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Characteristics of the European Platform Regulation

Platform Law and User Protection

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Abstract: This paper presents the European regulation of platforms. In its first part, it reconstructs the process by which the concept of ‘platform’ in information technology and marketing have evolved and become a legal concept. This emerged from the mid-2010s, first in amendments of sectoral rules and later in *sui generis* platform rules. The second part of the paper argues that these rules can be interpreted as an emerging separate area of law, the ‘European platform law’. One of the most important ultimate justifying principles and purposes of this legal corpus is the protection of users. This is achieved through a number of tools, some of which are legal transplants from other legal areas (such as consumer protection), while others are *sui generis* legal rules created specifically for platforms, such as the protection of user accounts or the explainability and transparency of algorithms.

Keywords: internet platforms, concept of platform, platform as legal concept, user protection on platforms, Digital Services Act (DSA), Digital Markets Act (DMA), platform-work, platform law, comprehensibility of user contracts, transparency and explainability of algorithms, complaint mechanism on platforms

1. Introduction

Most of the online platforms were created around the turn of the millennium, but it was only in the early 2010s that they really became important actors in our lives. They have never operated in an unregulated, ‘lawless’ space, but it is only in the last four or five years that they have been given a tailor-made set of legal rules. This paper recalls the process by which the platform emerged as a concept and evolved – first as a technical, then as a social science, and finally as a legal concept. It also briefly presents the evolution of the rules on platforms, and outlines the European rules, some of which are already in force and some in draft form at the time of writing this paper, that have been developed specifically for platforms.

As the entire body of platform legislation is so extensive that a description of it would go far beyond the scope of a single paper, the paper focuses its argument along two lines.

The first is that a new area of law is emerging in Europe, ‘platform law’, which is the result of the historical development described above, and which is developing certain internal recurring patterns and legal instruments regulating platforms operating in different areas through very similar means. The second consideration is that one of the main principles underlying these legal institutions is to protect platform users who are vulnerable in a new way. For this reason, platform law can be called “user protection law”, along the lines of “consumer protection”. The second part of the paper describes the main features and legal institutions of this set of user protection legislation.

2. The emergence and evolution of the concept of platform in EU law

2.1. Platform as a technical and information technology concept (1992–2006)

The importance of the *terminus technicus* with which we choose to describe the world has been expressed in many different ways (Riordan, 2016, p. 3). We are also aware that most of these choices are spontaneous, unconscious acts of a linguistic community. However, there are also situations, such as the language renewal movement in Hungary, or the linguistic ingenuity of poets and writers who have had a particularly strong impact on the language, where the rooting of a word in language can be linked to specific events or people. Today’s meaning of ‘platform’ can be explicitly linked to a specific series of events (Gillespie, 2010), the acquisition of YouTube by Google – at least according to Tarleton Gillespie’s convincing argument. We can add that the platform has become a legal concept over the course of a few years, and this can also be linked to certain specific events.

But before recalling the events of 2006, a few words about the origins of the term ‘platform’ are worth saying. According to the Oxford English Dictionary, the word ‘platform’ appeared in English in the 16th century (perhaps as a result of French influence – *platte forme*). It means “a raised surface on which people or things can stand, a separate structure intended for a specific activity or act”. In addition, the word ‘platform’ also had a figurative meaning from the very beginning: “A plan, a concept, an idea, something that serves as a model or template.”¹

This double meaning (platform, plateau and political programme, system of ideas, grouping within a party) persisted until the 1990s. Steven Wheelwright and Kim Clark’s book on revolutionising product development was published in 1992, turning the tide in English usage (Wheelwright & Clark, 1992). This book was the first to talk about the fact that one of the keys to product development is that there must be core products and ‘derivative’ products (Wheelwright & Clark, 1992, pp. 41–42). He gave the example of Sony’s Walkman range, which was actually built on three core products but had hundreds

¹ Oxford English Dictionary, heading ‘platform’.

of sub-variants. The core products on which the derivative products are built are what the book called their ‘platform’. It is quite likely that the book also inspired the automotive industry, which then began to call the chassis and engine designs used for several models of cars “platforms”. Another development of the “industrial age” is that platform often also meant a technical standard of some kind.

In the late 1990s, the word also started to be used by the software industry, but here it was enriched with a new meaning. In the software industry, it is now common for the platform (which, as I mentioned, is also a quasi or even a real standard) to be developed by other manufacturers, so that the platform becomes open to external manufacturers. This meaning, that a platform owner not only uses the platform for its own purposes, but also opens it up to external manufacturers, then took on a new layer of meaning with the advent of game consoles, when *users* also appeared on the platform. The actual power of the platform is also enhanced by user activity; in other words, direct and indirect network effects (Zhu & Iansiti, 2007). The phenomenon of network effects, in particular in the software industry, has been well known since the seminal work of Hal Varian and Carl Shapiro (1998), but the two-sided markets around platforms, the two markets that reinforce each other, is only a development of the mid-2000s.

Gillespie identifies a specific turning point in the evolution of the platform’s meaning: the moment when Google acquired YouTube in 2006. According to Gillespie, these large corporations seek to create an environment that is favourable to themselves not only through political influence, lobbying and subtle shaping of the regulatory environment, but also through ‘discursive work’, and part of this conscious framing was the consistent way in which Google began to refer to YouTube as a ‘platform’ when it gradually replaced the terms ‘website’, ‘service’, ‘forum’ and ‘community’ in its post-acquisition marketing communications. This mental conditioning using this term is not at all coincidental and uses all the connotations associated with the platform. Since the platform, as we have seen, has a physical space, an ‘architectural’ meaning if you like; that is, it is a raised, prominent surface, YouTube has begun to reinforce this meaning in its advertising campaign (“Broadcast yourself”).

So, by around the early 2010s, the word platform had developed the following meanings: a product or standard on which other products are built, on which other products can be developed, a software solution that underpins other software, and a software or game on which people or groups of people can engage in some joint activity.

2.2. Platform as a social science and marketing concept (2006–2018)

At that time, platform was still a concept of marketing and IT, and the law did not use this term but, for the web services we now call platforms, ‘hosting services’. For example, the GDPR,² drafted roughly between 2009 and 2015, does not mention the word

² 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, GDPR).

‘platform’ even once, even though one of the main issues in response to which it was drafted was the spread of ‘social networking and online activities.’³ The same applies to the Copyright Directive, which uses the term ‘online content-sharing service provider.’⁴

The turning points for the platform to become a legal concept are, clearly, 2015 and 2016. It was in these two years that the term ‘platform’ started to become common, especially in the context of the digital economy. It started to be used first in the materials for the preparation of decisions and expert inputs, then it appeared in the European Digital Single Market Strategy in 2015,⁵ and then in 2016 in another Commission Communication, focusing exclusively on industrial platforms.⁶ Also in 2016, a Commission Communication on a European agenda for the collaborative economy⁷ was published. All three documents were almost exclusively concerned with economic aspects, and the word ‘platform’, while being used as a general umbrella term, started to lose its clearly positive connotation. “The market power of some online platforms potentially raises concerns”⁸ states the Digital Single Market Strategy. “Online platforms have dramatically changed the digital economy over the last two decades and bring many benefits in today’s digital society”⁹ – starts the other communication on platforms.

The old meaning of platform was still alive for a while. For example, in 2016, the paper entitled *Digitalisation of European Industry*¹⁰ still referred to platforms as “multilateral market gateways that create value by enabling interaction between multiple groups of economic actors”,¹¹ in other words, under platform, it essentially meant a *loose association of companies*, not too large in number and mainly organised around common projects or standards, which had already been fashionable in certain industries.¹² So this clearly still carried the product development¹³ (and partly related to this, standards¹⁴) and of course

³ GDPR, recital (18).

⁴ 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.

⁵ 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 COM/2015/0192 final.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Online Platforms and the Digital Single Market Opportunities and Challenges for Europe COM/2016/0288 final.

⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda for the collaborative economy COM/2016/0356 final.

⁸ A Digital Single Market Strategy for Europe. 9.

⁹ Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, Ibid, (fn. 12) 2.

¹⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Digitising European Industry Reaping the full benefits of a Digital Single Market COM(2016)180, SWD(2016) 110 final.

¹¹ Ibid. 11.

¹² Ibid. Examples of existing industry platforms include AUTOSAR in the automotive sector (www.autosar.org).

¹³ Platform building means, inter alia, “the development of reference architectures”. Ibid.

¹⁴ “...platform on Cooperative Intelligent Transport Systems.” Ibid. 12.

the software industry¹⁵ meaning as mentioned above, but other *policy papers* and expert materials could also be cited.¹⁶

However, in 2016, the use of platform in the sense of a “general online infrastructure or coordination mechanism”, including services run by large tech companies for different purposes, also emerged. Dutch media scholar José Van Dijck played a major role in this shift in meaning and approach, by publishing a book on the platform society (De Waal et al., 2016) with two colleagues in 2016, and in the same year the Oxford Internet Institute organised a conference on the topic, at which Van Dijck was one of the keynote speakers.

Van Dijck was also influential in that the word “platform” then became clearly negative, because in his book, which was later published in English (Van Dijck et al., 2018), he already feared for our public values due to the platforms. The underlying idea of his book is that platforms have penetrated so deeply into certain spheres that they threaten to override the community, professional and ethical values and logics that had previously been established in these spheres (especially in the public and press spheres, education and health). Van Dijck has defined three conceptual elements of the platform: data-driven, algorithmic governance and monetisation. “Online platforms are not simply technology products – they are based on hardware infrastructure, driven by data (often user-generated data), automated and organised by algorithms, formalised by ownership, and monetised through business models” (Van Dijck, 2021).

Some well-known events contributed to the reinforcement of negative connotations. Firstly, the 2016 terrorist attacks in Brussels, in which the platforms played a role mainly by spreading hate speech. In the wake of this, heads of state and government issued a statement condemning the attacks, after which the EU drew up a code of conduct to which all the major social platforms subscribed.¹⁷ This has made the issue of hate speech and terrorist content on these platforms, particularly social media and video-sharing platforms, very much part of the public discourse. In the same year, Donald Trump was elected President and the Brexit referendum took place. In both cases, the role played by platforms, especially the largely illegal microtargeting campaign based on personal profiles by the data marketing company Cambridge Analytica (Wong, 2018), is still unclear. From then on, attention was not simply focused on social media platforms, but in many ways was disproportionately focused on them, and the term ‘platform’ became almost a catchword.

From this time onwards, in addition to companies (the GAFAM universe¹⁸), medium and small web services were also included in the meaning of a platform, provided they connected a larger number of users and applied “algorithmic management”, regardless of

¹⁵ “Building on existing open service platforms such as FIWARE.” Ibid. FIWARE or FI-WARE is the open technology platform that the European Union intends to build the future Internet on (www.fiware.org).

¹⁶ Some material for illustration: Competition Policy for the Digital Era (<https://bit.ly/3yJrt09>); Protecting Workers in the Online Platform Economy (<https://bit.ly/3MC8KZX>); A multi-dimensional approach to disinformation Report of the independent High level Group on fake news and online disinformation (<https://bit.ly/3rXwzC3>); The EU Code of Conduct on Hate Speech (<https://bit.ly/3s0mLqW>); An important milestone in the systematisation of legal solutions was the publication in December 2019 by the European Legal Institute of a document setting out model rules for the regulation of platforms (<https://bit.ly/3TrFZBK>), which I rely on also in this article.

¹⁷ The EU Code of conduct on countering illegal hate speech (<https://bit.ly/3s0mLqW>).

¹⁸ An acronym formed from the initials of the names of companies such as Google, Amazon, Facebook, Apple, Microsoft.

the economic sector and type of activity. They have thus become platforms for music and video sharing, for facilitating work, or for sharing objects and real estate, as well as for online services coordinating manufacturing, logistics, health services or administration.

2.3. Platform becoming a legal concept in EU sectoral rules (2018–2019)

Although platform as a legal concept did not exist until the late 2010s, this does not mean that platforms were not regulated by law. Platforms fell under the categories of “intermediary service provider”, including “hosting service provider”, as defined in the e-commerce Directive.¹⁹ Intermediary service provider is not formally defined in the Directive, but is understood as an information society (online) service that does not directly serve the purposes of providing services or content, but only passively transmitting or storing them (Riordan, 2016, p. 3). The E-commerce directive was drafted at a time when platforms apart from search engines did not exist and “hosting providers” meant providers who passively hosted websites. According to this, hosting service “consists of the storage of information provided by a recipient of the service” [Article 14 (1)].

The platforms were thus classified by analogy, but it soon became clear that the platform was in many places outside the scope of the regulation. Firstly, its activity is not passive but active, and more akin to editing than to simple storage. It performs this by using algorithms (sorting, classifying, personalising, etc. content). Secondly, it collects an unprecedented amount of data on users, much more than an intermediary. Thirdly, it monetises its services in some way based on user data or user activity (i.e. it does not simply charge a flat fee for services like an intermediary service provider, and even platforms with flat-fee structures, for example *video-on-demand* or music sharing providers also operate personalised referral systems). Fourthly, most platforms, in today’s wording “very large platforms”, create very strong network effects in their own territory (or able to operate by building on it), so they are partly in a monopolistic position and partly have a very strong social impact as a result. (In contrast to intermediary service providers, which do not have such network effects based monopoly positions and social impacts.) Of course, not all platforms have all four elements, but the first three are generally true for all platforms.

It is also typical of this period that legislators tried to deal with new problems raised by platforms within the framework of the norms that already governed certain sectors or spheres of life, usually by supplementing or amending them. Two standards are mentioned here as illustration: the AVMSD²⁰ and the amendment to the Copyright Directive.²¹ Both

¹⁹ 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.

²⁰ 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.

²¹ 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.

directives explicitly referred to certain new technologies, including platforms, as the main reason for their emergence.

The AVMSD already mentions video-sharing platform services as one of the objects of its regulation, “service is devoted to providing programmes, user-generated videos” by means of electronic communications, “for which the video-sharing platform provider does not have editorial responsibility [...] the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing” [Article 1(1)(b) AVMSD]. With this definition, at least in one area the platform becomes a legal concept, which already has three conceptual elements: user content, the absence of (editorial) responsibility and algorithmic management, content management. However, the basic premise of the Directive is that video-sharing platforms must be treated as media service providers.

The other sectoral standard that is heavily influenced by platforms is the 2019/790 Copyright Directive, as the main reason for its creation was also the emergence of platforms. Recital 3 of the Directive talks about new technologies, “new business models” and “new actors” as reasons for its adoption. Its central concept is the “content-sharing service provider”, which has three elements: 1. its main purpose is to host and provide access to copyright-protected content uploaded by users, namely 2. for profit, but 3. the Directive imposes certain additional obligations only on platforms of a larger size (with revenues of more than €10 million). The Directive basically specifies two obligations for platforms. On the one hand, it obliges video-sharing platforms to obtain licence for the works they transmit, and on the other hand, it effectively restates the notice-and-takedown obligation introduced by the E-commerce Directive,²² otherwise platforms “shall be liable for unauthorised acts of communication to the public [...] of copyright-protected works and other subject matter”.²³

2.4. The emergence of sui generis platform law (from 2019 until present)

2.4.1. The P2B Regulation

In the process of platform regulation an important milestone is the P2B (platform-to-business) Regulation, which was adopted in 2019 and now specifically targets platforms (and a specialised version of platforms, intermediaries of goods and services).²⁴ The aim of the Regulation is to reduce the vulnerability of (small) businesses that depend on platforms and to create a level playing field for them in their dealings with platforms. The Regulation also includes two regulatory instruments that have subsequently been included in several other standards, such as the draft Platform Work Directive described in section 2.4.4. The first are rules requiring *transparency* of algorithms and the second

²² “Acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter” [Copyright Directive, Article 17(4)(c)].

²³ Copyright Directive, Article 17(4).

²⁴ Regulation 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.

are rules requiring the operation of a *complaints mechanism*. The former is represented by the part of the Regulation dealing with ‘ranking’ (Article 5), which requires platforms to “set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters” [Article 5(1)]. This parameter description should be suitable to enable the user to understand the importance of the various details related to the products and the design of the online store. The Regulation explicitly states that platforms do not have to disclose their algorithms themselves, but they do have to disclose the broad outline of how the ranking software works and *what* changes to which parameters will cause *what kind of a* change in the ranking. The complaint-handling mechanism is set out in Article 11 of the Regulation: “Providers of online intermediation services shall provide for an internal system for handling the complaints of business users.”

2.4.2. *The draft Digital Services Act*²⁵

At the end of 2020, the Commission published its draft regulation on digital services to replace the E-Commerce Directive. Most of the provisions (three of the five sections in Chapter III) are actually about platforms or very large platforms. The text already includes a general legal concept of platform and places it in an ever narrowing field of four concepts. A platform is an information society service that falls within the category of “intermediary services” (which have in common the limited liability for content). Within this category, a platform is a *hosting service*, which is characterised by the storage of user-generated content [“storage of information provided by, and at the request of, a recipient of the service”; draft DSA, Article 2(f)]. Within this, a platform is a hosting service that not only stores but also “disseminates to the public” information [Article 2(h)]. Within the category of platforms, the DSA creates a new category with additional obligations, i.e. the “very large platform”, which refers to platforms with more than 45 million users [Article 25(1)]. Although this concept of platform is at first sight very different from the one used in social sciences, which mainly operates with the conceptual elements of datafication, algorithmic control, particularly close contact with users and large size (large network effects), after a closer examination, this difference does not seem so big. In the following, I will try to illustrate, through the platform concepts of each norm, that the legal definition relies heavily on elements of the social science concept.

First of all, it is worth noting that the DSA does not consider algorithmic management (control) as a conceptual element of platform (nor does the P2B Regulation), but it does define the concepts of recommender systems and content moderation, and at several points it attributes a key role to the rules on these – through which it seeks to influence the ‘behaviour’ of platforms. In case of a recommender system, the conceptual element is explicitly defined as a fully or partially automated system to “suggest or prioritise

²⁵ Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC [COM(2020) 825 final] (hereinafter: The draft DSA).

information [...] determining the relative order or prominence of information displayed”. According to the definition, algorithmic control is not an element of content moderation, as it is an *activity* of the intermediary service provider that is “aimed at detecting, identifying and addressing” compliant or illegal content. Both concepts become relevant for the very large platforms, which, among other additional obligations, must make their recommender systems *transparent*. They have to set out parameters in “a clear, accessible and easily comprehensible manner” [Article 29 (1)], and how the user can influence this, and they have to make this option of influencing “easily accessible” [Article 29 (2)].

Content moderation, although not necessarily an algorithmic activity in principle, appears at several points in the draft as an “automated tool” used in decision-making [Articles 14(6), 15(2)(c)], and all platforms are required to report on this in their regular transparency reports [Article 23(1)(c)]. According to the DSA, the concept of platform does not therefore include the concept of a large number of members and algorithmic control, but by defining a very large platform using the concept of a large number of users and by giving a key role to two algorithmic tools on giant platforms, it does indirectly include these two elements in the concept of platform.

2.4.3. *The Digital Markets Act*²⁶

An important milestone in the evolution of the concept of platform is the draft Digital Markets Act, which is treated as a package with the DSA Regulation, creating two new categories of platforms, one on a functional basis (‘core platform services’) and the other on a size basis, further narrowing the category of ‘very large platforms’ to the largest ones, the ‘gatekeepers’, and imposing additional obligations on them. The basic platform services envisaged in the draft are:

- online intermediary services
- online search engines
- online social networking services
- video-sharing platform services
- number-independent interpersonal electronic communication services
- operating system
- cloud services
- advertising services, including advertising networks, advertising exchanges and any other advertising intermediation service, where these advertising services are related to one or more of the other core platform services mentioned in the above sections

In addition to the known number of users (45 million), the size restriction also includes a revenue and capitalisation criterion (€6.5 billion in revenue or €65 billion in capitalisation).

²⁶ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [COM(2020) 842 final].

2.4.4. Draft Platform Work Directive²⁷

The draft Platform Work Directive, published in December 2021, is an important step towards expanding the concept of platform. The draft contains two important sets of rules. The first is the provision of a rebuttable presumption that platform workers shall be considered workers until this presumption is rebutted by the platform on the basis of criteria developed in the case law of the EU Court of Justice. This is less interesting for our topic. The second set of rules sets out the rules for “algorithmic management”. One of the interesting things about the draft platform working rules is that, although they do not mention any of the above concepts (data-driven, algorithmic management, user data collection and network effects)²⁸ in the definition of the labour platform, a substantial part of the norm is still constraining the work organised algorithmically.

3. The European platform law as a “law of user protection”

We have thus seen how the concept of platform has evolved, how it has become part of sectoral norms, and then how a *sui generis* platform law has emerged, and what platform concept, or rather concepts, it operates with. In this section I will attempt to summarise the characteristics of European ‘platform law’. Although the legislation and draft legislation seek to regulate platforms operating in very different spheres of life, with very different business models and sizes, and the problems and risks they seek to address are very different, some of their rules are very similar and usually very similar to the already known rules of some traditional area of law. One could say that these are legal transplants. However, transposition is never mechanical: the logic of the platform, or the particular sector or situation in which it operates, always modifies or bends the legal instrument. This is one of the main reasons why I dare to call this emerging new area of law ‘platform law’.

3.1. User protection as justification and purpose of platform law

If we look at the ultimate purpose and justification of this platform law, we should recognise the bulk of platform law as rules protecting users against illegal content on the

²⁷ Proposal for a Directive of the European Parliament and the Council on improving working conditions in platform work [COM (2021)762 final].

²⁸ It is provided remotely by electronic means, via a website or mobile device, at the initiative of the recipient of the service, and its main component is that it involves the work of individuals [draft Platform Work Directive, Article 2(1)(1)(a)–(c)].

one hand, and *excessive power of platforms*²⁹ on the other, alongside some other equally important but perhaps subordinate purposes, such as preserving a healthy structure of publicity or maintaining competition in certain economic sectors. These user protection rules can basically be divided into two categories: individual and collective user protection rules. These two sets of rules have different legal sources of inspiration. While the rules on individual user protection are very similar to some of the provisions of consumer protection and data protection, collective user protection is more reminiscent of investor protection rules. These two sets of rules are briefly, without claiming to be exhaustive, described below.

But before I get to that, it is important to discuss briefly why user protection has become such an important element of platform law, protecting individuals and small businesses from the excess power of the platform. How does this excess power manifest itself? As several authors (Van Dijck et al., 2019; Cohen, 2019) have noted, a new version of social power (authority) and everyday power (micro-power) has emerged here, based on the collection, continuous analysis and combination of personal data (datafication and surveillance) and its monetisation. An important element of it is that it takes place through behavioural advertising³⁰ and its more sophisticated version, microtargeting, which can influence behaviour in unprecedented ways.

This is not just, or even primarily, a question of privacy, competition, copyright or freedom of expression, because the issues addressed separately by the traditional branches of law are deeply interconnected and ultimately form a ‘platform power’. This power rivals the power of states and governments in terms of influence and strength, even if, unlike a traditional nation state, the platform cannot mobilise police, close borders or launch wars. It rivals it because it can drive people’s behaviour *en masse* in one direction without physical coercion or the prospect of it. Moreover, on platforms, this kind of vulnerability tends to appear in the longer term, as opposed to, for example, short-term abuses of monopolies, such as unilateral price increases.

The platform power does not distinguish between consumer, citizen, voter, entrepreneur, etc.; all these roles are equally targeted by the platform.³¹ Platforms have the unprecedented ability to penetrate the privacy of individuals, to learn about their behaviour, to collect data about them and their transactions, and to manipulate users. In this power field, individual freedom and (decision-making) autonomy can be seriously compromised (Dumbrava, 2021). To make matters worse, monitoring and data collection are largely carried out by algorithms, i.e. *impersonal mechanisms*, and what is more,

²⁹ The term ‘user protection’ is all the more appropriate because it appears in the very same context in several European documents. The logic of the model rules on the regulation of online platforms published by the European Law Institute in 2019 is also built around this. The largest part of the proposed legislation is a list of the obligations of the platform operators, with Article 8 entitled “Obligation to protect users”. Report of the European Law Institute. Model Rules on Online Platforms (<https://bit.ly/3TsXJg6>). The Declaration on Digital Rights and Principles for the Digital Decade [COM(2022) 28 final], published in January 2022, also aims to provide “strengthened protection of users’ rights in the digital environment” (Preamble, para. 2). The concept was further inspired by Jack Balkin’s fiduciary model, although this would only impose additional obligations on platforms in relation to *privacy* (Balkin, 2016; Balkin, 2020).

³⁰ Article 29 Working Party Opinion 2/2010 on online behavioural advertising, 00909/10/EN WP 171.

³¹ Ibid. 6.

a number of decisions are also taken by them. On top of that, in certain spheres (social public sphere, certain market segments), platforms have become so powerful, so inescapable that it is very difficult or impossible to get along without them. I describe five legal instruments below that seek to limit this excessive power.

3.2. Protection of users against illegal content

Undoubtedly, the most important justification and purpose of the new platform law, which is also constantly emphasised in the communication related to DSA,³² is the protection of users, especially minors, from illegal content. The underlying logic is very similar to the corresponding institutions of media law, and in the case of the AVMSD, the rules for electronic media must also be applied to video sharing platforms in this context. However, what greatly differentiates the obligations of platforms regarding illegal content from the media is the lack of prior screening and general monitoring obligations. It is well known that the E-Commerce Directive only codified the notification-removal procedure in relation to illegal content, the essence of which is that the hosting provider only deals with illegal content if it becomes aware of it, but has no general monitoring obligation.³³

However, the situation is far from being that simple, for two reasons. One is that, since monitoring is not prohibited, it is simply not mandatory, platforms have been monitoring content from the earliest times. The other is that a series of exceptions to the general lack of obligations have been established in part by some legislation, such as the supplement to the Copyright Directive,³⁴ and in part by judicial practice too. While the Copyright Directive does not impose a general monitoring obligation, it does make platforms generally responsible for unauthorised communication of copyrighted works and other protected achievements to the public unless they can prove that everything has been done to obtain permission and to prevent future uploads (Article 14).³⁵

However, the *sui generis* solution of the platform law for protecting the users from illegal content is a preventive (*ex ante*) system, consisting of three lines of defence. The first element is the detailed regulation of user-friendly, easily accessible interfaces for reporting illegal content (Article 14). The second is the system of trusted flaggers (Article 19). Finally, the third set of rules prescribes protection against abuse (Article 20).

³² The DSA and DMA have two main goals: "...to create a safer digital space" (<https://bit.ly/3g7MXxg>).

³³ 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) ("No general obligation to monitor").

³⁴ 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.

³⁵ "If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless..." [Article 17(4)].

3.3. Regulation of contracts with users

This new platform law, as I have mentioned, seeks to limit this platform power by rules taken from other branches of law. The first instrument is the mandatory provision of certain content elements in contracts (or general terms and conditions) with users. This instrument is very similar to the well-established consumer protection toolbox. The draft DSA already requires intermediary service providers (i.e. a broader category than the platform) to provide information in the contract “on any restrictions that they impose in relation to the use of their service” [Article 12(1)], such as content moderation, “including algorithmic decision-making and human review”. Platforms have even more serious obligations, for example to describe in the contract, clearly and in detail, their policy applied towards users who post notoriously illegal content and unreasonably report others. Very large platforms must also include in their contractual terms and conditions “the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters that they may have made available” [Article 29(1)], so the transparency of algorithms must be ensured already in the contracts.

The P2B Regulation also contains minimum requirements for contracts between the platform and the user. The first set of rules regulates some of the characteristics of the contracts between the platform and the contractor. One of these rules requires contracts to be drafted in a clear and comprehensible manner. This provision is included in nearly the same form in Article 5 of Directive 93/13/EEC. Point (c) requires, as a compulsory element of the contract, the indication of the reasons for the decision to suspend, terminate or in any other way restrict user accounts. (The rules for the protection of user accounts are discussed separately.) In the same article, there is also a provision on how to notify the user of changes to contracts and what grace period is required for them to take effect.

3.4. Decisions concerning the user account

A further set of user protection rules is used to control the decisions of the platform that most seriously affect users (in particular, termination, suspension or restriction of the user account). While the rules on user contracts are still written in consumer protection style, the rules on user account protection are already clearly *sui generis* platform law rules. Since most platforms have become a basic infrastructure for users (whether in a business or private sense), restricting or terminating accounts is essentially a truncation or even elimination of a person’s “digital identity”.

The norms seek to curb the unrestricted right of platforms to restrict or close user accounts in a number of ways. For example, the draft DSA provides for the operation of an “effective and easily accessible internal complaints-handling system” to be used in such cases (draft DSA, Article 17). The P2B, in addition to imposing certain formal requirements for these decisions (“communication on a durable medium”, 30 days’ notice in the event of termination), also imposes an obligation to state reasons for these decisions

(in addition to the internal complaints mechanism provided for in the DSA).³⁶ The Platform Work Directive provides for a written form and human review in the event of (algorithmic) decisions to restrict, suspend or terminate a platform worker's profile (account) (Article 8).

3.5. Transparency of algorithms and explainability

As a third means of user protection, all three documents contain provisions to make the operation of algorithms that affect users in their daily use more transparent. In relation to very large platforms, the DSA requires that the “main parameters” used in recommender systems and “any options for the recipients of the service to modify or influence those main parameters that they may have made available” be stated in the contract [draft DSA, Article 29(1)]. The other two draft instruments are much more detailed in terms of algorithm transparency rules, as the stakes are much higher in both areas than in a social media platform. The P2B Regulation, which mainly protects (small) businesses operating on large marketplace platforms, dedicates a specific article to provisions on transparency of “ranking”. According to it, “intermediary service providers” must set out in the contract “the main parameters determining the ranking and the reasons for the relative importance of those main parameters as opposed to other parameters” [P2B, Article 5(1)].

In addition, search engine providers must also disclose “the main parameters, which individually or collectively are most significant in determining ranking and the relative importance of those main parameters”. Moreover, in the Platform Work Directive, a whole chapter is devoted to algorithmic management issues (Chapter III, Articles 6–10). This not only contains rules on transparency and explainability, but also certain substantive rules on what algorithms for work platforms are forbidden, which is otherwise exceptional in platform law. For example, they must not place undue pressure on workers or otherwise endanger their physical or mental health. In addition, as I mentioned above, written justification and the possibility to appeal to a human must be provided with regard to certain algorithmic decisions.

It is no coincidence that the most elaborate algorithm transparency rules are in the draft work platform directive. Here the relevant article is entitled *Transparency on and Use of Automated Monitoring and Decision-Making Systems*.³⁷ The essence of this provision is that workers must be informed of both the systems that monitor and those that decide on the essential parameters of work (e.g. work assignment), and that this information must not only cover what systems are in place but also their basic operational characteristics, such as what parameters are used and their relative weighting in relation to each other, and under what conditions a worker can be suspended, banned or restricted. This information must be provided on the first day and any subsequent changes needs to be notified.

³⁶ P2B, Article 4.

³⁷ Draft Platform Work Directive, Article 6.

Further provisions deal with *human supervision* of automated systems. Platforms must regularly monitor and evaluate the consequences of decisions taken by automated monitoring and individual decision-making systems, continuously assess the impact on working conditions and the health of workers, and put in place preventive and protective measures to prevent the risks generated by these systems. The operation of systems exerting psychological or mental pressure is prohibited. The proposal also contains provisions for human review of substantive decisions, reminiscent of the right to explanation as defined in Article 22 of the GDPR (which is otherwise disputed in the literature) (Wachter et al., 2017; Malgieri & Comand, 2017). Accordingly, platforms must provide access to a contact person with whom the employee can discuss the individual machine-made decision, its factual basis and the arguments supporting this decision. Decisions that would result in the suspension, restriction or termination of the employee's profile or that affect his or her remuneration or contract must also be confirmed in writing by the platform. If employees are not satisfied with the decision, they must be given the opportunity to have the decision reviewed.

A provision also requires that, when algorithmic monitoring or decision-making systems are introduced or substantially changed, employees or their representatives must be provided with information and a consultation opportunity on them.³⁸ Finally, the last provision of this chapter of the draft provides that most of the rules on algorithmic management also apply to platform workers working in a relationship other than employment. Here, the legislator may have perceived that, in this case, the provisions of this Directive could overlap (and sometimes even conflict) with the P2B Regulation. Obviously, this is particularly true for businesses that are present and provide services on the large intermediary platforms as sole traders or small businesses providing a personal contribution. (This is not an option for businesses offering goods.) Namely, the P2B Regulation, as I indicated above, also regulates certain aspects of algorithmic management, in particular the problem of ranking goods and services, contains a set of provisions for the suspension, limitation and termination of an account, and codifies a complaints mechanism. The proposal makes business users primarily subject to the provisions of the P2B Directive, and explicitly excludes the option in Article 8 (right of access to a human) from the options available to business users.

3.6. Dispute and complaint-handling mechanisms

The fourth typical tool for user protection is the introduction of various dispute resolution, complaint-handling and “contestation” mechanisms. As we have seen, this tool is often intertwined with the first two, because it provides a “remedy” against key decisions or decisions taken by algorithms, but in no way in each and every case. The documents analysed seem to consider complaint mechanisms as a general user protection tool. They

³⁸ It is worth noting here that the algorithmic management chapter also includes the basic data protection rules according to which platforms may only process personal data that are intrinsically linked to the contractual relationship and are indispensable for its performance. Draft Platform Work Directive, Article 6(5).

exist in two versions: internal and external mechanisms. In external mechanisms, complaint-handling or dispute resolution does not take place within the platform, but independently of it (e.g. P2B, Article 12), but the institution of whistleblowers may also be considered such (draft DSA, Article 19). The mechanisms provided for in Article 17 of the DSA, Article 11 of the P2B and Article 7 of the draft Work Platform Directive, but also the successor to the old notice and take-down mechanism, the notification and action mechanism (draft DSA, Article 14), can be considered internal mechanisms. The AVMSD provides that, in order to protect minors, prevent hate speech and avoid criminal content, service providers are subject to an obligation of “establishing and operating transparent and user-friendly mechanisms for users of a video-sharing platform to report or flag to the video-sharing platform provider concerned” the infringing or harmful content on its platform [Article 28a(3)(d) AVMSD].

3.7. Collective user protection: rules on transparency on platforms

Finally, I will briefly deal with another area of user protection, namely the set of rules that impose compliance and especially transparency rules, especially for larger platforms. Some of these relate to the obligation for platforms to make public their individual user protection efforts and the data relating to them on an ongoing basis. In Article 13 of the draft DSA, intermediary service providers are already subject to such transparency reporting obligations, and then platforms are subject to even more (Article 23), and very large platforms are subject to additional obligations in addition to those (Articles 30, 33).

The transparency reporting obligation for intermediary service providers mainly covers the disclosure of information on content management (draft DSA, Article 13). Accordingly, they must report annually on content removed on the basis of external or internal initiatives, according to the type of unlawfulness. Online platforms are already obliged to report regularly on, among other things, suspensions, cases referred to dispute resolution bodies, the functioning of content moderation algorithms, and the number of active users. And the very large online platforms have such a wide set of reporting obligations that it is not possible to describe them fully here, so I will just mention by way of illustration that in addition to the obligations on the platforms, they are obliged to maintain a repository of online advertising, to give the Commission access to essentially all their data, to carry out risk assessments and mitigation measures and publish a report of them, to tolerate independent audits and publish the results of such audits, etc.

4. Evaluation and summary

The first and perhaps most important feature is that most of the institutions of platform law are formal-procedural-guarantee in nature, which means that, with very few exceptions, the norms cited do not contain any substantive criteria, which are left to the platforms to develop. Platform law is not a “substantive” law, if you like, but rather

“procedural law”, although not in the traditional sense. The DSA does not, for example, talk about what additional requirements a social media platform must enforce, for example, regarding offensive speech or pornographic content, in addition to the minimum requirements set out in the legislation. In essence, it grants the platform freedom in this, as well as the choice of sanctions in the event of a violation of these requirements. All it asks is that these requirements are transparent and, if someone is sanctioned, there must be a fair procedure whereby the decision is explained, the sanctioned person can explain their position and request a review of the decision. *Mutatis mutandis*, the P2B Regulation does not impose any substantive requirements on the criteria according to which goods must be ranked in the hit list, it only requires that the ranking criteria are transparent and included in the contract. By the same token, the P2B Regulation does not contain a list of specific “unfair commercial practices”, as in the case of the Consumer Directives 93/13,³⁹ 2005/29⁴⁰ or 2011/83,⁴¹ but only the above-mentioned provisions on transparency of ranking and guarantees for account closure.

This probably will be a disappointment to many. Those who were expecting the EU to take a clear stance on issues such as freedom of expression, or to list a taxonomy of unfair trading practices on platforms, will consider these rules insufficient.⁴² At the same time, it must be seen that they will enter into force almost simultaneously, without anyone really knowing how effective they will be, how they could be applied and whether they would really protect users from the excessive power of platforms. We do not know whether this procedural-formal regulation will be sufficient, nor do we know to what extent the current situation will be improved by the need for large platforms to disclose a range of information and data. We do not know whether the fact that some parameters will now have to be included in contracts with users (and whether users will read the contracts at all) would really improve the transparency of algorithms, etc. In any case, platform law is already with us and will play an increasingly important role in all our lives in the years to come, and it is possible that procedural provisions will be followed by substantive ones.

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³⁹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts Annex.

⁴⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. Annex I.

⁴¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

⁴² Although, for example, this is partly what the Parliament wanted in the context of the P2B Regulation. See Report (7.12.2018) on the proposal for a regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services. Amendments 2, 11, 21.

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