COMPETITION AND PLATFORMS REGULATION:

Case study on interoperability of social networks

SUMMARY

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CONTEXT AND PURPOSE OF THE STUDY

Regarding issues raised by the digital economy, many discussions are ongoing at national and European level to regulate large online platforms, especially non-European ones. In this context, several regulatory tools are discussed, one of them is the interoperability of services. Interoperability of services was considered to improve competition in the digital era in the citizens' consultation on the "general review of new digital regulations" organised by the French Digital Council in 2019[1]. However, its deployment raises many questions that the Council aimed to study, in order to highlight its potential benefits and risks for a given sector:

- the public policy objectives of interoperability of social networks (1);

- the scope of the platforms and functionalities to be subject to interoperability (2);

- the challenges of interoperability for social networks and their users (3);

- the legal bases of an interoperability obligation (4).

WHAT IS INTEROPERABILITY?

There is no commonly accepted definition of interoperability with regard to digital services. Etymologically, the term interoperates comes from the Latin inter operis, meaning to work together. There is a definition in the Directive on the legal protection of computer programs as "the ability to exchange information and to use each other's information"[2], but it is specific to the case of software protection. Without being defined, interoperability is also one of the purposes of electronic communications regulation[3]. Finally, interoperability is known from copyright when it regulates the use of technological measures for the protection of works.

The Council considered necessary to carry out a concrete case study on the relevance of this measure. It choses to focus on social networking platforms, which are often targeted by interoperability proponents as communication services. However, interoperability can be applied to other types of platforms, so the issues and recommendations from this study can be useful for a more global framework for regulating platforms.

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[1] Conseil national du numérique : Synthèse des Etats Généraux du numérique « Concurrence », mai 2020.
[2] §10 of Directive 2009/24/CE of 23 April 2009 on the legal protection of computer programs.
[3] Article 61 of Directive 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code.

WHY INTEROPERABILITY?

It is sometimes presented as a miracle solution to the competitive issues raised by major online platforms. However, it is necessary to determine in which market(s) it should be implemented and what its objectives would be. In the case of social networks, defined as "*services that allow users to connect, share, communicate and express themselves*" on the web or on a mobile application[4], interoperability could allow users of one social network to interact with and/or change the services of other social networks. This differs from data portability, which simply allows users to recover their data and transfer them to another social network, under Article 20 of the General Data Protection Regulation (GDPR).

In the social network market, several public policy objectives can be assigned to interoperability. First and foremost, it would allow to animate competition between platforms by fighting against network effects; it would also enhance the freedom of choice of consumers who could switch more easily from one social network to another. At the same time, interoperability could strengthen users' control over their data, in line with the right to data portability. Finally, some see it as a tool for combating hate content online.

WHICH PLATFORMS?

Before determining the forms that interoperability can take, it is necessary to define the social network platforms that could be concerned. **All the stakeholders interviewed agree that only the largest social networks should be subject to an interoperability obligation where appropriate**, in order not to impose disproportionate obligations on emerging social networks. Should we then restrict ourselves to the dominant players on the social network market within the meaning of competition law or go further? The question deserves to be asked, because the delimitation of the relevant market, which consists of products and services that are substitutable for the consumer, is hampered here by the fact that existing social networks are free of charge and differ from each other. In any case, **competition law alone cannot tackle all the negative externalities generated by the major social networking platforms.**

Therefore, the Council examined the different approaches that characterise systemic or structuring platforms, in order to reach a common position. While the constituent criteria may differ, the reasoning is the same: **because of their inescapable position on the market, certain players should have specific rules imposed on them, such as the interoperability of their services.** Therefore, a range of indices can be considered to define the "systemic" nature of the platforms: the nature of the activity (management of access to information, activities of general interest or of a regalian nature, etc.), the existence of massive network effects, the control of a considerable volume of non-replicable data, the unavoidable situation in a multifaceted market or the capacity of the player to define market rules himself, but also the overall effects on the community outside the economic field and its power of influence on sensitive areas of the social link, or the relationship of dependence existing between the platform and users.

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[4] European Commission, decision of 3 October 2014, FACEBOOK/ WHATSAPP, COMP/ M.7217, point 46.

WHICH FUNCTIONALITIES?

Regarding the hearings, the implementation of a common protocol for one or more functionalities is preferred to the opening of existing APIs of the major platforms. An approach by functionalities rather than by categories of platforms would indeed make it possible to avoid a dependence of the smallest actors. In the telecommunications sector, the subscriber of one operator can directly contact the subscriber of another operator. Similarly, for e-mails, the subscriber of one service can contact any other person of another service.

What about social networks, which have a wider variety of functionalities? During the hearings, the players did not support full interoperability, which would consist in making all functionalities interoperable. Therefore, the Council identified three step-by-step options for interoperability between social networks - not exclusive of each other :

> – **1) Social graph interoperability**, which would allow the user to maintain the relationships acquired on the previous social network when joining a new one;
>
> – **2) Instant messaging interoperability**, which would enable the user on network A to send or receive messages from a user on network B;
>
> – **3) Content interoperability**, which would allow the user to view (option 3.1), publish (option 3.2) or even interact with content (option 3.3) on a third party social network.

WHAT IMPACTS?

Despite the fundamental and plural objectives that interoperability could pursue, it is not certain that users, or even emerging social networks, would be willing to benefit from it. Indeed, the freedom of choice of consumers promoted by interoperability may be discussed in practice, due to the segmentation of uses and multi-homing. This increase in their freedom of choice could, moreover, be counterbalanced by a decrease in their right to privacy, considering the exchanges of personal data that interoperability implies. Any initiative in this respect should therefore be accompanied by strong data protection safeguards, in agreement with national and European regulatory authorities. As regards social networks - both dominant and emerging - the hearings show a mixed cost-benefit balance. While the financial cost in the strict sense may be moderate, major platforms could be affected by a loss of revenue, as their business model is based on the exploitation of users' personal data. Above all, interoperability would not always lead to better competition for the benefit of smaller social networks, or even as part of their innovation strategies.

UNDER WHICH REGULATION?

In positive law, the regulator has several potential legal bases for ensuring the interoperability of social networks, such as electronic communications law or competition law. Plus, the notion of the right to interoperability tends to emerge through copyright and consumer law. However, the limits of existing rules for dealing with the issue raise questions about the relevance of a new form of regulation.

On the principle of regulation, a cautious approach is suggested by the Council.

- Indeed, regarding the risks raised in the impact assessment, it would be preferable to first examine the effects of the implementation of the right to data portability, allowing users to transfer their data from one social network to another.

- Following this examination, if the Government wished to introduce a requirement for interoperability, this initiative should be part of a more global reform of the regulation of platforms that would integrate economic and societal aspects, at the European level (*Digital Services Act*).

- Asymmetric and ex-ante regulation could thus specifically target systemic platforms, including in their relations with consumers, as a complement to the P2B Regulation[5], which would continue to apply to all platforms in their relations with user undertakings.

- Where appropriate, interoperability could be recognised as a consumer right, insofar as it meets the needs of consumers to control their data and have their digital tools communicated.

On the implementation of regulation, the Council recommends the application of the principles of necessity and proportionality in several respects.

- The scope of the interoperability obligation should be strictly limited to systemic social networks, defined both by quantitative criteria (market share, number of users, etc.) and qualitative criteria such as the possession of essential data or the impact on users' cognitive systems.

- The degree of the obligation of interoperability should be minimal, taking into account the potential negative impacts on social networks on the one hand and on users on the other hand, such as the risk for privacy. Thus, a step-by-step approach should be favoured (option 2: instant messaging interoperability or option 3.1 content consultation interoperability).

- The format of the interoperability obligation should be part of a general framework, leaving flexibility to national regulators as well as agreements between platforms, such as for the telecommunications model. The choice of competent regulator could vary according to the interoperability objectives and options: competition authority, electronic communications authority (especially for option 2), or audiovisual communications authority (especially for option 3.1).

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[5] Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

LIST OF HEARINGS

– Mr. Serge Abiteboul, French informatician, member of ARCEP and INRIA

– Mr. Rafael Amaro, Director of the Competition Law Department at Trans Europe Experts

– Mr. Stéphane Bortzmeyer, French informatician specialized in networks at the French Association for Internet Naming in Cooperation (AFNIC)

– Mr. Régis Chatellier, member of the laboratory of digital innovation (LINC) at CNIL

– Mr. Dominique Chaubon, head of Service activities and Competition - French Treasury (DG Trésor)

– Data Transfer Project team : Mr. Jesse Chavez (engineer at Google) and Ms. Alethea Lange (public affairs analyst at Google)

– Mr. Arthur Dozias, project manager in the economy, markets and digital department at ARCEP

– Mr. Thomas Fauré, CEO of Whaller

– Mr. Thibaut Girka, co-developer at Mastodon

– Mr. Dominique Hazael-Massieux, president of the workshop on the interoperability of social networks at W3C

– The Privacy Policy team of Facebook EMEA

– Mr. Stéphane Lhermitte, economy, markets and digital director at ARCEP

– Mr. Arthur Messaud, lawyer at Quadrature du Net

– Ms. Marion Panfili, Deputy Head of Service activities and Competition - French Treasury (DG Trésor)

– Mr. Benoît Piédallu, engineer, member of the Quadrature du Net

– Mr. Pierre Antoine Rault, developer at Peertube

– Mr. Nicolas Rolin, data scientist at the Directorate-General for Enterprises (DGE)

– Ms. Chantal Rubin, head of the regulation of digital platforms at the Directorate-General for Enterprises (DGE)

– Ms. Marne Strazielle, communications director at Quadrature du Net

– Mr. Lucas Verney, engineer at the Directorate-General for Enterprises (DGE)

– Ms. Célia Zolynski, Director of the Intellectual Property and Digital Law Department at Trans Europe Experts.

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ABOUT THE FRENCH DIGITAL COUNCIL

The French Digital Council (Conseil national du numérique, abbreviated CNNum) is an independent advisory commission created on 29 April 2011 by the French presidential decree n°2011-476. Its articles of association were amended by the decree of December 8, 2017. Its members are appointed by order of the Secretary of State for Digital Affairs for a period of two years.

The Council issues independent opinions and recommendations on any question relating to the impact of digital technologies on economy and society. The government can consult the Council on new legislation or draft regulations.

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