# The new wave:
## Regulatory trends in liability of digital platforms and services

ReedSmith

Driving progress
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# Introduction

Twenty years ago, we saw regulators in Europe introduce legislation to clarify obligations around burgeoning online platforms and other services. Two decades on and we are seeing a new wave – some would say more of a tsunami – of regulations from all angles which look set to radically change the landscape of liability for digital platforms and services.

This document traces some of the developments over the last twenty years and contains a tracker to assist companies in identifying and understanding the various regulatory initiatives currently in play and proposed across the UK and European Union.

# Context: **The last 20 years**

This section summarises the key characteristics in case law and regulation over the last 20 years.

## Safe harbour rules

The main rule, which has shaped the position regarding liability in the digital realm for the last two decades, is what is known as the 'safe harbour' principle that is set out in the Electronic Commerce Directive of 2000. This provides that information society services (a term covering websites, apps, connected devices etc.) are not liable for illegal content on their services that may have been put there by users *provided* the service does not know it is there and acts expeditiously to remove it as soon as it is made aware that it is there. In practice, this defence protects companies that are 'hosting' or simply being a 'mere conduit'. This is similar to the 1998 Digital Millennium Copyright Act in the United States and has led to the so-called 'notice and take-down' policies used by many online platforms.

Over the years, we have seen various cases consider how these rules should be applied in practice, refining when a service may potentially be liable and when it will not. The timeline set out below (Figure 1) summarises the major case law on this issue in the UK and at CJEU level. Beyond the Electronic Commerce Directive, however, there have been amendments to consumer-protection rules, including tweaks to cooling off and returns rights and information requirements and developments in data protection rules (which are sector and service agnostic in Europe) but not a great deal else.

Of course, it is not as though platforms have sat back and ignored content on their services in the absence of specific rules: quite the contrary. The last 20 years have seen a long list of industry-specific initiatives to tackle varying issues. Notably, the Internet Watch Foundation, an independent self-regulatory organisation, was set up in 1996 to provide an internet Hotline available to the public to report potential criminal and child sexual abusive online content and quickly remove and disable access to it. It is funded by member companies such as internet service providers, mobile operators, content providers, search providers and trade associations and the financial sector. A more recent example is the Global Internet Forum to Counter Terrorism, set up in June 2017 following the New Zealand terrorist attacks. This is a voluntary industry forum (Twitter, Microsoft, Google and Facebook helped found it) to drive industry initiatives about terrorist content.

## Evolution in Ecommerce Directive Case law (Figure 1)

2000: e-Commerce Directive

**2009** — **Held in Favour of Platform**
Hosting Exemption Case

**Metropolitan International Schools Ltd v Designtechnica Corporation**

- Under common law, Google was not a publisher of defamatory material.
- In order for Google to be able to rely on the hosting defence, specific legislation would be required, since legislation did not extend to search engines.

**2009** — **Mixed Decision**
Mere Conduit Case

**Metropolitan International Schools Ltd v Designtechnica Corporation**

- Judge noted orbiter that it was unclear whether the mere conduit defence would extend to a cached index created automatically in relation to the operation of the search engine; however, the judge did note that in Austria under national law the scope of mere conduit defence was expanded to include cached indexes.

**2010** — **Mixed Decision**
Hosting Exemption Case

**Kaschke v Gray**

- Expands the defence: The hosting defence applies to some parts, but not others, as only certain parts are an information storage service. The judge held that when identifying the type of service provided, only the allegedly unlawful information should be considered, as opposed to the whole of the website.
- Limits the defence: Wherever an operator takes action to solicit material or intervene in the presentation of the material, the operator is removed from the scope of the defence.

**2010**

**Held in Favour of Platform**
Hosting Exemption Case

**Google France Cases (C-236-238/08)**

- Under Article 14 Google was not held liable for data stored by an advertiser if Google did not have knowledge of the unlawful nature of the data and did not act expeditiously to remove it.
- The judge also stated that just because Google "sets the payment terms or that it provides general information to its clients", it cannot be deprived of the exemptions from liability in Directive 2000/31 [116].

**2010**

**Held in Favour of Platform**
Mere Conduit Case

**EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd [2010] ECDR 17**

- EMI applied for an injunction requiring UPC, an internet service provider (ISP), to stop its users from illegally downloading EMI's copyrighted works.
- Judge concluded that UPC was acting as a mere conduit on the basis that "it did not initiate any peer-to-peer transmission, and in the course of the transmission, the information was not selected or modified" [108].
- Judge also stated that putting an ad on a transmission, or modifying it, would take the ISP outside the scope of the mere conduit defence.

**2011**

**Held Against Platform**
Hosting Exemption Case

**L'Oreal SA v eBay International AG**

- ECJ held that because eBay provided assistance in optimizing the presentation or promotion of offers, it did not take a neutral position between customer-seller and potential buyers, but played an active role to give it knowledge of, or control over, the data relating to offers of sale [116].
- ECJ ruled that it is sufficient, in order for the provider of an information society service to be denied entitlement to the exemption from liability provided for in Article 14…, for it to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question…" [120].

**2014**

**Held Against Platform**
Mere Conduit Case

**Cartier International v BT and another**

- Cartier was granted an injunction to prevent major UK ISPs from allowing access to websites which were selling counterfeit goods.

**2017**

**Held Against Platform**
Mere Conduit Case

**Stichting Brein v Ziggo "Pirate Bay"**

- The CJEU held the operators of a torrent hosting website play an essential role in making protected works available, despite the fact that the works are not hosted by the Pirate Bay, but rather the users through a peer-to-peer network.
- The concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29/EC […], must be interpreted as covering, in circumstances such as those at issue in the main proceedings, the making available and management, on the internet, of a sharing platform which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network."

**2018**

**Held in Favour of Platform**
Mere Conduit Case

**Cartier International v BT and another**

- After appeal of the case in 2014, the Supreme Court ruled that the ISPs did not have to pick up the costs of implementing the blocking orders, that the EU Directives do not deal with this and it should be a matter for national law.
- As an innocent intermediary, the ISPs only obligation was to comply and not to pay. However, the judge noted obiter that the position might be different for intermediaries engaged in caching or hosting.

**2019**

**Held Against Platform**
Hosting Exemption Case

**Glaswischnig-Piesczek v Facebook**

- The CJEU was asked to consider how far an online intermediary's removal of illegal content obligations should go. It held that the Directive does not prevent a court from ordering a host provider to remove or block content that is identical to or equivalent to the original unlawful content including worldwide.

## Separation between traditional and digital content services

Wind back 20 years, and a natural distinction could be seen between how digital platforms and services were regulated and how more traditional content-distributors such as broadcasters and newspapers were regulated. In general, we saw few rules then for digital platforms and services in relation to specific content rules or measures for the protection of children. In fairness, platforms themselves were very different then, with many seen as more of a 'wild west' for online comment posting by users compared to those we see today.

Over 10 years ago now, we saw a new theme in regulation emerge as, alongside the often discussed 'convergence' that began to emerge between traditional and digital content services, we saw louder and louder calls to push for increasing convergence of their regulation as well. Most noticeably, we saw the introduction of the EU's former Television Without Frontiers Directive (initiated in 2008), now in its current form in the Audiovisual Media Services Directive (AVMS). This regulatory initiative tracked the move from traditional linear broadcast channels to digital-distribution and on-demand services, now culminating in the latest changes we see and discuss below.

This development meant not only that content distributors had to engage with technology regulation as their services and ancillary offerings expanded, but also technology operators had to learn to understand content regulation. As traditional distributors' content appears increasingly on technology platforms, and technology platforms increasingly focus on their distribution of traditional content, so the old delineations and scope of regulation, and regulators, had become blurred and often inappropriate, forcing an evolution in regulatory approach. Despite rapid convergence, however, the promotion of cultural and linguistic diversity across the EU continues to motivate certain derogations for certain online platforms, including those that are operated by traditional television and radio services in Europe. There is no 'one size fits all model'.

## Evolution of competition enforcement

Throughout the past two decades, we have seen significant enforcement action against digital companies by competition authorities in the EU, both at the European Commission level and at the national level. Instead of using new regulation, this action has been based on the traditional competition laws that are established in the EU Treaties, namely the prohibitions against anti-competitive agreements and abuse of dominance. The European Commission has also focused on ensuring that one of the key pillars of the European Union, the freedom to trade goods and services across the EU single market, which has led to the Geo-blocking Regulation, is designed to prevent retailers and distributors from creating barriers within the single market, e.g. between Member States.

Even though the laws have not changed, the areas of focus for competition authorities have evolved and, to a large extent, followed the evolution of digital services, moving from traditional software in its long running abuse of dominance cases in the early 2000s, through newer digital services such as e-books and online hotel booking aggregators in the early 2010s, to its more recent enforcement action regarding mobile phone operating systems and online advertising.


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# The new wave

## From safe harbour to minefield

Whilst the principles of free flow of online services across the EU in the Electronic Commerce Directive remain a firm commitment, 'the Directive's safe harbour' defences have come under increased pressure. In part, this tension has been driven by an evolution of the platforms themselves, which have changed beyond recognition. At the turn of the century, a platform was little more than a bank of servers, a chatroom and some rudimentary capability. Today, platforms are vast environments that connect hundreds of millions of people through rich content, huge bodies of data, complex algorithms and incredible functionality.

Regulators have recently been seen to dig away at specific areas of content which they consider platforms should, in fact, be responsible for keeping off their service. This creates an obvious problem since, if such companies are forced to undertake more moderation or other forms of content checks in some areas, this puts at threat the reality of simply hosting or being a mere conduit and opens up all sorts of scrutiny and potential liability for third party content which can be unviable.

It is these kinds of debate which have come to the fore in the past two years with various proposals that would impose new obligations about specific defined harmful content, including hate speech, fake news and terrorist content. The EU's consultation on the Digital Services Act is one to watch very closely in seeking to redefine these lines of responsibility and what in practice this could mean. Similarly, keep an eye on the UK's Online Harms initiatives. Questions remain whether this is the right approach or whether self-regulatory initiatives remain the best route to tackling such issues, especially given their global dimension.

The road to further regulation has not been without controversy. In late-2019, the UK government's legislation to require age-verification implementation for websites carrying pornographic content (on the back of the Digital Economy Act 2017) was abandoned at the last hour due to concerns about privacy and the viability of technical solutions for effecting such checks. The law was a clear attempt to 'plug a gap' given that more traditional content-providers have long had to comply with stringent rules about adult content. However, its scrapping represented an embarrassing U-turn given the recent rhetoric about making the UK 'the safest place to go online in the world'. This was perhaps the right decision, just too late in the day given the expense many companies had already incurred in putting in place measures to comply. This is also a good reminder of how difficult regulation around content can be, and concerns still continue as to how the continued push for further protections for digital platforms can be met in practice given the unpopularity around age-gating and the additional personal data collection which goes with this.

## The value gap campaign and Article 17

The safe harbour principle was implemented when the biggest companies online were AOL, ebay and Yahoo!, in a world long before YouTube, Facebook or TikTok even existed. Rights-holders in the music and other creative industries have long argued that it is no longer fit for purpose in today's digital age. Their complaints focus on a so-called 'value gap'; that is the perception that online content-sharing platforms derive unreasonable value from enabling their users to make available and access copyright-protected works, without having obtained prior permission from the underlying rightsholders of those works and without having to monitor the re-upload of infringing content after a take-down notice has been filed.

After years of lobbying, fraught negotiations and even public demonstrations in European cities, the new EU Directive on copyright (the Digital Single Market Directive, or '**DSM Directive**') was passed by the European Parliament on 26 March 2019. The 27 EU member states have until 7 June 2021 to implement it into national legislation. The Directive includes a number of significant changes to the way copyright will be regulated and exploited in a digital environment. The fiercest debate and controversy has been reserved for Article 17 (previously known as Article 13) and its plans to address the so-called 'value gap' mentioned above. Article 17 puts an end to the debate we have seen over the years about whether online platforms commit an act of communication to the public by giving the public access to copyright-protected works. It confirms that online content-sharing platforms will be deemed to do so. Article 17 further removes the shield of the current hosting exemption and replaces it with a principle of full liability. This means that online content-sharing platforms will be liable for copyright-protected material uploaded by users and must obtain authorisation (i.e., a licence) from the relevant rightsholders. The expectation is that online content-sharing platforms will have to pay for such authorisation, thus closing the 'value gap'.

However, Article 17 does, in effect, create a new liability-exemption regime for online content sharing providers – albeit a much more onerous one than is currently provided by the Electronic Commerce Directive – whereby online content-sharing platforms will not be liable for the copyright-protected works that they communicate to the public provided that they:

- make best efforts to obtain the necessary authorisation (i.e., licence);
- expeditiously take down or disable access to content upon receiving a sufficiently substantiated notice to do so by rightsholders (i.e., similar to the existing 'notice and take-down' requirements);
- make best efforts to prevent future uploads of content about which they have received a notice from right-sholders pursuant to the previous requirement (i.e. a notice and 'stay-down' requirement); and
- make best efforts, in accordance with highest industry standards of professional diligence, to ensure the unavailability of specific works in respect of which rightsholders have provided the "relevant and necessary information". While references to upload filters have been removed from the final version of the Directive, in practice, upload filters will need to be implemented by online content-sharing platforms in order to comply with the Directive.

Online content-sharing platforms that have been available to the public for less than three years, and that have an annual turnover of less than €10 million, will only be required to comply with the first two of the requirements above. Once an online content sharing platforms has more than 5 million unique monthly users, it will also have to comply with the notice and stay-down requirement, even if it does not exceed the age or revenue thresholds.

## Towards convergence in audiovisual regulation

The latest evolution of the AVMS Directive we are seeing implemented in 2020, includes new obligations for on-demand services but, most significantly, the changes ramp up the content-rule requirements for video-sharing platforms with specific obligations and measures to protect children from inappropriate content and the general public from particularly harmful content and advertisements.

One dilemma with legislation in this area is that of jurisdiction and a perceived 'slicing and dicing' of different types of delivery mechanism for audio visual content. In the new Sat/Cab Directive (2019/789), for example, we see the extension of the application of the country of origin principle enshrined in the first Sat/Cab Directive (93/83) to 'ancillary online services' of broadcasters, which it defines as the online media properties of linear broadcasters. It does so by creating a fiction, under which it will be assumed that all the acts of communication to the public of an 'ancillary online service' will be deemed to have occurred in the country where it is established (the 'country of origin principle'). This means that online radio and TVs channels could, in principle, rely on the licence they obtained from their home territory, when accessed in another EU country by simulcast.

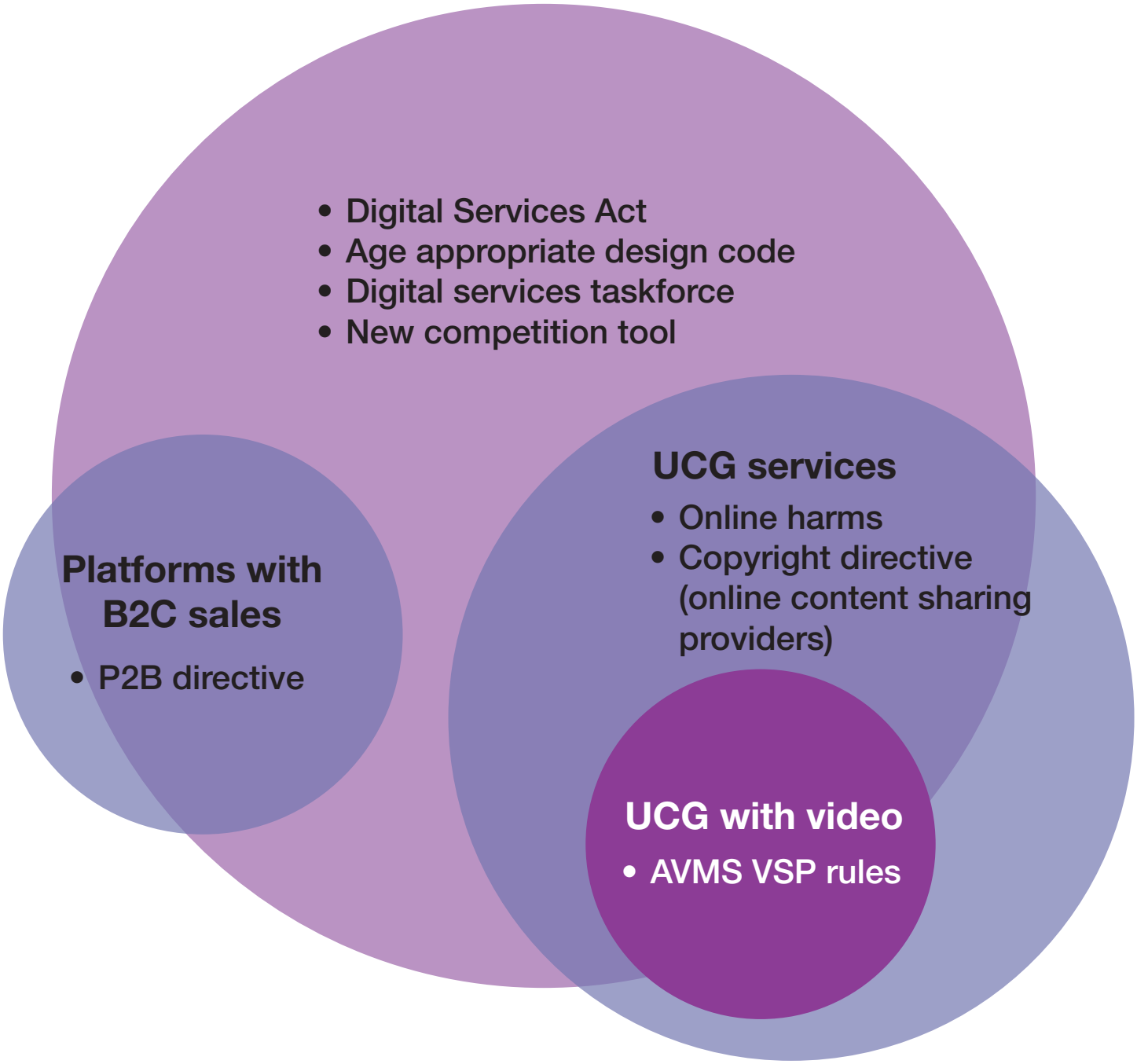
However, the new Sat/Cab Directive only extends the country of origin principle to simulcasts. Online services that are not fortunate enough to be run by linear broadcasters are absent from the system and will not be able to rely on the Directive to offer their webcasts on a pan-European basis. As a result, in the absence of permission from rightsholders, "pure" webcasters may need to geo-block their feed or seek national licences in each country where it can be accessed.

## Expanding competition policy to tackle new issues

Recent debate in competition policy has focused on whether competition is working effectively in digital markets and, if not, how best to address the issues. The European Commission, as well as national competition authorities, have recently brought high profile cases under antitrust rules against some of the largest online platforms. Whilst some of these cases have focused on traditional competition concerns, such as the foreclosure of rivals from markets or self-preferencing ancillary services on a dominant service, concerns have increasingly intersected with other areas of digital policy that are less traditionally a concern of competition authorities, such as data collection and privacy, as well as protection of copyrighted material.

One of the current areas of focus in Europe, both at the Commission level, as well as in Member States and the UK, is whether the existing competition law tools discussed above (enforcement against anti-competitive agreements or abuse of dominance) are sufficient to tackle the issues raised in digital-platform markets. In particular, there is a concern that *ex post* (after the fact) regulation, through standard competition tools, takes too long and often delivers results long after the market has shifted. As a result, regulators have sought to sharpen the competition tools at their disposal. In a recent case in the digital sector, the European Commission has used interim measures to prevent the implementation of the allegedly anti-competitive contractual provisions and practices pending the outcome of the investigation. The Commission's proposal to adopt a 'New Competition Tool' allowing it to examine and possibly implement remedies to address structural competition issues has the same objective. In addition, regulators are currently consulting about new powers that propose to regulate *ex ante* (before the fact) certain online digital platforms. The debate has now moved to the position where it seems *ex ante* competition regulation of some description appears inevitable, with the focus of debate now shifting to how regulators should define markets where intervention is appropriate (whether this be "gatekeepers" or platforms with "significant market status") and how far such powers should go. A key concern on all sides is the timing and extent of intervention in fast-moving technology markets – intervene too early or too often and consumers miss out on new and innovative new products; intervene too late and markets may have tipped to an extent where it is difficult to restore effective competition.

# Information society services
(Figure 2)



# Tracker

The table below is a tracker of new and pending legislation in the area of digital platform regulation, which is correct as at 31 October 2020.

## Digital Services Act ("DSA")

(I) General platform liability
(II) Competition – ex ante regulation of gatekeeper platforms

### Who it covers
(I) Digital Services and Online Platform Providers in the European Union

### What it covers
The Consultation Paper on the DSA asks a number of questions relating to "activities online that are not necessarily illegal but could cause harm to users", including disinformation, content that could be "harmful" to minors (such as grooming, bullying and "inappropriate" content), and "hatred, violence and insults" which don't amount to unlawful hate speech.

### Where to find out more
IAB Europe's preliminary comments on the review of legal framework for DSA: HERE.
Reed Smith materials: HERE.

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### Who it covers
(II) Online platforms that meet criteria of "gatekeeper" platform

### What it covers
- Concern that businesses are increasingly dependent on a small number of gatekeeper platforms.
- Proposal is to impose regulation on "gatekeepers" to ensure that the markets controlled by these platforms remain fair and contestable. There are several options being proposed:
  - **Option 1**: revise the framework set out in the Platform-to-Business Regulation (EU) 2019/1150 to cover certain practices, such as 'self-preferencing', data access policies and unfair contractual provisions;
  - **Option 2**: adopt a framework empowering regulators to collect information from large online platforms;
  - **Option 3**: adopt a new and flexible regulatory framework for large online platforms. Platforms falling within relevant criteria could be supervised and enforcement action taken by the regulator. Proposed "black list" of prohibited behaviour for such platforms and "grey list" of behaviour that may be prohibited depending on the circumstances.

### Where to find out more
European Commission materials: HERE. Reed Smith materials: HERE.

### Status (as at 31 October 2020)
The Commission initiated a public consultation to support the work in analysing and collecting evidence for scoping the specific issues that may require an EU-level intervention.

The consultation closed on 8 September 2020. CMA issued a response to this consultation. A first draft legislative tool is due in Q3/4 2020.

## New competition tool ("NCT") (EU)

### Who it covers

At its narrowest, proposed tool will apply across "digital markets", with possibility to apply economy wide

### What it covers

- The NCT is intended to allow the European Commission to examine and possibly implement remedies to address structural competition issues.
- Concerned with two categories of structural issues: (i) structural risks for competition (e.g. entrenched incumbent, network effects); and (ii) a structural lack of competition (e.g. high entry barriers).
- Proposals include:
  - a dominance-based competition tool to identify unilateral behaviour of a dominant company prior to it excluding competitors or raising costs, and to intervene against the company without having to find an abuse of that dominance (as required under its existing powers); or
  - a market structure-based competition tool that applies to all markets, not just markets where there is a dominant player. This tool would allow the Commission to intervene where a structural lack of competition in the market prevents the market from functioning properly. The outcome of this could be the European Commission recommending legislation to improve the market concerned.

### Where to find out more

IAB Europe's preliminary comments on the review of legal framework for DSA: HERE.
Reed Smith materials: HERE.

### Status (as at 31 October 2020)

Consultation on proposed scope closed on 8 September 2020. Awaiting Commission proposal.

## CMA Study on Platforms and Digital Advertising

### Who it covers

Platforms funded by digital advertising – focus of findings on Facebook and Google

### What it covers

- Report focuses on the largest online platforms funded by digital advertising, Facebook and Google.
- Concerns identified relate to the entrenched market position of Facebook and Google, which are difficult for rivals to address due to network effects, economies of scale and access to significant user data. Concerns are that potential rivals can no longer compete.
- CMA is concerned that a lack of competition in search and social media may result in reduced innovation and choice and consumers giving up data. A lack of competition in digital advertising increases the prices of such advertising, which feeds into prices of goods and services.
- CMA considers that its existing powers are not sufficient to address the concerns identified and is recommending a new regulatory regime for online platforms and a Digital Markets Unit (DMU) to enforce a code of conduct to govern the behaviour of platforms with market power.
- Recommendation that DMU should have power to increase interoperability and provide access to data, to increase consumer choice and to order the breakup of platforms where necessary.

### Where to find out more

CMA Final Report and homepage for market study: HERE and HERE.
Reed Smith materials: HERE.

### Status (as at 31 October 2020)

Report published on 1 July 2020 – results feed into work of Digital Markets Taskforce.

## Digital Markets Taskforce (UK)

### Who it covers
Scope likely to cover online platforms with Significant Market Status (a term yet to be defined)

### What it covers
- DMT comprises the Competition and Markets Authority, Ofcom and ICO and is required to report to Government on the functions, processes and powers needed to deliver on Government's objectives in digital platform markets in a proportionate and efficient way.
- Advice is expected to include: (1) how platforms with strategic market status (SMS) should be identified, (2) how a pro-competition code of conduct should be framed, (3) what powers and processes should be in place to ensure enforcement of the code of conduct.
- Advice is expected to cover areas identified in the CMA market study on Online Platforms and Digital Advertising, but also to address other non-advertising funded platforms which may have SMS (e.g. e-commerce marketplaces),
- It will be up to the Government to implement (or not) the DMT's advice and decide whether any additional powers to manage market power and to promote competition in digital platform markets are required. It is expected a Digital Markets Unit, as recommended by the Furman Report will enforce will be responsible for regulating the sector.

### Where to find out more
Digital Markets Taskforce homepage: HERE.

### Status (as at 31October 2020)
DMT is due to report to the Government by the end of 2020

## European Commission Proposal

### Who it covers
Hosting service providers

### What it covers
- In March 2018, the European Commission adopted a recommendation and a set of non-binding operation measures giving guidelines and principles on the prevention, detection and removal of illegal online content such as hate crime and terrorist propaganda.
- Following the report, the European Commission conducted an open public consultation and subsequently came up with a proposal for a new regulation.
- Main features of the proposal include:
  - a one-hour deadline for content to be removed following a removal order;
  - the provision of a clear definition for what constitutes as "terrorist content";
  - a duty of care for platforms to take drastic, protective measures and prevent the dissemination of terrorist content;
  - setting up a framework for strengthened cooperation between hosting services and Member States; and
  - the establishment and enforcement of complaint mechanisms from service and content providers – opportunities to challenge removal orders will also become available.

### Where to find out more
European Commission Proposal: HERE.

### Status (as at 31 October 2020)
This is a proposal for a regulation. Further negotiations and consultations awaited.

## Collective Rights Management Directive (2014-16)

### Who it covers
'Ancillary online services' (i.e. the online media properties of broadcasters) in their dealings with music Collective Management Organisations.

### What it covers
- Derogation for online music rights required for radio and television programmes.
- Article 32: The requirements do not apply to collective management organisations when they grant, on the basis of the voluntary aggregation of the required rights, in compliance with the competition rules under Articles 101 and 102 TFEU, a multi-territorial licence for the online rights in musical works required by a broadcaster to communicate or make available to the public its radio or television programmes simultaneously with or after their initial broadcast as well as any online material, including previews, produced by or for the broadcaster which is ancillary to the initial broadcast of its radio or television programme.

### Where to find out more
Collective Rights Management Directive and consultation documents: HERE.
Reed Smith materials: HERE.

### Status (as at 31 October 2020)
Directive is in force but currently under review.

## New Sat/CaB Directive (2019/789)

### Who it covers
'Ancillary online services' (i.e. the online media properties of broadcasters)

### What it covers
- Extends the application of the country of origin principle enshrined in the first Sat/Cab directive (Directive 93/83) to 'ancillary online services' of broadcasters which it defines as the online media properties of linear broadcasters.
- It does so by creating a fiction, under which it will be assumed that all the acts of communication to the public of an 'ancillary online service' will be deemed to have occurred in the country where it is established (the 'country of origin principle'). This means that online radio and TV channels could in principle rely on the licence they obtained from their home territory, when accessed in another EU country by simulcast.

### Where to find out more
Sat/CaB Directive: HERE. Reed Smith materials: HERE.

### Status (as at 31 October 2020)
To be transposed by June 2021 – will not apply in the UK

## Age Appropriate Design Code

### Who it covers
Information Society Services 'likely to be accessed by children'

### What it covers
- 15 standards giving detail on the ICO's expectations for services in relation to the processing of children's personal data. A 'child' is an individual up to the age of 18.
- This covers areas such as profiling (including personalisation and targeted marketing), data sharing, transparency, parental controls.
- At the core is a requirement that services act in the best interest of children when designing data processing in services.

### Where to find out more
ICO Age Appropriate Design Code: HERE. Reed Smith materials: HERE.

### Status (as at 31 October 2020)
In force as a statutory code under the UK's Data Protection Act 2018 on 2 September 2020, but with a 12 month transition period.

## Online harms

### Who it covers
Online providers that supply services or tools that allow, enable or facilitate users to share or discover user-generated content or interact with each other online.

### What it covers
- The White Paper proposes protecting internet users by introducing a wide-ranging regime of internet regulation in the UK, establishing a new statutory duty of care on companies to 'take reasonable steps to keep their users safe and tackle illegal and harmful activity on their services'.
- This duty of care would be overseen by an independent regulator (likely OFCOM) that will set out how businesses can comply with the duty of care in codes of practice.
- The regulator would be equipped with certain enforcement powers and sanctions to ensure that relevant companies are compliant with applicable codes and, even where no specific code exists, companies would be expected to be 'assessing and responding to the risk associated with emerging harms or technology'.

### Where to find out more
Online Harms White Paper - Initial consultation response: HERE. Possible appointment of Ofcom as online harms regulator: HERE. Reed Smith materials: HERE.

### Status (as at 31 October 2020)
Consultation on the White Paper has finished. Awaiting proposals.

# Copyright Directive (2019/790)

## Who it covers

Online Content Sharing Service providers ('OCSSPs')

## What it covers

- Article 17 removes the shield of the current hosting exemption to replace it with a principle of full liability. This means that online content-sharing platforms will be liable for copyright-protected material uploaded by users and must obtain authorisation (i.e., a licence) from the relevant rightsholders.
- Article 17 creates a new liability exemption regime for OCSSPs – albeit a much more onerous one than is currently provided by the E-Commerce Directive – whereby online content-sharing platforms will not be liable for the copyright-protected works that they communicate to the public provided that they:
  - make best efforts to obtain the necessary authorisation (i.e., licence);
  - expeditiously take down or disable access to content upon receiving a sufficiently substantiated notice to do so by rightsholders (i.e., similar to the existing 'notice and take-down requirements);
  - make best efforts to prevent future uploads of content about which they have received a notice from rightsholders pursuant to the previous requirement (i.e. a notice and 'stay-down' requirement); and
  - make best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific works in respect of which rightsholders have provided the "relevant and necessary information". While references to upload filters have been removed from the final version of the Directive, in practice, upload filters will need to be implemented by online content-sharing platforms in order to comply Online content-sharing platforms that have been available to the public for less than three years and that have an annual turnover of less than €10 million will only be required to comply with the first two of the requirements above but once an online content-sharing platforms has more than 5 million unique monthly users, it will also have to comply with the notice and stay-down requirement, even if it does not exceed the age or revenue thresholds.
- Article 19 creates transparency obligations. Authors and performers or their representatives are entitled to receive from sub-licensees additional information, in the event that their first contractual counterpart does not hold all the information that would be necessary for ensuring transparency. Online platforms may be required to send out information to third parties on that basis.

## Where to find out more

Text to Directive: HERE. Reed Smith materials: HERE and HERE .

## Status (as at 31 October 2020)

To be transposed by June 2021 – will not apply in the UK.

## EU Guidelines on Article 17

### Who it covers
OCSSPs

### What it covers
- Article 17(10) requires the European Commission to conduct a stakeholder dialogue on Article 17 and to publish guidelines on its application. The Commission is currently seeking the views of the participants to the stakeholder dialogue on the Commission's initial views on the guidance.

### Where to find out more
Draft EU Guidelines: HERE. European Commission policy on Article 17: HERE.

### Status (as at 31 October 2020)
The final draft is expected by the end of 2020.

## Platform to Business ("P2B")

### Who it covers
Services in scope. The P2B Regulation applies to online intermediation services and online search engines (i) provided to business users established in the EU, AND (ii) offering goods or services to consumers located in the EU.

### What it covers
- The P2B Regulation is a set of rules creating a fair, transparent and predictable business environment for smaller businesses and traders on online platforms. It aims to take actions on unfair contracts and trading practices in platform-to-business relations.
- Along with the new rules, the European Commission created the Observatory on the online platform economy in order to monitor the latest trends in this sector.

### Where to find out more
Platform to Business: HERE. European Commission's Observatory on the online platform economy: HERE.

### Status (as at 31 October 2020)
In force July 2020 in UK and EU..

# Audiovisual Media Services Directive ("AVMS")

## Who it covers

The various iterations of AVMS have always regulated broadcasters of linear channels, but have progressively applied further obligations to on-demand audiovisual media services (i.e. VOD services).

The new obligations (right) on VOD services do not apply to service providers with a low turn-over or a low audience, in order not to undermine market development and inhibit the entry of new market players.

New category of "video-sharing platform", i.e. a service:
"...where the principle purpose or a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos or both to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks… and 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".

Note that the test of whether a video-sharing platform will be subject to UK rules will change following Brexit.

## What it covers

- The new rules strengthen cultural diversity, by introducing obligations for video on demand services to ensure at least a 30% share of European content in their catalogues and to give prominence to such content.
- The new rules also allow, under certain conditions, Member States to impose on media service providers that are established in other Member States, obligations to contribute financially to the production of European works.
- Video-sharing platforms must take "appropriate measures" to protect: (a) minors from content and advertisements which may impair their physical, mental or moral development; (b) the general public from content and advertisements containing incitement to violence, hatred or discrimination; and (c) the general public from content and advertisements of which the dissemination would be unlawful (e.g. content containing terroristic offences, child pornography or racism).
- Video sharing platforms are also subject to general rules controlling advertising. The platform provider's obligations will apply differently depending on whether the advertising is marketed, sold or arranged by the platform provider itself, or contained within the user generated content made available via the platform.
- Video-sharing platform providers must also provide out of court dispute resolution procedures.
- In the UK, video-sharing platform providers will be required to notify their services to OFCOM from 6 April 2021, and pay regulatory fees from April 2022.

## Where to find out more

AVMS Directive: HERE.

European Commission's Guidelines on AVMS: HERE

European Commission's Guidelines on AVMS Q&A: HERE.

Reed Smith materials: HERE.

European Commission's Guidelines on definition of video-sharing platforms: HERE

OFCOM's guide on regulating video sharing platforms: HERE

Note that further OFCOM guidance is likely to be published during 2021, most significantly on the meaning of "appropriate measures".

## Status (as at 31 October 2020)

Member States were given until 19 September 2020 to transpose AVMS into national law.

The UK's transposition measures (largely, the Audiovisual Media Services Regulations 2020) were delayed, but will come into force on 1 November 2020.

DirectiveAs above, AVMS's video-sharing platform rules will be transposed into UK law from 1 November 2020.

Due to the combination of Brexit and the Online Harms project, in the UK the video-sharing platform rules are likely to be in force on an interim basis, subsequently to be subsumed into the wider regulatory framework to be implemented in relation to Online Harms (see above).

Both the video-sharing platform and Online Harms regimes are likely to be overseen by OFCOM.

# Omnibus Directive (also known as "New Deal for Consumers")

Directive (EU) 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (the "Omnibus Directive").

## Who it covers

Sellers and suppliers generally but with specific additional rules for online marketplaces.

## What it covers

- The Omnibus Directive amends the following Directives relating to consumer protection:
  - Council Directive 93/13/EEC on unfair terms in consumer contracts;
  - Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers;
  - Directive 2005/29/EC on unfair business-to-consumer commercial practices; and
  - Directive 2011/83/EU on consumer rights.

- The Directive aims to modernise consumer protection rules in relation to digital developments, and to introduce stronger mechanisms to enforce consumers' rights. It aims at introducing more transparency in online marketplaces by:
  - providing transparency as to the person with whom consumers contract when buying on online platforms, and whether European consumer rights are applicable to such contracts;
  - extending some consumer rights to contracts where consumers provide data instead of paying with money;
  - introducing individual remedies for consumers harmed by unfair commercial practices;
  - identifying new misleading commercial practices, in particular with regard to consumer reviews, the parameters for classifying the results of online queries or the marketing of products with different characteristics when they are presented as being identical in different Member States;
  - establishing more effective and deterrent financial penalties for breaches of consumer laws, in particular with the introduction of fines for cross-border infringements; and
  - simplifying certain rules and requirements.

## Where to find out more

Omnibus Directive: HERE.

## Status (as at 31 October 2020)

Member States have until 21 November 2021 to publish laws to implement the Directive. Measures to apply from 28 May 2022.

## Digital Content Directive ('DCD')

Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

### Who it covers

All companies supplying Digital content defined as 'data which are produced and supplied in digital form'.

### What it covers

- The DCD covers the supply of digital content including:
  - data produced and supplied in digital form (e.g. music streaming, VOD platforms, podcasts, etc.);
  - services allowing for the creation, processing or storage of data in digital form (e.g. personal cloud storage);
  - services allowing for the sharing of data (e.g. OCSSPs); and
  - services delivered for 'free' where the processing of personal data is used as a 'currency' fall under its scope.

### Where to find out more

Digital Content Directive: HERE. Reed Smith materials: HERE.

### Status (as at 31 October 2020)

Transposition deadline: 1 July 2021.

## Data Act

Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market

### Who it covers

Awaiting details

### What it covers

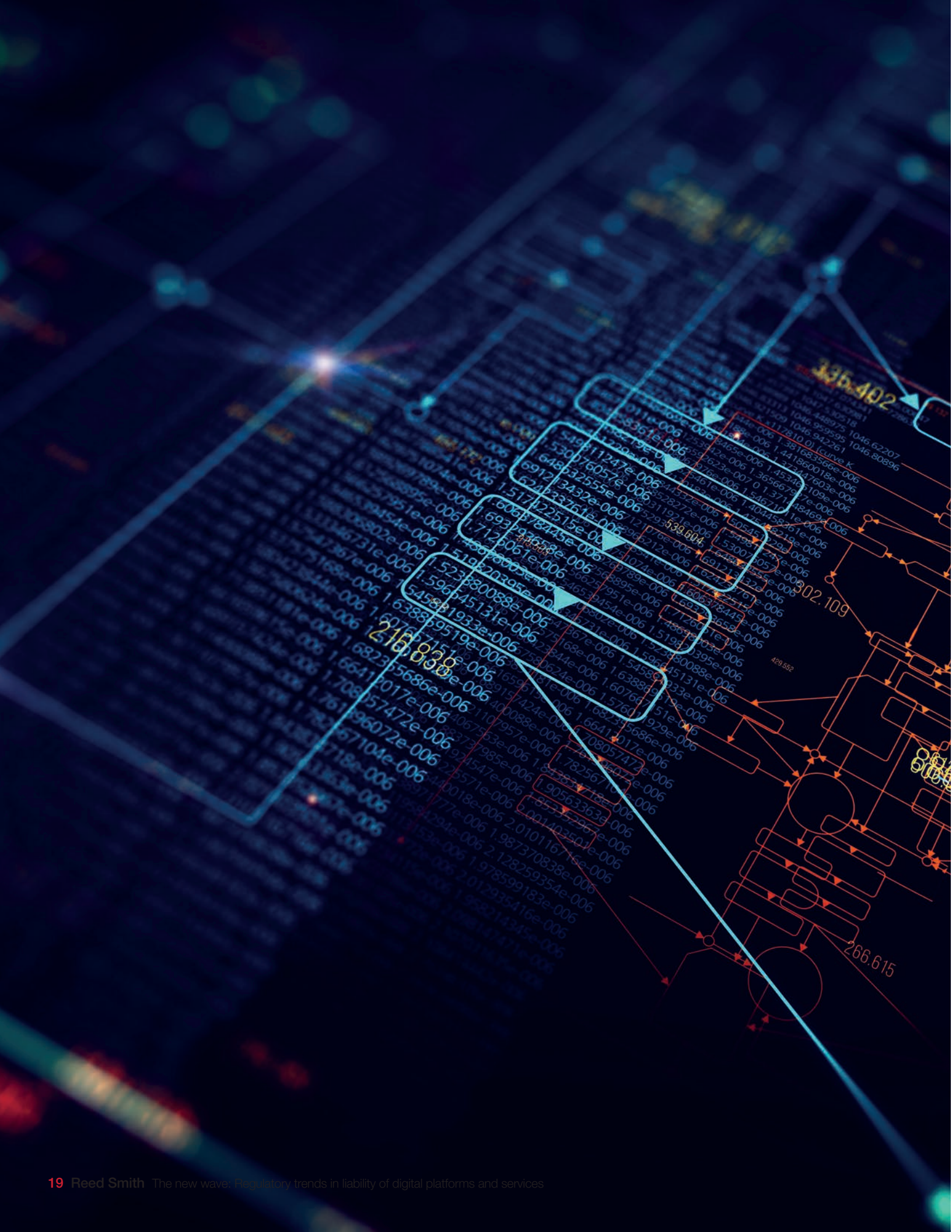
- This is part of the European Commisson's 'A Europe for the Digital Age' proposals. In particular the Data Act is expected to focus on:
  - Increasing the sharing of data between governments and businesses for the public interest.
  - Creating a single market for data in the EU.
  - Consideration of potential intellectual property law changes and compulsory rules for the provision of data to goverments.

### Where to find out more

A European Strategy for Data proposals HERE.

### Status (as at 31 October 2020)

Still at the proposal and drafting stage.



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