Against Platform Regulation

Daniel O'Connor & Matthew Schruers

Executive Summary

Although the term "platform" pervades contemporary technology, business, and economic scholarship, there is little consensus on what platforms are — neither within disciplines, nor across them. Nevertheless, some policymakers have seized upon the term, or have been urged to, in order to achieve a wide variety of regulatory objectives that generally have little to do with platforms. Policymakers pursuing "platforms" as a regulatory basis may be confused about what they propose to regulate, or may be adopting an unbounded term in order to expand their regulatory ambit. In fact, existing legal doctrine — including privacy and data protection, consumer protection, and competition law — already govern the vast majority of concerns cited when calling for "platform regulation," a sui generis *framework which lacks foundation in existing law. Nevertheless, some policymakers remain enamored with the notion of broad, horizontal ex ante online platform regulation, a fact reflected by the elimination of language which would have taken online platform regulation off the table between drafts of the European Commission's Online Platforms Communication, and the proliferation of platform regulation proposals in individual countries. When theories of regulation are not anchored in robust foundational principles, there is greater risk of manipulation of regulators and regulatory capture. To safeguard against these problems, new policies require at least four elements: (a) a precise understanding of the harms the regulation aims to address;(b) a clear definition of which actors are regulated; (c) a nexus between how regulating the first addresses the second; and (d) evidence that current regulations are inadequate to deal with the identified harms.*

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I. An Introduction to "Platform Regulation"

The concept of online platform regulation is relatively new. Although it is difficult to fully track down the intellectual lineage of the ambiguous concept, its profile was raised by loud complaints by the French and German governments about the perceived structural importance of online platforms to the European economy. This eventually led to the inclusion of a consultation on online platforms in the European Commission's Digital Single Market (DSM) strategy, which is a collection of regulatory consultations aimed — at least rhetorically — at facilitating intra-EU business online.

The original impetus of the DSM initiative was friction arising from different EU member-state implementations of privacy law, data protection regulation, intellectual property law, consumer protection law and tax policy. The online platforms consultation was a relatively late arrival to the discussion, spurred in part by political pressure emanating from the drawn-out Google competition investigation and other high-profile Internet-related complaints, such as those targeting Apple's App Store, Android, Facebook and Amazon. Ahead of the initial DSM announcement, the French and German economic ministers had written the European Commission stating, "[w]e believe that the growing power of some digital platforms is a wider challenge that warrants a policy consultation with the aim of establishing an appropriate general regulatory framework for 'essential digital platforms,'"[1] and it was reported that aides to the German European Commissioner in charge of digital economy had already drafted plans "for a powerful new platform regulator."[2]

The DSM proved to be a tempting vehicle through which to funnel these concerns related to prominent Internet companies. Within months of the DSM's formal launch, the platform regulation debate had spread through EU member states. Policymakers in Britain, France, Germany, and the Netherlands examined the topic. National parliaments held hearings. Various governments wrote the European Commission to express views. This debate is ongoing.

Although the political motivations for online platform regulation are relatively clear, the economic and intellectual underpinnings of grouping "online platforms" into a *sui generis* category for the purposes of similar regulatory treatment are less so.

II. Defining "Platform Regulation"

The term "platform regulation" may be widely used, but there is little consensus regarding what "platforms" are, or what it means to "regulate" them. As discussed below, the meaning of the term "platform regulation" has changed over time, as the context in which it is primarily used has shifted. Initially, platform regulation was primarily a descriptive term, used by scholars. Today, "platform regulation" is primarily used in the policy context. What began as a

[1] Duncan Robinson & Alex Barker, *EU to probe popular US sites over data use and search*, Fin. Times (Apr. 30, 2015), https://www.ft.com/content/9ff2c0b4-ef13-11e4-a6d2-00144feab7de (quoting from letter).

[2] *Disconnected continent: The EU's digital master-plan is all right as far as it goes*, The Economist (May 9, 2015), http://www.economist.com/news/business/21650558-eus-digital-master-plan-all-right-far-it-goes-disconnected-continent.

descriptive label, whose use was rooted in empirical observation, has transitioned to a *prescriptive* label whose application presages government intervention.

This section charts the evolution of the term "platform" from academic circles to business strategy to policymaking, illustrating how usage has varied in different contexts. It then describes how the term "regulation" has also evolved in the platform context, initially describing the operator's "regulation" of its own platform, but now generally referring to government involvement in platform operators' decision-making.

A. The Meaning of "Platform" in Context

1. *"Platform" across disciplinary silos*

In the context of its current usage, the term "platform" first emerged in computer science circles, and later was embraced by economists and intellectuals working on applied business strategy. Both within individual academic silos and across them, the term is not rigorously defined, nor is there agreement on a unified meaning. In fact, the popularity and ambiguity embedded in the term even spawned a satirical article in *The Onion*, noting that executives at a mythical company were increasingly discussing "platforming," which left employees "speculating that it could refer to some aspect of their website or possibly the sales or advertising department."[3] Ironically, the publication itself has received plaudits for pursuing a "platform strategy."[4]

In computer science and technology industry jargon, the term "platform" first appeared in the mainframe era, but it was not until the mid-1980s, during the shift to the personal computer, that the term became mainstream. In computer science, a computing platform is, in a general sense, an environment that software is designed to run within. The term platform was initially used to "denote a complete software programming development environment and underlying subsystem with language, runtime, components and all associated libraries and binaries."[5] Essentially, it is a system which includes a toolkit that allows a programmer to develop software for a specific type of hardware.

However, the term eventually took on a broader context. As technology journalist Adrian Bridgwater notes, "a platform became something slightly different. Where we used to think of a platform as the underlying computer system, we now probably have to accept the fact that the industry considers a platform to be anything that you can build upon."[6] As PC Magazine defines it, a platform is a "hardware and/or software architecture that serves as a foundation or base."[7]

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[3] *Never-Before-Heard Buzzword Flying Around Office Can't Be Good: 'Our Focus Is On Platforming,' Executives Repeat*, The Onion (Oct. 15, 2015), http://www.theonion.com/article/never-heard-buzzword-flying-around-office-cant-be—51552.

[4] *How 'The Onion' Bloomed Into a Digital Platform*, Bloomberg West (Dec. 3, 2013), http://www.bloomberg.com/news/videos/b/ca0c9c32-112c-4bc7-b6f2-48c1b42f3319.

[5] Adrian Bridgwater, *What's The Difference Between A Software Product And A Platform?*, Forbes (Mar. 17, 2015), http://www.forbes.com/sites/adrianbridgwater/2015/03/17/whats-the-difference-between-a-software-product-and-a-platform/#5c9547fd3877.

[6] *Id.*

[7] PCMag, *Definition of: platform*, http://www.pcmag.com/encyclopedia/term/49362/platform (last accessed Aug. 31, 2016).

In technology circles, the concept of a platform has evolved, but this evolution provided no greater clarity into its meaning. Quite the opposite: as Paul Miller, technology analyst and former consultant for the European Commission, noted, even in technology circles, the term has "drifted" from a relatively straightforward concept to a much less precise buzzword.

> Traditionally sloppy use of language, however, has led to a situation in which unnecessary confusion is now associated with a superficially straightforward term. Some of this confusion is introduced by innocent drift in the evolving usage of a word, but far more is down to the unfortunate fashion for everyone jumping on the bandwagon and unleashing a 'platform' of their own.[8]

As the focus of the computing world moved increasingly towards the Internet, the inevitable discussion of "Internet platforms" soon took center stage. Venture capitalist Fred Wilson pointed out in 2005 that industry experts were already referring to "the web as a platform."[9] As with prior evolutions of the concept, the term became even more expansive and fuzzy. As early as 2007, famed venture capitalist and co-founder of Netscape, Marc Andreessen, lamented on the confusion surrounding the term Internet platform:

> However, the concept of "platform" is also the focus of a swirling vortex of confusion — lots of platform-related concepts, many of them highly technical, bleeding together; lots of people harboring various incompatible mental images of what's about to happen in our industry as a consequence of various platforms. I think this confusion is due in part to the term "platform" being overloaded and being used to mean many different things, and in part because there truly are a lot of moving parts at play that intersect in fascinating but complex ways.[10]

Andreessen himself, perhaps reflecting his roots as a software developer, settled on "programmability" as being the core component of a platform.[11] However, to the chagrin of many technologists and programmers, the term became increasingly buzzy and evolved beyond its original computer science roots.

In the early 1990s, business management scholars embraced the term, which has itself evolved in the field. According to Baldwin and Woodard, the concept of a platform has "undergone three successive waves of research, respectively focused on products, technological systems and transactions."[12] The first wave, which emanated from the work of Wheelwright and Clark,

[8] Paul Miller, *Marc Andreesen digs into the Platform*, ZDNet (Nov. 1, 2007), http://www.zdnet.com/article/marc-andreesen-digs-into-the-platform/.

[9] Fred Wilson, *I Thought The Web Was The Platform*, AVC (Dec. 3, 2005), http://avc.com/2005/12/i_thought_the_w/.

[10] Marc Andreessen, *The three kinds of platforms you meet on the Internet*, PMARCA.com Blog (Sept. 16, 2007), http://pmarchive.com/three_kinds_of_platforms_you_meet_on_the_internet.html.

[11] *Id.* ("The key term in the definition of platform is 'programmed'. If you can program it, then it's a platform. If you can't, then it's not.").

[12] Carliss Y. Baldwin & C. Jason Woodard, *The Architecture of Platforms: A Unified View.*, in *Platforms, Markets and Innovation* 20 (Annabelle Gawer ed., 2009).

focused on "platform products" that possessed a consistent core, but were designed for "easy modification into derivatives through the addition, substitution, or removal of features."[13] The second wave, emanating from the study of the early computing industry, tracked more closely with the use of the term in technologist circles, and focused on key technology companies, such as Intel, Microsoft and Cisco, that sat in the middle of ecosystems, with complementary products and services built around them.[14]

The third wave, which is currently a popular strand of industrial economics, was popularized by Nobel prize winning economist Jean Tirole, and his colleague Jean-Charles Rochet, in their now-famous paper, "Platform Competition in Two-sided Markets." Building on the body of economic literature of network externalities, Tirole and Rochet came to the realization that "many if not most markets with network externalities are characterized by the presence of two distinct sides whose ultimate benefit stems from interacting through a common platform."[15] This observation launched a wave of economic research into multi-sided markets, where the platform was commonly defined as the intermediary through which distinct groups connected. Although Tirole and Rochet arrived at this realization studying some computer and Internet markets, such as video games, operating systems, and browsers, they generalized the "empirical scope" of the concept of a platform to include "phenomena as diverse as credit card networks, shopping malls and dating services."[16]

In current academic literature, "many seemingly disparate things have been labeled platforms, including auto-body frames, videogame consoles, software programs, websites, back-office processing systems, shopping malls and credit cards."[17] Annabelle Gawer, editor of one of the more comprehensive examinations of academic literature on platforms noted that "[w]hile the term platform is used across these different literatures, the meaning of the term seems to differ between them….One could even wonder at first glance if they are discussing the same underlying phenomenon. In the vernacular of business, the term platform can also have different meanings."[18]

2. *Defining platform in the context of online platform regulation*

The push for government regulation of online platforms began in Europe, stemming from concerns about the size and influence of mostly foreign large Internet companies in the European economy. Shortly after assuming office, Günther Oettinger, the European Commissioner for Digital Society, stated in a speech: "Americans are in the lead. They have the data, the business models and the power… They come along with their electronic vacuum cleaner and suck up all the data, take it back to California, process it and sell it as a service for money."

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[13] Steven C. Wheelwright & Kim B. Clark, *Creating Project Plans to Focus Product Development*, 70 Harv. Bus. Rev. 67, 73 (1992), https://hbr.org/1992/03/creating-project-plans-to-focus-product-development.

[14] Baldwin & Woodard, *supra* note 12.

[15] Jean Tirole & Jean-Charles Rochet, *Platform Competition in Two-sided Markets*, 1 J. Eur. Econ. Ass'n 990 (2003).

[16] Baldwin & Woodard, *supra* note 12, at 19.

[17] *Id*. at 21.

[18] Gawer, *Platforms, Markets and Innovation*, supra note 12, at 46.

With the French and German governments leading the charge,[19] it was announced that online platform regulation was being added to the agenda of the Commission's expansive Digital Single Market initiative, which as the name implies, was originally targeted at legal harmonization to enable more seamless intra-Europe e-commerce. However, instead of harmonizing existing rules, the online platforms consultation floated the idea of adding an expansive new category of online platform regulation,[20] and subsequently opened a public consultation on the topic.[21]

Specifics of the Commission's thinking first came to light when the *Wall Street Journal* reported on a leaked memo prepared by Commissioner Oettinger's senior staff, which warned that large Internet companies "are transforming into super-nodes that can be of systemic importance"[22] and outlined "a blueprint for the regulation of online networks in Europe that goes far beyond a general plan for the region's digital sector."[23] Although the memo conceded that there was no universally accepted definition of online platforms and there was little concrete evidence of harm, it still pointed to the political necessity for action:

> It is highly unlikely that platforms will unilaterally limit the power they have gained and will continue to accumulate. Some sort of control will be called for, possibly organized by the market or by public action. While the time may not be ripe for action now, there is a case for paving the way for future action.[24]

Concurrently with the European Commission's new online platform proposal, the Commission also released its "Better Regulation" initiative, which focused on reforming the European Union's approach to regulation by encouraging openness, transparency, and a generally more thorough approach to identifying the need for and the goals of new regulation. Specifically, the Commission stressed the need for a more "rigorous" and "evidence-based" process. It announced that "legislation should be comprehensible and clear," and "allow parties to easily understand their rights and obligations."[25] This mirrors the OECD guidance to regulators, which stresses the need for "clear objectives and frameworks." Unfortunately, "platform regulation"

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[19] Catherine Stupp, *Italy set to pull ahead of Brussels on online platform regulation*, EurActiv (Nov. 19, 2015), https://www.euractiv.com/section/digital/news/italy-set-to-pull-ahead-of-brussels-on-online-platform-regulation/ ("France and Germany put pressure on the [European Commission] to start the probe.").

[20] Zoya Sheftalovich, *Leaked digital single market's 'evidence file' reveals Commission's ambitions: Documents show policy came before evidence for cybersecurity measures*, Politico (Apr. 21, 2015), http://www.politico.eu/article/leaked-digital-single-market-strategy-evidence/ ("Online platforms such as search engines, social media, e-commerce, app stores and price comparison sites are squarely in the Commission's sights.").

[21] Press Release, European Commission, Have your say on geo-blocking and the role of platforms in the online economy (Sept. 24, 2015), http://europa.eu/rapid/press-release_IP-15-5704_en.htm.

[22] Tom Fairless, *Europe Looks to Tame Web's Economic Risks: European Union considers new regulator to oversee mainly U.S.-based Internet firms*, Wall St. J. (Apr. 23, 2015), http://www.wsj.com/articles/eu-considers-creating-powerful-regulator-to-oversee-web-platforms-1429795918.

[23] *Id.*

[24] Leo Mirani, *These documents reveal the EU's thoughts on regulating Google, Facebook, and other platforms*, Quartz (Apr. 23, 2015), http://qz.com/389905/these-documents-reveal-the-eus-thoughts-on-regulating-google-facebook-and-other-platforms.

[25] *Better Regulation for Better Results - An EU agenda*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (May 2015), http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2015_215_en.pdf.

proponents have failed to live up to this standard. They have failed to clearly define "online platform" or identify cross-cutting problems across platforms, which are unique to that context, and require new regulation.

These defects are also evident in other attempts at justifying platform regulation. Before the European Commission took up platform regulation, the French Digital Council issued a "Platform Neutrality" report, which called for extensive monitoring and regulation of online platforms to ensure they behave in a "neutral" manner. However, the report never attempted to define what a platform was, which would be the necessary first step in creating a new regulatory regime. Instead, the report offered characteristics that "platforms" allegedly share and offered a non-exhaustive list of specific companies that it considered to be online platforms, which included Amazon, Apple, Expedia, Facebook, Google, Microsoft, Netflix, Twitter, and Yahoo. The report noted that "most" online platforms "pair supply and demand" and "enable mass user function" by acting "as online intermediaries and provide valuable tools which can lead to the creation of new business lines and value chains."[26] The report also indicated that "several platforms" make "open tools available for other players to develop their own innovative products or services. These tools include Application Programming Interfaces (APIs), development kits, open source software, etc." Thus, in its description of platforms, the report traces concepts from both the technology-centric "programmability" definition of platforms and the "intermediary" concept of platforms from industrial economics. What the report does not do is settle on a falsifiable definition of platforms, so it can be determined who is and is not included in the definition, and therefore regulated. Nor does it clearly identify common threads unique to online platforms that call for similar regulatory treatment.

Besides lacking limiting principles, the Digital Council's list of companies did not even track the specified criteria. Netflix, for example, is merely a vendor of licensed content online via a subscription model, not an intermediary. Certain products of many of the companies listed as examples match the descriptions, but the majority of Amazon's business emanates from being an online retailer, and Yahoo is now primarily a provider of online content, with an advertising platform built into it, which is not very different from most high-trafficked websites serving advertisements online, such as online versions of newspapers. Furthermore, much of the report is dedicated to the perceived threat of algorithmic decision-making driven by data, which is pervasive across all industries, and not unique to companies that function as intermediaries or allow third parties to use common interfaces.

The European Commission's original attempt at defining platform also grasped at the generic "intermediary" concept, emphasizing aspects of "multi-sidedness." In its September 2015 online platform consultation questionnaire, the Commission defined an online platform as: "an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable

[26] *Platform Neutrality: Building an open and sustainable digital environment*, CNNum Conseil National du Numérique (May 2014), at 4, http://cnnumerique.fr/wp-content/uploads/2014/06/PlatformNeutrality_VA.pdf. It should be noted that even this interventionist approach acknowledges that existing regulations govern the issues in question. *See id.* at 7 (stating that many platform-related issues can be addressed "by making the best use of current law (consumer, business, competition, data, etc.) and by moving case law forward.").

interactions between two or more distinct interdependent groups of users so as to generate value for at least one of the groups."[27]

The definition went on to give a wide range of examples, including companies and products with widely varying business models, such as Google's search engine, Yelp, Amazon, eBay, Facebook, Netflix, Uber, Apple TV, and mobile app stores. Given that the final part of the Commission's definition can be used to define any market operating online (buyers and sellers are two distinct interdependent groups of users where, by definition, at least one party to the transaction generates value), the definition itself boils down to multi-sided markets on the Internet.

Even this definition itself is problematic. The term "multi-sided market" is relatively new in economic circles, an outgrowth of Tirole and Rochet's pioneering economic work. Although economists have now discussed multi-sided markets at length, defining them is still a question for debate. The leading economists in the field, Jean Tirole and Jean-Charles Rochet, acknowledge that the concept has a "you know a two-sided market when you see it" feel. Without proper conditions to refine the term, they note, it is overinclusive "[b]ecause all markets involve transactions between two (or more) parties and therefore could be two-sided markets."[28] The European Commission's proposed definition of an online platform also lacks limiting principles to constrain the concept from being interpreted as Internet regulation writ large. Furthermore, the definition arbitrarily excludes non-Internet platforms, as well as "Internet Service Providers," which featured prominently in Tirole and Rochet's identification of multi-sided platform markets.

Given these inadequacies, the European Commission's proposed definition of online platforms was widely criticized. Ofcom, the United Kingdom's communications regulator, noted that regulation "requires a clear definition of the services that are to be regulated" and that the Commission's definition failed that test due to "lack of specificity."[29] Furthermore, it pointed out that if Amazon is an online platform, "this suggests a very broad definition of two-sided market, which might also reasonably include Tesco.com, or any retail site."[30] If Netflix were an online platform, then "so would be the BBC iPlayer or any online broadcaster or video-on-demand service."[31] Other critics concurred.[32] The online home rental intermediary Airbnb

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[27] European Commission, "Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy," Consultation Survey, Sept. 2015, at 5, https://ec.europa.eu/eusurvey/pdf/survey/31103?lang=EN&unique=b91d8ce8-a2a0-4b29-a92c-3689dce5f71c

[28] Jean-Charles Rochet & Jean Tirole, "Two-sided markets: an overview," Institut d'Economie Industrielle Working Paper, at 40 (2004), http://web.mit.edu/14.271/www/rochet_tirole.pdf.

[29] *Written evidence from Ofcom (OPL0047)*, Ofcom (Oct. 21, 2015), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/23277.html.

[30] *Id.*

[31] *Id.*

[32] *See, e.g.*, *House of Lords EU Internal Market Sub-Committee: Etsy Submission to the Internal Market Sub-Committee Call for Evidence Inquiry into Online Platforms*, Etsy (Oct. 30, 2015), http://extfiles.etsy.com/advocacy/Etsy%20Submission_Online%20Platform%20Inquiry.pdf (noting overbreadth of definition); *Written evidence from Professor Eric Clemons, Professor of Operations, Information and Decisions, The Wharton School of the University of Pennsylvania (OPL0071)*, University of Pennsylvania (Dec. 3, 2015),

argued that the definition "does not necessarily illuminate any cross-cutting regulatory issues that may need to be addressed."[33] The UK's Competition and Markets Authority (CMA) testified that "there is no 'one size fits all' definition, and that "[w]hile many share the common feature of acting as intermediaries between other actors in the market, they may have quite different functions including: providing a marketplace where sellers and buyers can meet (such as peer to peer sites); providing information about sellers or buyers (such as review sites); and/or facilitating a transaction (such as payment intermediaries)."[34] The head of the CMA went even further in a speech at the German Federal Network Authority in Bonn:

> So let's begin this assessment by considering online platforms in broad perspective.... I challenge you to tell me what characteristics the following online models uniquely share: communications and social media platforms; operating systems and app stores; audiovisual and music platforms; e-commerce platforms; content platforms (itself a diverse group); search engines; payment systems; sharing platforms… and the list could go on.[35]

A study commissioned by the Dutch government came to a similar conclusion, finding: "[t]he term 'digital platforms' is often loosely defined. Many studies on digital platforms do not provide a definition or the authors use examples to make clear what they refer to when they mention digital platforms."[36]

Responding to these criticisms, the European Commission backtracked. It acknowledged that there is "no consensus on a single definition of online platforms."[37] It did not abandon the term, however. Similar to the French platform neutrality paper, the Commission's updated Communication offers a broad set of characteristics that some online platforms share, with no limiting criteria.[38] In short, despite conceding its inability to delineate whom "platform"

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http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/25630.html (arguing that definition was "too broad and it encompasses virtually all two sided markets").

[33] *Written evidence from Airbnb (OPL0061)*, Airbnb (Oct. 30, 2015), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/23750.html.

[34] *Written evidence from Competition and Markets Authority (OPL0055)*, Competition and Markets Authority (Oct. 23, 2015), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/23391.html.

[35] *Alex Chisholm speaks about online platform regulation*, gov.uk (Oct. 27, 2015), https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-online-platform-regulation.

[36] Nico van Eijk, Ronan Fahy, Harry van Til, Pieter Nooren, Hans Stokking, & Hugo Gelevert, *Digital platforms: an analytical framework for identifying and evaluating policy options*, TNO (Nov. 9, 2015) https://english.eu2016.nl/documents/publications/2016/04/18/digital-platforms.

[37] *Commission Staff Working Document: Online Platforms*, European Commission (May 25, 2016), at 2, https://ec.europa.eu/digital-single-market/en/news/commission-staff-working-document-online-platforms.

[38] For a more thorough discussion of the problem in the same document, *see id.* at 46 ("These variations in platforms' business models and characteristics have important implications for a policy analysis of online platforms. It is challenging to set out a clear-cut definition of online platforms, especially from a legal perspective. Doubts have been raised during the stakeholder engagement process over whether any 'one-size-fits-all' definition would be feasible. Such a definition is unlikely to be future-proof and it might overlap with other definitions, for example of an online intermediary and information society service provider.")

regulations would apply to and resisting ex-ante sectoral regulation in the short term, the Commission refused to abandon the concept of horizontal online platform regulation.[39]

Variants of the concept remain under consideration in several European member states, and across the world.[40] For example, the French National Assembly recently passed its Digital Republic Bill that imposes various neutrality requirements on platform operators, which it defines as legal entities that engage in the "classifying or referencing contents, goods or services offered or uploaded by third parties, by using computerized algorithms; or putting in relation several parties for the sale of a good, the provision of a service or the exchange or sharing of content, a good or a service."[41]

3. *"Platform" is an open set*

Because "platform" definitions are generally designed to include, rather than exclude, they lack outer bounds. The term tends to be a deliberately open set, with no clear mechanism for falsifying the categorization. Indeed, at broader levels of abstraction, scholars and regulators can label *anything* a platform, including sociological constructs like science and medicine and socio-legal institutions like competition and property rights.[42] The term's vagueness means it is entirely context-dependent. At best, it means – per Lewis Carroll – just what we choose it to mean when we use it.[43]

There is an obvious problem with this. When the litmus test for being a platform can validate, but not *in*validate, nothing is definitively *not* a platform. The only meaningful constraints are the adjectives applied to "platform." Discussions of platform regulation is usually confined to *digital* platforms, but as digital technology permeates modern society, the limitation of digital platforms will serve as less of a constraint. Hardware, software, business models – with a sufficiently ambiguous definition, everything is fair regulatory game.

Given that there are no clear outer boundaries to the regulated subject matter, platform regulation might be better understood as a proposed *rationale* of regulation. That is, one might contend that we regulate platforms like we regulate general phenomena, such as externalities, moral hazards, information asymmetries, public goods, and scarcity.[44]

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[39] See discussion *infra*, Section IV, regarding language rejecting ex-ante online platform regulation being stricken from the European Commission's May 25 Communication on Online Platforms.

[40] *Taming the beasts: European governments are not alone in wondering how to deal with digital giants*, The Economist (May 28, 2016), http://www.economist.com/news/business/21699465-european-governments-are-not-alone-wondering-how-deal-digital-giants-taming.

[41] Christine Gateau & Pauline Faron, *French Digital Bill: To be or not to be a platform?*, Lexology (April 6, 2016), http://www.lexology.com/library/detail.aspx?g=be6c5e61-9b43-471a-b479-39d602e12049

[42] Richard Langlois, "Design, Institutions, and the Evolution of Platforms," 9 J. L. Econ. & Policy 1 (2009). Langlois attributes this observation to historian Niall Ferguson, who instead used the word "apps," but also acknowledges that "calling things like competition and science platforms is just as flamboyantly fuzzy-headed as calling them apps."

[43] Lewis Carroll, *Through the Looking Glass, And What Alice Found There* 123 (1897).

[44] Robert Baldwin *et al.*, *Understanding Regulation: Theory, Strategy, and Practice* (2d ed., Oxford: 2012), at 15-21 (cataloguing various rationales for regulation).

But this rationale only creates more problems. First, economic phenomena tend not to be the locus of organizing the modern regulatory taxonomy. For example, we regulate clean air, not public goods, even if air quality might resemble a public good. There is no "public goods law." Second, even at this level of abstraction, the definitional problem remains. We know that public goods are characterized by non-rivalrousness and non-excludability, for example, and can therefore identify that many things are *not* public goods. There is no consensus, however, on what is *not* a platform.

B. The Meaning of "Regulation" in Context

Just as the meaning of "online platform" has been a moving target, the import of "regulation" has also changed over time. Although often associated with public authorities, the term is more fundamental. The Oxford English Dictionary defines the term as "to control, govern, or direct." As such, it extends beyond government regulation, to anything that exerts control on an individual or object.

Early discussion of platform regulation focused on the fact that online platforms engaged in commercial and architectural decision-making that had de facto regulatory effects.[45] These observations, building on the early Internet regulatory theory of scholars like Lawrence Lessig,[46] conceptualized the platform operating company as the regulator, and the platform ecosystem as the regulated construct.[47] Only in more recent years has the focus of attention shifted to the platform operator as the regulated construct, with the regulator's judgment being substituted for that of the platform regarding welfare maximization in the ecosystem. This shift should not be surprising. Scholars have previously noted that regulators and platform operators often have similar goals in regulating platforms, although current scholarship suggests that operators may be better positioned to accomplish those goals on a given platform than regulators are.[48]

Public authorities "regulate" to discourage harmful behavior, and sometimes to encourage beneficial behavior. Stated otherwise, regulation is targeted at instances where the free market fails to produce what society determines to be the proper outcome. As Baldwin, Cave and Lodge note in their textbook *Understanding Regulation*, "[m]any of the rationales for regulation can be described as instances of market failure. Regulation in such cases is argued to be justified because the uncontrolled marketplace will, for some reason, fail to produce behavior or results in accordance with the public interest."[49] The underlying assumption of government regulation is that the incentives of market actors are not aligned with the public good. However, the rise of platforms has, at least in some instances, altered the regulatory calculus. Given that platforms sit in the middle of value creating transactions and earn profits based on their effectiveness at maximizing that value, they are incentivized to maximize the value of the platform for platform users, and thus to minimize fraud, abuse and other potential market failures. In economic speak,

[45] *See* Kevin J. Boudreau & Andrei Hagiu, *Platform rules: multi-sided platforms as regulators*, *in* Platforms, Markets, & Innovation (Edward Elgar, 2009), at 16-170.

[46] Lawrence Lessig, *Code and Other Laws of Cyberspace, Version 2.0*, 123-25 (2006).

[47] *See* Boudreau & Hagiu, *Platform rules: multi-sided platforms as regulators*, *supra* note 45, at 174-75, 183-84 (platform operators likely to "act as an unusually effective regulatory of the ecosystem as a whole").

[48] *See infra* notes 50-58.

[49] Note that there are other motivations for regulation, but those are more subjective and not universally shared.

the platform's job is to minimize negative externalities and encourage the capture of positive externalities — objectives which are very similar to that of a government regulator.

Although early empirical work on platforms focused mostly on price-setting, economists began examining the platform's role as a regulator. In fact, before the notion of the government regulation of platforms as a category was floated, the term "platform regulation" appeared in academic literature to discuss platforms not as the subject of regulation, but as the regulator. As Boudreau and Hagiu discuss, the markets platforms operate in are "riddled with externalities and other sources of coordination problems" and the regulatory role of platforms "goes well beyond price setting and includes imposing rules and constraints, creating inducements and otherwise shaping behaviors."[50] Other prominent economists studying platforms have made similar observations, referring to regulation by platform operators as "platform governance"[51] and "rules."[52] Parker, Van Alstyne, and Choudary note that "good governance is important to both nation-states and platform businesses."[53] Evans similarly observes: "multi-sided platforms develop systems of rules and penalties to manage many of the same kinds of problems that communities subject to public laws and regulations face."[54] Platform economics is rife with examples of platforms addressing market failures, policing bad behavior and minimizing negative externalities; this role is "pervasive and at the core of [platforms'] business models."[55]

In addition to having similar goals to regulators, platform operators are often better positioned than public authorities to effectuate the desired outcomes. Government regulation, however well meaning, has known limitations, including regulatory capture, poor enforcement tools, and information asymmetries. As Boudreau and Hagiu note, "[e]ven in the best of circumstances, public regulators tend to have access to just a few blunt instruments" whereas platform operators "may have superior information" and "access to a wider menu of regulatory instruments to implement desired activities," including being in control of the technological architecture of the marketplace itself.[56] Furthermore, platform operators often have better incentives than a regulator, thus guarding against regulatory capture, as the platform operator "will directly derive profits to the extent that the regulation is successful."[57] In fact, ineffective government regulation often presents entrepreneurs with a business opportunity. If the platform operator addresses an underlying market failure better than current public authorities, then they have the

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[50] Boudreau & Hagiu, *Platform rules: multi-sided platforms as regulators*, *supra* note 45, at 165-67.

[51] Geoffrey Parker *et al*., *Platform Revolution: How Networked Markets Are Transforming the Economy and How to Make Them Work for You* 157-82 (2016).

[52] David S. Evans & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* 140-43 (2016).

[53] Parker *et al*., *Platform Revolution*, *supra* note 51, at 161.

[54] David S. Evans, *Governing Bad Behavior By Users of Multi-Sided Platforms*, 27 Berkeley Tech. L.J. 1202 (2012), http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1961&context=btlj.

[55] Boudreau & Hagiu, *Platform rules: multi-sided platforms as regulators*, *supra* note 45, at 187. *See also id.* at 1241 ("The governance mechanisms for private multi-sided platforms mirror many... laws and regulations. Multi-sided platforms have developed rules and enforcement mechanisms for dealing with negative externalities created by agents on their platforms.").

[56] Boudreau & Hagiu, *Platform rules: multi-sided platforms as regulators*, *supra* note 45, at 169-70. *See also* Evans, *supra* note 54, at 1204.

[57] Boudreau & Hagiu, *Platform rules: multi-sided platforms as regulators*, *supra* note 45, at 170.

opportunity to make money doing so, and its profits would be share of the added value they bring to market participants.[58]

There is also considerable discussion in academic and business literature about platform businesses failing to adequately regulate their ecosystem, and being replaced by platforms that do. Atari,[59] MySpace,[60] and Symbian[61] are three examples offered of platforms that failed to regulate their platforms effectively (either through rules or through the architectural design of their products) and were eventually replaced by competitors (Nintendo, Facebook and Android, respectively) with better internal regulatory structures. Unlike with public authorities, competition acts upon platform business models to encourage regulatory innovation and efficiency.

Just as platform operators regulate their platform ecosystem through managerial and architectural choices, scholars have documented how market forces regulate "up." Attempts by platform operators to abuse their position at the expense of platform users provide a good example of this. In 2015, Green Mountain Coffee, manufacturer of the ubiquitous Keurig machines, tried to increase profits by architecting their product to reject third-party coffee "pods"; essentially, it sought to exploit its position as a platform to the detriment of both users and complementary product makers. The strategy failed spectacularly. Sales declined 23% and the stock price fell 9% in the face of a strong consumer backlash. The company's CEO ultimately reversed course, issuing an apology in an earnings call:

> [W]e heard loud and clear from the consumer… what we learned is... that we want consumers to be able to brew every brand, any brand of coffee in their machine and bringing the My K-cup back allows that…. We took the My K-cup away and quite honestly we're wrong.[62]

As Parker *et al*. note in *Platform Revolution*, Green Mountain's attempt to extract revenue at the expense of platform constituents "angered its community and forfeited profits" because it violated the "three fundamental rules of good governance: always create value for the consumers you serve; don't use your power to change the rules in your favor; and don't take more than your fair share of the wealth."[63]

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[58] Patrick McLaughlin, *A Disruptive Innovation Like Uber Is Not 'Spontaneous Deregulation'*, Expert Commentary, Mercatus Center (July 1, 2016), http://mercatus.org/expert_commentary/disruptive-innovation-uber-not-spontaneous-deregulation, ("[T]he common theme across all those industries where a market-making platform has been extremely successful is that regulations protecting incumbents helped create the opportunity for disruption in the first place. Instead of being characterized in a negative light, platforms that identify regulatory failures, and deliver innovative solutions, should be praised for performing the "regulatory bricolage" that regulators should have done long ago.)

[59] *Id.* at 163.

[60] Evans & Schmalensee, *Matchmakers*, *supra* note 52, at 145-48.

[61] *Id.* at 110-13.

[62] Megan Geuss, *Keurig says it was wrong to force users to buy single-serving pods: Coffee company will bring back "My K-Cup" reusable filter, license more outside brands*, Ars Technica (May 7, 2015), http://arstechnica.com/business/2015/05/keurig-stock-drops-10-percent-says-it-was-wrong-about-drm-coffee-pods/.

[63] Parker *et al.*, *Platform Revolution*, *supra* note 51, at 157-58.

Not surprisingly, given that both platforms and regulators are institutions devised to counteract market failure, the literature on prescriptions for engineering successful platform rules mirrors the discussion of sound regulatory principles. In fact, the language is uncannily similar.[64] Platform operators are counseled to promote "internal transparency" and encourage participation by giving "external partners and stakeholders a voice in internal decision processes equal to that of internal stakeholders."[65] The OECD, similarly, recommends regulators ensure "transparency and participation in the regulatory process"[66] and provide "meaningful opportunities (including online) for the public to contribute to the process of preparing draft regulatory proposals." The European Union makes "more transparency and consultation" the first recommendations in its Better Regulation Agenda.[67] Parker et al. discuss the need to eliminate internal silos within the platform business, noting "companies that limit their ability to see across business units are likely to fail to establish viable platforms." A key component of the EU's agenda to improve regulation was removal of silos within European regulatory institutions. As part of its "Interinstitutional Agreement on Better Regulation," the Commission laid out a proposal that included a detailed series of communications protocols and standardized procedures that were to be followed by all EU institutions to facilitate standardization and collaboration to ensure that public authorities were cooperating and working with the same information.[68] This effort mirrors internal steps taken within Amazon to improve their platform governance and relationship with external partners.[69] The imperatives of better regulation and better platform management both are aimed at earning the trust of their respective constituencies and optimizing their ability to intake and process information to adequately perform their often complex and delicate regulatory functions. As Parker *et al*. observe, "just and fair governance" is a necessary condition for the creation of wealth in a platform's ecosystem,[70] just as it is a necessary condition for the creation of wealth in societies.[71]

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[64] For example, compare Amazon and Intel's internal rules for transparency, fairness, and accountability when dealing with their platform partners (even at the short term expense of their own proprietary products) to OECD's 12 point list of recommendations on regulatory policy and governance. *Platform Revolution*, *supra* note 51, at 176-82; http://www.oecd.org/gov/regulatory-policy/49990817.pdf.

[65] Parker *et al*., *Platform Revolution*, *supra* note 51, at 177-78.

[66] *Recommendation of the Council on Regulatory Policy and Governance*, OECD (2012), http://www.oecd.org/gov/regulatory-policy/49990817.pdf.

[67] Press Release, European Commission, Better Regulation Agenda: Enhancing transparency and scrutiny for better EU law-making (May 19, 2015), http://europa.eu/rapid/press-release_IP-15-4988_en.htm.

[68] *Better Regulation*, *supra* note 25.

[69] Jeff Bezos, Amazon's CEO, issued an internal company decree (dubbed the so-called "Yegge Rant" after the executive who communicated it) when facing communications problems between internal teams and external partners. The decree required all internal teams to utilize widely used protocols to expose "their data and functionality through service interfaces" to both inside and outside users. In fact, the decree banned communication outside of these open channels ("[t]here will be no other form of communication allowed") and required that "all service interfaces, without exception, must be designed up to be externalizable. That is to say the team must plan and design to be able to expose the interface to developers in the outside world. No exceptions." Both Amazon and the European Commission, as part of their respective reforms for better governance, focused on a core theme: increased communications using common toolkits. As Parker *et al*. explain in *Platform Revolution*, successful platform managers need to avoid corporate "silos" and develop "a shared vocabulary and tool set" in order to promote consistency and to give business divisions "a clear view across the entire platform."

[70] *Id*.

[71] *See generally* Douglas North, *Structure and Change in Economic History* (1982); Daron Acemoglu & James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (2013) (theorizing that societal success turns on fair and participatory social and governmental institutions).

In conclusion, there is considerable ambiguity around what constitutes platform regulation. In addition to the inherent difficulties of defining platforms, there is a fundamental mismatch between how scholars and regulators discuss regulation. The theoretical roots of "platform regulation" were not normative, but positive. Platform regulation was not something governments should do, but rather something that certain economic actors did do, and they were identified as such by their behavior. Furthermore, when considering platform regulation by government, it is imperative to consider the platform-as-regulator strand of economic literature. Besides being heavily regulated under current law, as we will argue in the next section, online intermediaries are often incentivized to regulate the markets in which they operate with similar goals to the relevant public authorities responsible for the specific economic sector in which they operate. Platforms who fail to regulate their platforms well often fail in the marketplace and are replaced by platforms that do a better job balancing interests of stakeholders and regulating behavior in their ecosystems.

III. Platform Regulation and the Law of the Horse

As described in the previous section, a number of jurisdictions have undertaken the intellectual and legal exercise of revising their legal systems to respond to perceived shortcomings in existing law, ostensibly made apparent by the manifestation of platforms. For the most part, these exercises reflect no consensus around which specific doctrinal areas require updating. Some platform regulation proponents view the issue to be a question of competition and antitrust law. Others see platforms as a privacy law matter. Still others regard them as indicative of a need to reboot legal regimes governing free expression, pluralism, or still other issues.

Competition lawyer Alfonso LaMadrid has observed that the diversity of issues included in the "platform" conversation are illustrative of a phenomenon that prominent American jurist Frank Easterbrook once characterized as "the law of the horse."[72] In an essay criticizing proponents of a law of "cyberspace," Easterbrook charged that the study of the 'Law of ____' was "indeed intellectually blank," and "suited to dilettantes." There was no law of cyberspace, he contended, any more than there was a Law of the Horse.[73] The importance of the Internet to the economy did not, in Easterbrook's view, warrant a new doctrinal category of law, anymore than the one-time importance of horses to the economy might have warranted the study of Horse Law.

This does not mean that Easterbrook proposed equine anarchy. The absence of Horse Law does not leave horses unregulated. On the contrary; the law governs contracts about horses, injuries caused by horses, gambling on horse racing, crimes committed from horseback, and so on. But it does not govern these items *similarly*. A legal dispute involving a contract for a horse has far more to do with legal disputes involving other contracts than it does with disputes over horse-related injuries. Easterbrook regarded so-called "cyberlaw" similarly. Disputes about contract formation on the Internet have little to do with disputes about defamation on the Internet. To

[72] Alfonso La Madrid, "Regulating platforms? A competition law perspective," Chillin' Competition Blog, Nov. 24, 2015, https://chillingcompetition.com/2015/11/24/regulating-platforms-a-competition-law-perspective/.
[73] Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. L. Forum 207 (1996).

mistake the Internet as the locus of doctrinal coherence in a dispute, Easterbrook contended, was to miss more pertinent connections – connections which have little to do with the Internet.[74]

This critique of "cyberlaw" applies with even greater force to platform regulation. As horses once did, platforms may have considerable importance in the economy. Indeed, putative regulators point out that platforms seem omnipresent in modern society (although this may be partly attributable to imprecision in the definition). But the fact that platforms – however we define them – are important does nothing to change the fact that the legal issues associated with platforms arise in largely unrelated areas of law. At bottom, platform regulation is an amalgamation of complaints in search of a unifying legal doctrine.

Ultimately, however, there is no need to defend platform regulation in itself to complain about platforms. Stated otherwise, we do not need horse regulation to mitigate horse-induced injuries. Platforms' conduct in the marketplace is still regulated by competition law, and platform privacy policies continue to be regulated by existing data protection law.

The question, therefore, is whether existing rights and remedies in these doctrinal areas are adequate to respond to legal wrongs that have been identified. Can competition law respond to alleged injuries caused by anti-competitive platform conduct? Can privacy law respond to violations alleged against platforms?

As discussed below, the answer is that existing legal doctrines already respond to injuries alleged in this context.

IV. Do Existing Tools Address Platform Issues?

The debate over platform regulation is often unhelpfully framed as "should we regulate a platform?" This question bakes into the conversation a misunderstanding that regulation is not already occurring. As discussed above, the platform is regulated by its users, by its operator, and in a variety of existing ways, but existing law. Rather, the question should be better understood as whether government should regulate *more*, and – just as importantly – in what context.

As described in Section I, the EU's "REFIT" program aims to improve regulation, and part of the Commission's ongoing effort focuses specifically on "whether existing tools could be used to do the job – before considering new initiatives."[75] An argument for platform regulation must first establish that existing law doesn't address stated concerns. However, a survey of the regulatory landscape indicates otherwise.

Most theories of harm raised in relation to online platforms pertain to established areas of legal doctrine. Concrete platform-related concerns fall principally into three categories: (1)

[74] In a response to Easterbrook, Lawrence Lessig and others subsequently contended that there were such unifying characteristics. *See, e.g.*, Lawrence Lessig, *What Cyberlaw Might Teach*, 113 Harv. L. Rev. 501 (1999). The continued study of "cyberlaw" in legal education might be viewed as vindicating Lessig's contention, but the fluidity of what *constitutes* cyberlaw study actually substantiates the argument that there is little doctrinal cohesion in these studies.

[75] *See Better Regulation*, *supra* note 25, at 8.

privacy/data protection; (2) consumer protection; and (3) competition/antitrust.[76] Additional, more abstract concerns such as pluralism and economic disruption have also been raised, but as discussed below, are either not specific to platforms, or are non-cognizable. As discussed further below, various existing general-purpose regulatory systems currently apply to these "horse problems," to the extent they exist.

A. Privacy and data protection

Privacy matters are "one of the most common problems" attributed to platforms,[77] although there is no precise consensus on the nature of problems alleged. Some arguments are that current law must be revised to address privacy considerations. Others argue that some online services' privacy practices are "illegal on their face".[78] There is considerable tension here; if indeed current practices are illegal, those practices cannot be evidence of deficiencies in substantive law.[79] Rather, they are evidence of enforcement deficiencies, and under-enforcement of a law is not very good evidence for enacting more law. In fact, it might demonstrate the need to enact less, more efficiently, to ensure more comprehensive enforcement. For this reason, we focus on substantive concerns here.

The substantive concerns voiced generally contain themes pertaining to transparency, trust, "asymmetric power relationships,"[80] and unapproved use of data, collected without consent. Regulators generally worry that users do not control data use or "benefit from this use in their dealings with businesses",[81] or point to consumers' perceived lack of awareness and/or discomfort with how data is used.[82] Some scholars raise similar concerns.[83] Before advancing

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[76] European Data Protection Supervisor, *Privacy and competitiveness in the age of big data (preliminary opinion)*, European Data Protection Supervisor (Mar 2014) at 11-26, https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2014/14-03-26_competitition_law_big_data_EN.pdf.

[77] *Revised transcript of evidence taken before the Select Committee on the European Union: Internal Market Sub-Committee Inquiry on Online Platforms and the EU Digital Single Market*, Evidence Session No. 7, at 2 (2015), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/oral/24970.pdf (statement of Charly Bethet). *See also Commission Staff Working Document: Online Platforms*, European Commission (May 25, 2016), at 33, https://ec.europa.eu/digital-single-market/en/news/commission-staff-working-document-online-platforms ("In recent years, privacy concerns have come to the fore").

[78] Nathan Newman, *Taking on Google's Monopoly Means Regulating Its Control of User Data,* The Huffington Post Blog (Sept. 24, 2013), http://www.huffingtonpost.com/nathan-newman/taking-on-googles-monopol_b_3980799.html.

[79] They may, however, be evidence of deficiencies in enforcement, but enforcement deficiencies will not be cured by additional substantive regulation.

[80] *Platform Neutrality: Building an open and sustainable digital environment*, CNNum Conseil National du Numérique (May 2014), at 29, http://cnnumerique.fr/wp-content/uploads/2014/06/PlatformNeutrality_VA.pdf.

[81] *Id*. at 34. Other than, of course, through the receipt of free services.

[82] House of Lords Select Committee on European Union: Online Platforms and the Digital Single Market (2016) at 56, 58 (U.K.), http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/129/129.pdf.

[83] *See, e.g.*, Annabelle Gawer, Supplementary written evidence (OPL0050) (Oct. 22, 2015), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/23342.html (urging regulation of Google, Amazon, Facebook and Uber, which are "all based on digital data capture, transmission, and utilization over the Internet", and allegedly monetizing data without transparency or disclosure).

"platform regulation" as the solution to the these concerns, it makes sense to consider what privacy and data protection regulations already exist on both sides of the Atlantic.

In Europe, most privacy-related concerns raised in connection with platforms are already governed by multiple directives, as well as supplemental EU regulations. The first relevant directive is the EU Data Protection Directive (95/46/EC), which establishes an extensive horizontal system of regulation over the processing of individuals' personal data.[84] The Directive narrowly constrains the collection and use of data by so-called data 'controllers,' and also provides for member states to constitute national-level Data Protection Authorities endowed with independent enforcement authority. As a result, most aspects of the collection and use of data are strictly controlled, with regulators in each EU Member State being independently empowered to enforce their requirements. The Data Protection Directive (DPD) will soon be superseded by the 2016 General Data Protection Regulation (GDPR), which will enter into force without any additional implementation in May 2018.[85] In addition to implementing a version of the controversial 'right to be forgotten,'[86] the GDPR also creates an affirmative right of data portability, data breach notification obligations, and design mandates.[87] The GDPR also carries forward the framework of the DPD, enforced by regulators residing both in Brussels and member states, with member states empowered to demand documentation of compliance, and possessing the authority to impose fines of exceptional magnitude.[88]

While the Data Protection Directive mostly predated modern Internet services, regulators did not hesitate to construe these services as data controllers governed by the relevant Member state laws. And there is no question that the GDPR was specifically designed to increase regulatory oversight of online platforms. As the House of Lords "Online Platforms" report points out, the GDPR "was designed to address some of the issues that have arisen because of the way online platforms collected personal data."[89]

Independently, the E-Privacy Directive (2002/58/EC), issued in 2002 and updated in 2009 (Directive 2009/136/EC) – sometimes colloquially referred to as "the EU Cookie Law" – also regulates various aspects of behavioral tracking online. The E-Privacy Directive is currently the subject of an EU consultation regarding how it interacts with the future GDPR, which could result in further expansion of these regulations.[90]

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[84] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[85] Regulation 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,

Whereas the Commission's previous Directives resulted in varying implementation across EU Member States, the Regulation is an effectively self-executing instrument and requires no implementing legislation.

[86] Rebranded as a 'right of erasure,' this right resides in article 17 and 19. *Id*., arts. 17, 19.

[87] *Fact Sheet: Questions and Answers – Data Protection Reform*, European Commission (Dec. 21, 2015), http://europa.eu/rapid/press-release_MEMO-15-6385_en.htm.

[88] GDPR, *supra* note 85, arts. 22 & 83.

[89] UK House of Lords, *Online Platforms and the Digital Single Market*, at 60 (2016).

[90] *Public Consultation on the Evaluation and Review of the ePrivacy Directive*, European Commission (Apr. 11, 2016), https://ec.europa.eu/digital-single-market/en/news/public-consultation-evaluation-and-review-eprivacy-directive.

While U.S. privacy law is often characterized as "sectoral" in nature, the Federal Trade Commission has aggressively used its general "Section 5" enforcement authority in defense of privacy interests.[91] Most prominently illustrating the breadth of the agency's authority, in *Federal Trade Commission v. Wyndham Worldwide Corp*., the FTC punished a hotel chain for unfair practices and deceptiveness in relation to its privacy policy after the company suffered a data breach, and intruders gained access to Wyndham customers' personal and financial information.[92] As of early 2016, the agency had brought over 50 general privacy suits (not counting cases alleging spam and spyware violations), including numerous cases against online services, and over 60 cases involving data security.[93] In addition to broad FTC regulation, privacy-related private causes of action – namely the Wiretap Act and the Stored Communications Act – are available to consumers even if regulators take no action.[94] Such provisions have served as vehicles for privacy-related class action litigation.[95]

Given the extent of existing law, it is not surprising that a study commissioned by the Dutch Ministry of Economic Affairs concluded that existing regulatory tools "seem fit to deal with most of the characteristics of digital platforms",[96] and French regulators acknowledged the need to "make better use of current law."[97] Many complaints revolve around actions that are already clearly governed by existing privacy law. For example, the frequent allegation of collection and utilization of data without prior disclosure and consent would violate the existing Data Protection Directive. Following the GDPR, catastrophic remedies could be sought across the EU for such transgressions. Similarly, data collection in the United States without adequate notice and choice would run afoul of the FTC's interpretation of its Section 5 enforcement authority.[98] "Platform" regulations are thus not necessary to respond to these alleged, undisclosed data controller activities. While U.S. and EU privacy and data regulations do not speak directly to "asymmetric power relationships,"[99] the principle that consumers may be at a disadvantage in negotiating over terms of service is a foundational principle of consumer protection law in both jurisdictions, and both therefore tend to construe contract terms in favor of the consumer for this reason.[100]

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[91] 15 U.S.C. § 45(a) (prohibiting "unfair methods of competition" and "unfair or deceptive acts or practices").

[92] 799 F. 3d 236 (3d Cir. 2015).

[93] Federal Trade Comm'n, *Privacy & Data Security Update (2015)* (Jan 2016), https://www.ftc.gov/reports/privacy-data-security-update-2015.

[94] *See* 18 U.S.C. § 2707(a) (SCA); 18 U.S.C. § 2520(a) (Wiretap Act). These statutes also provide for criminal enforcement by federal law enforcement.

[95] Kat Sieniuc, *Google Can't Escape Gmail Privacy Suit, Judge Says*, Law360, Aug. 15, 2016, http://www.law360.com/articles/828337/google-can-t-escape-gmail-privacy-suit-judge-says (discussing *Matera v. Google Inc.*, No. 15-04062 (N.D. Cal. Aug. 12, 2016).

[96] TNO *et al*., "Digital platforms: an analytical framework for identifying and evaluating policy options," (2015), at 3, http://www.ivir.nl/publicaties/download/1703.

[97] *Platform Neutrality: Building an open and sustainable digital environment*, CNNum Conseil National du Numérique (May 2014), at 7, http://cnnumerique.fr/wp-content/uploads/2014/06/PlatformNeutrality_VA.pdf.

[98] *See generally* 15 U.S.C. § 45. Fed. Trade Comm'n, Protecting Consumer Privacy in an Era of Rapid Change (2012), at 26-27, http://ftc.gov/os/2012/03/120326privacyreport.pdf.

[99] *Id.* at 29. *See also Commission Staff Working Document: Online Platforms,* at 14 ("Some of the above concerns are already covered by existing EU law").

[100] It should be noted that differences in negotiating leverage are not specific to Internet services; this also characterizes a user's relationship with their domestic telecommunications provider, for example, where users generally have fewer options in the marketplace.

In short, both U.S. and EU privacy law have long governed privacy matters associated with platforms. Additionally, recent expansions of EU privacy regulation have been specifically aimed at expanding regulatory control over online platforms. Indeed, the European Commission leadership's own statement on the GDPR stated that "work in creating first-rate data protection rules providing for the world's highest standard of protection is complete."[101] The Commission's Working Document on online platforms also indicates that the potent sanctions of the GDPR "should provide incentive for companies to ensure they are fully complying with the data protection rules."[102] Given these characterizations, it is difficult to rationalize not only new regulation, but an entirely new doctrinal construct that would regulate the privacy matters involving platforms.

B. Consumer protection

Many of the "platform" issues that are not subsumed within data protection and privacy law fall within pre-existing consumer protection law.

European consumer protection law includes multiple directives aimed at safeguarding consumers from unfair or deceptive practices, including the Consumer Rights Directive,[103] Unfair Commercial Practices Directive,[104] Directive on Unfair Contract Terms,[105] and Misleading and Comparative Advertising Directive,[106] which collectively aim "to remove barriers to the internal market by building trust in products and services throughout the internal market, on the basis of transparency and good faith."[107]

U.S. consumer protection law is similarly deferential to consumer interests. Like privacy law, federal consumer protection law consists of numerous sector-specific regulations, such as the CAN-SPAM Act,[108] married to an open, horizontal mandate to the FTC's Section 5 authority. Similar state statutes, so-called "mini- or Little-FTC acts," ensure that consumer protection enforcement is supplied at both the state and federal level. Finally, government enforcement is complemented with private rights of action, often enforced through broad class-action

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[101] *Joint Statement on the final adoption of the new EU rules for personal data protection*, European Commission (Apr. 14, 2016), http://europa.eu/rapid/press-release_STATEMENT-16-1403_en.htm.

[102] *Commission Staff Working Document: Online Platforms*, European Commission (May 25, 2016), at 43, https://ec.europa.eu/digital-single-market/en/news/commission-staff-working-document-online-platforms.

[103] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights*, EUR-Lex (Nov. 22, 2011), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0083.

[104] *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*, EUR-Lex (Nov. 6, 2005), http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32005L0029.

[105] *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, EUR-LEx (last updated Sept. 22, 2015), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al32017.

[106] *Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising*, EUR-Lex (Dec. 27, 2006), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006L0114.

[107] *Privacy and competitiveness in the age of big data*, *supra* note 76, at 23.

[108] CAN-SPAM Act of 2003, Pub.L . 108–187117 Stat. 2699 (codified at 15 U.S.C. § 7701 *et seq.*).

proceedings. These actions, usually brought under state law (at least in the consumer protection context) supplement government enforcement with the threat of potent civil liability judgments.

While the EU approach focuses more on ex ante regulation and the U.S. approach demonstrates more aggressive ex post enforcement, both consumer protection systems are tailored to contexts where consumers are not fully informed or are misled about the character and nature of products or services. These regulations also speak directly to another "platform" complaint: transparency. Transparency itself is not a theory of harm; rather, the putative injury is that consumers are inadequately informed in their decision-making, or are affirmatively misled — usually with regard to the use of data.[109] EU Directives prescriptively address non-transparent or "opaque" contract terms, or terms which are subject to change without disclosure. The FTC's Section 5 authority also applies here, and courts routinely refuse to enforce contract terms about which they conclude consumers had no notice.[110]

C. Competition and antitrust

Competition-related theories of harm involving platforms are often described as flowing out of the use of consumer data.[111] Doctrinal imprecision aside, this suggests that legal relief for platform-related issues could be provided either by data protection and privacy law, or competition law. As the previous section illustrates, there are ample regulatory tools for providing relief to a privacy-related theory of harm. As this section demonstrates, competition law is similarly robust.

European competition law resides principally in articles 101-102 of the Treaty on the Functioning of the European Union and related regulations, which prohibit cartelization, anticompetitive agreements, and abuse of a dominant position.[112] The Commission's Directorate General for Competition administers these provisions, although "well-placed" national competition authorities may deal with certain cases.[113]

U.S. competition law is comprised of civil and criminal prohibitions, enforced by government prosecution and private sector litigation before courts. U.S. law is centered on the Sherman

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[109] *Platform Neutrality: Building an open and sustainable digital environment*, CNNum Conseil National du Numérique (May 2014), at 5, 22-23, 27 http://cnnumerique.fr/wp-content/uploads/2014/06/PlatformNeutrality_VA.pdf.

[110] *See, e.g.*, Eric Goldman, *How Zappos' User Agreement Failed in Court and Left Zappos Legally Naked*, Technology & Marketing Law Blog, Oct. 29, 2012, http://blog.ericgoldman.org/archives/2012/10/how_zappos_user.htm (discussing *In re Zappos.com Customer Data Security Breach Litigatio*n, 2012 WL 4466660 (D. Nev. Sept. 27, 2012)).

[111] *See, e.g.*, Andres V. Lerner, *The Role of "Big Data" in Online Platform Competition* (2014) at 63, http://awards.concurrences.com/IMG/pdf/big.pdf (describing "far-fetched" theories that "violating user privacy amounts to anticompetitive conduct, by somehow depriving rivals of user data and thereby inhibiting their ability to compete effectively").

[112] Treaty on the Functioning of the European Union (2012), arts. 101-102, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT (formerly arts. 81-82 of the EC Treaty; formerly arts. 85-86 of the 1957 Treaty of Rome).

[113] *Privacy and competitiveness in the age of big data*, *supra* note 76, at 22.

Act,[114] which prohibits unreasonable restraints of trade, unlawful monopolization, and monopoly maintenance, among other conduct.[115] The Sherman Act is supplemented by the Clayton Act, which focuses on controlling anticompetitive mergers and acquisitions, among other conduct. The Federal Trade Commission is separately empowered by the FTC Act to enforce anticompetitive practices by means of its Section 5 authority, noted previously. U.S. states have their own enforcement capacity, to say nothing of numerous private class actions, which provide additional deterrence to U.S civil and criminal penalties.[116] Like EU law, remedies under U.S. antitrust law may be severe.[117]

Like privacy law, antitrust laws already govern conduct in the "platform" context, independent of any proposed *sui generis* platform regulation. Indeed, some of the most prominent antitrust enforcement victories of the past three decades have involved companies whose products are at least nominally described as platforms.[118] These claims have been brought notwithstanding arguments that competition law no longer works due to new technology. Such arguments are nearly as old as antitrust law itself.[119] A U.S. antitrust modernization effort concluded that antitrust can and has adapted to new technology over time, and cautioned against calls for new industrial policy upon each wave of new innovation.[120]

Platforms may in fact demonstrate certain special characteristics, like network effects, tipping, and multi-sidedness (if indeed multi-sidedness is a requirement of one's definition of "platform").[121] There is relatively little that is unique about the application of antitrust *law* in the platform context, however. The concerns raised by platforms are, according to French regulators, "the usual concerns in competition economics: abuse of a dominant market position, predatory behaviour, vertical restraint of trade, etc."[122] Competition law has wrestled with these claims before; they fall well within the existing toolset.

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[114] 15 U.S.C. § 1 *et seq*.

[115] *Id.* (The Sherman Act addresses both single firm conduct and cartels, and provides both civil and criminal remedies.).

[116] Robert H. Lande & Joshua P. Davis, *The Extraordinary Deterrence of Privacy Antitrust Enforcement: A Reply to Werden, Hammond, and Barnett*, 58 Antitrust Bulletin 173, 174-75.

[117] Id. at 174.

[118] *See, e.g.*, United States v. Microsoft Corp, Dkt. No. 98-1232 (D.D.C. Nov. 12, 2002); United States v. American Express Co., Dkt. No. 10-4496 (E.D.N.Y. Feb. 19, 2015); United States v. Apple, Inc., Dkt. No. 13-3741 (2d Cir. Jun. 30, 2015),

[119] *See, e.g.*, Jonathan M. Jacobsen, "Do We Need a 'New Economy' Exception for Antitrust?" Antitrust Magazine, at 89 (Fall 2001) (recounting prior examples).

[120] U.S. Antitrust Modernization Comm'n, Report and Recommendations (April 2007), at 9, 22, http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (Policy Recommendations 1, 2, 62).

[121] This is a source of disagreement. *See, e.g.*, TNO *et al.*, "Digital Platforms, *supra* note 96, at 11 ("Contrary to the definition used by the European Commission... this study does not limit the definition to two (or multi)- sided markets... [T]here are firms with a technical basis for delivering content to end-users that cannot be considered multi-sided but are often considered digital platforms").

[122] *Platform Neutrality, supra,* note 26 at 20. *See also* Revised transcript of evidence taken before The Select Committee on the European Union: Internal Market Sub-Committee Inquiry on Online Platforms and the EU Digital Single Market, Evidence Session No. 7 (2015), at 2 (statement of Charly Bethet) ("For business-to-business relationships, most of the concerns might be addressed by using ordinary law, especially competition law").

While competition law is frequently charged with being outmoded when it comes to technology,[123] challenges to its capacity are due less to characteristics of technology than to macro-institutional shortcomings. Problems like the glacial pace of legal and regulatory proceedings, and coordination problems between various enforcers are not unique to the "new economy."[124]

To the extent there are limitations to current antitrust analysis when multi-sided markets are analyzed, modernization should occur in the context of competition law, rather than via *sui generis* platform regulation. In fact, the economics of multi-sided markets does appear to demand new thinking about competition regulations for certain Internet platforms. This is not necessarily in the way that interventionists think, however. If indeed multi-sidedness is the primary characteristic of a "platform" (an open question, as noted above), then market definitions cannot focus on one side of the market and neglect others, nor can they discount the welfare of customers on one side or the other.[125] In short, "modernizing" antitrust analysis to account for multi-sided markets may weaken some cases for enforcement.

D. Other platform-related concerns

Privacy, data protection, consumer protection, and antitrust and competition law are not the only contexts in which platform regulation is advanced. A number of other concerns, some abstract, are also raised in relation to platforms, including copyright infringement, free expression and pluralism concerns, for example. Generally, we dismiss these as either misplaced or non-cognizable.

Reexamining copyright regulation, for example, is seriously misplaced in the platform context. First, intellectual property rights are regulated through the Information Society Directive, which undoubtedly applies to platforms (however defined), and the E-Commerce Directive clearly spells out the liability of intermediaries. To the extent this issue requires reexamination, that examination cannot ignore the existing parameters of the E-Commerce Directive's notice-and-takedown provisions. Online platforms are in fact a species of intermediary, which common law copyright systems have long regulated via secondary liability doctrines, although these doctrines are in fact under-developed in European copyright law. As a result, doctrines of *direct* liability are called upon to do more work than is appropriate. And if any doubt remained whether platform-related copyright issues could be addressed in the context of copyright law instead of

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[123] *See, e.g.*, Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L. Rev. 925, 931-33 (2001) (concluding "antitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competitive issues presented by the new economy").

[124] *Id. See also* House of Lords Select Committee on European Union: Online Platforms and the Digital Single Market (10th Report), 2015-16, at 4 (citing "The slowness of competition enforcement, as exemplified by the ponderous Google case, is cause for concern in such fast-moving markets").

[125] David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platforms*, (2013), at 23, http://rschmal.scripts.mit.edu/docs/2015%20E-S%20MSPs%20and%20Antitrust%2030Jan2013%20version.pdf. *See also* Parker *et al*., *Platform Revolution*, *supra* note 51, at 228 (characterizing platform competition composed of "three levels: platform against platform, platform against partner, and partner against partner").

platform regulation, they were dispelled in late August 2016 when a leaked Commission draft on copyright reform in the Digital Single Market proposed to do exactly that.[126]

We are similarly skeptical that algorithms or content guidelines in private commercial venues are appropriately regulated in any context, including that of platforms. Were governments to engage in algorithmic decision-making to suppress content (for example, what is to be deemed hate speech), free expression concerns might be implicated. With respect to private actors, however, these are not and should not be cognizable injuries, because online platforms are not state actors, and no individual platform is a necessary facility for speech, with the possible exception of domestic broadband providers — whom regulators seem to think are not online platforms. In any event, algorithms are neither specific to nor necessary for a platform.

E. Policymaker views on the viability of "platform regulation"

Complaints advancing "platform regulation" tend to be scattershot, and lack internal coherence. They also tend toward hypotheticals, and to the extent that specific platform-related concerns have been articulated, these are better visited in the context of existing legal doctrines.

Some policymakers have accepted that new *sui generis* "platform law" is unwise, but this remains the subject of internal debate. In a non-paper commenting on the European Commission's platform consultation, for example, the Dutch Government concluded that "[g]eneric digital platform regulation is not necessary", including with respect to platform neutrality.[127] Similarly, the European Commission memorandum leaked to the Wall Street Journal (noted in Section I.A.2 above), characterized the views of the Commission's Directorate-General for Competition as follows:

> To apply principles on a horizontal, systematic basis extrapolated from a specific case [Google] could be counterproductive and restrict the future development of platforms (including European ones). Given that the differentiation and selection of information is inherent to the business of platforms, it is necessary to be cautious and pragmatic in one's approach to the issue.

Commission personnel appear to have been like-minded in a draft of the Online Platforms and Digital Single Market Communication, which leaked in April 2016. That document frankly concluded that "at this stage, there is no compelling case for general ex-ante regulation of online platforms across the board."[128] When the final Communication issued one month later, however, this language was conspicuously absent from the same section.[129]

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[126] Eleonora Rosati, *Here's the draft Directive on copyright in the Digital Single Market*, The IPKat Blog (Aug. 31, 2016), http://ipkitten.blogspot.be/2016/08/super-kat-exclusive-heres-draft.html (hosting leak and discussing, *inter alia*, alleged "value gap" in intermediary remuneration).

[127] *Non-paper from the Netherlands on the consultation 'Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy'* at 3, https://zoek.officielebekendmakingen.nl/blg-661677.pdf.

[128] *See* Draft Communication from the Commission to the European Parliament, *Online Platforms and the Digital Single Market* (May 2016), at 16, *available at* http://www.euractiv.com/wp-content/uploads/sites/2/2016/04/2917_001-1.pdf. *See also* Catherine Stupp, *Commission wants to regulate US-dominated online platform market*, EurActiv (Apr. 26, 2016),

V. Conclusion

To summarize our story so far: The term "platform" originated in computer science and social science communities, where it served the primarily descriptive purpose. So too did platform "regulation." Due to vagueness, imprecision, and possibly interventionists' interest in expanding the mandate of the bureaucracy, the term has evolved into a proposed charter for online regulation with no specific boundaries. There is a particular irony to this result, given that one distinguishing characteristic of platforms is that they share many goals with the regulators whose judgment would supplant their own. This outcome — a "Ministry of Platforms" — is not without risk. Not only would a new *sui generis* regulatory approach to platforms *qua* platforms inevitably result in duplicative regulation, but regulations would likely be subverted from their initial purpose. When theories of regulation are not anchored in firm foundational principles, the system is susceptible to drift, capture, and manipulation.

"Platform regulation" may drift or sprawl, losing sight of the initial, articulated goal. Without a clear guiding policy, regulators and courts may simply attempt rough justice, or may adopt their own objectives, which can be at odds with legislators' original intentions. For example, in the mid-20th century U.S. antitrust law suffered through a well-documented era of "infidelities," according to Christina Bohannan and Herbert Hovenkamp, in which enforcement occurred despite the fact that "injury to competition was so often absent." The cause? "[L]egal policy became disconnected from its articulated goals and began pursuing other ends," and "ultimately fell to excessive government regulation in markets that actually worked much better on their own than policy makers thought." U.S. policies thus penalized various vertical practices which were not injurious to competition, and possibly pro-competitive.[130] Platform regulatory systems will also be prone to capture by the very industry which they regulate,[131] whereas laws of general application are not.

One possible explanation for policymakers cobbling unrelated issues under the umbrella of platform regulation is that they simply do not understand the subject matter. But as noted at the end of Section IV, many regulators *do* appreciate that "platform regulation" is a hodgepodge. In at least some contexts, platform regulation proponents are working backwards from their desired result: imposing additional constraints on the economic influence of a specific set of companies, and are drawing whatever circles are necessary to encompass them. In these cases, platform regulation is an outcome in search of a policy rationale. Hence, both the definition of "platform" and the breadth of the undertaking will necessarily be amorphous and malleable, so as to ensure the desired outcome. Imprecise regulatory obligations are not a symptom of definitional carelessness; it is the motivation.

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https://www.euractiv.com/section/digital/news/commission-wants-to-regulate-us-dominated-online-platform-market/ (reporting leak).

[129] Draft Communication from the Commission to the European Parliament, *Online Platforms and the Digital Single Market*, *supra* note 128 at 15.

[130] Christina Bohannan & Herbert Hovenkamp, *Creation Without Restraint: Promoting Liberty and Rivalry in Innovation* (2012), at 35.

[131] George Stigler, *The Theory of Economic Regulation*, 2 Bell J. of Econ. & Mgmt Sci. 3-21 (1971).

Of course, this is at odds with principles of good regulation. Prospectively, we endorse a straightforward checklist for new sectoral regulation, drawing from comments offered by Ofcom in response to the UK's House of Lords platform inquiry: [132]

1) Identify specific, concrete harms;
2) Ensure there is a clear and targeted definition of whom the regulation applies to (and, equally important, allows the identification of companies to whom it doesn't apply);
3) Verify that regulatory obligations are relevant to the actual business activity undertaken by those providers that fit the definition; and
4) Confirm that current regulations are inadequate to deal with the identified harms.

To date, online platform regulation fails on all four counts. First, many harms identified are non-specific and abstract. Alleged injuries are often theoretical, and some are not even rooted in sound conceptual theory, such as the biasing of algorithms to unfairly disfavor ecosystem partners, behavior which would run counter to the imperatives of governing a successful platform. Similarly, concerns about the lack of algorithm neutrality or threats to societal pluralism are anything but concrete. A truly neutral platform, which made no decisions on what to promote or how to prioritize content, would be useless for users. Moreover, plurality complaints accusing platforms of over-censoring speech are lodged by the same governments that are simultaneously pushing online platforms to do more to control 'objectionable' content. In many cases, regulators' judgment, which is neither neutral nor consistent, would be substituted for that of companies whose success is predicated on providing utility to the very same users that regulators purport to protect.

Second, we have discussed how the definitions of online platforms are an open set, suggesting broad range of characteristics shared by *some* platforms instead of a falsifiable definition. This definitional ambiguity is related to Ofcom's third criteria: because the scope of "platform" is so broad, regulatory proposals are often irrelevant to the companies identified as examples of platforms. Putative platforms like ride-sharing companies, user-generated content sites, search engines, e-commerce sites, and mobile app stores are sufficiently diverse that a single set of regulatory obligations will often be inapplicable. Moreover, arbitrarily excluding offline platforms and brick-and-mortar competitors from the obligations runs counter to the "level playing field" principle espoused by the Commission in its online platforms Communication. The characteristics attributed to online platforms, including operating multi-sided markets, algorithmic decision making, the heavy reliance on data, the use of ICT technology, and the creation of strategic dependencies, are reflective of modern business, both online and offline. As such, using that as a starting point to a discussion of regulating companies that happened to be "born digital" makes little sense.

Finally, as we discussed in Section IV, to the extent that some of the harms identified are cognizable, those harms fall clearly into existing categories of law, which are already frequently used to address problems related to consumer harm, competition, unfair trade practices and deception.

[132] *Written evidence from Ofcom (OPL0047)*, *supra* note 29, at para. 14.

Many platform regulation proponents appear to be working backwards from the set of companies they wish to regulate, toward a rationale for doing so. While malleable definitions and sweeping, ill-defined obligations maybe be expedient this political purposes, these purpose-built regulatory regimes will live on long after their intended targets. As "platform" business models become increasingly commonplace, and brick and mortar firms increasingly digitize, the scope of the economy that is covered by platform regulation will undoubtedly increase.[133]

Insofar as interventionists seek to boost domestic startups over established online platforms, they may inadvertently cause the opposite.[134] Instead of fomenting competition and disruption by local heroes, regulations may disproportionately burden those smaller entrants and new competitors.[135] Large established companies, on the other hand, will employ lawyers, lobbyists, and regulatory specialists to navigate complex compliance obligations. As incumbent entities utilize their familiarity with the regulatory apparatus to disadvantage upstarts, platform regulation may create the future it aims to avert.

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[133] Michael A. Cusumano, *Platforms versus products: observations from literature and history*, Advances in Strategic Management, Volume 29, 35-67 (2012). ("In fact, the more look inside modern society and it technological artifacts — the computer, cell phone, media player, home entertainment systems, or even the automobile — the more we will see platforms, and platforms within or on top of platforms.")

[134] Günther Oettigner, *Speech at Hanover Messe: Europe's Digital Future*, European Commission (Apr. 14, 2015), https://ec.europa.eu/commission/2014-2019/oettinger/announcements/speech-hannover-messe-europes-future-digital_en ("Industry in Europe should take the lead and become a major contributor to the next generation of digital platforms that will replace today's Web search engines, operating systems and social networks.").

[135] Daniel O'Connor, *Globalizing European Internet regulation will not necessarily benefit European companies*, Project DisCo (Mar. 11, 2015), http://www.project-disco.org/competition/031115-globalizing-european-internet-regulation-will-necessarily-benefit-european-companies; *see also* Tim Wu, *In the Grip of Internet Monopolists*, Wall St. J. (Nov. 13, 2010), http://www.wsj.com/articles/SB10001424052748704635704575604993311538482 ("no one has ever conceived a better way of scotching competitors than to make them comply with complex federal regulation.").