



## **Digital Single Market: electronic commerce and collaborative economy**

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*ABSTRACT: The so-called collaborative economy is developing in a wide variety of sectors. The aim of the present Article is to outline and analyse the way EU regulation applies or may apply to the collaborative economy, in particular, the e-Commerce Directive, in light of the recent case-law of the Court of Justice.*

*KEYWORDS: Digital Single Market – electronic commerce – collaborative economy – platforms.*

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## I. Introduction

In the Autumn of 2014, when the new Commission took office, the Digital Single Market (DSM) was the second in President Juncker's 10 announced priorities. In May 2015 the Commission set out a DSM strategy for Europe.<sup>1</sup> The Commission's approach in this area was to act in a very focussed way with a limited number of legislative and non-regulatory measures aimed primarily at making the market work for business and for consumers alike. Accordingly, the implementation of the DSM strategy combined targeted initiatives with direct interest to consumers – for example, the end of roaming charges, the portability of online content services, geoblocking – with proposals having broader regulatory implications, such as the European Electronic Communications Code<sup>2</sup> or the modernisation of the Copyright framework.<sup>3</sup> From the legal and regulatory perspective, the Commission's approach in the DSM has been one of evolution, rather than revolution. Despite the advances in technological convergence, the DSM is primarily based on the existing legal framework, tackling areas where the need for adaptation to new challenges was identified on the basis of a problem-based approach. This does not mean, however, that the impact of the DSM is not important in nature. Indeed, the existing legal framework has been modernised to a significant extent and in some areas, such as on sales of digital content<sup>4</sup> and business relations with platforms<sup>5</sup> the new rules adopted involve innovative legal approaches.

Specifically regarding the collaborative economy, the Commission issued a Communication in 2016 (the Communication)<sup>6</sup> containing guidance and policy recommendations on how existing EU law should be applied with a view to ensure the balanced development of the collaborative economy in the EU, focusing on key issues faced by market operators and public authorities. In the Commission's view to facilitate the development of the collaborative economy legal clarity is needed and regulatory fragmentation in the Single Market should be avoided. Furthermore, it is necessary to ensure that the collaborative economy is not unduly restricted.

According to the Communication, the term “*collaborative economy*” refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. It involves three categories of actors: (i) service providers who share assets, resources, time and/or skills – these can be private individuals offering services on an occasional basis (‘peers’) or service providers acting in their

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<sup>1</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, Brussels, 6.5.2015, COM(2015)192 final.

<sup>2</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), *OJ L* 321, 17.12.2018, 36.

<sup>3</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, *OJ L* 130, 17.5.2019, 92.

<sup>4</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, *OJ L* 136, 22.5.2019, 1.

<sup>5</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, *OJ L* 186, 11.7.2019, 57.

<sup>6</sup> COM(2016)356 final.

professional capacity (“professional services providers”); (ii) users of these; and (iii) intermediaries that connect – via an online platform – providers with users and that facilitate transactions between them (collaborative platforms).

It should be noted that the activity of enabling the sharing of goods or services is far from novel. What is innovative is the expansion of “sharing” beyond an individual’s social network, region or even country. This innovation was enabled by the extensive use of mobile devices, elaborate apps and GPS-mapping in real time, intelligent, secure and user-friendly payment systems and a culture of sharing, amongst the younger generations. This has resulted in profitable business models in a great variety of sectors, in which a platform typically links those who are looking for specific services and those who may offer them.<sup>7</sup>

## II. EU rules that apply to the collaborative economy

The first legal question that arises is whether a platform is a services’ provider under Union law and whether its services qualify as “information society services”.

Pursuant to Article 57 TFEU, services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

Directive 2000/31/EC (e-Commerce Directive)<sup>8</sup> sets up an Internal Market framework for electronic commerce and provides legal certainty for business and consumers alike. The Directive has removed a series of obstacles to cross-border online services. Its legal basis is Article 114 TFEU, along with Articles 52 and 62 TFEU on establishment and on services, respectively and is therefore clearly placed in the Single Market context. Its Internal Market clause, which states that the Member States may not restrict the freedom to provide information society services from another Member State, is the cornerstone of the DSM.

An intermediation service, according to the definition laid down in Article 1(2) of Directive 98/34,<sup>9</sup> to which Article 2 of the e-Commerce Directive refers, is “*a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*”. Recital 17 of the e-Commerce Directive states that “*this definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition*”. Recital 18 explains that “*information society services span a wide range of economic activities which take place on-line*”. Those activities go beyond online contracting and also “*extend, in so far as they represent an economic activity, to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services*”.

<sup>7</sup> Examples include the way we book a hotel or other type of accommodation, travel or navigate around a city, order a dinner, etc.

<sup>8</sup> 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 (“Directive on electronic commerce”), *OJ L* 178, 17.7.2000, 1.

<sup>9</sup> Directive 98/34/EC has been replaced by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), *OJ L* 241, 17.9.2015, 1.

also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service. They also include services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services”.

In its judgment in *Asociación Profesional Élite Taxi*<sup>10</sup> the Court of Justice of the European Union (“Court of Justice”) analysed whether services provided by Uber (more specifically, its UberPop service), a platform that connects by means of a smartphone application passengers and non-professional drivers, qualifies as an information society service. In this regard, the Court held that:

“34. [...]an intermediation service consisting of connecting a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey is, in principle, a separate service from a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle. It should be added that each of those services, taken separately, can be linked to different directives or provisions of the FEU Treaty on the freedom to provide services.

35. [...]an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his or her own vehicle, meets, in principle, the criteria for classification as an ‘information society service’ within the meaning of Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31. That intermediation service, according to the definition laid down in Article 1(2) of Directive 98/34, is ‘a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’.

Typically, intermediation services are provided by means of online software/applications (an online platform) ensuring interaction between “peers” or between professionals and their clients. The platform that acts as an intermediary either charges a subscription fee or claims a commission for each contract concluded with their intermediation, or makes money from secondary use of users’ data<sup>11</sup> (e.g. advertising).<sup>12</sup>

Regarding market access, the e-Commerce Directive lays down two important principles: (a) the “country of origin” principle and, (b) the principle of “exclusion of prior authorisation”.

a. The “country of origin” principle, laid down in Article 3(1) of the e-Commerce Directive<sup>13</sup> means that an information society service is entitled to free movement if it is legal according to the law of the Member State where

<sup>10</sup> Judgment *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, of 20 December 2017, C-434/15, ECLI:EU:C:2017:981.

<sup>11</sup> Judgment *Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH*, of 15 September 2016, C-484/14, paragraphs 41 and 42, ECLI:EU:C:2016:689.

<sup>12</sup> Judgment *Papasavvas v. O Fileleftheros Dimosia Etaireia Ltd a o.*, of 11 September 2014, C-291/13, at paragraphs 28 and 29, ECLI:EU:C:2014:2209.

<sup>13</sup> Recital 19 states that “[T]he place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service”.

it originates. More concretely, this principle gives competence to the Member State where the service originates. Regarding the host Member States, Article 3(2) prevents restricting the freedom to provide information society services from another Member State for reasons falling within the coordinated field.<sup>14/15</sup> However, the host Member State may, pursuant to Article 3(4), derogate from the principle of the country of origin and be, therefore, allowed to impose its own measures if: (i) the measure is necessary for one of the reasons indicated therein; (ii) is taken against a given information society service which prejudices the objectives listed in point (i) or which presents a serious and grave risk to prejudice them (iii) if the measure is proportionate to those objectives. In addition to these substantive conditions, the host Member State will also need to respect certain procedural requirements, including informing the Commission.

b. The principle of ‘exclusion of prior authorisation’ is laid down in Article 4. Paragraph 1 provides that “*Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorization or any other requirement having equivalent effect*”. This rule is however without prejudice, to authorization schemes which are not specifically and exclusively targeted at information society services [cf. Article 4(2)].

Certain platforms provide an information society service together with services having a material content of which the information society service forms an integral part (inseparable). In that situation, for the determination of whether the e-Commerce Directive is applicable, it is necessary to verify which of the services provided by that platform represents the main component. If intermediation forms an integral part of an overall service which represents the main component and the platform exercises decisive influence over that service, the legal regime that applies to the latter will, in principle, apply also to the information society part.

This interpretation follows from the judgment in *Elite Taxi* in which the Court of Justice held:

“[...] a service such as that in the main proceedings is more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey” (paragraph 37).

Indeed, Uber also organises the general operation of the intermediation service, including, the selection of non-professional drivers using their own vehicle “to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers” (paragraph 39).

The Court of Justice, therefore, concluded that the intermediation service provided by Uber must be regarded as forming an integral part of an overall service whose main component is a transport service. Accordingly, such service must be classified not as ‘an information society service’ within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as ‘a service in the field of transport’ within the meaning of Article 2(2)(d) of Directive 2006/123. (paragraph 40).

<sup>14</sup> Article 2 defines the ‘coordinated field’ as “*requirements laid down in Member States’ legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them*”.

<sup>15</sup> According to paragraph 3 of Article 2, the two preceding paragraphs shall not apply to a number of areas listed in the Annex: Copyright and neighbouring rights, electronic money, choice of law, consumer contracts, real estate contracts and spam.

As a consequence, Uber cannot benefit from the two principles laid down by the e-Commerce Directive referred to above for the provision of transport services. Also, a transport service within the meaning of Article 2(2)(d) of Directive 2006/123/EC (the Services Directive) is excluded from the scope of this Directive. Furthermore, the Treaty provisions on the freedom to provide services do not apply to the transport field by virtue of Article 58 TFEU.

At the time of writing, new cases are pending before the Court of Justice concerning the collaborative economy, including in the accommodation sector.<sup>16</sup> Member States' approaches to the growing use of intermediation services such as those provided by Airbnb differ in a number of ways. *E.g.* in certain cases, Member States impose on providers of the underlying service (professionals or peers) the obligation to obtain an authorisation. Others opted for a regime of declaration. In other cases, Member States entered into agreements with the platforms in view of collecting information for tax purposes. When compared with the *Elite Taxi* Case, the intermediation services provided by Airbnb do not seem, at first sight, to entail the same level of control or 'decisive influence' as in the former. In his Opinion in Case C-390/18, *AIRBNB Ireland*,<sup>17</sup> delivered on 30 April 2019, Advocate General Szpunar considers that it cannot be concluded that AIRBNB Ireland's electronic service satisfies the criterion relating to the exercise of control over the services having material content, namely the short-term accommodation services. He further considers that the services having a material content, which are not inseparably linked to the service provided by electronic means, are not capable of affecting the nature of that service. He therefore concludes that a service consisting in connecting, via an electronic platform, potential guests with hosts offering short-term accommodation, in a situation where the provider of that service does not exercise control over the essential procedures of the provision of those services, constitutes an information society service within the meaning of Article 2(a) of Directive 2000/31/EC, read in conjunction with Article 1(b) of Directive (EU) 2015/1535.

It should be stressed that in a situation where the e-Commerce Directive does not apply to the whole or part of the services provided by a platform, the Services Directive may be relevant. Where an obligation to obtain an authorisation in the sense of Article 4(6) of the Services Directive has been imposed, the concerned Member State must justify it on the basis of an overriding reason of general interest. Pursuant to Article 9(1) of this Directive, "*Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied: (a) the authorisation scheme does not discriminate against the provider in question; (b) the authorisation scheme does not discriminate against the provider in question; (c) the need for an authorisation scheme is justified by an overriding reason relating to the public interest*" (see also Article 4(8) of the Directive, which defines the concept of "overriding reasons relating to the public interest").

Concerning accommodation, it is worth mentioning two judgements in which the Court of Justice already recognised overriding reasons in the public interest: (i) to guarantee sufficient housing for the low-income or otherwise disadvantaged sections of the local population<sup>18</sup> and (ii) housing policy of a Member State and the financing

<sup>16</sup> Pending cases C-62/19, *Star Taxi App SRL*; C-390/18, *AIRBNB Ireland*.

<sup>17</sup> Opinion of the Advocate General in the pending case C-390/18, *AIRBNB Ireland*, at paras. 72 to 78.

<sup>18</sup> Judgments *Eric Libert and Others v Gouvernement flamand* and *All Projects & Developments NV and Others v Vlaamse Regering*, joined cases C-197/11 and C-203/11, at paras. 52 and 67, ECLI:EU:C:2013:288.

of that policy pursuing objectives of ensuring an adequate supply of accommodation for persons on low incomes or for other categories of less fortunate members of the population. According to the Court of Justice, those considerations acquire greater significance in light of certain features specific to the situation on the national market in question in the main action, such as a structural shortage of accommodation and a particularly high population density.<sup>19</sup>

### III. The liability regime under the e-Commerce Directive

The e-Commerce Directive contains a specific liability regime that may apply to certain ISSPs. It provides for an exemption from liability for certain categories of intermediary service providers qualifying as a “mere conduit” activity, a type of storage called “caching” and a “hosting” activity under Articles 12, 13 and 14 respectively.<sup>20</sup> This regime of liability exemption (also called “Safe Harbour”) extends to all kinds of legal responsibility issues, including criminal. For instance, even if the nature, characteristics and harm connected to terrorism-related material, illegal hate speech or child sexual abuse material or those related to trafficking in human beings are very different from violations of intellectual property rights, product safety rules, illegal commercial practices online, or online activities of a defamatory nature, all these different types of illegal content fall under the same overarching legal framework set by the e-Commerce Directive.

In order to be able to benefit from the exemption from liability, the activity concerned must be: *a)* merely technical, automatic and passive so that the information society service provider does not have actual knowledge of the illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; *b)* in cases covered by Article 14, upon obtaining such knowledge or awareness, the service provider concerned shall act expeditiously to remove or to disable access to the information.

The extent to which online intermediaries should be compelled to take proactive action and how to frame their duties of care and responsibilities remains a fundamental substantive issue in many fields. In its Communication of 2017 on tackling illegal content online,<sup>21</sup> the Commission put forward a set of guidelines and principles for online platforms to step up the fight against illegal content online in cooperation with national authorities, Member States and other relevant stakeholders.

Liability issues and court injunctions (for which the ‘safe harbour’ offers no protection) have led to a number of decisions of the Court of Justice giving it the opportunity to clarify important aspects of the regime established by the e-Commerce Directive, such as the identification of service providers that may benefit from the exemption, the criteria for the application of the exemption from liability and issues concerning jurisdiction in cases of publication of information on the internet adversely affecting personality rights.

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<sup>19</sup> Judgment *Woningstichting Sint Servatius*, of 1 October 2009, C-567/07, para. 30, ECLI:EU:C:2009:593.

<sup>20</sup> See also recitals 42 to 46.

<sup>21</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online, Towards an enhanced responsibility of online platforms, Brussels, 28.9.2017, COM(2017)555 final.

a) *Technical, automatic and passive nature of the activity*: this requirement, which applies to the activities covered by Articles 12(1), 13(1) and 14(1) respectively, implies that that service provider must play a neutral role in the sense that its conduct is merely technical, automatic and passive.

Regarding the ‘mere conduit’ activity, the Court of Justice confirmed that Article 12(1) must be interpreted as meaning that providing access to a communication network must not go beyond the boundaries of such a technical, automatic and passive process for the transmission of the required information. In order to benefit from the liability exemption, no further conditions need to be satisfied, such as a condition that there be a contractual relationship between the recipient and provider of that service or that the service provider use advertising to promote that service.<sup>22</sup> Furthermore, Article 12(1) does not subject the exemption from liability to the condition that the provider must act expeditiously upon obtaining knowledge of illegal information to disable access to it.<sup>23</sup>

The situation is different for ‘hosting’ services within the meaning of Article 14. Indeed, in order for the providers of such services to benefit from the exemption from liability laid down in that provision, in addition to the need of those services to be of mere technical, automatic and passive nature, pointing to a lack of knowledge or control of the data which they store, such providers upon obtaining knowledge of illegal information must act expeditiously to remove or to disable access to it.<sup>24</sup>

More generally, if the provider of ‘hosting’ services, instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, it may not benefit from the liability exemption. Whereas especially in relation to ‘hosting’ activities it may not always be easy to draw the line between passive and active behaviour of the service provider, several cases enabled the Court of Justice to clarify at least to some extent the situations in which a service provider can, or where the case may be, cannot benefit from the liability exemption. Indeed, in *Google France and Google*, the Court confirmed that the mere facts that a referencing service is subject to payment, that the operator of the search engine sets the payment terms or that it provides general information to its clients do not have the effect of depriving that operator of the exemptions from liability.<sup>25</sup> The same is valid for an online marketplace operator that stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers, as confirmed in *L’Oréal v eBay*.<sup>26</sup>

Conversely, the role played by an operator or a search engine in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords may be relevant. Indeed, if it has played an active role of

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<sup>22</sup> Judgment *Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH*, of 15 September 2016, C-484/14, paragraphs 49 to 54, ECLI:EU:C:2016:689.

<sup>23</sup> Judgment *Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH*, of 15 September 2016, C-484/14, paragraphs 57, 60 and 64, ECLI:EU:C:2016:689.

<sup>24</sup> Judgment *Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH*, of 15 September 2016, C-484/14, paragraph 58, ECLI:EU:C:2016:689. Also, judgments *Google France SARL and Google Inc. v Louis Vuitton Malletier SA*; *Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others*, cases C-236/08 to C-238/08, of 23 March 2010, paragraph 113.

<sup>25</sup> Judgments *Google France SARL and Google Inc.*..., paragraph 116.

<sup>26</sup> Judgment *L’Oréal v eBay*, of 12 July 2011, C-324/09, paragraph 115, ECLI:EU:C:2011:474.

such a kind as to give it knowledge of, or control over, the data stored, it cannot benefit from the liability exemption.<sup>27</sup> The same is true when an online marketplace has provided assistance which entails optimising the presentation of the offers for sale or promoting those offers. In such a situation, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale.<sup>28</sup> Similarly, the Grand Chamber of the European Court of Human Rights (“ECtHR”) held in *Delfi v Estonia*<sup>29</sup> that an operator of a news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them and made those comments public, exercised a substantial degree of control over the comments published on its portal. The ECtHR confirmed that in that activity Delfi, “*went beyond that of a passive, purely technical service provider*”. It therefore confirmed the findings by the domestic courts that the *Delfi* news portal was to be considered a provider of content services, rather than a provider of technical services, and that it should have effectively prevented clearly unlawful comments from being published. The fact that *Delfi* had immediately removed insulting content after having received notice of it did not suffice to exempt *Delfi* from liability.

*b) Acting expeditiously after obtaining knowledge to remove or to disable access to the information:* An information society service may obtain knowledge of illegal content hosted or conveyed by its services by different means, such as a notice by a user, by any other person or an injunction by a public authority, including a court.

It is worth noting that Article 15(1) of the e-Commerce Directive prevents Member States from imposing a general obligation on intermediary service providers to monitor information which they transmit or store. That prohibition however only concerns obligations of a general nature and does not concern monitoring obligations in a specific case (see also Recital 47).

The Court of Justice confirmed in *Scarlet Extended*,<sup>30</sup> that the prohibition of a general obligation on intermediary service providers (ISP) to monitor information applies in particular to national measures, and likewise their application by the national courts, which would require an ISP, such as an internet service provider, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights.<sup>31</sup> Consequently, an injunction against an ISP requiring it to install a system for filtering all electronic communications passing via its services, which would apply indiscriminately to all its customers, as a preventive measure, which was capable of identifying on that provider’s network the movement of electronic files (i.e. general monitoring) with a view to blocking the transfer of files the sharing of which would infringe copyright, is prohibited by Article 15(1) of Directive 2000/31.<sup>32</sup> Indeed, in adopting such an injunction, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual

<sup>27</sup> Judgments *Google France SARL and Google Inc.*..., paragraph 116, paragraphs 118 and 120.

<sup>28</sup> Judgment *L’Oréal v eBay*, of 12 July 2011, C-324/09, paragraph 113, ECLI:EU:C:2011:474.

<sup>29</sup> European Court of Human Rights (“ECtHR”), *Delfi v. Estonia*, judgment of 16 June 2015, Application No. 64569/09.

<sup>30</sup> Judgment *Scarlet Extended*, of 24 November 2011, Case C-70/10, paragraph 36, ECLI:EU:C:2011:771.

<sup>31</sup> Judgment *Scarlet Extended*, of 24 November 2011, Case C-70/10, paragraph 37, ECLI:EU:C:2011:771.

<sup>32</sup> Judgment *Scarlet Extended*, of 24 November 2011, Case C-70/10, paragraph 40, ECLI:EU:C:2011:771. See also judgment *SABAM v Netlog NV*, C-360/10, of 16 February 2012, paragraph 38, ECLI:EU:C:2012:85.

property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.<sup>33</sup>

In its Communication on tackling illegal content online,<sup>34</sup> the Commission recalled that under their ‘duty of care’, as part of their responsibilities, online platforms should ensure a safe online environment for users, hostile to criminal and other illegal exploitation, and which deters as well as prevents criminal and other infringing activities online.

The Commission also recalled the online platforms’ central role and capabilities and their associated responsibilities. In this context, the Commission considered that they should voluntarily adopt effective proactive measures to detect and remove illegal content. In the Commission’s view, taking 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.

Concerning the liability regime, even if the Commission remained true to its commitment in 2015 – repeated in 2017 – not to reopen the e-Commerce Directive, its ‘problem-based’ approach and the changes which have ensued through the inclusion of video-sharing platforms in the Audio Visual Media Services Directive (“AVMSD”),<sup>35</sup> the revised Copyright Directive provisions on the ‘value gap’<sup>36</sup> and the draft Regulation on preventing the dissemination of terrorist content online,<sup>37</sup> will undoubtedly lead to a complex and fragmented framework once these rules are applicable. At the very least a codification or consolidation of the existing law would be welcome.

#### IV. Other rules that may apply to the collaborative economy

Platforms that process personal data must comply with the rules laid down in the General Data Protection Regulation.<sup>38</sup> Platforms also need to comply with other rules such as, where applicable, labour law, taxation and consumer law protection.<sup>39</sup> Furthermore, in their dealings with other businesses, platforms will need to comply with the new Regulation on ‘promoting fairness and transparency for business users of online intermediation services’.<sup>40</sup>

<sup>33</sup> Judgment *Scarlet Extended*, of 24 November 2011, Case C-70/10, paragraph 53, ECLI:EU:C:2011:771. See also judgment *SABAM v Netlog NV*, C-360/10, of 16 February 2012, paragraphs 45 to 51, ECLI:EU:C:2012:85.

<sup>34</sup> COM(2017)555 final.

<sup>35</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, *OJ L* 303, 28.11.2018, 69. See in particular, Article 28b and recital 48.

<sup>36</sup> Directive (EU) 2019/790, cited under footnote 3 above.

<sup>37</sup> European Commission, Proposal for a Regulation on preventing the dissemination of terrorist content online, Brussels, 12.9.2018, COM(2018)640 final.

<sup>38</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ L* 119, 4.5.2016, 1.

<sup>39</sup> See European Commission, Commission’s guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices Directive, Brussels, 25.5.2016, SWD(2016) 163 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163>.

<sup>40</sup> Regulation (EU) 2019/1150, cited under footnote 5 above.

## V. Conclusion

During its current mandate, the Commission has followed a very pragmatic approach: not regulating for the sake of regulating but building on the existing Internal Market legislative framework to update it and deal with specific well-identified challenges posed by digital developments. Regarding electronic commerce, the Commission decided not to reopen the e-Commerce Directive. Therefore, the principles established by this Directive remain valid for the collaborative economy.

Regarding the liability regime under the e-Commerce Directive, the obligations on platforms through the inclusion of video-sharing platforms in the AVMSD, the Copyright Directive's provisions on the value gap and the draft Regulation on preventing the dissemination of terrorist content online will undoubtedly lead to a complex and fragmented framework once these rules are applicable. This would merit at least a codification or consolidation of the existing law. The fundamental substantive issue remains the liability regime and the extent to which online intermediaries should be compelled to take proactive action and frame their duties of care and responsibilities.

Technology is evolving incredibly fast and the law can only follow and seek to keep pace with these developments.