CAN REGULATION SAVE THE INTERNET?

A VIEW FROM LONDON

Foreword

The Digital Revolution is bringing sweeping change to all aspects of life, fundamentally impacting and transforming economies and societies around the world at a breathless pace. Amidst this rapid process of digitalisation, the utopian optimism that first surrounded internet communication and technology has steadily given way to a more nuanced appreciation of the host of challenges and opportunities it creates.

Initially perceived as a space for innovation overseen by little to no traditional regulation, this is increasingly being called into question as the internet and emerging technologies are subordinated for nationally strategic purposes, monetised by a handful of companies wielding significant levels of influence, and weaponised by state and non-state actors to conduct illegal or illicit activities ranging from cyber-attacks to electoral interference.

In this context, Europe has a pivotal role to play in promoting a human-centric digitalisation; one that preserves European values and ensures citizens reap the rewards. Lagging behind the USA and China in the digital economy, the EU nonetheless seeks to leverage its single market and regulatory capacity vis a vis third actors to become a rule maker; driving its vision of how the internet and new digital technologies should be regulated and so have a say in defining the digital ecosystem.

But what should this regulation look like? Who is responsible for implementing it? Can there be any reconciliation between the US, EU and Chinese models or will relations continue to be marked by persistent regulatory and technological disputes?

It is with this in mind that the European Council on Foreign Relations in collaboration with Telefonica launched a series of workshops in London, Berlin, Washington, Brussels and Madrid to debate these questions with stakeholders. Each workshop brought together approximately 20 to 25 experts and leading professionals from the private sector, academia, government, tech platforms, and civil society for a discussion under Chatham House Rule.

In this document, we bring you the key conclusions from the inaugural workshop in London.

The issues

1. Opaque and unaccountable platform governance

Online platforms do not passively allow access to content but actively curate the flow of services and communication to users, often through the opaque functioning of algorithms which have consequences that are only starting to be understood. Politicians are not on top of platform governance, which has slipped the moorings of national law and democratic accountability. Yet regulating the platform economy poses many challenges for governments, namely how to gain visibility and some level of traction over platforms without trying to control them by setting prescriptive rules of forms of governance insufficiently nuanced to tackle the issues.

"We're concerned that technology is no longer seen as a force for good but as something which is endangering our values."

– Christoph Steck,
Director Public Policy and Internet,
Telefónica.[1]

2. Regulation vs freedom of speech

Under the EU's Terrorist Content Regulation, companies can be fined up to 4 percent of revenue for failure to remove terrorist content from their websites or platforms. Hefty economic sanctions such as these are likely to lead companies to be overzealous in their content removal, with a chilling impact on freedom of speech. Some participants argued that a concerningly similar take down regime is proposed in the UK Government's Online Harms White Paper.

3. Regulation as a burden on small companies

Broad-brush regulation which is resource intensive will be difficult to implement for small companies and will represent an undue burden on them, entrenching dominance of large firms. However, small companies cannot be overlooked as unacceptable content is often hosted on small niche platforms and furthermore, there is interdependency between smaller and bigger platforms e.g. grooming may begin on the smaller platforms and then move onto the larger ones.

"We need much more focus on the mechanics of how policy is made and how regulation is done."

– Mark Bunting,
Communications Chambers.[1]

4. Geoeconomic and geopolitical implications

The internet has become a site of geopolitical and geoeconomic competition, as have other new technologies such as artificial intelligence. There is a consistent gap between policymakers on the one hand who do not grasp the implications of technology for their geopolitical concerns, and technologists and private sector on the other, who do not understand those concerns. As witnessed in the ongoing dispute over 5G and the rising 'splinternet' phenomenon, European policymakers can no longer delay engagement on these issues.

[1] This quote along with all others in the document are taken from publicly available video interviews conducted with participants following the workshop discussion. To see the full interviews, visit [link al video]."

"We should try to make sure we preserve all the enormous good that the internet brings while dealing with the social issues and the social adaptation that is needed to come to grips with this major technology."

– Jean Jacques Sahel,
Vice President for Europe at ICANN.[1]

5. Uninformed policymakers and judges

Policymakers and judges at the national and European level may not be sufficiently resourced or informed to regulate the internet and tech industry and enforce law. This can lead to no regulation or bad regulation such as kneejerk "regulation by outrage". To deal with the scale, complexity, and jurisdictional challenges posed by the internet will require a great deal of political appetite and investment.
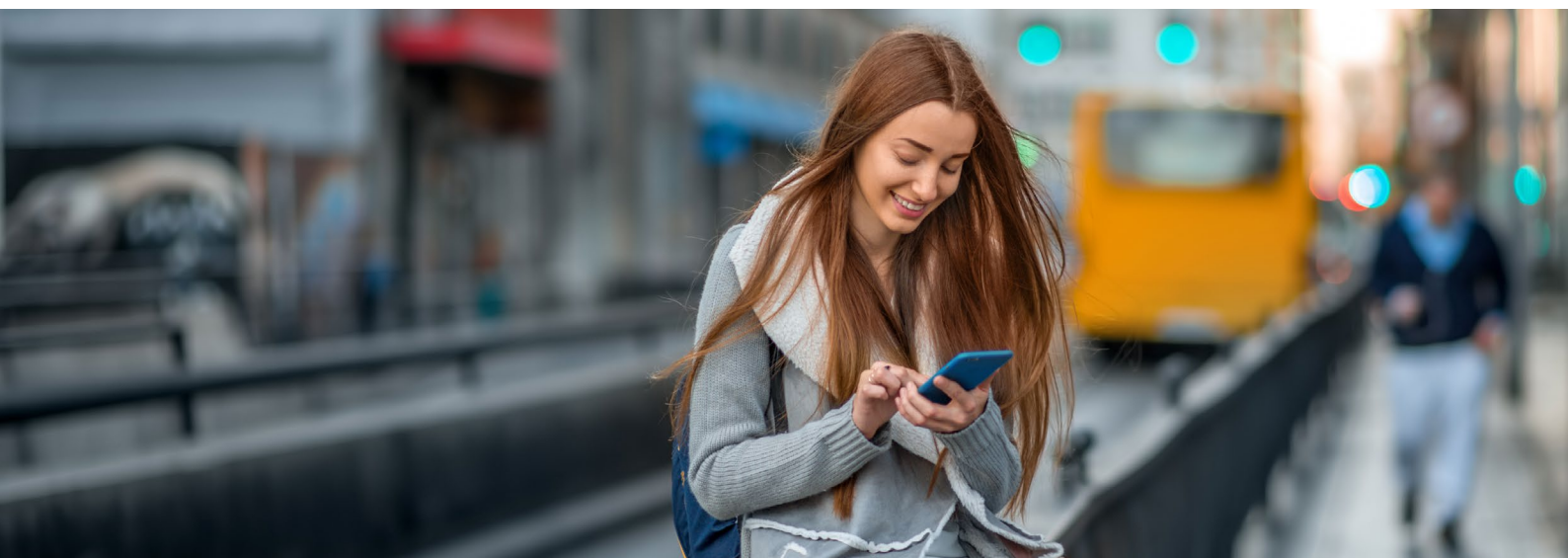
The solutions

1. Interpret and apply existing laws

One participant argued that instead of enacting new laws, several relevant laws already exist that can be interpreted and applied to the digital sphere, such as competition law to block mergers. The EU has been successful in modernising rules or frameworks that were already in place, not only in the area of competition but also in data protection. However, it should be noted that alignment between Member States and the EU made that possible and such alignment may be difficult to replicate in more contentious areas such as content and online conduct where there are national sensitivities.

2. Resolving information asymmetry

As one participant pointed out, politicians may not understand technology, but the tech industry hasn't made a concerted effort to assist. Technology companies should reduce information asymmetry and educate policymakers or see itself continuously fall victim to misguided pieces of legislation.

3. Duty of Care

Several participants argued that other legal frameworks, such as customer protection or health and safety, could provide models or precedents for platform and general online governance. Platforms would be obliged to put in place terms of service that prevent unacceptable harms on their platforms. Such a measure could address policymaker concerns while mitigating concerns about scope and freedom of expression. This underpins the 'Duty of Care' proposal that has been envisaged in the UK Government's Online Harms White Paper.

4. Alternative incentives and framing

One participant suggested a pivot from punitive sanctions to mechanisms that encourage good corporate conduct such as tax breaks to incentivise ethical behaviour in the context of internet regulation. Also, as opposed to focusing on regulation, "supervision" and "accountability" would perhaps be more helpful concepts, encouraging companies to take measures that will shore up public trust in them.

5. Regulatory proportionality

Instead of overregulating to track every activity through constant monitoring, the aim for regulation should be to encourage an overall safer system, possibly based on statistical sampling instead of monitoring. While a few small things may slip through the net, the system is safe as a whole. Regulation should also be proportionate in its impact upon small businesses.

6. A degree of self-regulation/ co-governance

Co-governance will be essential as platforms have more data about their operations and impacts than do regulators and are in a better position to enforce rules, while regulators can better decide what those rules and limits should be for the public interest. However, in order to do this, the division of roles and responsibilities between governments, platforms, and regulators must be clearly determined for every issue ranging from the definition of hate speech to election interference.

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"The first step is to clearly identify what the roles of each of these stakeholders are: what is the role of government, what is the role of industry and what is the role of civil society."

– Markus Reinisch,
Vice President for Public Policy in Europe, the Middle East and Africa at Facebook.[1]

7. Agile regulation

Regulators should adopt an "agile" approach similar to that of platforms themselves. Instead of rolling out a permanent piece of regulation, regulators can pilot it, test the waters and receive feedback, and then tweak it accordingly. Such an iterative, incremental and more real-time approach would offer the flexibility needed in regulating such a dynamic industry and would appeal to industry representatives as a similar approach to their own.

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Jonny Shipp, The Internet Commission

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