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**Fair play between economic stakeholders**  
(February 2015)

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It was with interest that ARCEP took stock of the contributions that the French Digital Council, *Conseil national du numérique* (CNNum) received on the issue of fair play between economic stakeholders. The Authority would like to underscore what it considers to be three central elements.

**1. Ensure a framework that is fair for all of the stakeholders providing an equivalent service**

Even though they are providing a similar service in the marketplace, some players may be subject to a different rules or laws, either because they have different geographical origins or employ different technologies. This disparity raises questions of inequality between market players when competing for access to end users who consider them as interchangeable.

This issue exists in electronic communications, for instance, where some online service providers are competing with traditional telecom operators by providing end users with communication services, such as calling, without being declared as operators as defined by France's electronic communications code. Similarly, in the case of television services, in particular because of their geographical origins, some online providers are not subject to the rules and regulations that apply in the country where their product is being consumed, e.g. taxation or production financing.

As suggested in the first course of action listed in the CNNum summary, and while also working to protect incentives to innovate, to avoid any unfair competition it is important to ensure that rules are applied fairly and equally to all of the different players providing equivalent services, and this in lasting fashion.

**2. Guarantee that all platforms treat their users fairly**

Under the terms of Articles L. 33-1, I, b) and D. 98-5, I) of France's Electronic communications code (CPCE), operators must remain neutral with respect to the content of the messages they relay. ARCEP is the guarantor of that neutrality. These principles can be seen as translating a generic requirement of fairness that governs how operators run their networks. Now that platforms are playing an increasing role in the internet's operation, the question is being raised of whether they should be subject to this same principle.

As defined by the Conseil d'Etat in its annual report for 2014 on "Digital technology and fundamental rights"<sup>1</sup>, unlike simple web hosting companies, platforms provide mechanisms and services for ranking and referencing the content, goods and services that third parties make available online. Without necessarily going so far as to impose a principle of non-discriminatory access, several of the contributions cited in the CNNum summary suggest guaranteeing a minimum level of fairness in how platforms treat their users, as the Conseil d'Etat proposes in the same report.

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<sup>1</sup> Conseil d'Etat, *Etude annuelle 2014 – Le numérique et les droits fondamentaux*, Paris, La documentation Française, 2014.

ARCEP is also in favour of introducing into positive law the same principle of fairness that would apply to platforms, and which must relate not only to the individual users of their services, but also to commercial users.

As concerns individual users, ARCEP's experience in transparency with respect to consumers has made it possible to ascertain how vital it is for end users to understand the information that is available to them.

As concerns commercial users (e.g. content providers, start-ups, etc.), it is especially important to prevent against the risks of platform providers' engaging in abusive or sudden practices of removing some of a vendor's services from their listings or rankings.

### 3. Strengthen the supervision of major players that are key agents in the digital economy

Some internet companies are particularly powerful, and a change in their policies can singlehandedly alter the market's structure to a considerable degree, and heavily influence end users. Naturally, the freedom to innovate is a very valuable aspect of the digital economy, but once it grows beyond a certain size, regardless of innovative it is, a company can also become a threat to the freedom of other companies, a fact that should require some form of supervision or regulation. This need for supervision may be further accentuated by the diversification of these companies' businesses, most of which offer a wide array of complementary and interdependent products and services.

The first challenge for such a system of supervision will lie in identifying the scope of the companies to be regulated which, given that their tremendous influence on the marketplace goes beyond just competition issues, can undoubtedly not be based solely on the principles of competition law, and notably the notion of dominant position.

The nature of the obligations weighing on certain market players must then take into account the extraordinarily fast pace of the market's ongoing development, and would no doubt need to lie in sufficiently general principles such as fairness, objectivity, proportionality, and even non-discrimination.

As to putting these obligations into effect, strengthening supervision of the internet giants must be consistent across the globe, or at the very least across Europe, and ensure strong reactivity given the market's rapid evolution – necessities that were recalled in the seventh course of action in the CNNum summary. Guidelines could be adopted at the European level, and detailed at the national level, notably as the result of investigations, on a case-by-case basis, through the swift settlement of disputes between market players, such as those permitted for the electronic communications sector in France, where this type of procedure has proven very effective in establishing fair regulations in a quick and practical fashion.