

A new separation of powers? UK and French proposals to regulate online platforms for harmful and illegal content

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Overview

Platforms have long existed, but economically important digital platforms are a comparatively recent phenomenon. Today's vast global online markets could not function without them, but they also give rise to new challenges and concerns.

This essay considers how policy and regulation are adapting to platforms' role in governing markets; arguments for new institutions and regulatory frameworks; and efforts to 'reconcile code and law.'¹ While platforms touch a huge range of markets, I focus on two particular proposals as case studies, both seeking to deal with the complex issues raised by regulation of online content and speech: the UK's Online Harms White Paper and the recent French report proposing a framework for social media accountability. The UK approach has raised significant concerns about its implications for free expression. The French report appears more sensitive to the need for regulation to carefully balance fundamental rights. But neither proposal currently describes a comprehensive, convincing 'separation of powers' between government, regulator and platform.

About the author



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Platforms and the private governance of speech

Platforms enable direct interactions between two or more distinct sides of a market.² There is no consensus on a single definition of online platforms, but they often exhibit some or all of a range of features:³

- The ability to create new markets and/or disrupt existing markets, including by providing new, low-cost means for buyers and sellers to participate
- A degree of control over the nature of interactions between users, for example through terms of use, design choices, community standards and content filtering/prioritisation tools
- Network effects, and consequently the potential to scale rapidly
- Low-cost and near-instantaneous user interactions
- New forms of value creation and capture, including by accumulating data, facilitating new businesses and locking in both consumers and suppliers

Online platforms have grown in response to the need to manage complex markets that can have millions or even billions of participants. They provide a form of centralised control of the Internet's massively open global bazaars. They have written rules – Facebook's Community Standards, Uber's Driver Requirements – but

these are arguably less important than the implicit rules embedded in the algorithms that sort, rate, rank and recommend users' choices.

These rules can be conceptualized as a form of market governance.⁴ Online platforms determine their markets' terms of access and rules of exchange, and thereby regulate their ecosystems. A common complaint is that these new players are 'lawless',⁵ but a deeper concern may be that they are 'law-makers', in their use of code, algorithms and data.⁶ However, platform 'law', and the way it is enforced, is often opaque, and may have unintended consequences.

Nonetheless, platforms are not unconstrained in this rule-making function. The myth of omnipotent platforms ignores the reality that their rules and affordances must be carefully designed and continually iterated to balance the interests of different groups of users. Indeed their effectiveness in aligning different users' interests is core to their business model, network effects and competitive advantage. Sustainable governance creates value for consumers; rules that are skewed in the interests of the platform operator create opportunities for competitors to enter.⁷ As Edith Ramirez, former Chairwoman of the FTC, noted: "A platform provider has strong incentives to make its platform as attractive as possible to maximize its value to participants."⁸

When platforms' rules raise highly sensitive political issues such as the balance between freedom of expression and protection from harmful and illegal content, questions of legitimacy are inevitable.⁹ As the Internet Association puts it,¹⁰ moral and ethical judgements around content should not be simply delegated to private companies. But the vast majority of online content regulation today is done by automated tools designed by platforms, overseen by moderators employed by platforms, according to rules set by platforms, with impacts only observable at scale by platforms.

Of course, governments and law shape platforms' rules. In Europe, an extensive body of law, 'soft law', multistakeholder forums and industry initiatives have contributed to the development of online policies and practices. But there is no general means of ensuring platforms address systemic problems of harm and illegality in their ecosystems, if they lack commercial incentives to do so; nor of ensuring that they take into account all relevant rights. The transparency reports published by many platforms shed some light, but the data are hard to interpret and leave many questions unanswered, particularly about how their decisions are made.¹¹

This has proved unsustainable. Governments of many stripes are racing to establish greater control over platforms' rules. For example, at the time of writing, the UK, France, Germany, Italy, India, Sri Lanka, Singapore, Australia, New Zealand and even the US had either already introduced or were actively considering legislation to require platforms to remove or suppress illegal or harmful online content of one kind or another.

There is much to fear from bad regulation – potential anti-competitive effects on small platforms, unjustified restrictions on free expression, abuse by governments. Unlike platform governance, conventional law-based regulation is not typically subject to competitive pressures (beyond challenges to the courts and the risk of loss of legitimacy and independence). Regulation therefore tends to become entrenched, to adapt slowly, if at all, and can come to serve the interests of existing producers rather than consumers.¹²

Nonetheless, the trend towards policy intervention is inexorable, and the debate has slowly shifted to how, not whether, to regulate online platforms.



Principles for platform regulation

Most expert commentators agree that prescriptive, rules-based regulation is unlikely to work in platform markets. Platform governance is dynamic, data-driven and iterative. Problems manifest in different ways on different platforms, and evolve over time. Each platform will need to develop bespoke responses to the particular challenges it faces, and iterate its strategy in response to changing user behaviours. Ensuring consumer choice, and competition between platforms on governance, is part of the solution.

Regulation of today's dynamic, massively open but also highly centralised platform markets will require new models of co-governance, not bright-line rules. One way of thinking about this is in terms of the concept of separation of powers: the division of responsibilities between different actors, and the balance and interaction between them.

In *The Spirit of the Laws* (1748), Montesquieu argued that protection of liberty required 'distribution' of executive, legislative and judicial functions. His concern was the risks of concentration of power, as he observed in France's absolute monarchy of the time. However, the English parliamentary model, on which Montesquieu drew heavily, was really a mixed model, far from strictly 'separate';¹³ each branch of government had powers, and the ability to defend its powers (including with recourse to the courts), but those powers were also constrained and subject to the oversight, and sometimes veto, of the other branches.

Similarly, a 'separation of regulatory powers' for platform markets should specify a new distribution of powers and duties. Governments, legislatures, regulators, industry, platform users and courts all have a role to play in securing the benefits and mitigating the risks of the open Internet; the role of each player in co-governance models needs careful definition. Power should be diluted, not concentrated either in a single all-powerful regulator, nor within dominant platforms. Mechanisms of transparency, oversight and accountability are needed, with procedures to ensure users' rights are protected and appropriately balanced.

While the specifics of the regulatory model will vary from case to case, some general principles of effective distribution of power can be identified.¹⁴ Many are not unique to platforms, but represent good regulatory practice in general:

- Consider the anti-competitive effects of regulation applied indiscriminately to small and large platforms. Target regulation where there is evidence of real harm – regulate with a scalpel not a sledgehammer
- Hold platforms to account for their systemic responses to problems, not individual cases of harm
- Give different platforms flexibility to develop tailored responses and take account of existing, voluntary and international efforts
- Consider whether a supervisory regime

is sufficient as a first resort

- Focus on clearly defined problems
(including drawing on platform data, which may require regulators to have effective information gathering powers)
- Consider whether old policy objectives remain valid, and how they have been effected by the explosion of online content and the growth of platforms. Platforms may have incentives to fix problems that characterised offline markets – for example, eBay has a strong interest in preventing fraud, and providing remedies where eliminating it entirely is impossible
- Apply established measures of success; don't expect platforms to fix complex problems whose solutions have eluded years or even centuries of human scrutiny and governance
- Distinguish competition concerns from other policy issues, and consider that competition remedies are likely to be ineffective in achieving social or consumer protection objectives
- Beware of unintended consequences of regulatory intervention.



The UK Online Harms White Paper

With these principles in mind, how does the UK Online Harms White Paper¹⁵ stack up? It contains a wide-ranging package of legislative and non-legislative measures to incentivise companies to take greater responsibility for their users' safety online. It proposes to establish in law a new 'duty of care' towards users, overseen by an independent regulator. The scope is broad, encompassing diverse content types (both illegal and 'legal but harmful') and all companies "that allow users to share or discover user-generated content or interact with each other online" (§4.1). All such companies will need to be able to show that they are fulfilling their duty of care, although the regulator's approach will be "risk-based and proportionate," meaning that the initial focus will be on "those companies that pose the biggest and clearest risk of harm to users, either because of the scale of the platforms or because of known issues with serious harms" (§31).

Graham Smith QC has criticised the foundational 'duty of care' concept, suggesting that it is too generic as a basis for liability.¹⁶ Offline duties of care apply in strictly limited cases, to risks of foreseeable and objectively ascertainable physical injury, created or capable of being remedied by the liable party's actions. He argues the white paper describes risks that are too nebulous and subjective, and renders platforms responsible not only for their own actions, but also the actions of their users. If facilitation of speech is seen as a risk-creating activity, this is "tantamount

to asserting that individual speech is to be regarded by default as a harm to be mitigated, rather than as the fundamental right of human beings in a free society."

It is not clear how closely the white paper's approach is modelled on offline duties; indeed Smith has argued that it is not really a duty of care at all.¹⁷ It does not provide a basis for users to make a damages claim against the companies for breach; any such basis would likely be highly limited, since being able to demonstrate harm from a speech act that a platform could reasonably foresee and prevent would be challenging, to say the least. Moreover the duty's scope includes 'harms to society' – it is not obvious who could make a claim against such a duty nor how they could demonstrate social harm had been caused.

It is possible that the 'duty of care' is not intended as a direct translation of an existing offline model, but as a wrapper for a wholly new regulatory framework. While many of the details are underspecified in the White Paper, the expectation seems to be that a regulator would be tasked with providing specific definitions of harm, identifying platforms on which harm manifests, and assessing whether companies have 'done enough' to mitigate it.

There is little detail in the white paper about how this could be achieved. But one feature, which has given rise to significant concern, is the prominent role of Codes of Practice, intended to illustrate to companies how they may fulfil the proposed new legal duty.



Numerous Codes are proposed; they are not binding, but: “If companies want to fulfil this duty in a manner not set out in the codes, they will have to explain and justify to the regulator how their alternative approach will effectively deliver the same or greater level of impact” (§20).

Unfortunately the ‘expectations’ of companies described in the white paper, which the regulator is expected to reflect in future Codes, are too granular and prescriptive. For example, it is suggested that the regulator should provide guidance on proactive steps to prevent new and known child sex abuse or terrorist material, or links to it, being made available; action on illegal material in live streams; systems to prevent further circulation of images of children that may fall below the illegal threshold but leave them vulnerable to abuse; measures to identify which users are children; identification of violent or violence-related content to prevent its availability or further sharing; and so on.

There is little detail in the White Paper about how a regulator might go about developing ‘guidance’ on these complex matters, nor on the limits to their discretion

in doing so. A regulator directed to provide such detailed Codes of Practice is likely to stray into a level of prescription beyond its technical competence, and that sits uncomfortably with the flexible, supervisory regime described above. The Codes may (a) set an unachievable standard, (b) impose solutions that may not work, or may not even exist, (c) become rapidly outdated, (d) only be relevant to some companies, and/or (e) favour larger companies who already have, or can afford to invest in, complex technical solutions. Consistency may be seen as a virtue, but in practice any detailed rules will favour some over others. The burden of compliance with multiple Codes on small firms could be enormous.

A less prescriptive approach would be more future-proof, and capable of applying across multiple harms. Where there appears to be significant risk of harm, the regulator could be empowered to request information to assess its nature and extent, and, subject to its evidence-based assessment, require a company to develop a policy for managing it. The regulator should not, in general, prescribe particular technical or functional solutions.

The French framework for social media regulation

A French report,¹⁸ written in early 2019 by former Arcep head Benoît Loutrel, takes a rather different approach. It proposes a general framework for regulation of social networks, with a particular focus on online hatred; the report was written following a two-month mission to Facebook, in which the company shared its content moderation policies, organization and resources.

Perhaps unsurprisingly, the report emphasises Facebook's wide range of self-regulatory mechanisms, praising their agility and diversity. The problem as the report sees it is that self-regulation is still evolving, too reactive and lacks credibility due to the "extreme asymmetry of information" between social networks and public authorities. In other words, to be seen as legitimate, self-regulation requires

that independent parties can assess the effectiveness of that self-regulation, which in this case is lacking. This is particularly problematic when the social networks in question are "systemic actors capable of creating significant damages to our society."

The report proposes to address this with a compliance approach in which "the regulator supervises the correct implementation of preventive or corrective measures, but does not focus on the materialisation of risks, nor try to regulate the service provided." The proposed regulatory framework has five pillars:

- A public policy guaranteeing individual freedoms and platforms' entrepreneurial freedom



- Regulation focusing on the accountability of social networks, with only three core obligations: transparency of content prioritisation, transparency of content moderation and enforcement of Terms of Service, and a duty of care
- Informed political dialogue between platform operators, government, legislature and civil society
- An independent administrative authority, acting in partnership with other branches of the state, and open to civil society
- Cooperation at European level.

These proposals echo many of the principles discussed earlier in this paper. They emphasise the agility of platform governance, and focus on platforms' accountability for incorporating public interest objectives into their own algorithms, terms of service and moderator guidelines. The legally binding obligation is procedural, not substantive – to allocate resources to tackling problems and report on the effects, not to impose specific

operational or technical constraints – and the emphasis is on supervision, not enforcement. Fundamental rights, including to free expression, are acknowledged and protected.

However, one wonders if the regulatory task in the French proposal is as straightforward as the report may imply. Supervision is a good model – but how will the regulator assess whether a particular company's efforts and results are adequate? If the regulator is empowered to require or recommend that a company does more, how will it assess whether the costs of 'doing more' – including the potential risks to free expression – are justified by the benefit? The implication of the French paper is that this would be worked out collaboratively with platforms and civil society, but what does this mean? All platforms individually, or through some collective process? Where there are disagreements about the adequacy of responses, how will they be resolved? The intended separation of powers between platform and regulator is far from clear.



Discretion, certainty and accountability

Perhaps the UK and French approaches have more in common than appears at first glance. Both seek to establish a broad, flexible regime for online content regulation, capable of incorporating new problems as they emerge. Both place platforms at the heart of the regulatory model. Both recognise the need for a differentiated approach to different platforms and different types of content, and do not prescribe exactly what action is required of platforms (although as we have seen the UK approach appears rather more prescriptive than the French).

Broad, flexible regulation would certainly have advantages, considering the principles described above. It would allow different responses by platforms of different size or that pose risks, thereby allowing tailored responses and reducing the risk of favouring large incumbent platforms over start-ups. Flexibility allows both regulators and platforms to learn from experience and iterate accordingly.

However, breadth and flexibility could cause problems for regulatory certainty, which requires that expectations of companies are clear, and regulatory action predictable. The regulator in both proposed regimes appears to have great discretion, to define harms, specify expectations of companies, assess compliance, and impose sanctions. The risk of both proposals is replacing one system of unaccountable, opaque speech regulation with another – the former operated by platforms, the latter operated by platforms under the direction of a regulator.

Such a scenario risks over-zealous regulation and censorship, undermining freedom of expression and foreclosing the benefits of open online environments. The scope of regulation may expand over time, with the regulator adding new obligations either in an attempt to create greater certainty or in response to political pressure, without sufficient regard for whether additional regulation is necessary or proportionate. The relationship between law and regulatory standards may be unclear – would the UK 'duty of care' take precedence over or establish an alternative legal regime to existing law on, for example, blasphemy or harassment?

Clarifying the separation of powers

Both the UK and French proposals need to provide, in time, greater clarity about what companies are expected to do, how regulators will assess compliance, and the thresholds for enforcement action. Full assessment of both approaches is impossible without more detailed elaboration of the remit, powers and duties of the powerful regulators that they envisage. Breadth and flexibility must be balanced by fetters on regulatory discretion; at present, these are unclear.

Here are two areas that could be explored.

First, should regulators be expressly prohibited, by statute, from directing platforms to adopt particular technical or functional solutions, or introducing requirements that have the effect of imposing such solutions? I have argued elsewhere¹⁹ that platforms should be held to account for the effectiveness of their procedural response to online harms; that is, the policies, code and processes they use to identify, evaluate and respond to broad objectives established by law. In a procedural regime, the regulator's role would be to define the governance standards companies should meet, with appropriate oversight in place to ensure those standards are upheld and where necessary enforced – but not to tell them how to manage their platforms.

Second, the regulator's own accountability arrangements will need careful thought. These could include mechanisms for

independent external scrutiny, due process obligations enshrined in legislation, a general duty to respect human rights, and accountability to Parliament. Any proposals to extend the scope of regulation to new harms or legal content should be subject to scrutiny by an appropriate body, which could also be Parliament. The UK White Paper suggests that there should be a statutory mechanism for companies to appeal against a decision of the regulator. Both the UK and French regulatory proposals envisage a new 'separation of powers' between state and platform, to allow a wide-ranging and flexible response to the challenges of online content moderation at scale. But they have only scratched the surface of what that division of roles and responsibilities might be. Much further work is needed before it will be possible to make a full assessment.

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Appendix

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