities for new value creation. Platforms have become ubiquitous precisely because of their ability to transform the linear model of doing business by facilitating the exchange of goods and services. Platforms which do not own any production capacity themselves are able to transform businesses by dramatically lowering the cost of B2B and B2C interaction. The regulator's interest in platforms should, therefore, not come as a surprise. Most companies have either moved to platforms models already or are in the process of doing so. While it is difficult to define platforms due to their diversity and numbers, there are a couple of common elements that define them: they are technology-enabled businesses that facilitate interactions between different groups. In this, they are synonymous with "intermediaries".¹⁰ Although there is no official EU definition of platforms, the 2016 Commission Staff Working Document accompanying the Communication on platforms,¹¹ and in line with an earlier attempt at a definition,¹² platforms are defined as "two-sided" or "multi-sided" markets "where users are brought together by a platform operator in order to facilitate a transaction".¹³

I have indicated earlier that EU regulators chose to adapt its present legacy rules to the needs of convergence. This means that no horizontal policies (those that target converged platforms rather than only services of a particular type) have been developed. In spite of this, there is no doubt that platforms stand as a distinct regulatory unit in the minds of EU regulators, since not only does the EU maintain its distinct regime on intermediaries (thus singling them out as being something

⁹ See Geoffrey Parler, Marshall W Van Alstyne, Sangeet Paul Choudary, *Platform Revolution* (W.W. Norton & Company : New York 2016).

¹⁰ Although not with Internet intermediaries, which are companies engaging in selling retail Internet access.

¹¹ European Commission, SWD(2016) 172.

¹² Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, available at <https://ec.europa.eu/digital-single-market/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>, accessed 7.11.2016.

¹³ This definition makes little sense, as there are no reasons why platforms could not be one-sided (e.g. serving only members of a club or a gaming community).

different than platforms), but it also usually explicitly emphasises that there is no need for its change. The EU regulation of platforms arises from the need to address convergence but stands on the shoulders of its vertical policies in three layers of digital regulation.

In addition to saying that convergence and platform regulation stand in a direct relationship, this article's second main claim is that the EU's platform regulation is inadequate. While documents referred to in sections 2 and 3 testify to the Commission's interest in platforms and confirm its awareness of the problem, attempts to regulate platforms remain problematic. The reason for this is not only that the EU's attempts to regulate platforms clash with its existing laws on information society services (ISSs) and networks & services (telecoms) but also that platforms remain diverse by type, function and business model. To believe, as the EU does, that telecoms providers, transport services, streaming media and user-generated sites should all be treated the same is, at best, naïve and, at worst, counterproductive. Convergence may very well have been the trigger for EU's interest in platforms but does not, in and of itself, justify a unified approach.

The emergence of platforms, just like converged technologies, problematises the Commission's legacy "silo" model of regulation where carrier (telecoms wires) and content (what these wires carry) have their own regulatory circles. In this paper, I put forward two claims regarding that model. The first, examined in Section 2, is that the slow but gradual policy shift in the EU from networks and services to platforms as main subjects of regulation results not from a coherent set of new objectives but from a desire to make platforms fit *current* objectives. The second claim, examined in Section 3, is that the move to platforms as regulatory objects in the new proposals results from the need to overcome the legacy regulatory model of non-converged services and answer to specific challenges of convergence. I will argue that this move will prove to be inadequate precisely because an overarching convergence-based platform policy is lacking. Finally, in Section 4, in criticism of this approach, I look at the alternative regulatory models for platforms stranding the content and carrier and submit the claim that platforms require an integrated rather than silo approach. If governments desire to regulate the intermediaries efficiently, they need to abandon the legacy approach based on networks and services in favour of objectives and tools that better match the new reality.

2. FROM “SERVICES” TO “PLATFORMS” - THE EMERGENCE OF A NEW POLICY

2.1. THE “SILO” APPROACH

A careful reader attempting to look at how the EU regulated “platforms” in its IT laws in the early 2000s would hardly notice the word mentioned in any of the policy documents then circulated. A further, more detailed, analysis of the relevant laws would not be more revealing either. A conclusion that platforms are not the subject of EU regulatory effort would, therefore, quickly impose itself and would, partially at least, be correct. What would be noticed, instead, is that the digital world is subject to three separate regulatory circles, each developed before technological convergence took swing.

The first of these applies to the transmission of signals. This is the regulation of “wires” that carry the signal or, in technical terms, of electronic networks and services. This regulatory circle, the outline of which had been laid down in various laws in the late 80s but which, in its present form dates to 2002, with some important revisions being proposed in 2009, is traditionally referred to as Telecommunications Regulatory Framework.¹⁴ In 2016 the Commission suggested significant reform, including codification of different directives.¹⁵ The proposals are still pending as of May 2018. The main policy objective in telecoms has traditionally been to liberalize telecoms networks and service followed by a degree of harmonization. The chosen tool has been ex ante asymmetric regulation of undertakings with the significant market power.

The second regulatory circle applies to the content being carried through wires. In broadest terms it can be described as encompassing all information society services (ISSs) which, in turn, are defined as services provided at a distance, for remuneration (although not necessarily against a payment) and at an individual request (rather than being broadcast). These services encompass the entirety of content distributed on the Internet. The framework directive in this area is the E-Commerce

¹⁴ European Commission, Regulatory framework for electronic communications in the European Union, December 2009, available at <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/Copy%20of%20Regulatory%20Framework%20for%20Electronic%20Communications%202013%20NO%20CROPS.pdf>

¹⁵ See Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast) - COM(2016)590. For details, see Andrej Savin, *EU Telecommunications Law* (Edward Elgar: Cheltenham 2018).

Directive,¹⁶ although separate laws cover copyright, privacy, payments, consumer protection, jurisdiction, etc.¹⁷ The main policy objective has been to facilitate the free movement of information society services and the main tool has been home country control, limited ISP liability and comprehensive data and consumer protection measures.

The third regulatory circle, which covers media in general, revolves around content over which there exists editorial control. Typically, this category is defined as encompassing audio-video media services. The AVMS Directive¹⁸ is the framework directive that controls this area. The main policy objective has been the free movement of audio-video media services and the main tool home country control coupled with various content-control measures.

The current regulatory model - and this is a crucial point in this paper - is a vertical model based on three separate regulatory pillars.¹⁹ In this model, electronic communications, linear and non-linear audio-visual and information society services are each subject to separate regulatory framework. That separate pillars existed in the 80s and 90s, when the respective frameworks had been set up, should come as no surprise. There would have been no converged services and no need for converged laws. However, while technology has been converging, regulatory layers have largely not. Where they have, this has been forced through practical problems of convergence.

The subject of regulatory intervention of each circle, respectively, are telecoms networks and services, information society services and audio-video media services. Platforms do not feature in any of the three. This is partially a result of the choice made following the 1997 Green Paper: no new regulatory framework in response to convergence. In a paper written in 2016, deStreel and Larouche explore the possibility of targeted regulatory framework for digital networks and services and

¹⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1, 17.7.2000.

¹⁷ For details, see Andrej Savin, *EU Internet Law* (2nd edition, Edward Elgar: Cheltenham 2017).

¹⁸ Directive 2010/13/EU of the European Parliament and of 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 (Audiovisual Media Services Directive), OJ L 95/1, 15.4.2010. For a proposal for update, see COM/2016/0287, 25.5.2016.

¹⁹ See also Alexandre de Streel and Pierre Larouche, *An Integrated Regulatory Framework for Digital Networks and Services*, CERRE Policy Report, CERRE Report, 27 January 2016.

advise the Commission to abandon the current vertical model in favour of one “based on horizontal layers, distinguishing between digital networks and all types of digital services.”²⁰.

The key point requiring new laws is precisely the substitutability of different services. Since such services can be easily substituted, the existence of separate regulatory silos is superficial. But, although substitutability may point in the direction of “level playing field”, which is the idea that like services should be regulated alike, this is not what is claimed here. There is a subtle difference between applying the existing laws to a new category of services and creating new laws for it. The level playing field does the former. Convergence arguably requires the latter. The lack of converged laws, coupled with an ad hoc approach to regulating platforms (explored in Section 3) may have unexpected results since regulatory objectives, principles and regulatory tools do not correspond to the technological and social realities.

2.2. THE SHIFT TO PLATFORMS

Starting from 2015, when the Digital Single Market Strategy had been adopted, an interesting trend can be noted. The EU policy documents gradually begin talking about regulating “platforms” rather than “networks” or “services” and the proposals on platform regulation are openly debated and tabled (see Section 3 below). These calls signal a shift to platforms as legitimate regulatory targets. There should be no confusion here. A platform can be subject to different sector-specific laws, competition, advertising, telecoms, etc., without special platform-specific rules or, indeed, policies. This has been the case since the mid 90s when the Internet gradually emerged as a medium. A platform-specific law, however, targets platforms only. A policy shift would signify a move from a more traditional regulatory model to platform-specific laws. Such a shift can result from a comprehensive policy or a set of ad hoc corrections.

It is important to emphasise that platforms in the EU have not been targeted as a result of a comprehensive call for the analysis of their effects on the economy. This is a point of considerable importance. The general regulatory direction in the digital world has always been clear. Rather than a change in the agenda, the move has been local and a result of the perceived disruption that platforms have caused deeper down the policy tree and a desire to address it. Thus (see Section 3), OTT platforms needed to be brought to a level playing field with the

²⁰ Alexandre de Streel, Pierre Larouche, *ibid* 8.

traditional ones, user-generated services needed to be forced to install filtering and video distribution platforms needed to be made similar to traditional linear television.

The absence of a general policy direction in the most important document is nothing short of striking. The 2015 DSM suggested that market power of some platforms may be a reason for concern. In response to that, it claimed that a “fit for purpose environment for platforms and intermediaries” is needed. No further comment is offered, making this one of the shortest policy elaborations on offer. Combatting illegal content online, in particular, is alleged to be in the need of action. Here, the Commission suggests that platforms facilitate the distribution of illegal content. The Commission promises action in five areas: transparency in search results, platforms’ use of information they collect, relations between platforms and suppliers, intra-platform movability of users and illegal content. No detailed analysis of the nature of platforms, their emergence or their operation is offered or referred to here. Platforms are taken for granted as is the fact that future intervention might be necessary. Although the promised platform regulatory intervention is classified under one of the three other proposed reforms of the Digital Single Market, there is little doubt that the lawmakers give it relative importance.

A number of follow-up documents set the Commission’s promised action in motion and set out the foundations for the EU policy on platforms. The 2016 Communication on platforms was followed by a 2017 Communication and 2018 Guidelines on Illegal Content. Although lacking mandatory force of law, the three documents serve as guidelines and, in the case of 2018, as a benchmark to be met in case targeted stakeholders wish to avoid further legislation.

The 2016 Communication on Platforms²¹ is neither a comprehensive document on platforms nor a proper policy paper but a brief 15-page-long outline of the principles that the Commission declares will guide it in its effort to regulate platforms and an outline of the ways in which these principles will be implemented. To be the former, it lacks a commissioned body of research normally accompanying other proposals and to be the latter it lacks separate objectives and tools (although it does declare some basic principles). The Communication begins with a brief and relatively superficial overview of the importance of platforms. The principles the Commission promises to take into account are:

²¹ 25.5.2016 COM(2016) 288 final.

- a level playing field for comparable digital services;
- responsible behaviour of online platforms to protect core values;
- transparency and fairness for maintaining user trust and safeguarding innovation;
- open and non-discriminatory markets in a data-driven economy.

Several important policy goals can nevertheless be discerned from this. Probably the most striking statement is the idea that a level playing field should exist for comparable digital services. Put in other words, this means that like should be regulated alike. Although the level playing field has not been formulated properly in legal theory, it is occasionally used in different policies to either decrease the burden on the incumbent provider or to increase the burden on the disruptive one. Kenny and Suter²² suggest that the ‘level playing field’ argument only makes sense a) if the parties operate in the same market, b) if the regulation is actually burdensome on one but not on the other party, c) whether the regulation as a whole favours one party but not the other and, finally, d) if the benefits of symmetric regulation actually outweigh the benefit of asymmetric. It is doubtful whether level playing field should be applied as a general principle for regulating digital platforms which are as diverse in their design as they are in the choice of the business model they apply. Similar doubts can be raised in respect of “responsible behaviour”, “transparency” or “fairness” - terms which are vague and would be left to national courts.

Based on the foregoing, the Commission promises action in three separate areas. First, it promises to bring a level playing field to OTT services. The suggestion is that telecoms rules should be reviewed and that scope and extent of existing legislation should be reduced (deregulation) while applying a limited set of laws to all comparable services (harmonisation).²³ The second promise is to ensure that online platforms “act responsibly”. While this refers to increased instances of copyright violations, hate speech and other transgressions online, the reality is that the illegalities referred to are diverse. The promised action include reforming of the Audio-visual Media Services Directive, a new copyright package and self-regulation.²⁴ Very significantly, the

²² Robert Kenny & Tim Suter, “An unraveling of the Digital Single Market, A Review of the Proposed AVMSD” (Communications Chambers 2016).

²³ This will be analysed in Section 3.1 below.

²⁴ These are analysed in Section 3.2 below.

Communication does not promise a radical change in the regime for intermediary liability.²⁵ The third step is “fostering trust, transparency and fairness” and relates to first, reform of consumer protection laws and, second, to fairness in business-to-consumer relations.²⁶ The final suggestion is to keep open and non-discriminatory markets in the effort to foster a data-driven economy.

Fulfilling some of the promises made in the 2016 Communication, the Commission followed up with the 2017 Communication on Tackling Illegal Content Online and the 2018 Recommendation on the same subject. Unlike the 2016 Communication on Platforms, which is a policy outline specifically targeting platforms, these documents are more general in seeking to eliminate different types of illegal content, not necessarily only generated or spread by platforms. Nevertheless, it is abundantly clear that platforms are the real target of any intended action. The 2017 Communication, for example, contains the words “towards an enhanced responsibility of online platforms” as its subtitle, leaving little doubt as to its objectives.

The 2018 Recommendation is in particular important as a policy paper since it threatens²⁷ action unless the changes it proposes are not followed. This indicates the Commission’s impatience but also a change in attitude as threats of this kind are relatively rare in EU law. The Recommendation starts from the premise that platforms ought to be more proactive and do more to step up the fight against illegal content online. The Commission makes the assumption that “platforms” ought to be the target of such efforts. Little or no effort is made to distinguish between different types of platforms and little evidence is otherwise provided to support the Commission’s claims. Furthermore, the document declares that no clash is intended or created with Articles 12-15 of the E-Commerce Directive. As I will discuss in Section 3.2 below, this is precisely a sudden shift in policy that generates conflict. The Recommendation calls for clearer ‘notice and action’ procedures, more efficient tools and proactive technologies, stronger safeguards to ensure fundamental rights, special attention to small companies and closer cooperation with authorities. Special rules are introduced for “terrorist” content online and this includes the obligation to remove such content

²⁵ Articles 12-14 of the E-Commerce Directive protect intermediaries (as conduits, caches and hosts) from liability until the moment of notification. Article 15 removes the obligation of permanent monitoring.

²⁶ The latter is looked at in Section 3.2 below.

²⁷ Cf. Preamble 33.

within an hour of referral, faster detection and removal, better referral and regular reporting to the Commission, in particular about referrals.

The problems with the Guidelines are abundant. First, they lack effective safeguards. The safeguards they do provide are either vague or left to Member States. Second, the monitoring, which would effectively arise as an obligation if the Guidelines were to be followed, is in conflict with Article 15 of the E-Commerce Directive. Finally, different kinds of illegal content do not necessarily lend themselves to similar mechanisms for removal.

An analysis of the policy documents drafted since 2015 reveals a surprising approach to platforms. First, the post-2015 approach cannot be labelled a proper policy as it lacks separate objectives, principles and tools, borrowing, instead, heavily from legacy policies. Second, there is no doubt that the common thread is the fear that platforms may facilitate the spreading of illegal content online and the fear that platforms may treat different players on the market unfairly. Thus, platforms need to be “more transparent” and “more responsible” and the “level playing field” needs to be imposed on different market players. While lip service is paid to platforms’ importance, the EU policy is not enabling new and improved uses nor is it designed to promote. Instead, it can be labelled as “defensive” or “reactive”. Such as it is, the new policy has shifted the regulatory interest. Section 3 reveals whether the new focus has brought significant changes.

3. CONVERGED PLATFORMS IN THE NEW PROPOSALS

In the previous section, I have demonstrated that the EU gradually included platforms in some of its documents, in spite of the absence of a *comprehensive* policy that would address platform regulation. I noted that the main aspect of this partial approach is an attempt to address platforms as a threat to existing business models. This new EU model gradually shifted the regulatory focus from intermediaries, networks and services, which were the regulatory units of most EU IT regulation in the 90s and 00s, to platforms. The change took place consistently in each of the three content and carrier regulatory circles described in Section 2.1. In each of them, platforms brought about by the converged technological reality caused a defensive policy shift and brought a proposal shielding legacy technologies from the converged platforms. The effect is least prominent in the main part of the new telecoms proposal but is apparent in each of the other layers.

In telecoms services, converged OTT platforms threatening traditional telecoms models are subjected to traditional telecoms rules. In

information society services, collaborative platforms based on user-generated content are subjected to traditional IP models. In audio-video media services, on-demand platforms are subjected to regulatory models suitable for linear broadcasting. I will look at each in turn.

3.1. TELECOMS AND OTT SERVICES

The European telecommunications regulatory framework in its present form dates to 2002. The main feature of that framework is that telecoms networks and services are subject to *ex ante* sector-specific regulation. Rather than regulate after the harm had taken place, as is the case with competition law, the lawmaker gives national telecoms authorities the right to impose remedies *ex ante* in all cases where a significant market power (SMP) exists and where there is a risk that anticompetitive effects might follow. The telecoms framework consists of general rules (Framework Directive²⁸), coupled with the rules on authorisation (Authorisation Directive²⁹), access (Access Directive³⁰), universal service (Universal Service Directive³¹) and privacy (ePrivacy Directive³²).

Changes to the EU telecommunications regulatory package have been tabled in 2016,³³ after an abortive attempt in 2015.³⁴ The proposal aims to codify the present laws, modernise various aspects that are considered to be outdated, streamline the procedural aspects and remove regulatory barriers to investment. Among the most notable challenges the EECC had to address, however, is the status of over-the-top providers (OTTs). In simplest terms, OTTs can be defined as media companies that distribute content and services (VoIP, instant messaging, streaming, etc.) through the Internet rather than other proprietary channels. OTT services are the result of a converged Internet and a manifestation of what such an Internet means in practice. Instead of relying on their own purpose-built networks, which would be subject to telecoms regulation, OTTs use the Internet, thus falling under the definition of information society services (ISSs). As such, they are

²⁸ Directive 2002/21.

²⁹ Directive 2002/20.

³⁰ Directive 2002/19.

³¹ Directive 2002/22/EC.

³² Directive 2002/58.

³³ Proposal for a European Electronic Communications Code (EECC), 14.9.2016. COM(2016) 590 final.

³⁴ The 2013 proposal, COM(2013) 627 final, have been significantly reduced so that the regulation adopted in 2015 only dealt with roaming and net neutrality, Regulation 2015/2120 (EU), OJ L310/1, 26.11.2015.

subject to the significantly simpler and less onerous regime that covers ISSs.³⁵

The incumbent telecommunications companies argue that OTTs compete unfairly and that either the regulatory regime imposed on them should be relaxed and/or that OTTs should be subject to telecoms-style *ex ante* regulation. The Impact Assessment document for the telecoms proposal leaves no doubt that the Commission is aware of the problem but also leaves the impression that no radical measures were contemplated.³⁶ Having considered the options, the EECC proposal addresses the issue in a significant but measured way, proposing a somewhat changed definition of electronic communications services as a solution. In its Article 2(4), it suggests that telecoms services are Internet access services and interpersonal communication services. The latter are then divided into number-dependent and number-independent ones. It then subjects the number-dependent interpersonal communication services to a limited set of obligations, with the effect of putting the converged OTT services under the scope of some of the obligations, albeit very limited ones.

A somewhat more radical intervention is envisaged in the ePrivacy Regulation,³⁷ designed as a replacement of the 2002 ePrivacy Directive.³⁸ Recital 11 and Article 4(1)(b) of the Proposal directly refer to EECC definition of electronic communications services which, in turn, now covers interpersonal communication services. Article 2(1) subjects such services to the new proposed Regulation. Significantly, the EECC definition of electronic communications services informs the two proposals differently. While the EECC only subjects OTT services (and only number-based ones at that) to a relatively restricted set of new rules (as seen in the preceding paragraphs), the ePrivacy Proposal suggests more radical changes. In principle, *all* obligations which the Proposal imposes on telecoms services apply equally both to traditional and to OTT services. This relates to confidentiality (Article 5), permitted processing (Article 6), storage and erasure (Article 7), protection of information (Article 8), consent (Article 9) and others (Chapters III, IV and V). This means that a very wide group of platforms – those providing interpersonal communication services – are fully subject to ePrivacy rules. While it is unclear whether the proposal would be

³⁵ BEREC, Report on OTT Services, January 2016, BoR (16) 35.

³⁶ 14.9.2016 SWD(2016) 304 final.

³⁷ 10.1.2017 COM(2017) 8 final.

³⁸ Directive 2002/58/EC, OJ L 201/37, 31.7.2002.

adopted and, if so, in what form, if it is adopted in its present form, this would signify a significant shift to significantly more regulated OTTs.

Two observations can be made in respect of the latest telecoms proposals and their potential impact on the regulation of platforms. Each is, in its own right, revealing. First, the changes have been prompted by convergence. This is one of the instances where the preparatory documents declare the aims very clearly, both for the EECC³⁹ and the ePrivacy Regulation.⁴⁰ In this sense, there is no doubt that the proposals are informed by the realities of the converged Internet. Second, there is a shift from networks and services to platforms as regulatory units at least in case of the ePrivacy Directive. While the EECC proposal extended the scope of telecoms rules to OTTs, it did so in a very narrow set of circumstances. This is not the case of the ePrivacy Proposal, which subjects platforms to its full set of tools, without going into details as to whether such legislation is appropriate. The difference in the two proposals could not be more striking. But, rather than rethink the need for privacy intervention in platforms of different kinds, the proposal simply extends the legacy regulatory objectives (comprehensive privacy) and tools (Articles 6, 8, 9, etc.) to platforms without fundamentally rethinking either.

3.2. INFORMATION SOCIETY SERVICES AND FILTERING

Information society services have for a long time been subject to a stable set of laws dating to late 90s and early 2000s. The framework directive in this area is the Electronic Commerce Directive from 2001.⁴¹ The Directive subjects information society services, which are defined as services provided at a distance, by electronic means, at individual request and for remuneration (although not necessarily against a payment), to the laws of the home state, introduces some information requirements and insulates intermediaries from liability in a well-defined set of cases. In addition to this, sector-specific e-commerce laws have been passed covering a number of areas including copyright,⁴² privacy⁴³ and consumer protection.⁴⁴

No open calls for revision of the E-Commerce Directive have been made, either in the 2015 Digital Single Market Strategy, nor in any of the other policy documents. On the contrary, policy papers mentioned in

³⁹ Recital 7.

⁴⁰ Recital 11.

⁴¹ Directive 2000/31/EC, OJ L178/1, 17.7.2000.

⁴² Directive 2001/29/EC (InfoSoc), OJ L167/10, 22.6.2001.

⁴³ Directive 95/46/EC (Data Protection), OJ L281/31, 23 November 1995.

⁴⁴ Directive 2011/83/EC (Consumer Rights), OJ L304/64, 22.11.2011.

Section 2 all declare that any changes, proposed or contemplated, do not modify general e-commerce laws and the ISP liability regime in specific.⁴⁵ The key components of that regime, I would argue, are home country control (Article 3(1)) and ISP liability insulation (Articles 12-15). While the former ensures that a provider acting legally in their state of origin can simply export their services, the latter ensures that such provider would not be liable for acts which it does not itself initiate or actively monitor.

The 2015 DSM Strategy indicated a number of areas which the Commission promised to look into but a close look at the Strategy would not give the impression that deep-going changes are demanded. Nevertheless, several proposals have a significant impact for platform regulation and two in particular demonstrate the regulatory move from services to platforms which we have indicated in Section 2 as well as the translation of legacy-era objectives onto the platform world.

The proposal for a Directive on Copyright in the Digital Single Market⁴⁶ is a result of a prolonged process of reform, prompted mostly by the increased demands for copyright law to take account of new technologies, changed patterns of production and use of intellectual property goods and increase in user-generated content. The Proposal aims to improve exceptions, improve licensing practices and “achieve a well-functioning marketplace for copyright”. In light of the latter, Article 13 proposes measures on the use of protected content by ISP providers “storing and giving access to large amounts of works and other subject-matter uploaded by their users.” The proposed text does not define such providers. The first obligation that they would have to be subjected to is to take measures to ensure the functioning of agreements concluded with rightholders in cooperation with them. This means an obligation to conclude appropriate licensing agreements. In the alternative (the text uses the connection “or”), i.e. in case these agreements have willingly not been concluded or have proven difficult or impossible, the providers have the obligation to prevent the availability on their services of works or other subject-matter identified by rightholders through cooperation with them. This includes measures for effective content recognition technologies which need to be appropriate and proportionate. Explaining the operation of the proposed measures in relation to Articles 12-15 of the E-Commerce Directive, preamble 38 maintains that the regime outlined in Article 13 applies wherever the E-Commerce

⁴⁵ p. 9 in the 2016 Communication, paragraphs 14 and 17 of the Preamble to 2018 Recommendation, paragraph 38 of the Copyright in the DSM Proposal.

⁴⁶ 14.9.2016 COM(2016) 593 final.

exception does not. This suggests that the lawmaker believes platforms to still be subject to ISP liability exemption. Hoping to clarify the situation further, it adds that

it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.

Analysing the provisions in light of the current EU law and CJEU cases that interpret it, it is difficult to justify its existence and escape the feeling that, if adopted, it would cause a direct clash with existing laws.⁴⁷ There are several reasons for this. First, Article 15 of the E-Commerce Directive obliges Member States not to impose on ISPs a general obligation to monitor or to seek illegal activities. Article 13 of the Proposal demands that ISPs engage in automated monitoring in the form of “effective filtering”. Generic filtering requires monitoring by its very nature. Matters are further complicated by CJEU’s interpretation in *SABAM* which clearly indicates that generic and indiscriminate filtering is, in itself, illegal.⁴⁸ This case has subsequently been slightly modified in *UPC*,⁴⁹ where the Court ruled that injunctions not specifying the measures but allowing the ISP to demonstrate that it had taken all reasonable measures were legal. The difference, however, is that even under *UPC* it is the ISPs that bear the burden of proving that they took reasonable measures while under Article 13 a pre-defined set of such measures (state-of-the-art filtering) is imposed.

Second, it would appear that the proposed Article 13 demands that either agreements should be concluded or that “effective” filtering should be installed. It then maintains that not complying with either of these two would remove the protection provided by Article 14 ECD. In other words, the Proposal maintains that only Article 13-compliant ISPs would benefit from Article 14 ECD. While it is true that Article 14 of the E-Commerce Directive provides exemption from liability only for bona fide providers, it is not clear why and when “optimising the presentation” might eliminate protection nor what amounts to

⁴⁷ See, for example, Stalla-Bourdillon et al., ‘Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society’ (September 30, 2016). Available at SSRN: <https://ssrn.com/abstract=2850483>.

⁴⁸ C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 24 November 2011, ECLI:EU:C2011:771.

⁴⁹ C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktiongesellschaft GmbH*, 27 March 2014, ECLI:EU:C2014:192.

“promoting” the works. This is in direct conflict with CJEU’s reading of Article 14 in both *Google France*⁵⁰ and *L’Oreal v eBay*.⁵¹ In the former, the Court said that non-active providers should benefit from protection except where they, having obtained the knowledge, fail to act. In the latter, the Court suggests that only the operator who was well aware of the circumstances would lose the protection. Taken together with Article 15, this should be taken to mean that ECD does not require filtering as an essential component for the existence of insulation from liability (although they may very well form part of an individual court order).

The fascinating element in the Proposal is the clash in objectives and tools. While intermediaries in the legacy world are shielded as long as they lack information on the alleged illegalities (and, thereafter, remove or filter out specific content), the platforms in the new policy need to filter out in advance if they are to be shielded at all. In the former, the assumption is that intermediaries are innocent until proven otherwise. In the latter, they are assumed to be a spreading ground for illegal content.

The proposal on the transparency on business-to-business platforms had first been announced in the 2015 DSM Strategy, where transparency in search results, platforms’ usage of information they collect and relations between platforms and suppliers have been flagged as areas of interest. In April 2018, following a detailed inquiry,⁵² the Commission proposed a Regulation on promoting fairness and transparency for business users of online intermediation services.⁵³ As mentioned, in spite of the Commission’s declared reservations towards openly legislating on platforms, the policy documents do promise that some action will be taken. The main premise of the Proposal - that platforms act as gatekeepers on which businesses depend - represents a summary of one of the Commission’s main new policy positions regarding the digital world. The present proposal seems to be aimed at bringing extra requirements for clarity and transparency in situations where platforms could abuse their dominance.

The regulation would apply to online intermediaries and search engines providing services to business users with a place of establishment in the EU and offering goods and services to EU consumers. It is not important for the purposes of the Proposal if platforms *themselves* have a place of business or residence in the EU, as

⁵⁰ C-236/08 and C-238/08 [2010] ECR I-02417.

⁵¹ C-324/09 12 July 2011, ECLI:EU:C:2011:474.

⁵² See Impact Assessment, 26.4.2018 SWD(2018) 138 final.

⁵³ 26.4.2018 COM(2018) 238 final.

long as business users they offer services to have such a place and engage in targeting EU consumers. A platform based in the US (such as Google) would therefore fall in the scope of the regulation in as much as its clients are businesses dealing with EU consumers. Although the word “platforms” is only used in the preamble, there is no doubt that platforms are the real target. This means that a search engine or a social network based in the United States would fall under the new rules. Although the list of obligations the platforms would be subject to is diverse, it can be summarised as increased obligation of transparency in all situations where platforms’ actions could unfairly influence the businesses that rely on them. Particularly important, however, is Article 5, forcing online platforms to set out in their terms and conditions the main parameters determining ranking and the reasons for their relative importance. Where businesses have an opportunity to pay to influence ranking, such possibility would also have to be disclosed. Online platforms do not have to disclose any trade secrets as defined in the EU Trade Secrets Directive.

Two features of the Proposal, in particular, should cause concern. First, the Proposal covers search engines, on whose definition wide agreement exists, and “online intermediation services”, known as platforms both colloquially and in EU policy papers (see Section 2). The latter are defined in Article 2(2) as

- information society services within the meaning of EU law;
- which allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded;
- provided to business users on the basis of contractual relationships between those business users and their own clients (business or private)

This definition is exceptionally wide in its scope. In essence, it is enough for a platform to offer services facilitating the interaction between businesses and their clients for it to fall under the obligations. No financial threshold is offered and the platform need not operate on a subscription model (advertising income would be enough).

The second problem is the scope of the proposed Article 5 which would force platforms to disclose “the main parameters determining ranking and the reasons for the relative importance” of those parameters as opposed to others in their terms and conditions.

While the other demand, to disclose that ranking might be influenced by payment, is reasonable from the viewpoint of fair competition, the disclosure of ranking criteria is poorly defined. For search engines, paragraph 2 of Article 5 requires the main parameters determining ranking to be disclosed in an “easily and publicly available description, drafted in clear and unambiguous language.” Article 5(3) explicitly excludes the possibility of disclosure of any trade secrets as defined in Directive 2016/943. It is difficult to explain how platforms and search engines can release meaningful information without also releasing elements of trade secrets.

Both proposals demonstrate the broad strokes with which the lawmaker aims to regulate platforms and search engines. While the Copyright in the DSM covers *all* user-generated websites (or at least a large majority thereof), the Transparency on business networks proposal covers *all* search engines and *all* platforms. It is true that the E-Commerce Directive applies to all information society services, a category even broader than platforms. The nature of the regulatory intervention in that document, however, is radically different than the two proposals above. When the Clinton administration considered the best approach to regulating the Internet in the 90s, it adopted the *laissez-faire* approach which, in turn, had influenced the drafters of the E-Commerce Directive to take the enabling of free movement of information society services as its main goal.⁵⁴ This leads to an important distinction between information society services and/or intermediaries as opposed to platforms as regulatory targets. While the EU policy in the case of the former had been drafted to enable their spread (home country control, limited liability), the policy in case of the latter had been mainly defensive - it has been targeting platforms as *obstacles*. This has meant that platforms in the ISS world have been taken out of the scope of legacy regulatory *objectives* (free movement of digital services) but taken within the scope of legacy *tools* (full liability, disclosure of ranking criteria). Even more significantly, this is not done with the objective of making platforms spread their services liberally but, on the contrary, with a view to preventing their (perceived and real) illegal activity.

3.3. AUDIO-VIDEO MEDIA SERVICES AND VIDEO-ON-DEMAND

Audio-video media services (AVMS), as indicated earlier, are regulated separately from information society and telecoms services. The

⁵⁴ For details, see Andrej Savin, EU Internet Law (2nd edition, Edward Elgar: Cheltenham 2017), Chapter 1.

chief differentiating factor is the existence of editorial control: media are communication intermediaries with editorial control. Where media are not subject to such control, they may fall under one of the other frameworks. The purpose of the 2010 AVMS Directive was to bring minimum harmonisation in a number of areas but also to create a level playing field for emerging audio–video media, preserve cultural diversity, protect children and consumers, safeguard media pluralism, combat hate speech and guarantee the independence of national regulators.⁵⁵ Although the Directive is only a minimum/partial harmonisation of the relevant law, it covers a significant number of issues, including general principles, hate speech, protection of disabled users, promotion of EU works, jurisdiction, protection of minors and advertising. The Directive’s main regulatory tool - the home country control principle - subjects all audio-video services to the law of the country in which they originate.

That convergence prompted the legislative changes is stated explicitly in the 2010 Directive (Preamble, paragraph 14). This is confirmed in Article 1, which states that *all* media - irrespective of the manner of delivery and the technology used - are covered. The linear (broadcast) and non-linear (on-demand) means of communications are thus both covered, with each also being subjected to a set of rules specific to their own mode of delivery.

The 2013 Green Paper explored the effects of convergence further, paving the way for the reform of the 2010 Directive.⁵⁶ The AVMS revision finally proposed in 2016 after a long period of consultations⁵⁷ is under the direct influence of convergence between television and services distributed via the internet. In the proposed Article 28a, it subjects video-sharing platforms to special content-related obligations. The Commission gave three reasons to justify further need for regulatory reform: insufficient protection of minors and consumers on video-sharing platforms; the lack of a level playing field between the new and old platforms, in addition to internal market problems; and, finally, inadequate rules regarding commercial communications. All three point to platforms, either specifically, as is the case with first two, or indirectly,

⁵⁵ Directive 2010/13/EU, 15.4.2010., OJ L 95/1. See Mark D. Cole and Jenny Metzendorf (eds), *The EU Audiovisual Media Services Directive: Comparative Commentary on the AVMSD and National Implementation* (Nomos/Hart, Oxford 2016).

⁵⁶ Green Paper, *Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, 24.4.2013 COM(2013) 231 final.

⁵⁷ 25.5.2016, COM(2016) 287 final. Not yet adopted.

as is the case with the last one. A move towards regulation of platforms is, therefore, the major driving point in the Proposal.

To understand the impact that the Proposal might have on platforms, one must look at the *present* regulatory regime for video-sharing platforms. For something to even qualify as an audio-video media service under the 2010 AVMS Directive it has to be under the editorial responsibility of a media service provider. If it is not, it would still (likely) be covered as an information society service under the E-Commerce Directive. Under the Proposal, a completely new category is introduced in addition to linear and non-linear services - video-sharing platform service. These are defined as

- storage of a large amount of programmes or user-generated videos where the provider has no editorial responsibility
- organisation of the content is determined by the provider, manually or automatically, in particular by hosting, displaying, tagging and sequencing;
- the principle purpose is provision to the general public
- the service is made available through telecoms networks

It should be clear that this definition encompasses a very large number of platforms of all sizes. Thus defined in very broad terms, video sharing platforms are subjected to Article 28a and forced to protect minors from content which may impair their physical, mental or moral development and protect all citizens against hate speech. In order to achieve such objectives, platforms would need to use terms and conditions, install mechanisms for users to flag inappropriate content, use age verification systems, install mechanisms allowing users to rate the harmful content and use parental control systems. The interesting aspect of this change is that it is the Member States that are addressees of the obligation and not the providers themselves. They are to use, among other, co-regulation.⁵⁸

The Proposal has been met with mild approval from media associations⁵⁹ but also calls to better adapt to the needs of particular professions.⁶⁰ On the other hand, critics have also been vocal. Analysing the text, CERRE concluded that it could endanger the freedom of expression and that guidance on what should constitute incitement to

⁵⁸ On co-regulation in EU law, see Christopher Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace* (Cambridge University Press 2011).

⁵⁹ See EBU opinion, available at <https://www.ebu.ch/news/2016/05/revision-of-audiovisual-media-se>.

⁶⁰ See Cineuropa, 16.4. 2018. <http://cineuropa.org/en/newsdetail/351846/>.

hatred and violence should be established as soon as possible.⁶¹ In a paper commenting on the trilogue negotiations, EDRI commented that a proper definition of user-generated video is needed. It also suggested that Article 28a be completely deleted or at least substantially changed through amendments.⁶²

It is difficult to argue against the need to reform the current Directive and its broad scope should not leave anyone surprised. First, the breadth matches similar interventions in the e-commerce and telecoms discussed above. Second, the intervention had been envisaged in the 2015 DSM document, when the Commission promised that it would look at the rules applicable to “*all* market players”. It promised at that point to examine if the scope of the rules should be extended to “new services and players”. This is a typical “level playing field” intervention, attempting not to create a new set of objectives and principles but trying instead to bring the new media under the scope of legacy rules. Most worrying, however, is the explicitness with which both the original 2010 AVMS and the 2016 Proposal encompass “platforms”, which are simply taken to be modern extensions of regulated media and thus, in the lawmakers’ mind at least, justifiably subject to intervention. The new platforms may have a separate article dedicated to them, but the proposed measures are exactly the same that apply to linear and non-linear television. The appropriateness of such an approach is questionable. It is also difficult to escape a feeling of unease, however, as the US *Reno v ACLU* case⁶³ comes to mind.

4. THE INTERPLAY OF CONVERGENCE AND REGULATION AND POSSIBLE ALTERNATIVES

The main claim of this article has been that a gradual shift from regulating *networks and services* to regulating *platforms* is notable in EU digital policymaking and that this shift had been prompted by, among other things, convergence of services. I argued that the EU’s interest in regulating platforms arises partially from convergence, which had erased the clear boundaries between networks that provide digital services on the content and carrier layers. There is no doubt that technological convergence has its effect on the content (information society services)

⁶¹ Sally Broughton Micova, Key issues in the AVMSD revision debates: Video-sharing platforms and regulator independence, CERRE Position Paper, 19 March 2017.

⁶² EDRI, EDRI position on AVMSD trilogue negotiations, 14 September 2017, available at https://edri.org/files/AVMSD/edriposition_trilogues_20170914.pdf

⁶³ In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the US Supreme Court struck down anti-indecency provisions of US Communications Decency Act.

as well as carrier levels (telecommunications networks and services) although the nature of the policy response to this still remains somewhat obscure.

There should, on the surface, be no surprise in EU's fascination with platforms, which have come to represent the powerful and dominant intermediaries. In *Platform Revolution*,⁶⁴ Parker and others are arguing that networked markets are transforming the economy and that disruptive platforms are connecting the actors on the market in unprecedented ways. Platforms eliminate the gatekeepers typical of the linear model and unlock new value. These platforms are made possible by network effects and superior marginal economy. But, while it may be obvious that the EU takes interest in platforms, why has it shifted its regulatory interest from intermediaries? The EU law on intermediaries, after all, is well-established and it would have been logical to target them instead. Particularly in favour of that would be the relatively broad definition of intermediaries both in the E-Commerce Directive itself and the subsequent CJEU interpretation of Articles 12-15. There is nothing in CJEU case-law that points in the direction of narrowing the scope of the original definition. The CJEU case-law on injunctions very clearly indicates both that different types of injunctions can be used to prevent current and future infringements and that such injunctions must be specific in their aims and means.⁶⁵

The answer should be sought in the nature of EU regulatory intervention concerning platforms, already discussed above. The EU of mid 90s and early 2000s sought to position the intermediaries as the enablers of the Internet. It thus insulated them from liability, ordered Member States not to place unreasonable obstacles to their proliferation and sought to subject them only to the laws of their state of origin. The post-2015 EU IT policy is of a very different nature. While intermediaries have been targeted in the 2000s in order to *enable* the spread of digital services, the focus of the 2015 DSM document is largely on creating the level-playing field and *constraining* the spread of illegal content. The policy documents analysed above indicate that the EU is committed to maintaining the most important parts of its regulatory regime on intermediaries *while* targeting platforms in fear of their power and the consequences of the public's increased dependence on them.

⁶⁴ Geoffrey Parler, Marshall W Van Alstyne, Sangeet Paul Choudary, *Platform Revolution* (W.W. Norton & Company : New York 2016).

⁶⁵ See C-360/10 SABAM, 16 February 2012, ECLI:EU:C:2012:85 and C-314/12 UPC Telekabel Wien, 27 March 2014, ECLI:EU:C:2014:192.

Here, ISSs are still the legitimate regulatory targets, platforms are the necessary evil.

Section 2 shed light on the EU's growing policy body on platforms while Section 3 showed that regulatory interventions are already under way. We saw that the EU largely applies the existing regulatory tools to new platforms. Critically, however, the tools available in the legacy world and taken over by platform-specific laws discussed in Section 3 are by their very nature harsh since they target non-compliant intermediaries. Thus, full spectrum of ePrivacy obligations on the carrier layer or full liability or filtering for intermediaries on the content layer. Such tools are designed to catch exceptional illegalities and not created as a toolset controlling the operation of intermediaries in normal situations. There is no doubt that some of the proposed laws are targeted. This is mainly true of the changes proposed to the telecoms framework (although not the ePrivacy part). It is also true, however, that the remainder of the proposals do not contain essentially new solutions for platforms. The EU model is, simply put, too 'crude' and too reliant on old ideas.

But if such responses are questionable, what would the alternatives look like? In order to answer that we must recollect that technological convergence generates friction when regimes come into conflict. Ibáñez Colomo had argued that this is the case where regulatory *objectives* pursued by regulation and specific *tools* chosen to implement them do not match.⁶⁶ In this situation, legacy tools are used to achieve the new and modified objectives. From this point, two paths are possible. The first path is to deregulate. In some cases deregulation removes some of the assumptions made by legacy regulation. The most typical example of this is the EU's gradual reduction of the number of markets susceptible to *ex ante* telecoms regulation. Another path is the *regulatory* convergence in pursuit of *technological* convergence. The current "silo" approach is not converged but has one regulatory regime for each of the three layers. A converged path would result in a gradual creation of a single regulatory regime, consisting not only in a unified set of rules covering all (or the majority of services) but also in the redefinition of authorities in charge of the enforcement. Regulatory convergence may, but does not necessarily, mean the development of new tools.

The lawmaker can react "defensively" to convergence where the current objectives are not judged to be in the need of new regulatory tools. The 2010 AVMS Directive had simply extended its regime to on-

⁶⁶ Pablo Ibáñez Colomo, n4 19. See also pages 19-22 for possibilities for a regulatory evolution away from the legacy regime.

demand services, judging the objectives to justify this. The principle of technology neutrality, which is built into all EU digital directives on the content and carrier layer, takes as a starting point the idea that laws should not be drafted with a particular technology in mind. Nevertheless, the principle is not designed to prevent regulatory convergence by continually applying the same regulatory paradigm to every changing technologies. Instead, it is meant to bring extra flexibility by removing the need for each new technology to be covered by a matching law. A consequence of non-reaction to convergence is the application of several regimes to technologically converged services.

Regulatory convergence need not follow with equal speed in all targeted areas and may proceed faster in some. But, what has been EU's reaction? We have seen that there has been early recognition of the problem (1997). We have also seen that the vertical approach had not been abandoned and that, on the contrary, three "pillars" had been maintained, also in the latest round of reforms. That, in itself may not signify deeper problems but it indicates, especially in light of the proposals discussed in Section 3, that the EU reaction is largely defensive.

In the first section I stated that the fact that services are delivered over different networks does not, in the EU lawmaker's eyes, make these services the same nor does it necessarily imply that they should be regulated through a single regulatory framework. This crucial statement came to inform the EU policy and caused the sector-specific interference into platforms. While the convergence made *some* intervention necessary (as we saw in Section 3), the legacy-informed regulatory paradigm prevented logical development of a unified approach.

It is not known to what extent the current regulatory models can be applied to platforms. The present regulatory model is, in its essence, a collection of legacy objectives and tools. That new regulatory forms occasionally need to be invented is a well-known fact but the regulation discussed in Section 3 is not new. Section 3.1 explained how OTT's are subjected to present laws in a narrow class of cases. Section 3.2 talked about the *current* filtering regime being imposed on platforms in an extended set of circumstances and platforms bring forced to disclose their ranking criteria. Section 3.3 talked about extending the present regime to video-sharing platforms. In none of the cases can there be any talk about a new set of rules. Instead, the lawmakers' reaction is the same: disruptive platforms are seen to be escaping the present regime, are occasionally reprimanded for not doing more themselves, and ultimately subjected to stricter laws.

I submit that the EU lawmaker's current approach to platforms is both too broad in scope and misguided.⁶⁷ Too broad, because it is not clear if platforms necessarily raise any new issues which cannot be dealt with through present laws and which would require sweeping intervention of the type seen in the proposal on transparency of filtering of UGC content. In discussing the pitfalls of regulating platforms, Hatzopoulos points out the lack of consensus on definition, the subject and the scope of regulation.⁶⁸ The dilemma is not only whether to regulate but also whether to opt for ex ante or ex post, general or specific, national or EU. The Commission's documents to date have provided little to no material to support one form of regulation over another. Self-regulation – an approach that platforms themselves prefer – may very well be adequate but only if properly enforced.

Misguided, because it misses the key point that convergence has been forced upon us and needs to be addressed. The crucial questions that need to be asked are: what has convergence done to vertical regulation and what needs to be done differently? In a comprehensive report based on the examination of services at different layers, CERRE suggested that horizontal regulation is better suited to converged technological realities. So far, the EU lawmaker had attempted to legislate within distinct legal pillars. Instead, converged services need to be tackled horizontally - *across* these circles if and when needed, through clear objectives and principles and by good enforcement mechanisms by authorities capable of addressing the problem.

Substitutability ought to be a leading factor in favouring horizontal regulation of services. This naturally leads to at least a simplification of the regulatory framework to one applying to networks (traditional telecoms/carrier) and another to all services (both ISSs and AVMS). Even in this division, some regulation on the carrier layer – such as the ePrivacy Directive – would almost certainly need to be revised so that it does not cover non-telecoms services. The horizontal model would also take most advantage of the already existing legislation (competition law, consumer protection, privacy, contract law, etc.)

The problem with the Commission's approach is not only the lack of understanding of the subject that is to be regulated, nor the inherent difficulties of regulating it, but the volatility of its approach. While 2015

⁶⁷ In particular on why this is the case in legislation targeting alleged discriminatory practices of platforms, see Jan Krämer et al., *Internet Platforms and Non-Discrimination*, CERRE Report, 5 December 2017.

⁶⁸ Vassilis Hatzopoulos, *The Collaborative Economy and EU Law* (Bloomsbury 2018), in particular chapters 1 and 7.

DSM Strategy indicates a soft approach, the 2018 Guidelines moves towards a hard one. While earlier regulatory initiatives take a subject-specific approach, the later ones (such as the 2018 proposal on transparency) take a more sweeping brush. And, while the latest proposal takes a somewhat new method in emphasizing transparency, the majority of the other ones are firmly based on a model of thinking based on legacy technologies.

Convergence is both an important phenomenon and one that has been recognised as such in the EU as early as 1997, but the EU lawmaker, rather than changing policy objectives and tools in pursuit of converged realities, chose to maintain the legacy model of regulation and extend its tools to platforms. Nevertheless, the EU lawmaker has been thrown into the reality of converged technologies. I indicated that, post-2015, this has been primarily through the emergence of platform-specific regulation. But, rather than attempt to rethink its digital policies, the EU has chosen to act *defensively* - it attempted to translate the regulatory objectives and tools from the legacy world to the new and threatening phenomenon. Ultimately, it seems that new and more dynamic regulatory models may be needed in order to properly address the phenomenon of convergence.