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The background of the Digital Services Act: looking towards a platform economy

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Abstract  The E-Commerce Directive laid the foundation of the EU legal framework for digital services. Since its adoption in 2000, the legal framework has remained largely unchanged, while the digital economy has undergone a profound transformation. The digital economy is today becoming a platform economy. Rules and legal solutions underpinning the Directive effectively accommodate the structural, operational, and behavioural features of a preliminary stage to the platform economy. Thus, the cornerstone of the EU digital services legal framework now requires a thorough revision. Despite its merits, noticeable limitations on facing new challenges surface. The aim of this Paper is to highlight those legal issues that call for attention in the Digital Services Act package.

Keywords  Platform economy · Safe harbour · Digital intermediaries · Digital services · Notice-and-take-down mechanism

1 The foundations of the EU legal framework for digital services

The adoption of the Electronic Commerce Directive (hereinafter, ECD or the Directive) in 2000 laid the foundation of the European Union (hereinafter, EU) legal framework for digital services. Since then, the legal framework has remained largely unchanged, while the digital economy has undergone a profound transformation.

Rules and legal solutions underpinning the ECD did effectively accommodate the structural, operational, and behavioural features of the digital context in a preliminary stage to the platform economy. A radical evolution of the digital economy in the last
two decades has challenged the adequacy of the ECD rules for the new scenario. The digital economy is today becoming a platform economy.

Even if some of the principles inspiring the ECD can be preserved, and the success lessons learned in the implementation and the application of the ECD provisions should be leveraged, a deep re-contextualisation of the current EU rules for digital services in a platform economy with complex technological ecosystems is needed.

1.1 The merits of the Electronic Commerce Directive

The ECD is based on three main pillars for achieving the policy aims of promoting a proper functioning of the internal market by removing obstacles to cross-border digital models, facilitating the free movement of digital services within the EU, and ensuring legal certainty and predictability in the digital economy.

First, the Directive includes an Internal Market Clause articulating the principle of the country of origin, according to which providers are subject to the law of the Member State in which the provider is established.

Secondly, the Directive contains common rules on transparency and information requirements, electronic contracting and online advertisements.

Thirdly, it provides for the legal regime applicable to “information society service providers” (ISSPs). The pivotal concept of an ISSP is based on a binary taxonomy: (general) service providers, and intermediary service providers. In addition to general obligations related to contracting and information requirements, intermediary service providers are shielded from liability to the extent of and in conformity with the “safe harbour” regime (Chapter II, Sect. 4, ECD).

Underpinned by these conceptual and substantive components, the ECD has succeeded in paving the way for the development and the consolidation of the digital market in Europe. The rules provided for by the ECD have effectively addressed and overcome the key hurdles to the growth of electronic commerce and struck in masterly fashion a balance between the promotion of digital service provision, in particular, of intermediary services, and the protection of interests and rights by the “safe harbour” regime. Not surprisingly, the ECD is still the backbone of the EU legal framework for digital services.

1.2 The shortcomings of the Electronic Commerce Directive

Nonetheless, and despite its pivotal role, the ECD has started to show shortcomings to confront the emerging challenges of today’s digital economy. Some shortcomings simply arise from an inharmonious implementation of the ECD by the Member States, whereas others reveal gaps to be filled or potential unsuitability of certain rules to manage new issues posed by the platform economy.¹

1.2.1 Inharmonious implementation: gauging the “legal distance”

ECD provisions have been differently transposed into national legal systems. Differences between national rules have resulted in legal fragmentation and, in practice, in

the compartmentalisation of the market for digital services. “Legal distance” caused by legislative divergences has turned into “trade distance”, due to higher compliance costs, and lower predictability. Disparate implementation of ECD provisions in national legal systems can be caused by different interpretation of the solutions provided for by the Directive or simply by a diverse development of those issues where the Directive does not contain specific rules for the design, the content, or the operation of mechanisms, procedures, or systems – e.g., as regards the liability of hyperlinks providers, or as regards “notice and take down” procedures. In such cases, national disparity increases in the absence of a regime harmonised at EU level.

The hampering effect of “legal distance” has been aggravated by other indirect domestic barriers to entry related to the complexity of administrative procedures, the costliness of cross-border dispute settlement mechanisms, or the lack of availability of regulatory information for the provision of digital services. This combination of legal fragmentation and indirect domestic barriers may hinder real EU-wide provision of digital services.

Legal divergence is scarcely reconcilable with the global nature of digital models (the “digitality” factor). Beyond the provision of digital services, the emergence of digital platforms as the new architecture for the digital economy shatters the underlying logic of legislative territoriality. The real challenge posed by the platform economy goes beyond the transnational character of digital activity: platforms aim to emulate and manage a “private legal system” in the exercise of private ordering. Hence, the challenge is how to regulate platforms’ operators as regulators, supervisors, trust generators, and dispute resolution facilitators without promoting “platform shopping”. Even if the central role of the internal market clause is not questioned, the determination of adequate connecting factors and the demarcation of the scope of EU rules – albeit that these are harmonised – are challenging key decisions. An unsteady balance between ensuring that the provision of digital services in the EU, both for providers established in the EU or outside the EU (provided that they are directing services to the Union) and minimising the risk of regulatory arbitrage and its impact on the accessibility of EU users to digital services must be struck.

2 Beyond the concept of globality or universality, intended to describe the expansion of international trade and the nature of cross-border transactions, the author advocates the coining of a new concept that better reflects the genuine nature of digital activities: the “digitality”. Rodríguez de las Heras Ballell [5].

3 Hence, a global harmonized legal approach to platforms would be highly advisable and desirable, as I advocated in Rodríguez de las Heras Ballell [6].

4 Schwarcz [9].

5 In Rodríguez de las Heras Ballell [7], I coined the term “platform shopping”, a new variant of regulatory arbitrage, “to describe the intentional search for those platforms that offer a more favourable climate or a friendlier regulation for a specific activity. In a non-harmonised regulatory environment, platforms compete with each other as private-ordering-based systems to attract users to join their community and operate in their “private jurisdiction”. Thus, in the absence of harmonised rules on platforms, regulatory competition would enable actors in the digital market to deploy strategic actions and look for the most convenient platform. Although such efforts could be a natural response on the part of private actors to healthy competition among platforms, “platform shopping” rather describes the risks of a lack of harmonised legal framework, setting out the duties, obligations and liabilities of platform operators, leading to a proliferation of illegal content, hate speech, fake news, unlawful activities within platforms subjected to less stringent applicable laws and exploiting the non-harmonised legal background” (p. 62).
1.2.2 Facing the transformation of the digital economy: the malleability of technology-neutral rules

Apart from the lack of harmony found in national rules, the ECD also manifests limitations due to the transformation of the digital economy during the two-decade life of the Directive. The digital economy has profoundly transformed exceeding the adaptability margin of the ECD rules.\(^6\) The architecture of the digital economy is different, new business models have emerged, and the second generation of digital technologies (AI, IoT, big data analytics, DLT, deep learning, etc.) has invaded and permeated the market.

Even if the technology-neutral provisions of the ECD did not ignore the dynamism of the business models and did not disregard at all the technological progress, some concepts underpinning the ECD seem inadequate to fully embrace the contours of today’s digital economy. A purposive interpretation may, nonetheless, provide some reassuring responses. But, even though key principles might endure, the transformation of the context is too drastic and substantial to simply force adaptation of existing rules. Reinvigorated context-specific solutions are certainly needed. The intensive and extensive use of algorithms in classifying, filtering, prioritising, or removing digital content challenges the conventional interpretation of “obtaining knowledge or awareness”, as per Art. 14 ECD, and stretches the traditional understanding of the “general obligation to monitor”, as banned in Art. 15 ECD.

The evolution of the digital economy has also revealed gaps in the ECD. The emergence of new realities thanks to technological advances which have gone beyond the horizon of the provisions of the ECD needs attention and may require a bespoke legal approach. Interpretative efforts will not be sufficient to that end. The technology-neutral solutions underpinning the legal regimen of the ECD for electronic contracting may be overtaken by the challenges of smart contracts\(^7\) and the extensive application of artificial intelligence and learning techniques.\(^8\) The overwhelming transformation of the digital economy and the latest trends in business models, e-contracting, advertisement, or digital-service provision models has thus exceeded the room for manoeuvre of the ECD. The advisability of revisiting old solutions and considering the need to devise new ones, where functional equivalence is no longer workable and technology neutrality has been exhausted, is undeniable.

1.2.3 Reconsidering the horizontal approach

Yet, since the adoption of the Directive, sectoral rules have been adopted in the EU which have had an impact within the purview of the ECD’s scope and aims. Both

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\(^6\) Gaps and ambiguities of the ECD provisions were progressively addressed and smoothed over by case law since the Directive’s adoption and implementation in domestic legal systems. The EU Study on the Legal Analysis of a Single Market for the Information Society. New rules for a new age?, prepared by DLA Piper and commissioned by the European Commission’s Information Society and Media Directorate-General, November 2009, relates the evolution of case law addressing some of these legal issues and ambiguities after less than a decade of the ECD being in force.

\(^7\) Feliu Rey [3].

the 2019 Copyright Directive\(^9\) and the 2018 Audio-Visual Media Services Directive\(^{10}\) provide for rules to be applied to information society service providers within the meaning of the ECD: online content-sharing service providers and video-sharing providers, respectively. The approach of both sectoral regimes does, however, differ. Whereas the Audio-Visual Media Services Directive opts for an explicit acknowledgment of the applicability to video-sharing providers of the “safe harbour” regime (see Art. 28b\(^{11}\) and Recitals 44\(^{12}\) and 48),\(^{13}\) the Copyright Directive (see Art. 17.3 and Recital 65)\(^{14}\) expressly provides for the liability of online content-sharing service providers for certain acts disapplying Art. 14(1) ECD.\(^{15}\) Hence, the monolithic horizontal approach of the ECD may gradually start fragmenting with the adoption of sectoral rules\(^{16}\) intended to strike a fair balance between conflicting interests. Furthermore, the recent Regulation P2B\(^{17}\) provides for certain rules applicable to “online intermediation services providers” falling within its scope. According to Art. 2(2)(a) of Regulation P2B, online intermediation services constitute information society services.

Thus, the ECD, the cornerstone of the EU digital services legal framework, today requires a profound and thorough revision. Despite its acknowledged merits in paving the path up to now, noticeable limitations to its capacity to face new challenges have surfaced.

First, the lack of harmony between various domestic implementations causes legal fragmentation, increases compliance costs, and undermines predictability, which

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\(^{11}\) “Without prejudice to Arts 12 to 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect (...).”

\(^{12}\) “The video-sharing platform providers covered by Directive 2010/13/EU provide information society services within the meaning of Directive 2000/31/EC of the European Parliament and of the Council”.\(^{13}\)

\(^{13}\) “When providing services covered by Arts 12 to 14 of Directive 2000/31/EC, those requirements should also apply without prejudice to Art. 15 of that Directive, which precludes general obligations to monitor such information and to actively seek facts or circumstances indicating illegal activity from being imposed on those providers, without however concerning monitoring obligations in specific cases and, in particular, without affecting orders by national authorities in accordance with national law”.\(^{14}\)

\(^{14}\) “When online content-sharing service providers are liable for acts of communication to the public or making available to the public under the conditions laid down in this Directive, Art. 14(1) of Directive 2000/31/EC should not apply to the liability arising from the provision of this Directive on the use of protected content by online content-sharing service providers. That should not affect the application of Art. 14(1) of Directive 2000/31/EC to such service providers for purposes falling outside the scope of this Directive”.\(^{15}\)

\(^{15}\) The complexity behind the compatibility of Art. 17 Copyright Directive and the prohibition of general monitoring obligation as per Art. 15 ECD is wisely brought to light by Spindler [10].

\(^{16}\) Frosio [4].

calls for EU action. The Digital Services Act package is the name given to just such an initiative.

Secondly, the rapid evolution and radical transformation of the digital economy have created new legal issues and raised barriers to the provision of digital services that are not covered by the ECD. Concurrently, the emergence of innovative business models, the reshaping of the structure of the market, and the prominent role which platforms now have also require the reconsideration of the legal solutions provided for by the ECD in this new context.

Thirdly, the ability of the ECD to constitute a single horizontal regime for the provision of digital services is weakened by the adoption of sectoral regimes dealing with issues covered by the ECD and general rules adding obligations to providers of certain services.

The aim of the next sections of this article is to highlight those legal issues of the ECD that call for attention in the revision of the EU legal framework for the provision of digital services in a platform economy. Specially, analysis here will focus on the liability regime for platforms and the accommodation of existing principles and rules to the pervasive use of emerging digital technologies (artificial intelligence, internet of things, big data analytics, deep learning).

2 The opportunities of the Digital Services Act

The modernisation of the legal framework for the provision of digital services so that it embraces technological innovation and levels the playing field in the platform economy is instrumental to the consolidation and strengthening of the Digital Single Market. A Digital Strategy for Europe needs to confront and accommodate the transformation of the digital economy architecture. The Digital Services Act is the means by which is channelled the firm commitment of the EU to lay the foundations for a renewed strategy for facing the challenges and opportunities of a platform economy. This initiative rests on two pillars: a common set of responsibilities for platforms, and ex ante rules for large platforms acting as gatekeepers.18

In confronting the transformation of the digital economy, the prominent role of platforms and their increasing power in the market have highlighted the limitations of the ECD to address effectively the needs of a platform economy. The above-analysed shortcomings of the current legal framework reveal the inadequacy of the existing rules to the new architecture of the digital economy as a platform economy. The platform economy claims harmonised19 platform-orientated rules20 sensitive to the transformational impact of algorithm/artificial intelligence-driven systems21 on the liability exemption regime as conceived in the ECD.

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19See text of this article infra at Sect. 2.1.

20See text of this article infra at Sect. 2.2.

21See text of this article infra at Sect. 2.3.
2.1 A case for harmonisation and the risk of “platform shopping”

As one of the undesired outcomes of the ECD implementation by Member States has been the legislative fragmentation due to diverging or inharmonious solutions, the need of harmonised regulatory approach is the biggest defiance of the platform economy. While the global digital economy is growing on the basis of platform-based models, policy disparities raise obstacles to international trade, arouse uncertainties, increase risks in electronic commerce transactions conducted through online platforms and pose an obstacle to the flourishing of innovative and disruptive business models. As a consequence, not only cross-border activities and electronic transactions are discouraged, but, above all, efficiencies deriving from and opportunities associated with the resort to platforms are missed and the trust-creating potential of online platforms is seriously undermined. More importantly, disparate regulation on platforms may trigger an undesired effect of “platform shopping”.

Discrepancies in regulations and diversity in the policies and procedures of platforms would fragment the digital scene in a plurality of fora. Illegal content, misinformation campaigns, hate speech, or messages inciting racism might circumvent the most stringent regulatory models and avoid more illegal-content-unfriendly platforms with a skilful “platform shopping”. Only if more rigorous regulatory models and more respectful platforms manage to make their strategies a proxy for credibility will regulatory competition produce a positive effect. Then, compliant platforms will indeed become trusted third parties, returning to a centralised-trust model. Otherwise, if regulatory arbitrage erodes confidence and impedes users from identifying credibility indicia, misinformation and uncertainty will endure, eluding efforts made to counter it.

Clear and common conflict-of-law rules would certainly be a very positive achievement to mitigate disparities but it would still be only a partial solution. In the two-layer structure of platforms – consisting of platform operator and the community of its users – a variety of laws may be applicable. Possible alternative solutions are not satisfactory either. On the one hand, the application of a plurality of laws in conformity with the different relevant connecting factors – the seat/domicile of the platform operator, the law applicable to the membership agreement, the law applicable to each transaction between users, the domicile/residence of the users – would render the platform subject to a constellation of regulatory fragments. On the other hand, an attempt to extend the application of the law applicable to the membership agreement (through a choice-of-law clause or conflict-of-law rule) to any users’ activity could be consistent with the idea of the platform as a “private jurisdiction”, but it nonetheless raises concerns.

First, the law chosen in the membership agreement can be highly unpredictable, and even unreasonable to deploy it as the law applicable to users’ transactions. Secondly, platform operators gain total control over the law applicable to the users’ community. That would lead to a high market concentration in certain jurisdictions and would exacerbate regulatory arbitrage. Thirdly, in the case of consumers, the applicable law would be continuously made subject to exceptions through the application of the law of the consumer’s domicile/residence with the consequence, again, of a regulatory fragmentation.
Such a degree of unpredictability would increase the operational costs of a platform, which would be unable to foresee the laws applicable. Therefore, the proposed solution is to harmonise substantive rules relevant to obligations and duties, and, especially, to the liability regime. The liability rules applicable to platform operators in the context of the provision of information society services will determine the expected behaviour of operators in the implementation of monitoring systems, proactive measures, and control over a community’s activity. Thus, irrespective of the regulatory model adopted, no change in the liability paradigm of digital intermediaries or platform operators should be carried out on a local or regional basis. Risks of a paradigm shift in intermediary liability are high, but the risks of non-harmonised action on this issue are immense. Fragmentation, discrepancies among jurisdictions and legal and regulatory arbitrage would exacerbate the perception of uncertainty in the digital environment.

Hence, the EU has to deal with two challenges in the devising of the Digital Services Act. On the one hand, a high level of EU harmonisation is critical. Not only can the effects of the non-harmonised implementation of the ECD not be repeated, but also the risk of an internal regulatory competition race among Member States, devastating for the European Digital Single Market, should be effectively prevented. On the other hand, the EU must carefully manage the impact of EU rules on providers and platforms established outside the EU. The global nature of the platform economy is conspicuous and stronger than ever. The risk of isolating the EU from the global platform economy is always latent. Rules can raise barriers to entry, but, more importantly, can have a deterring effect if compliance is perceived as cumbersome or unreasonable or if applicable rules are uncertain or unexpected.

Therefore, the scope of application of any legislative action aimed at regulating platforms has to be thoughtfully pondered. What the applicable rules are must be clear and predictable for platforms directing their digital services at the EU. Thus, Regulation P2B opts for a clear two-factor alternative to delimit its scope of application (see Art.1.2): place of establishment of the professional user and the location of the consumers in the Union. The place of establishment or residence of the platform operator is irrelevant, as well as the law that would be otherwise applied. The resort to two factors of objective nature facilitates the determination of the applicable legislation and minimises the risk of legal elusion.

### 2.2 The need of platform-orientated rules

The emergence of platforms in the digital economy raises a number of intriguing issues that are new and different and go beyond the scenario envisaged by the ECD.

First, there is a category of legal issues associated with the fact that platforms become self-regulated environments on a contractual basis, and with the extent of such a regulatory autonomy and its implications. Platforms operate on the basis of contractual terms and conditions crystallised in a membership agreement and in a set of policies, rule books, regulations, or codes of conduct that the operator adopts as a contractual regulator. Users join a platform by entering into a membership agreement with the platform operator and thereby accept the duty to comply with all platform rules in force. Beyond the limits imposed by consumer protection legislation, the
adoption of the Regulation P2B represents a firm step forward in taking actions on unfair contracts and trading practices in platform-to-business relations. Specific rules on terms and conditions, termination and suspension, or data access are set out in the Regulation P2B (Arts. 3, 4, 8 or 9).

Secondly, there is another category of legal issues arising from the trust-generating capacity of platforms (through providing mechanisms to control access, supervision systems to monitor compliance, infringements and penalties policies, feedback reputational systems, rating techniques and dispute resolution models). Regulation P2B adopts a transparency-driven approach regarding rankings, or differentiated treatment (Arts. 5 and 7), but it takes a more prescriptive stance as regards complaint-handling and dispute resolution (Arts. 11 and 12). The Model Rules on Online Platforms adopted by the European Law Institute (ELI) do explicitly address some angles of the role of platform operators, providing for rules on rankings and reputation systems, and portability of reviews, and also duties to protect users or react to misleading information, albeit preserving the ban on a general duty to monitor.

Thirdly, there is a category of relevant legal issues regarding the role of platform operators as regulators, supervisors, “first-line” enforcers, and service providers, that lead to a debate as to whether platform operators act as genuine intermediaries and to which extent intermediary liability rules are then applicable. These are the issues the following comments are devoted to.

Beyond enhancing the provision of digital services leveraging their network efficiencies, economies of scale, and value-creating benefits, platforms aspire to create contract-based “private legal systems”. Within an immense variety of business models, platform operators act as (contractual) regulators by adopting the platform’s rules and policies, by supervising compliance and sanctioning infringement (on a centralised basis, or more frequently by implementing decentralised P2P supervisory mechanisms and adopting penalties policies), by facilitating dispute resolution, and by providing systems for creating and preserving reputations.

Such roles for platform operators break the mould shaped by the ECD for pure intermediary service providers. In fact, the variety of platform operators in the market hardly fits into the binary taxonomy of the ECD: namely, (general) service providers and intermediary service providers. Whereas platform operators certainly do act as facilitators, enablers, or even intermediaries, their functional profile is far from the passive, or technical conception of an intermediary service provider envisaged by the ECD. While the distinctive features of intermediary service providers who are shielded by the “safe harbour” are precisely lack of control and lack of knowledge, platform operators strive to create a trustworthy environment for users by providing mechanisms to obtain awareness, to handle notices, to remove content, or to ensure compliance with internal platforms policies. In that regard, platforms implement notice-and-take down systems, algorithmic filtering, or rating mechanisms, rely on fact-checkers and trusted flaggers, and make efforts to adopt common rules and ensure effective compliance. Hence, platforms need to abandon the position of mere passive intermediaries as envisioned by the ECD for enhancing their services, capturing and preserving users, and being attractive in a competitive “market of platforms”.

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Thus, given the constellation of varied business models that platforms can adopt, the legal categorisation of a platform operator has to be based on a prior analysis of its functions, duties, and obligations as stated in the membership agreement (and other related contracts) and of the operation of all the systems and mechanisms implemented for rating, notice-handling, removal, tagging, or classification. That is the route which was taken by the European Court of Justice in its most recent decisions on platforms (Uber and Airbnb). An analysis of each platform reveals whether, and if so, to what extent, the platform operator has control over, and decisive influence on the activity of the users within the platform. Consequently, the Court of Justice incorporates in the binary taxonomy of service providers the relevant factors of control and decisive influence to assess the role of the platform operator. A natural consequence of the CJEU’s multifactorial assessment should be the impact on the liability regime. Without altering the “safe harbour”, the assessment of influence and control inevitably affects the passive role of the platform operator underpinning the exemption from liability.

2.3 The impact of automation on the liability paradigm

Effectiveness in monitoring and removal illegal content can be significantly enhanced by incorporating automatic filtering, algorithm-based mechanisms, and artificial intelligence-guided monitoring systems. Automation raises, nevertheless, concerning risks of over-removal and awakes the phantom of censorship. A growing trend towards the increase of transparency in the configuration, the operation and the self-learning process of algorithms is echoing such concerns. Full disclosure and clear explanation on platforms’ content policy in the terms of the service, on notice-and-action procedures, and on automatic filtering criteria should attenuate those concerns. In market-oriented terms, transparency would increase competition in the market of platforms and enable reasonable choices and educated decisions.

Likewise, other safeguards against over-removal and abuse of the system might be adopted to alleviate the risk of encroaching upon the freedom of speech. Reasonable notice procedures, well-designed and continuously-supervised automatic filtering, and a balanced removal policy should be complemented with trusted flaggers, counter-notice procedures, and measures to prevent and penalise bad-faith notices and counter-notices.

Yet, it is worth considering the extent to which the intensive use of automation in detecting, filtering, and removing may jeopardise the sound basis of the “safe harbour”. Although it has been declared that the adoption of encouraged proactive

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23 De Francheschi [2].

24 Rodríguez de las Heras Ballell & Felia Rey [8], pp. 91–114.

25 According to the Tackling Illegal Content Communication, par. 3.3.1.:

“The Commission considers that taking of such voluntary, proactive measures does not automatically lead to the online platform losing the benefit of the liability exemption provided for in Article 14 of the E-Commerce Directive.”

As reiterated by the Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online, C (2018) 1177 final (26).
monitoring does not entail losing the benefit of an exemption from liability for collaborating platforms, it is undeniable that it may be considered a tool for obtaining knowledge and therefore able to trigger the duty to expeditiously react. How the adequacy of the measures will be assessed and the consequences which defective or ineffective measures will have, are relevant issues to discuss. Whether the duty to monitor, even on a voluntary basis, is an obligation of result or an obligation of means is uncertain. Whether proactive monitoring measures serve to provide genuine knowledge of illegality or harmful potential is disputable. Whether an algorithm-based removing system respects notice-and-take-down logic or de facto constitutes a general monitoring of the platform is also an intriguing question deserving attention. Should the use of an automatic system enhance effectiveness but, concurrently, increase exposure to liability or, at least, generate uncertainty, platforms would be discouraged from implementing more sophisticated monitoring mechanisms.

The Digital Services Act must lean on the merits of the ECD and leverage the lessons learning from the domestic implementation, the practical application, and the judicial interpretation of the Directive’s provisions. The challenges of the platform economy are an argument for a thorough revision of the existing rules however. The gaps, shortcomings, and natural limitations of a Directive devised and designed in 2000 for a stage preliminary to today’s platform economy have become visible. Many of the underpinning principles and solutions of the ECD can and should persist, while other aspects require renewed attention and contextualised solutions.

References
