Digital Economy

IN FOCUS

Regulating Digital Platforms and Intermediaries

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Summary

In the 1990s Bill Gates said: 'As we look ahead into the next century, leaders will be those who empower others.' He has been proven right. Over the last two decades intermediaries have emerged that empower, among others, writers and other content creators, innovators, traders, programmers, businesses and start-ups. These intermediaries are private businesses technologically enabled by digital platforms. They are the cyberspace counterparts of, for example, newsletters, pinboards, bazaars, public squares, roads and toolboxes. A new kind of digital economic ecosystem has emerged and needs to be addressed by regulation. The relevant laws are about to be changed in the US and in the EU.

The regulation of this ecosystem needs to preserve and possibly enhance the dynamism of innovation and remain open and competitive. On private platforms existing national laws and human rights must be observed. The enforcement of the law should in principle be carried out by the government and in principle the responsibility to comply with the law lies with each of the actors involved. Platforms may voluntarily assist in law enforcement on their platforms. Moreover, platforms are free to set their own rules on who may use them and what can be done on them.

However, some of these platforms play a pivotal and sometimes unique role which, naturally, gives rise to calls for them to be subject to regulatory oversight that would place constraints on their ability to set their own rules. Such oversight is needed to ensure that platforms are open to all users who would make lawful use of their services. It is also needed to help ensure that any rules set by the platform operators are fair and are

applied in a manner that ensures free and fair competition. Regulations that attempted to stifle innovation or limit freedom of expression would be harmful. The same holds for regulations that simply tried to prevent the shift towards the platform economy for the sake of protecting the old ways of connecting customers and providers.

Introduction

Coupled with application stores, operating systems, such as iOS and Android, have empowered programmers to create millions of services and tools called 'apps'. Platforms for the publication of texts, such as WordPress, Blogger or Medium, have enabled millions of writers to publish their ideas. Platforms for the publication of videos, audio recordings and podcasts, such as YouTube, Vimeo, SoundCloud and Anchor, have allowed multimedia creativity to explode. Facebook, Twitter and other social media platforms have created virtual public spaces where people can meet, share ideas and discuss issues. The cloud computing paradigm makes powerful hardware and software infrastructure as readily available as common utilities such as water or electricity. Services include Amazon AWS, Microsoft Azure and Alibaba Cloud. Applications for office work, engineering, design and more have moved to the cloud: Office 365, G Suite, Autodesk 360, Dropbox and many others. Collaboration by programmers has been facilitated by platforms such as GitHub. Platforms have emerged for setting up shops (Amazon and Etsy), offering work (Fiverr and Dribble), processing payments (PayPal), finding drivers (Uber and Lyft) and making hotel reservations (Booking.com and TripAdvisor). Start-up funding can be found through GoFundMe and Kickstarter. The list goes on and on and on.

In the last two decades, not only has our society become much more digitised but the paradigm for delivering digitalisation has changed. What used to be an owned, isolated, in-house solution now takes the form of connected, networked services that are available on subscription. What used to be created by a software vendor on top of an operating system is now created on top of an intermediary platform, in collaboration with others on that platform. What used to be published only after editorial

approval is shared without oversight on one of the competing platforms. Big companies with large markets used to have an advantage. Now small and medium-sized companies can compete, because the technological infrastructure that once only large companies could afford has been replaced by platforms. Mass production and mass media are being replaced by mass customisation. It is possible to serve much smaller groups of customers and even to tailor a service to an individual.
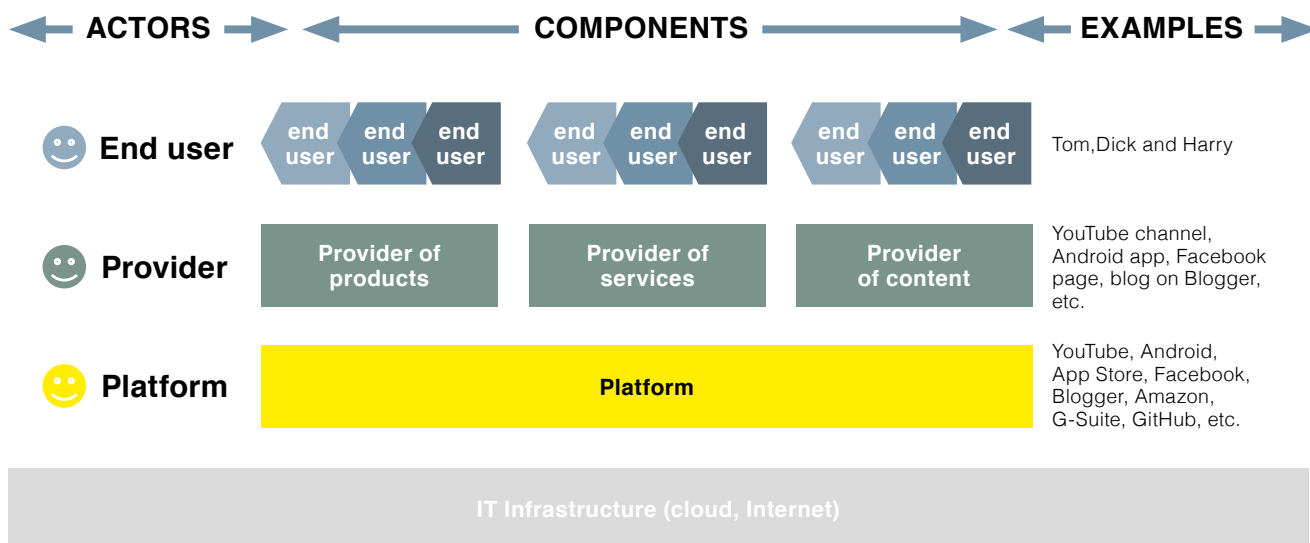
Platforms

Empowerment has technically come in the form of a platform, sometimes functionally called an 'intermediary'. It has supported creativity and innovation, simplified delivery and offered the means for a monetary or non-monetary reward. Popular platforms connect businesses with customers, or customers with customers. An emerging trend—part of the EU's Industry 4.0 strategy[1]—is the rise of business-to-business platforms, which share many features with the existing customer-oriented platforms.

The structure of this new way of delivering products, services, content and so on is shown in Figure 1 below. At the bottom there is the IT infrastructure on which everything is based. This can be located in the cloud. The Internet provides communication. The platform is offered so that third-party providers can put their innovations on it. They provide products, services, content and so on. These products are then used by the end-users, such as you and me. Often users and providers are the same individuals. A popular model is for users to create value for other users, for example by ranking content and adding comments. The structure depicted in Figure 1 is simplified. There are usually more layers of platforms and providers.

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[1] C. Santos et al., 'Towards Industry 4.0: An Overview of European Strategic Roadmaps', *Procedia Manufacturing* 13 (2017), 972–9.

Figure 1 Simplified structure of the modern digital ecosystem

Harari has written, 'we control the world basically because we are the only animals that can cooperate flexibly in very large numbers.'[2] Platforms make it possible for the number of people that can collaborate and be innovative to grow by an order of magnitude. They have allowed for a new wave of specialisation, which is a key to productivity growth. They have made it possible for more brains to be used creatively, perfectly illustrating Hayek's view on the use of knowledge in a society. Creativity requires more than freedom: it needs to be given opportunities. Platforms provide them.

Existing legal context

This explosion of creativity and innovation was made possible by both technological and legal developments. On the side of technology, one can include the Internet; the exponential increase in hardware performance; and developments involving the World Wide Web, service-oriented architectures and cloud computing. But all of these developments would have been quite useless had a very wise legal framework not been put in place on both sides of the Atlantic. Both the US and the EU set up a legal framework to shield intermediaries (that is, platform providers) from liability for what could be done by users on platforms. To that end, the US

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2   Y. Harari, 'Why Humans Run the World', *Ideas.Ted.Com*, 16 June 2015, accessed at https://ideas.ted.com/why-humans-run-the-world/#:~:text=Humans%20control%20the%20world%20because,in%20a%20very%20rigid%20way on 4 August 2020.

passed the Communication Decency Act in 1996[3] and the Digital Millennium Copyright Act in 1998.[4] In 2000 the EU adopted the e-Commerce Directive.[5] These three acts made it possible for the model of innovation and creativity described above to come into being and flourish. Platforms did not need to worry about being held liable for activities carried out on them. As long as they were not actively engaged in editing or curating the contents of the platform, they would generally not be liable for any illegal or harmful activities that took place on the platforms without their knowledge.

Modern platform ecosystem

After 20 years much has changed. First, many more activities are happening online through these platforms. Moreover, many real-world, day-to-day activities, such as working, shopping and travelling, are being facilitated by platforms. The platform has become an intermediary through which we see the world, interact with others, and share and form opinions. What used to be a street full of shops is now a platform—and the same holds for what was once a marketplace, a public square, a theatre district, a toolbox, a newsstand, a bank, a post office and a phone company. What used to be free and open public spaces with several small, independent outlets are now private platforms, which vary in the extent to which they are open or walled. This is a very different economic, innovative and media ecosystem than that which existed 20 years ago. And it is quite natural that citizens, but also businesses, expect it to be regulated in some way.

The wake-up call to revisit the regulation of platforms came in 2016. At that time questions about potentially adverse influences on the democratic process were raised in the context of the US presidential election, several elections in Europe and the Brexit referendum. Some argued that questionable content distributed on social media platforms had led to people forming opinions based on information that had not been verified by the traditional media editorial boards and journalistic professionalism.

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[3] *Wikipedia*, 'Communications Decency Act' (n.d.), accessed at https://en.wikipedia.org/wiki/Communications_Decency_Act#:~:text=The%20Communications%20Decency%20Act%20of,indecency%20provisions%20of%20the%20act on 4 August 2020.

[4] *Wikipedia*, 'Digital Millennium Copyright Act' (2013), accessed at https://en.wikipedia.org/wiki/Digital_Millennium_Copyright_Act on 4 August 2020.

[5] European Parliament and the Council, Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, OJ L178 (17 July 2000), 1.

Measures were taken to reduce the spread of so-called fake news over the social media,[6] but governments lacked the tools that were needed—not least because such content was not actually unlawful. The discussions at issue were taking place on private platforms that were not liable for the content users shared on them. Policing those platforms was hard, if not impossible. Politicians, particularly on this side of the Atlantic, hoped—and still hope—that platforms would police themselves. For some politicians, the hope has been so as to avoid being the ones to interfere with freedom of expression. In a few cases, they hoped the platforms would silence populist voices that have gotten to be dangerously competitive.

The influence that the content on platforms such as Facebook, YouTube and Twitter has over public discourse is a good example of how platforms have changed the public space. On the one hand, it is those who use the platforms to post and share content who wield this influence. On the other, it is the platforms themselves that exert influence, for they are able to promote, demote or even ban content. The platforms have emerged as players whose power, if exercised, can exceed that of the largest media conglomerates and even of governments. These platforms are great enablers of creativity and vehicles of free speech, but they can also create private rules that govern what is essentially a public space. Were platforms to misuse these rules—for example, by unduly limiting the expression of certain views—they could land up being able to disproportionally shape public opinion, even to the extent of affecting our democracies.

Public spaces on platforms

The key impact of the platform economy is that activities that used to take place in the public space, which is governed by the laws of the land, have moved to platforms. Platforms vary in the extent to which they are open or walled, but in all cases they are governed by the rules, community guidelines and conditions set by the platforms themselves.

In the past, if someone wanted to start, say, a newspaper, a restaurant, a theatre or a factory, he or she had to deal mainly with the national or local authorities. To start an information-related business today, one often

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6   European Commission, 'Tackling Online Disinformation' (18 January 2021), accessed at https://ec.europa.eu/digital-single-market/en/tackling-online-disinformation on 26 January 2021.

does have to register with the authorities. But the business will depend on the platform that supplies the technological and business infrastructure, and through which one can reach customers. For example, if Apple does not allow an app in the App Store there is no way for the creator of the app to reach its customers. The places where many aspects of life and work happen are not public anymore. There is an added layer that hardly existed in the past, though the situation is not entirely new.

This situation is a bit like all retail shops moving to a single shopping centre that decides who can set up shop, who may shop there and what can be sold—and which takes a percentage of all sales. Shopping did move from the streets to shopping centres. But it is not the case that there is only one global shopping centre: there are thousands of them, and they compete for customers. While they can set some of their own rules, they are limited in what they can do. For example, in many countries they must be closed on Sunday, and they may not restrict access to, say, minorities. But they may ask all the shops to be open at the same times, they may undertake local policing of shoplifting and they may forbid spitting or loitering. In short, they prevent illegal behaviour, and they also prevent what they consider to be harmful behaviour.

Regulating platforms

Clearly there is a need to modernise the legal framework so that it takes the role of the platforms into account. In Europe this is supposed to be part of the upcoming Digital Services Act.[7] Its aim is to 'strengthen the Single Market for digital services and foster innovation and competitiveness of the European online environment.'[8] The European Commission has proposed rules to frame the responsibilities of digital services vis-à-vis their users and to protect users' rights. It has also proposed rules covering platforms that act as gatekeepers. These rules will aim to ensure that these platforms function in a fair manner and that the ecosystem remains competitive and open to innovation.

[7] European Commission, 'The Digital Services Act Package: Shaping Europe's Digital Future' (19 January 2021), accessed at https://ec.europa.eu/digital-single-market/en/digital-services-act-package on 26 January 2021.
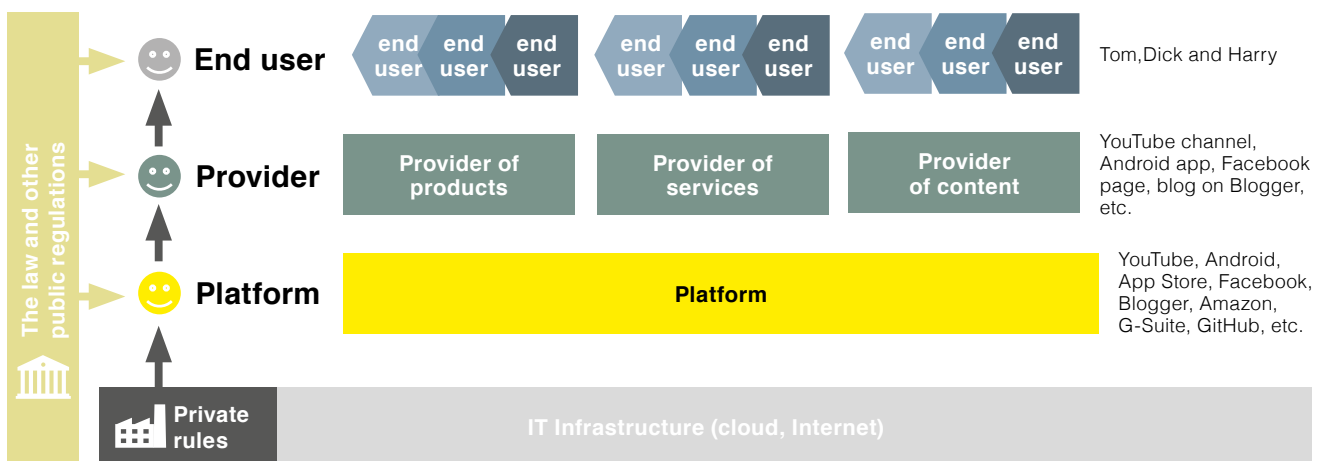
[8] European Commission, 'New EU Rules and Guidance for a Fairer Online Economy ' (10 July 2020), accessed at https://ec.europa.eu/commission/presscorner/detail/pt/ip_20_1301 on 26 January 2021.

Platforms are the infrastructure through which most digital services are provided. They are in fact the novel element in the entire system, which justifies the need to overhaul the regulations. Without this intermediary element there would be little need to update the regulations.

Furthermore, it would be wrong to pretend that services can be regulated as if they were monolithic services. They are not. At the very least, services are provided by two entities: the enabling platform and the service provider. It is this that makes the issue novel, difficult and interesting. Figure 2 shows schematically how rules are imposed on the various actors. There are two sources of rules: (1) public authorities (gold) and (2) private entities (grey). Governments can set rules for each of the three kinds of actors. Private businesses can impose rules on those who choose to use their services. The number of rules grows as we move towards the top.

Figure 2 Sources of rules in the platform ecosystem

The narrower view of the scope of the Digital Services Act is that it will reconsider the liability of intermediaries, and especially intermediaries in the social media space, in which politicians—for obvious reasons—are particularly interested. The underlying goal seems to be to curb the excessive freedom of expression on social media and to control the spreading of harmful speech and hate speech, which is illegal. It would appear that the objective is to make the social media act more responsibly when it comes to shaping the public debate, and to prevent the dissemination of fake news and harmful speech.

To date the platforms have pointed out that it is the providers or users who are ultimately responsible for posting inappropriate content and

that everyone has to be aware that what is unacceptable offline is also unacceptable online. It is clear that legislators would like the platforms to take more responsibility for policing themselves. The legislators believe that they can ask this because many modern platforms engage in practices such as recommending content and enabling users to search for content, so that it is difficult to consider them the entirely neutral and passive actors that they might have been when the protections were set up 20 or more years ago.

When it comes to considering changes to the legislation, it is important not to think of platforms as if they only or mainly provided (social) media services. We should not limit ourselves to thinking about platforms merely in terms of old-world metaphors such as 'newspaper publishers'. Platforms are infrastructures for other things as well. To get an overview of the current digital landscape, one should look at the stakeholders of this new ecosystem and how they should be regulated. The stakeholders are four: (a) the platforms, (b) providers of services or content, (c) end-users and (d) governments. Regulations should define what governments *are* allowed to do; and what platforms, providers and end-users are *not* allowed to do.

What kind of Digital Services Act?

The Digital Services Act should regulate the platforms with three goals in view.

1. Human rights must be respected, just as they have to be in the offline world. The two major sources of breaches need to be tackled: (a) violations of rights by end-users, for example by attacking the dignity of people with hate speech or libel; and (b) breaches by platforms and providers themselves, for example by discriminating against certain groups of users when it come to determining who may use specific platforms.

2. The Internet needs to remain a vibrant, open and creative space for permission-less innovation. Legislation should create clear rules and a predictable environment in which everything is allowed which is not forbidden. This is why there is a need for a set of rules that limits what governments are allowed to do. The list of activities that are forbidden to the other stakeholders should be short and precise. Moreover, the legislation should be descriptive rather than prescriptive: it should stipulate what outcomes are expected, not

how these outcomes are to be achieved. Technology will continue to evolve and should not be limited by what is currently imaginable.

3. There should be a free and open market where good ideas can easily be translated into jobs and value. No one should pick the winners: not governments, not platforms. For both platforms and providers, success should come as the natural and fair consequence of using innovation to provide what platform users need and prefer. Users should be free to move to whatever platform provides the best experience, the greatest value and the most useful innovations. Any distortions of this natural and fair process by any of the stakeholders should be dealt with using solutions from competition law.

Limiting government power over the platform ecosystem

In democracies governments should do only what the law allows them to do. This is the core principle of limited government. Businesses are not restricted in this way. On the contrary, they are allowed to do anything that is not explicitly forbidden. It is this difference that makes outsourcing the policing of the platforms to the platforms themselves so problematic.

It is governments that should be enforcing laws and rights on the platforms; the platforms are only called upon to assist. These laws relate to, among other things, human rights, competition law, intellectual property protection, hate speech and incitement to crime. The question arises as to what extent platforms should help the government to enforce the law. In principle, they are expected to cooperate with law enforcement, whilst fully respecting the rights of their users. But law enforcement should be left to governments, as it is on the streets and in bricks-and-mortar shops. Shoplifters are prosecuted by the state, not by shops.

Policing users and providers

When it comes to regulating the platform ecosystem, the source of a lot of confusion is that the bottom-up (drawn in grey) direction of regulation (Figure 2) is also the direction of all enforcement. The elements below enforce the rules applicable to the elements above. An infrastructure provider (e.g. YouTube) sets rules on what the infrastructure can be used for (e.g. the kinds of studios that can set up shop on YouTube). This is logical and natural for the private 'grey' rules created by the businesses.

However, it is considered convenient that platforms would enforce the law and other 'gold' regulations in the same direction. This approach is dangerous and wrong as it mixes two different kinds of rules: private rules set by the platform and the laws of the land.

Only in very clear cases of criminal activity should platforms be expected to act on their own, for example by removing child pornography or dealing with apparent breaches of copyright. In such cases, however, legal tools are still needed that ensure that fair procedures are in place through which users can fight such decisions. Users should be able to sue platforms if their use of the platform is unfairly obstructed, but platforms should not be punished by the government if they fail to take the initiative to enforce the laws. They should, however, facilitate the government's policing of the online world.

In principle, governments should not outsource the policing of digital space to private companies, except in very simple cases. For example, it is not up to Facebook to decide that articles claiming the earth is flat are to be censored while those that maintain that the earth is round can be posted. What Facebook can do, however, is allow users to add an optional service that publishes information about the trustworthiness of this or that post.

It should be made clear that liability and responsibility lie with the end-users. Only where the user/provider cannot be identified and the platform does not expeditiously remove unlawful content following notice should the platform be held liable and responsible. This goes together with the principle of 'know your users', a practice which should be encouraged.

In short, law enforcement on the platforms should be carried out by the state. Platforms are expected to cooperate. In cases that are universally considered illegal, such as those involving the sexual abuse of children, law enforcement could be outsourced to the platform, provided the platform gives its consent.

Policing platforms in general

Then there is the question of the rules that platforms impose on users—in the form of, among other things, service agreements, licences and community guidelines. These rules restrict illegal and unwanted activity, though the distinction is usually blurred. What is illegal has already been

defined; this does not have to be repeated or reinterpreted by platforms. Platforms can broaden the list of prohibited activities beyond what the law stipulates, which would make these activities unwanted, but not illegal.

As far as the law is concerned, everything that is not prohibited on the platform is allowed. As far as platform rules are concerned, platforms are free (but not entirely free, as we argue below) to forbid activities they themselves see as unwanted, for example pornography on a site such as YouTube.

In general, platforms have the authority to set their own rules on what takes place on them, provided that the rules are compatible with the general laws. For example, a platform may not discriminate based on race or ethnicity, though it can address itself to a single community or language group. In general, platforms can arbitrarily decide who may and who may not use them, and what activities are allowed, as long as these restrictions do not violate existing regulations, including those on competition.

Ensuring the public nature of private platforms

However, platforms that are widely used by the public should be subject to scrutiny regarding the kind of private rules they set and the way they enforce them. Without such oversight, popular platforms could effectively act as gatekeepers and could unduly prevent specific providers from entering a market. These 'critical' platforms, or gatekeepers, should not be permitted to arbitrarily deny users access to a provider of a service or content, nor should they be permitted to arbitrarily deny providers access to their platform. Unlike a baker of a cake,[9] but like a bus service provider,[10] they should offer services to everyone. They should not be made to enforce political correctness or maintain a specific political bias; on the contrary, they are expected to be neutral.

This is particularly important for (social) media platforms. The idea of a platform being hostile to, or even banning, content from one end of the political spectrum might well appeal to certain politicians on the other end. But it is valuable for a democracy that, within the constraints imposed by

[9]   D. Smith and L. Graves, 'Supreme Court Sides With Baker Who Refused to Make Gay Wedding Cake' *The Guardian*, 4 June 2018, accessed at https://www.theguardian.com/law/2018/jun/04/gay-cake-ruling-supreme-court-same-sex-wedding-colorado-baker-decision-latest on 4 August 2020.

[10] US History.org, 'Rosa Parks and the Montgomery Bus Boycott', (n.d.), accessed at https://www.ushistory.org/us/54b.asp on 4 August 2020.

law, *all* voices should be heard on the *same* platform—that people with different convictions meet, exchange views and talk out their differences. YouTube, Facebook and Twitter are such platforms. Content can be curated; it can even be curated to suit a particular user's preferences. But the critical social media platforms should be open to all law-abiding providers. Compare a situation where a country has only one printing company. It should print newspapers from the left, the right and the centre, regardless of the political views of the owner of that company. If there is merely one shop for a specific kind of product (such as iPhone apps for the iPhone operating system), it should be open to selling all apps that are legal and comply with justifiable general technical criteria. It should not, for example, introduce roadblocks for apps simply because they compete with the platform's own products.

All platforms, even the critical ones, should be free to define how they use the data they collect. Indeed, they should be free to set any rules whatsoever as long as they treat all their users equally and their activities conform to the applicable legislation, such as the General Data Protection Regulation (GDPR). This should remain a matter for the platform and the users alone. Again, where the platform is a critical one, the freedom to decide how data is used should be subject to oversight.

In short, platforms and providers are free to select their users, to restrict their users' activities and create value from user activity as specified in the agreement between the platform and the user—providing that this is done in accordance with the applicable laws. The exceptions are critical public platforms. They are not to be regulated in the same way as utilities, publishers or shopping centres. Rather, they are obliged to be neutral and provide unbiased services to anyone. Their power should be limited, as is the power of government in a democracy.

Conclusion

Over the last 20 years a new digital ecosystem has emerged which has proved to be a fantastic engine of innovation and prosperity. Intermediary platforms have been developed that have empowered providers of many different services, products, apps, types of content and more. The regulations established to date have largely defended the platforms against liability for the activities that providers and end-users carry out on them. This situation is now being changed. It should change in such a way that this engine of permission-less innovation is preserved. Liability and responsibility should lie with the entity that carries out the activity in question and not with the entity that enables it to do so. In this ecosystem the law should be enforced by governments. Platforms and providers can be asked to help, but only in a few simple cases. Platforms are free to set additional rules on what can happen on their platform. Likewise, service providers can set additional rules governing the use of their services. However, this freedom should be subject to regulatory oversight when a platform becomes so popular that it is critical to enabling providers to provide their services online or to enabling end-users to take advantage of these services.

About the author

Žiga Turk is a Professor at the University of Ljubljana, Slovenia. He holds degrees in engineering and computer science. He studies design communication, Internet science and scenarios of future global developments, particularly the role of technology and innovation. He is an internationally recognised author, public speaker and lecturer on these subjects. Dr Turk was Slovenia's Minister for Growth as well as Minister of Education, Science, Culture and Sports and Secretary General of the Felipe Gonzalez's Reflection Group on the Future of Europe. He is a member of the Academic Council of the Wilfried Martens Centre for European Studies.

Credits