A POLICY PLAYBOOK FOR PLATFORMS

In the second article on platforms in this issue, **VICKI NASH** and **MARK BUNTING** take a practical look at the role for policymakers in more effective oversight

The role of digital platform companies in our lives is expanding rapidly. Every day, huge numbers of us are creating and sharing content with known and unknown others on social media, booking rides, and buying goods from distant sellers in online multisided marketplaces. Behind the scenes, companies, big and small, trade on platforms offering B2B services or access to casual labour who will work from a distance. Such advances have brought huge benefits of cost, efficiency and choice.

But at the same time, warning bells are ringing. Workers may be technically self-employed yet work exclusively via one platform, and consequently find themselves reliant on policies and rating systems that they may have no influence over and no means of recourse against. Consumers rely on platforms for effective exercise of their rights, which may prove hard to enforce when the seller is a small producer on the other side of the world. More dramatically, we read about pop-up brothels abusing the new market for ultra-short-term lets, and extremist groups using video-sharing platforms as tools of radicalisation.

In each of these cases, it is easy to believe that the root problem is our embrace of the "platform society". It has become fashionable to see this as little more than a fancy name for technologically enabled systems whose primary innovation is their capacity for bypassing regulation while generating economic rents. But this is to ignore the significant benefits of platforms in unlocking latent supply and demand, removing barriers to trade, opening markets and driving innovation.

The question is what kind of regulation, if any, can address growing concerns about platform impacts while preserving their benefits. There seems to be a developing political consensus, at least in the EU, US and UK, that these benefits should not be won at the expense of citizen, worker or consumer rights. Legal cases are being fought which challenge the freedom of platforms to offer services without taking sufficiently responsible steps to protect longstanding rights. Notably, legislators are moving to enact laws which might remove some of the legal protections that online service providers have thus far relied upon to avoid liability.[1] Regulation seems inevitable – but how, and to what end?

This trend is nowhere more visible than in the domain of social media. After a tumultuous year in which Google, Facebook, Twitter and YouTube have suffered public failures on issues such as fake news, political manipulation and data protection lapses, even Tim Berners-Lee was moved to comment. In his 2018 letter marking the birth date of the web he

protested the ability of "a few dominant platforms... to control which ideas and opinions are seen and shared".[2] He called on internet users to imagine an improved digital economy where the incentives of the tech sector are better aligned to fit those of their users, and society as a whole. This may be a worthy challenge, but what exactly might it entail? And is it possible?

One of the most obvious problems is that, as many scholars have noted, there isn't really any such thing as "the platform society". There's so much variation across sectors that from a regulatory perspective little is to be gained by lumping together companies simply because they share a single core design principle, namely their role as multisided markets, connecting buyers and sellers or consumers and advertisers. But it is worth reminding ourselves why this fundamental feature matters. Online platforms provide a space in which third parties can connect: buyers are exposed to sellers of goods, services or labour; sellers gain immediate access to new markets; and all hope to benefit from speedy, transparent and mutually beneficial transactions.

Certainly, this core feature of platform companies goes some way to explaining why they so often seem to sidestep existing regulatory expectations; if all the platform does is to help others transact, it is not immediately obvious that they should bear responsibility for ensuring that those transactions are lawful or respecting of individual rights. Or this at least is the argument that some platform companies have made.[3] In practice, if we think more critically about the role of platform companies in shaping the environment in which their users transact, it is clear that their role is less that of a neutral host, and more akin to a benevolent dictator, shaping the rules of engagement. Today's digital platforms do far more than enable users to share, communicate or transact easily. At a fundamental level, they govern the types of transactions that are possible, and the terms on which they take place.

While this goes some way to explaining why the platform model can seem to enable digital companies to fall through regulatory gaps, identifying where policy interventions might be needed, and what sort might help ameliorate the situation, is less straightforward. In the case of social media, for example, companies are rarely paid by their users for the service they provide. Instead, the data trails left by users as they traverse the network can be used to create valuable profiles that enable more accurate targeting of advertisements, meaning advertisers pay a higher price than they would if adverts were merely shown at random.

This gives social media companies an incentive to keep users actively engaging with their service, which in turn may mean showing them content that holds their attention or keeps them scrolling. The departure from social objectives arises if the content that best keeps our eyeballs on a page is more likely to be harmful to others, hateful or illegal. In this context, policymakers can urge social media companies to act responsibly by regulating content but the drive towards monetising engagement will continue to pull against this, even for those companies that strive to cooperate.

If it is hard to imagine which policies might effectively and consistently align platform incentives with the public good, it is equally hard to ensure that considerations of what constitutes such a good are not swayed by the interests of incumbents threatened by platform innovation. Copyright, for example, is a policy area where vested interests still shape the regulatory agenda. The new EU digital single market directive on copyright includes proposals for both a "link tax" that is supposed to reward rights holders for content shared, and for the monitoring of content uploads to sift out copyright-infringing content. Both aspects have raised significant concerns for champions of innovation in the digital economy who argue that such measures stifle creativity and information sharing, and introduce unnecessary surveillance of user content.[4]

Against this backdrop, it is easy to understand why policymakers are rummaging through their regulatory toolboxes. We are seeing a direct shift away from the principle embraced in the EU e-Commerce Directive, namely that information service providers are "mere conduits" enjoying immunity from liability regarding illegal online content unless notified about it, towards more proactive obligations to detect and remove illegal content before being notified. While it is hard to argue against an expectation that companies should not make money from circulating illegal content if they have the tools to identify and remove it, what we are left with is a scenario in which governments effectively pass on the responsibility for policing speech to "private sheriffs"[5] without requiring them also to protect lawful expression.

> **Today's platforms do far more than enable users to share, communicate or transact easily.**

If the UK government proceeds to make platforms directly liable for all the content they host (as it has suggested it might do),[6] it is hard to see how this would work without either limiting opportunities for expression and participation online, or giving unaccountable private companies unprecedented powers over information and speech. Indeed, with the introduction of measures such as Germany's Network Enforcement Act we already see governments measuring companies' success in removing content not by assessing the accuracy of their decisions, but the speed with which they act. It is not hard to imagine the incentive this metric creates.

A DIFFERENT KIND OF POLICYMAKING

Good policy responses must get to grips with three profoundly disruptive effects of platforms on law and regulation.

First, they raise a new kind of problem. Much existing regulation responds to problems of

scarcity, and the risks that emerge when a finite resource is held in too few hands. The regulation of media, supermarkets or retail banking has traditionally addressed the problem of too much power and too much concentration. Competition is part of the solution, but regulation of other kinds has always been deemed necessary to protect consumers, suppliers and workers.

Now we have a different challenge – a surfeit of openness. Anybody can reach a global market on Facebook, Amazon, peer-to-peer lenders or crypto-currency trading sites. Platforms seek to build trust, including by working to filter out bad actors. But it is often impossible to assess how effective their rules, algorithms and automated detection technologies are at this. The range of issues is as diverse as the economy itself; we don't know how to measure success; and we don't have access to the data even if we did.

Second, applying old rules to platforms' new business models is unlikely to be effective, because the costs and benefits of regulation are so different in different contexts. As Edith Ramirez, former chair of the US Federal Trade Commission, put it in 2015: "...existing regulatory schemes tend to mirror, and perhaps even entrench, traditional business models and thereby chill pro-consumer innovation."[7] Demands to "level the playing field" are frequent, but usually self-interested, and may not coincide with consumer interests.

Instead, policymakers need to focus on clearly defined and evidenced problems, and be cautious of unintended negative consequences, including raising entry barriers and foreclosing the benefits of competition enabled by platforms. Transparency is helpful to identify potential areas of concern, but it is important to clarify "transparency of what" as too much transparency can enable platform rules to be gamed.

Third, new ways of regulating are needed.[8] Prescriptive rules that pre-empt platforms by enforcing particular technical solutions to complex and rapidly changing issues are often counter-productive. Law needs to be rethought alongside code, reconciling private market governance with public policy. Dialogue is called for between policymakers and platforms to increase mutual understanding, maximise benefits and anticipate challenges.

We are moving from an era of command-and-control regulation to one characterised by co-governance, forums for collaborative rule-making, and a need to ensure all stakeholders' interests are sufficiently represented.

In this world, we need to avoid vague law that delegates legal and regulatory decision-making to platforms without clear mandates or accountability. But often, the risk is law that is the opposite of careful: that throws problems over the wall to technology firms, based on unproven assumptions about technological capabilities, little visibility of intermediaries' policies and processes, and no systematic approach to oversight, impact assessment and review. The protracted debate about the EU Copyright Directive provides an example; in the row about whether to require upload monitoring, it has lost sight of the bigger picture, which is the need for platforms to strike a fair and reasonable balance between different fundamental rights, and for regulators to ensure effective oversight of how they do that.

NEW FORUMS, NEW REQUIREMENTS

There have been two kinds of response to these challenges.

The first is the proliferation of "multistakeholder initiatives" to tackle policy objectives online. These cover everything from extremist content online[9] to the development of artificial intelligence for social good.[10] They are usually nominally voluntary, although they often form under intense pressure from policymakers.

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One of the earliest enduring examples is the Internet Watch Foundation. Its chair, Andrew Puddephatt, has produced a checklist of success factors: good multistakeholder models have a clear remit, a precise definition of the problem or opportunity to be addressed, and a shared goal; independent governance; the ability to make binding decisions about content or sources to be blocked or promoted; and transparency about performance relative to goals.[11]

One advantage of the multistakeholder approach is the ability to take a global approach to global problems. But equally, this can cause problems where differences in legal frameworks and social expectations exist between jurisdictions. And these initiatives can be slow and wasteful; indeed, they can be used by participants as a means of delaying action. Most importantly, the processes themselves can lack transparency and accountability – concerns have been expressed about whether multistakeholder initiatives further the interests of the participants rather than pursue consumer and citizen benefit. It can be unclear who, if anyone, is seeking to identify and further the public interest in these initiatives.

A second response, then, is what we think of as "procedural accountability", a collection of regulatory initiatives to oversee the processes by which platforms make rules and govern markets, rather than the services they host or the tools they use. In these approaches, regulators specify goals to be achieved (in broad terms), and standards for platform procedures to achieve them – for example, standards for goal-setting and problem definition; for assessment of impact of chosen solutions; for stakeholder engagement; for dispute resolution and appeal processes; and for transparency.

This provides a way for intermediaries to achieve legitimacy through procedural means – that is, by developing processes, policies and systems consistent with principles of good governance. Such regulatory strategies might work well where disputes about policy are inevitable, desired

outcomes are difficult to specify, and it is hard to assess the impacts of algorithms and platform features. In such cases, following due process may be a better indicator of responsible decision-making than decision outcomes themselves.

Companies already voluntarily put in place some types of procedural accountability, for example, ethics committees and transparency reports. But as with multistakeholder forums, government usually lurks in the background. There are procedural elements in a number of current policy and legislative proposals. For example, both the EU's draft Copyright Directive and recommendation on illegal content have procedural components, including standards for complaints and redress mechanisms, transparency undertakings, and platform notifications of decisions.

In the UK, the Code of Practice on Search and Copyright signed in 2017 by Google, Bing and rights holders, provides an example of regulators playing an active procedural role – they convened the parties and worked to agree measures of success for actions to reduce infringing material appearing in search results, and an approach to evaluation and reporting, with the Intellectual Property Office (IPO) commissioning research to track progress.[12] However, this also illustrates the potential limits of procedural approaches; there is no requirement of redress for websites that can show they have been wrongly classed as infringing. All stakeholders need to be represented in procedural accountability initiatives, including those who will push the case for freedom of expression, consumer interests and competition.

Procedural accountability does not of course resolve the difficult issues at the heart of online content regulation: the trade-off between different interests, the difficulty of differentiating legal and illegal content and the importance of context, which mean content decisions will inevitably be contested. But by establishing due process, independently defined and ideally independently validated, intermediaries may be able to legitimise their content policies and practices without the need for regulators to specify the particular tools and specific outcomes by which they manage their communities.

REMAKING LAWS AND PUTTING CONSUMER, CITIZEN AND WORKER INTERESTS FIRST

Platforms provide an opportunity for the role of policymakers to evolve. They should leave specific rules and particular technical solutions to platforms, which are in the best position to implement and evaluate responses to identified problems, and assess unintended consequences.

Instead, policymakers should focus on setting overall objectives, determining whether intervention is needed to achieve them and working with platforms if additional measures are considered necessary. More generally, they should encourage good governance by platforms that achieves a fair and responsible balance between fundamental rights, and thereby builds public trust, and promotes freedom of expression and open markets, while also protecting consumers and citizens from harm.

Perhaps a new policy playbook is starting to emerge that can help in this task:

- First, identify specific problems, based on robust evidence, and with reference to consumer, citizen and worker rights, not historic vested interests or incumbent lobbying
- Second, convene all the parties who can play a role in addressing identified problems – this may include platforms and other technology firms, but also civil society, the media and various parts of government
- Third, set measurable objectives, in consultation with all parties, and define clear remits and tasks. This may be achieved by "nudging" parties to consensual agreement. But government has a range of carrots and sticks at its disposal – finding the right leverage to achieve the right outcome is a critical part of the new policy challenge
- Fourth, explore ways of testing and revising policies rapidly. Lessons from technology – the use of sandboxes, test-and-iterate, trials – may help
- Finally, put in place due process to oversee parties' efforts to fulfil their commitments, assess the fairness and effectiveness of their actions, and iterate policies and incentives where necessary.

CONCLUSION

The task of modernising regulation for a platform society is not trivial, as digital will touch every part of the analogue economy, and more often than not we are likely to find the old rules are not fit for purpose. New capabilities and maybe new institutions are required. Risks – failure to achieve the intended purpose, or unintended consequences for the various sides of platform markets – are impossible to mitigate entirely.

Nonetheless, the breadth and complexity of platform challenges and opportunities make accountability more important, not less. Platforms undertake a great deal of regulatory activity, much of it in consumers' interests, but rarely with systematic scrutiny.

Policymakers must find better ways of engaging with platforms, and more effective oversight of platform activities, if we are to move from today's counter-productive "dialogue of the deaf" to a more constructive future.

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