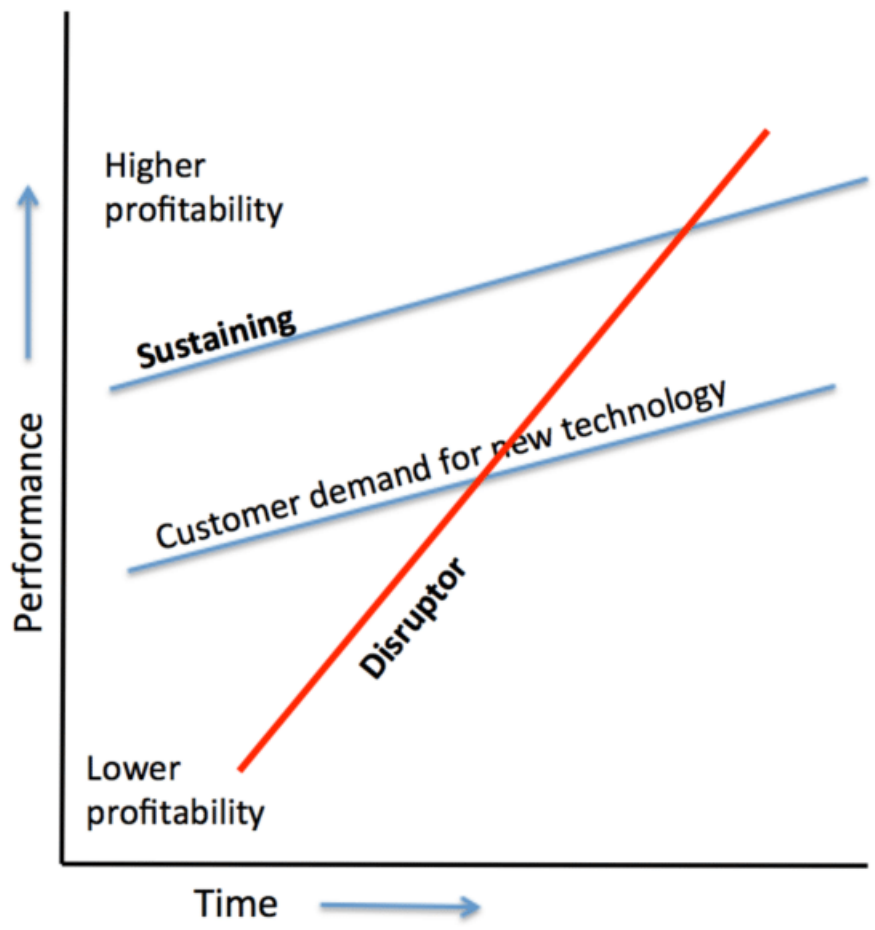


Market developments in the age of disruption

How emerging technologies and business models are revolutionizing postal and audiovisual markets from an economic and regulatory point of view

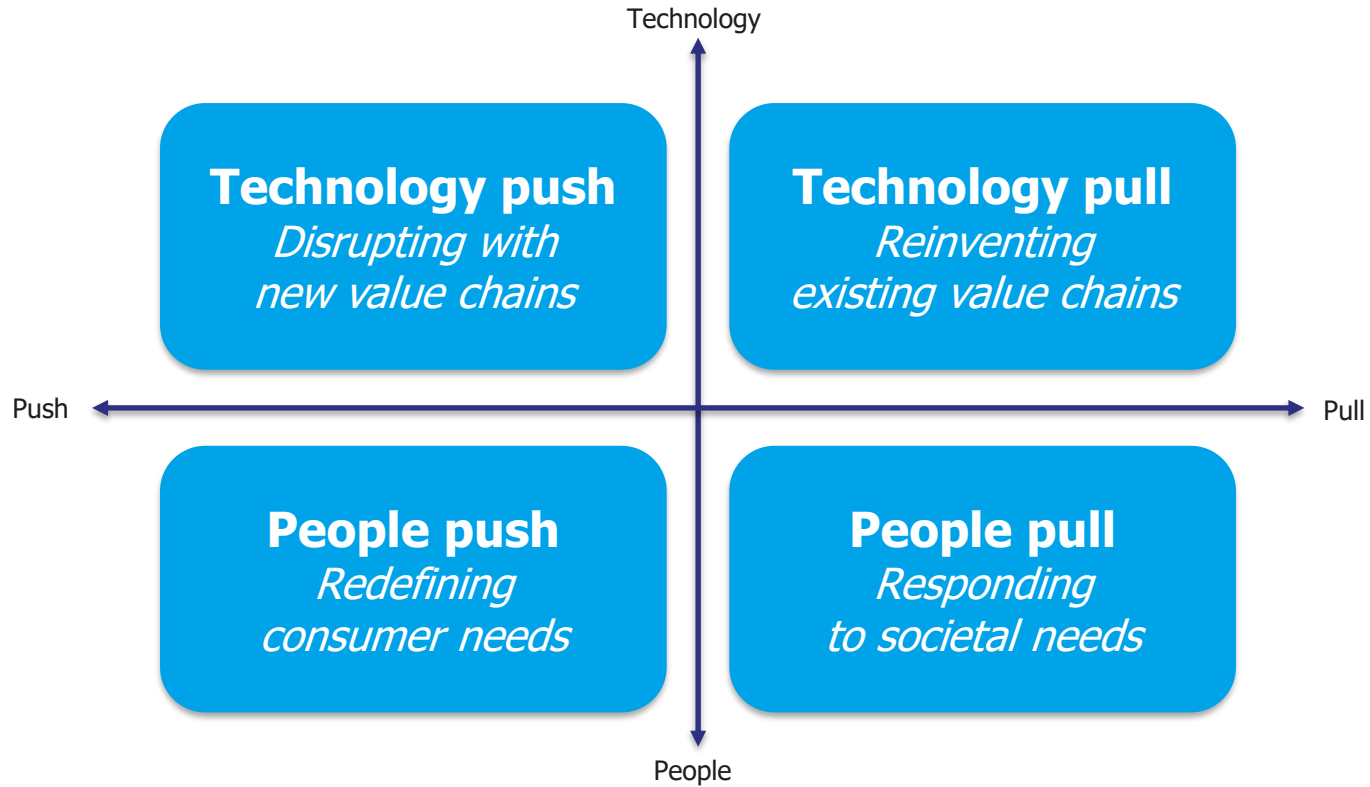
Bernardo Herman, Member of the BIPT Council

9TH ANNUAL COPENHAGEN ECONOMICS POSTAL & DELIVERY CONFERENCE – 8 May 2023



Disruption

Schumpeterian economies





Platforms have emerged in many markets

amazon

 YouTube

lyft


Alibaba Group
阿里巴巴集团

NETFLIX

Uber

ebay

 TikTok

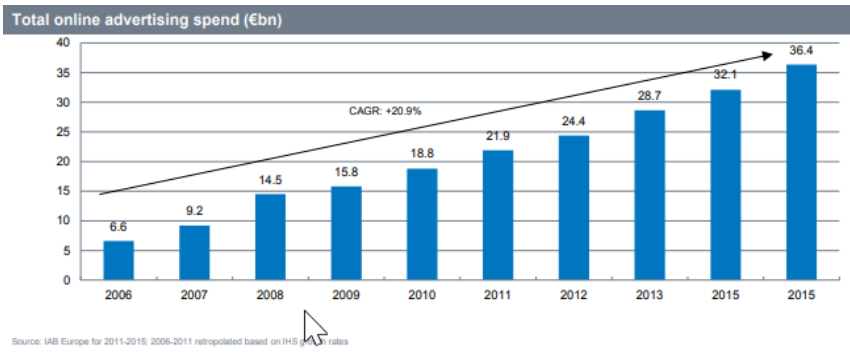
 Meta



Disruption in the audiovisual sector

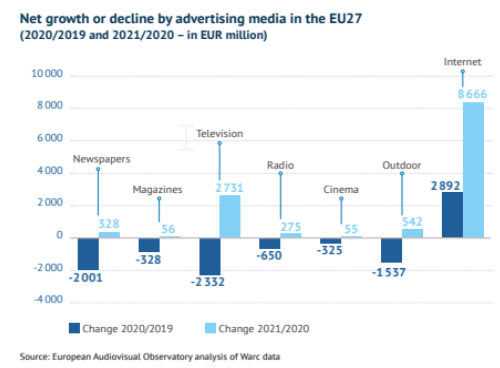
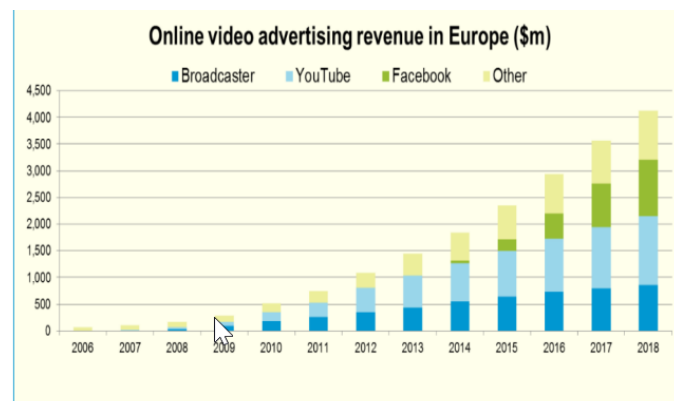


The rise of online streaming and advertising



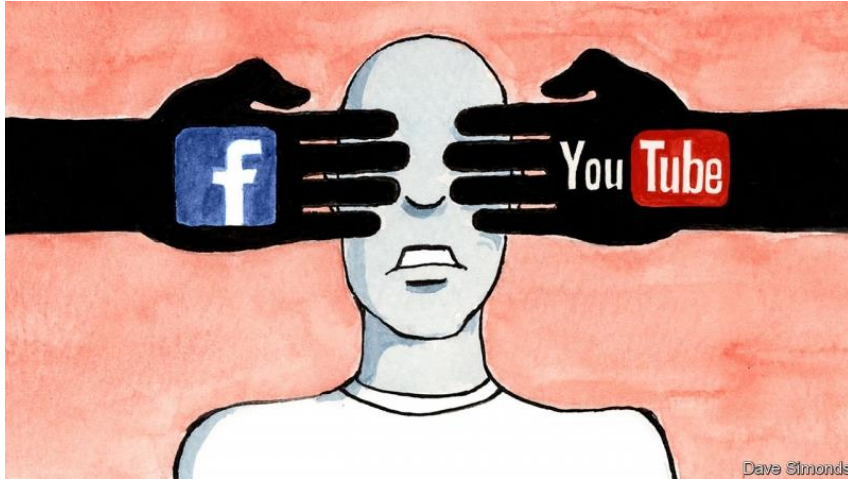
□ According to IAB Europe, total online advertising reached 92 Billions EUR in 2022

□ In 2016, "IHS estimated that by 2018, 57.2% of online video advertising generated in EU-5 (DE, ES, FR, GB, IT) will be captured by Google and Facebook. European broadcasters are expected to only capture less than 1/4 of the European online video ad market (see Figure 34). → In 2023, this share reached around 65%", EAO, The online advertising market in the EU, 2016.



Should the tech giants be liable for content?

The Economist, September 9th 2018



- *“Back when Google, Facebook, Twitter and others were babies (...) Lawmakers reasoned that the fledging online industry needed to be protected from costly lawsuits. That position is hard to maintain today. Online giant no longer need protection: they are among the world’s most successful and influential firms. (...) The platforms’ algorithm curate the flow of content; they help decide what users see.”*

A journey to regulating audiovisual platforms

BILAN NOUVEAUX MÉDIAS

10 January 2013

CSA Towards a graduated editorial responsibility for video sharing platforms?

- Terrestrial increasingly offer equivalent viewing experience to consumers who can hardly notice the source of the content, whether being provided through a TV channel or through the internet.
- Customers' expectations, as regards protection rules tend to be similar in the non-linear environment.
- Do video sharing platforms still play a passive role when:
 - they actively promote user-generated content (highlighting on their users profiles)?
 - make recommendations based on their customers preferences?
 - hold the right to modify these contents?
 - derive advertising revenues from the users?

October 2014

March 2016 – The Platform is the Message!

August 2016 Study Digital natives & Pub



June 2014

Distribution platforms: open your eyes!

October 2015



Case New Media Online C-347/14

April 2016

L'ACCÈS AUX MÉDIAS AUDIOVISUELS

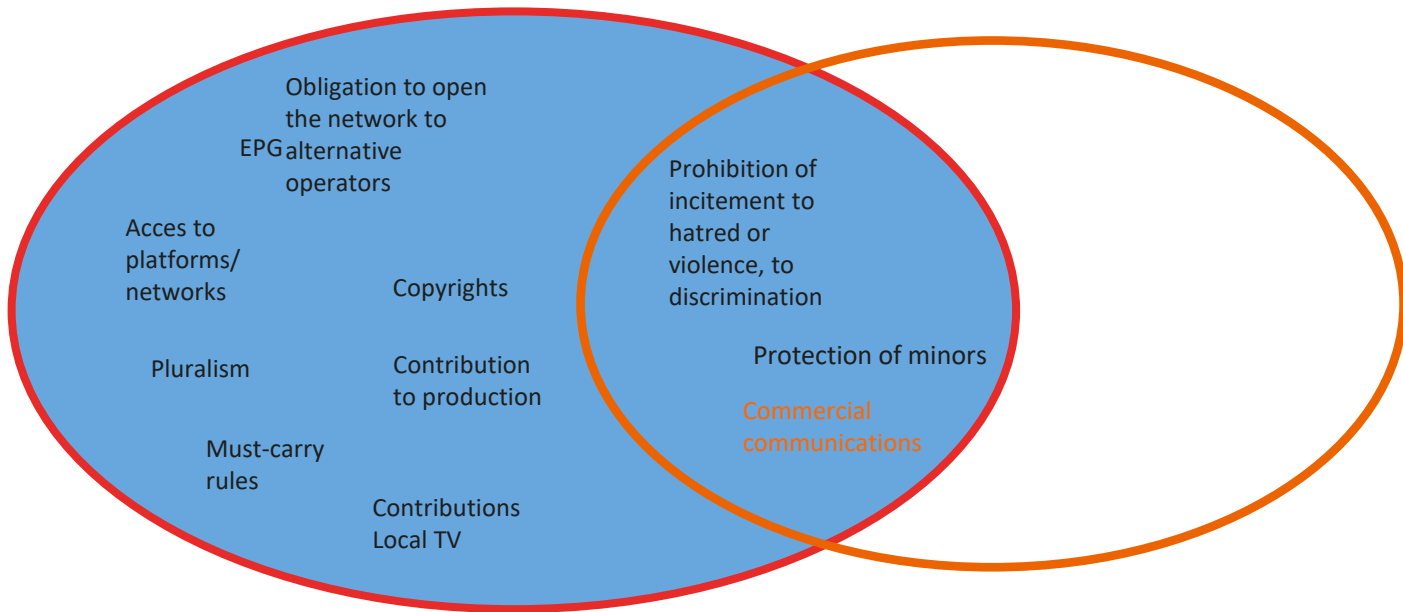
PLATEFORMES & ENJEUX



Two worlds that partially overlap

Distributors / aggregators

Audiovisual platforms





Are the form and content of short videos comparable to the form and content of TV broadcasting ?

CJEU Case C-347 New Media Online GmbH

- *(21) Like a television broadcast programme, the videos at issue in the main proceedings are aimed at a mass audience and are likely to have a clear impact on that audience ...Consequently, the manner in which the videos at issue are selected is no different from that proposed in the context of on-demand audiovisual media services, which fall within the scope of that directive*
- *(23) ...those videos accordingly compete with the news services offered by regional radio broadcasters. That is also true for videos of short duration...which compete with sports channels and entertainment programmes*
- *(24) ...the concept of programme must be interpreted as including the provision of videos of short duration consisting of local news bulletins, sports and entertainment clips*





The Platform is the message!

- March 2016 – proposal to create a new subject of rights and obligations in the AVMSD. This new category would **cover all platforms distributing audiovisual media services**. Obligations linked to this category could relate to the access to these platforms, findability of European works, and investment in local content for instance.

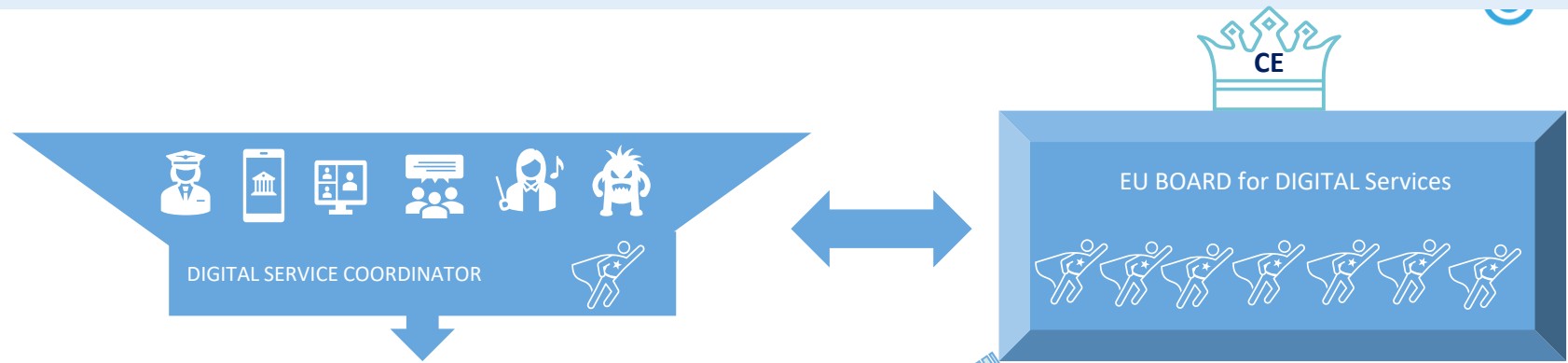
Aggregators-distributors

Video-sharing platforms

- Service as defined by Art 56 & 57 of the TFEU
- Made available by means of an electronic communication network
- Whose principal purpose **or** of a dissociable section thereof **or** an essential functionality is devoted to **providing programmes, user-generated videos or both** to the general public

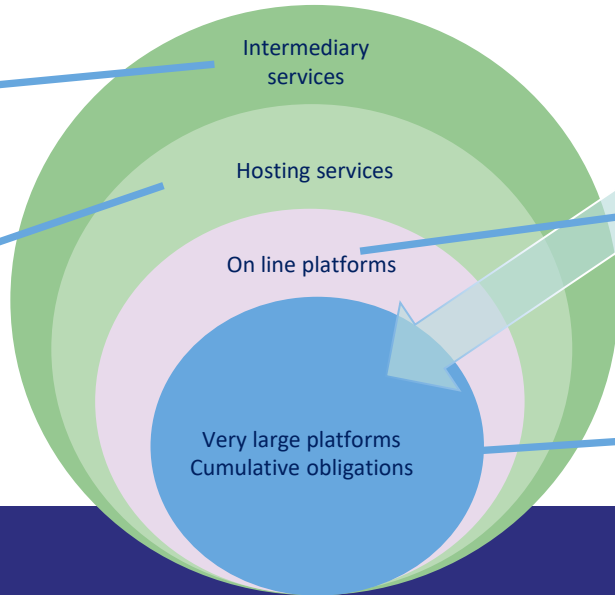
- For which the video-sharing platform provider does not have editorial responsibility
- In order to inform, entertain or educate
- And the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithm in particular by displaying, tagging and sequencing

Main features of DSA Governance



- Points of contact & legal representatives
- Clear terms and conditions & diligent, objective, proportionate enforcement
- Transparency reporting

- Notice & action
- Information to notice providers
- Information to content provider

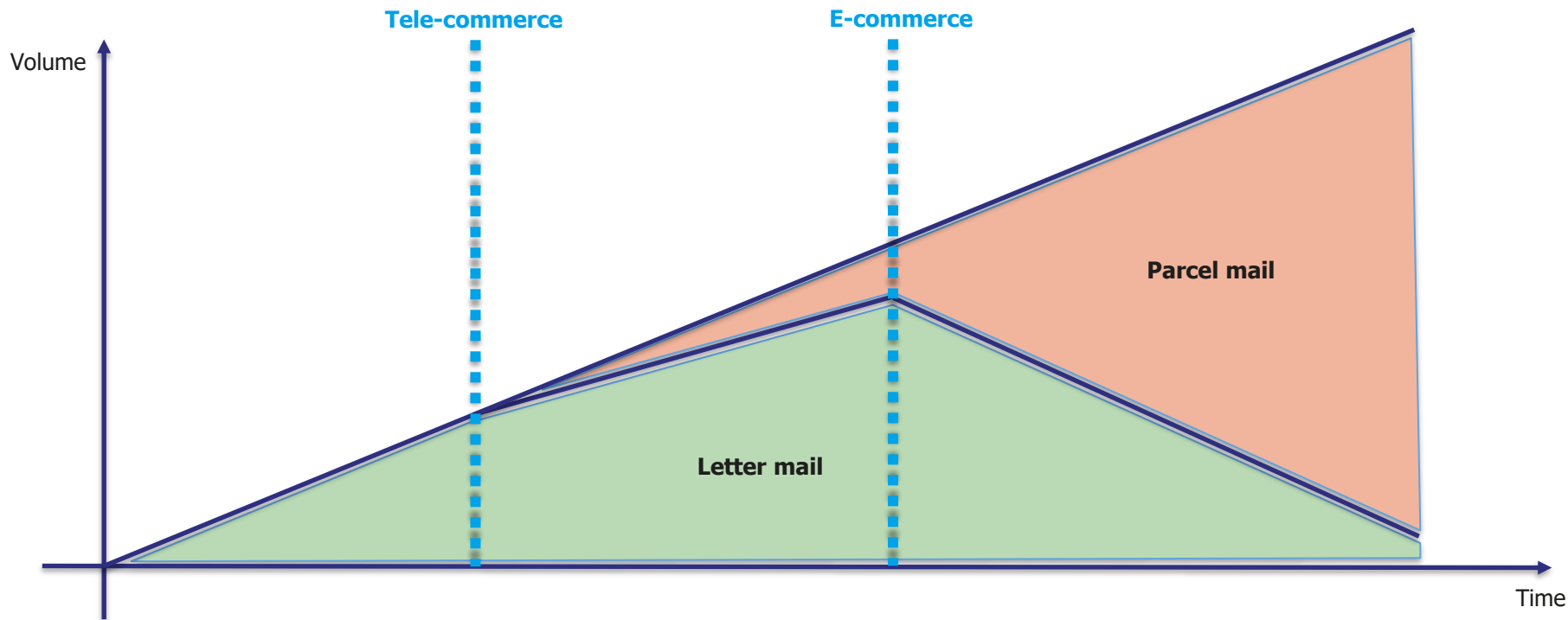


- Internal & out of court complaint systems
- Trusted flaggers
- Limiting misuse
- Suspicious criminal evidence
- Know your business customer
- Advertising transparency
- Enhanced transparency reporting

- Risk management & Independent audits
- Recommender systems
- Ad repositories
- Data access for vetted researchers
- Data access to supervisory authorities
- Compliance officer
- Further transparency reporting

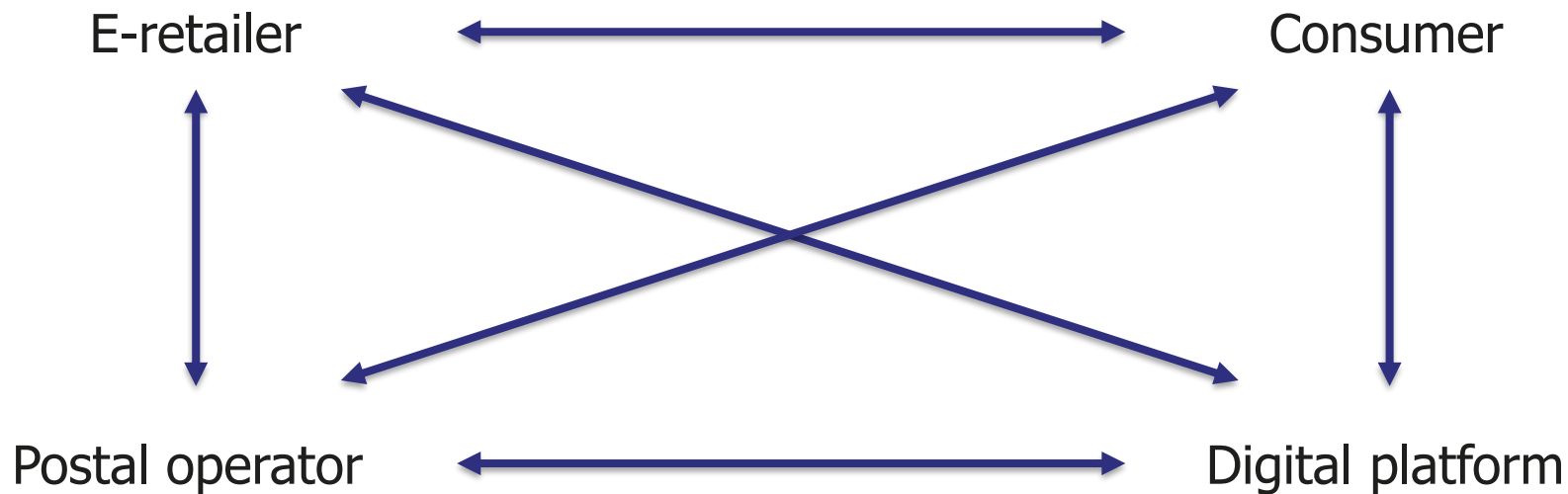


Disruption in the postal sector





Postal complexities





How to disentangle post & transport ?

→ Which activities are included in the scope of postal law ?



Definitions in the regulatory framework

- Postal services : “*services involving the clearance, sorting, transport and distribution of postal items*” (article 2.1 directive 97/67)
- Postal item : “*an item addressed in the final form in which it is to be carried by a postal service provider. In addition to items of correspondence, ...postal parcels containing merchandise with or without commercial value*” (article 2.6 directive 97/67)
- Parcel : “*a postal item containing goods with or without commercial value, other than an item of correspondence, with a weight not exceeding 31,5 kg*” (article 2.1 regulation 2018/644)



Step 1 - Four cumulative criteria to be matched for being identified as a parcel mail

1. Weight
2. Content
3. Packaging
4. Addressing

> The weight limit (31.5 kg) is the most obvious to implement.



Step 2 - Is the activity a postal service ?

CJEU Confetra – 2018, C-259/16 & C-260/16

(34) “....an undertaking must be classified as a ‘postal service provider’ within the meaning of Article 2(1a) of Directive 97/67 where it provides at least one of the services set out in Article 2(1) of the directive or the service or services thus provided relate to a postal item, although its business cannot consist merely in the provision of transport services. It follows that haulage and freight-forwarding enterprises offering, as their principal business, a service entailing the transport of postal items and, as an ancillary activity, services entailing the clearance, sorting, and distribution of postal items does not fall outside the scope of the directive.”





Step 3 – Does the company have an affiliate or linked undertaking that falls within the scope of the regulation ?

- Recital 17 , Regulation 2018/644 (Cross-border) : *Transport alone that is not undertaken in conjunction with one of those steps should fall outside the scope of parcel delivery services, including when it is carried out by subcontractors, either in the context of alternative business models or not, as it should in that case be assumed that this activity is part of the transport sector, unless the undertaking concerned, or one of its subsidiaries or linked undertakings, otherwise falls within the scope of this Regulation.*



Step 4 - Self-provision or not ?

- According to recital 21 of Directive 97/67, a parcel delivery service constitutes self-provision if:
 - **either** the natural or legal person performing the service distributes its **own goods** by means of its **own network** (i.e. its own infrastructure and salaried or temporary staff);
 - **or** the natural or legal person distributes its **own goods**, using one or more **subcontractors** working **exclusively** for it;

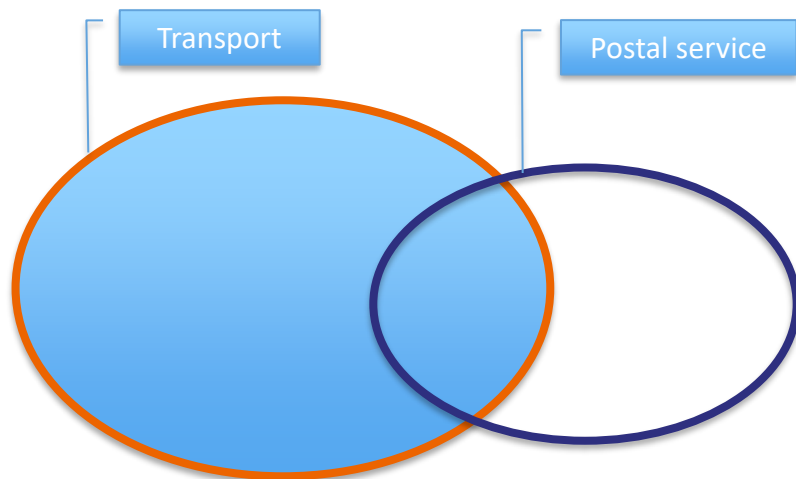
- ✓ Should one of these conditions above be met, then there is self-provision and the activity is not subject to postal law



Extension of the scope of postal law (1997-2018)

1997	Directive 97/67	The four elements of postal services
2008	Directive 2008/6	Only one of the elements of the postal service, except transport
2018	Regulation 2018/644	Consideration of postal activities subcontractors and related companies
2018	CJUE Confetra Case Law	Consideration of postal activities exercised on an ancillary basis

Postal law as *lex specialis* towards Transport law



- Undertakings in the transport sector which provide collection, sorting, transport or distribution services for postal items (except where only the transport service is operated), constitute postal service providers within the meaning of Directive 97/67.
- The Deutsche Post AG judgment of 21 November 2019 confirms that postal service providers are generally subject to transport law.
- Furthermore, it is known from legal literature and case law that postal law provisions take precedence over transport law as *lex specialis*

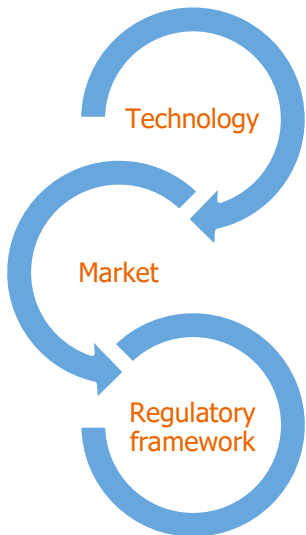


Towards a delivery market?





Conclusion - To ensure a level playing field and protect EU values, regulatory frameworks sometimes follow similar paths to adapt to market changes/disruptions



Audiovisual sector

Growth of digital enabled the rise of AV platforms

Changes in media consumption and financing

New Media Online case-law
Review of AVMS Directive + DSA

Postal sector

Development of the digital and e-commerce

Changes in type of postal deliveries: decline of letter mail, growth of parcel mail

Confetra case-law
Review of the Postal directive is urgently needed