

# House of Lords Select Committee on Communications The Internet: To Regulate or Not To Regulate?

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## Consultation response from the Centre for Competition Policy

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This consultation response has been drafted by the named academic members of the Centre, who retain responsibility for its content.

### The Centre for Competition Policy (CCP)

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## CCP Response to the House of Lords on the Internet: To Regulate or not to Regulate

We welcome the opportunity to give evidence to the House of Lords Select Committee on Communications on several of the issues that have been identified as crucial to considering how Internet regulation may be improved. In our response we briefly address questions 1, 2, 5, 7, and 9 in the call for evidence and are available for further discussion on these topics.

### **1. Question 1: Is there a need to introduce specific regulation for the internet? Is it desirable or possible?**

- 1.1** Regulating the Internet as a whole is a very complex task that is unlikely to be efficient. A preferred approach would be to break down this very broad question by types of online services or categories thereof. Some services, such as social media platforms, seem to lend themselves better to co-regulation. For example, for platforms for sharing video content the way has been paved by the soon to be adopted revision to the Audiovisual Media Services Directive<sup>1</sup>. Though the UK might want to depart from this Directive in a post-Brexit world (should it be allowed to do so), the model of encouraging self- and co-regulation for the protection of minors and other consumers could still be followed. Where intervention by the regulator is necessary, we suggest a targeted approach aimed at specific types of services.
- 1.2** For the most part effective implementation and independent monitoring of existing laws governing a range of issues such as data protection, intellectual property rights, competition, or defamation, together with minimal additional internet specific legislation could ensure better protection of the various interests at play than extensive legislation aimed at regulating the Internet. Emphasis should be placed on establishing healthy legal frameworks within which self- and co-regulation can take place.
- 1.3** While there is real danger that over-regulation of the online space could lead to undue restrictions on expression, the devolution of responsibility to industry also carries a risk if self- or co-regulatory mechanisms are not set up well. The state has an obligation to ensure that efforts to protect intellectual property rights,

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<sup>1</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Text with EEA relevance) OJ L 95, 15.4.2010, p. 1–24; Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities COM/2016/0287 final - 2016/0151 (COD).

rights to dignity, security or privacy do not overly impinge on rights to expression and information or the right to assembly (virtually). Most models of self- and co-regulation in other industries do not involve large individual companies making the decisions that involve the balancing of these rights based with reference to their own terms of use or community guidelines and its interests in maintaining its user base and advertisers. They involve collectively determined standards or codes, public involvement or at least consultation, effective appeal mechanisms, and often, regulatory backstop and/or incentives. The British advertising industry, for example, came together to develop a Code of Advertising Practice that set common standards and Ofcom now backstops its enforcement in a co-regulatory arrangement. Press publishing across Europe is governed by self-regulatory systems that involve collectively set ethical codes, criteria and/or participation incentives set by the state, and often public involvement in the enforcement bodies<sup>2</sup>.

## 2. Question 2: What should the legal liability of online platforms be for the content that they host?

2.1 Given the challenges brought by the advent of the Internet, several private mechanisms emerged to fill in the regulatory gaps. Currently, this is achieved through terms of use policies and voluntary cooperation between platforms with right-holders, police or other authorities (e.g. using regularly updated 'list' systems whereby a central list of blocked URLs or domain names are stored). A number of specific domestic instruments also exist such as the removal of terrorist material (i.e. UK's terrorism Act 2006) or notice-and-takedown procedures for defamatory content and copyright infringements (deriving from the implementation of article 8(2) Information Society Directive)<sup>3</sup>. Platforms can also be shielded against liability for the upload of infringing materials by third parties until they are being notified, following which they must act 'expeditiously' to remove the infringing content (i.e. article 14 E-Commerce Directive)<sup>4</sup>. Therefore, the current situation and blocking measures rely primarily on contractual terms established by platforms.

2.2 Whilst most platforms act as mere conduit, some companies have voluntarily gone a step further and taken proactive steps to detect or identify and determine which third party uploaded content (i.e. dominant platforms) should be available. Nevertheless, most current platforms do not act as publishers. This should be noted before deciding to change the legal liability of platforms. Additionally, it seems more appropriate to distinguish the activities of platforms rather than trying to classify them wholly as mere conduit or publishers as a platform be doing the activities of both. We have serious concerns as to

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<sup>2</sup> Manuel, Micova, and Tambini, 'Reforming the PCC: lessons from abroad' (2012).

<sup>3</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001 P. 10 – 19.

<sup>4</sup> Jacques and al., 'Automated anti-piracy systems as copyright enforcement mechanism: a need to consider cultural diversity' (2018) 40(4) *European Intellectual Property Review* 218-229.

extending a monitoring obligation to all platforms (especially due to the tendency to remove more content) reduces the possibility for dissemination of user-generated content, limiting freedom of expression. There is a difference between platforms being the best placed to *identify* content and them being best placed to *act/assess* whether there is indeed an infringement and therefore, whether the content should be available on the Internet.<sup>5</sup>

**2.3** The main pressing change necessary to the current liability rules is better transposition of international standards in UK law, such as some instruments adopted by the Council of Europe including the Protocol to the Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems and the Convention on Prevention of Terrorism which are yet to be ratified by the UK Government.

**2.4** Any specific legal framework should define grounds and conditions upon which content is made unavailable (whether through filtering, blocking or taking down) to ensure that freedom of expression (and freedom of information) is preserved online. To safeguard these fundamental freedoms, the grounds for refusing access to content online should closely mirror the limitations to freedom of expression as enshrined in article 10(2) of the European Convention of Human Rights (ECHR), namely: the protection of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, and the prevention of the disclosure of information received in confidence. The balance struck between the competing interests at stake on the grounds for rendering online content unavailable should preferably not be left to the courts or to private entities (i.e. intermediaries) but should be enshrined in the law and implemented through effective self- and co-regulatory systems. There is currently no need to add grounds for limiting online expressions to the list enshrine in article 10(2) ECHR. Nevertheless, conditions should also be specifically defined to avoid creative judicial interpretation. Although, national sensitivities and cultural diversity should be preserved which may lead to different judicial outcomes.

**3. Question 5: What measures should online platforms adopt to ensure online safety and protect the rights of freedom of expression and freedom of information?**

**Question 7: In what ways should online platforms be more transparent about their business practices—for example in their use of algorithms?**

**3.1** Two things are crucial in terms of the way platforms act to balance online safety and freedom of expression and information: transparency and appeal. Of course absolute transparency in the algorithms that sort content or execute filters is not possible, in the same way it is not possible or necessary to have complete transparency of the thoughts inside the heads of each member of a press council

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<sup>5</sup> Ibid.

that is deciding whether an article is libellous or headline hate speech. Transparency goes hand in hand with effective appeals mechanisms. In the same way someone can appeal a decision by Ofcom or a press regulator based on an understanding of the broadcasting code or editors code that were supposed to be the basis for that decision.

- 3.2 Some platforms have introduced complex algorithms capable of monitoring content online as well as complaints mechanisms to challenge decisions made by said algorithm, but a lot remains to be done to make the process transparent and fair. Important questions remain: how do these private companies monitor content and what ‘flags’ trigger action. When responding to notifications from users, what criteria are used to determine whether the contents should be removed? Aggregate data on removals of content for copyright, hate speech, security or other concerns, and on de-listing for data protection reasons is lacking making it difficult to monitor the balancing of fundamental rights.
- 3.3 Platforms could do more to ensure the protection of freedom of expression online (e.g. if algorithms can detect copyright infringements, these same algorithms should also be able to detect the possible application of copyright exceptions which could then be confirmed by human oversight), but the current incentives favour removal of content.<sup>6</sup> Content is increasingly being removed as pressure mounts for platforms to combat hate speech or fake news. Since the Facebook, YouTube, Twitter, and Microsoft signed up to the Code of Conduct on countering illegal online hate speech, for example, removals of content reports as hate speech increased from 28% to 70%.<sup>7</sup> Therefore, without jeopardising the application of safe harbour provisions, the attention of authorities should re-focus on also providing more incentives for platforms to respect human rights rather than just on controlling expression.
- 3.4 Effective appeal mechanisms are crucial to well functioning self- and co-regulatory systems and a lot more could be done regarding counter-notification or appeal mechanisms for platforms. Currently, such mechanisms as operated by Google on YouTube do not require human oversight and rely on the user to be able to articulate why the content is lawful within a certain number of limited characters. This process should be simplified for the user by removing any statement deterring them from challenging the decision applied by an algorithm, providing further explanations to users to help them in formulating a counter notifications or appeals, and verifying whether they should pursue the upload of particular materials. Information on the criteria being used to instruct algorithms or otherwise evaluate content could be provided to help users understand how their content is being assessed, and platform response to counter-notification or appeals should be monitored and compared regularly to take down or blockage data.

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<sup>6</sup> Jacques and al., ‘An empirical study of the use of automated anti-piracy systems and their consequences for cultural diversity’ (2018) *SCRIPTed* (forthcoming).

<sup>7</sup> European Commission, Results of the 3rd monitoring exercise of the implementation of the Code of Conduct January 2018 [http://ec.europa.eu/newsroom/just/document.cfm?doc\\_id=49286](http://ec.europa.eu/newsroom/just/document.cfm?doc_id=49286).

#### 4. Question 9: What effect will the United Kingdom leaving the European Union have on the regulation of the Internet?

- 4.1 Many directives and regulations (including the GDPR and the Open Internet Access Regulation) will cease to have effect in the UK after March 2019. As the UK government intends to implement all EU laws into national law before departure, the legal framework is likely to remain the same as in the EU territory for the time being. However, the UK will not benefit from the developing CJEU case law in this area. If there is a willingness to consult the CJEU jurisprudence after March 2019, there is no certainty that the UK will follow and endorse the developments of the CJEU.
- 4.2 Furthermore, leaving the Digital Single Market is likely to have a dramatic impact on the UK as it will have to comply with EU rules in order to trade without being able to influence these. Historically the UK's influence on EU communications policy has been very high, with UK expertise and pressure being particularly influential in the liberalization of telecommunications and audiovisual markets, not least because of the research capacity and expertise in its regulators. Leaving the EU, the UK will lose its leading role in shaping one of the largest markets and in policy innovation that is often copied in other markets around the world.