# PARLIAMENT, PEOPLE AND PLATFORMS

**DAMIAN TAMBINI** says the first step in reining in platform power is to set up independent, cross-party, civil society commissions supported by governments

After a series of scandals about Facebook in particular, but also YouTube (Google) and other platforms, governments are now involved in multiple negotiations with powerful internet intermediaries. The danger is that these complex processes will get bogged down and parliaments and the public will be played by the platforms. To ensure the best deal for the public, governments need a clearer overall strategy and coordination, and genuine support of the public.

The platforms have finally been dragged to the table. Facebook's Mark Zuckerberg was called to testify to the US Senate and the European Parliament. With several ad-hoc inquiries in the UK and the EU on issues such as internet regulation, fake news and hate speech, what happens next in Brussels, Washington, London and other capitals will shape not only the internet but the traditional media for generations. The emerging crisis has occurred because these platforms now play a crucial infrastructure role in most of our lives. They are too important and powerful to ignore.

They are associated with a range of harms from hate speech to child exploitation to dominance in advertising markets. They enjoy power without responsibility as news publishers, widespread data tracking in "surveillance capitalism" supported by addictive behaviours, and are re-engineering our environment from the High Street to our transport infrastructure. But they also deliver huge benefits, which is one reason why it is so difficult to leave, and why they benefit from powerful lock in and network effects.[1]

Such a broad canvas requires a clear-sighted approach – policymakers must consider more holistic approaches to the problem of platform power. This means joining up the various policy fields where states and platforms are negotiating about the responsibilities of powerful internet intermediaries. If policymakers fail to do this, they will undermine their negotiating position.

In the UK, a House of Lords inquiry has posed the question of how the internet should be regulated. As Harvard law professor, Cass Sunstein, has pointed out,[2] regulation is the norm on the internet, in the form of property rights, and protection from harm is necessary online as it is elsewhere. The regulatory question is how and by whom. The internet – as a regulatory object – is difficult to grapple with, because it is nothing but a cluster of communications protocols and standards. What do exist, and increasingly control and even supplant the internet for many consumers and services, are platforms and intermediaries such as Google, Amazon, Facebook and Apple. This is what the House of Lords inquiry is really about. If we, via our representatives, do not regulate the platforms, they will regulate us.

## WHAT IS THE SOCIAL VALUE OF PLATFORMS?

In the UK, the government has a standard procedure when considering if anything needs to be regulated, and that is the treasury's Green Book.[3] According to this government bible, policymakers must first ask whether markets will fail to deliver optimal welfare. Like the methodologies used in competition law, it is based on a model of individual consumer welfare. As pointed out by myself and colleagues on spectrum allocation,[4] there are limits to this approach when it is applied to complex, incommensurable policy issues.

Fundamentally, it is not possible to capture the value to society of broadcasting and the internet in simple models based on cash values. In policy terms, what is the value of a service to society is the question that must be asked before any regulatory question is posed; whether that is the question of whether something needs regulating at all (the Green Book question); or how it needs regulating – through fiscal measures, competition instruments or some form of licensing?

In the context of public service broadcasting, there is a generally accepted – if sometimes contested – notion that the BBC, for example, delivers positive social externalities – or "public value" – that would not be delivered by the market. Our problem with

The UK's Houses of Parliament, where the House of Lords internet inquiry is taking place

regulation of the internet is that we have not even asked the prior question of whether the internet – or rather the platforms – deliver social value or whether that value might be negative.

The truth is of course that what the platforms do, and whether they deliver value for society, is being worked out in a discussion across society and parliament. In essence, parliament is negotiating with the platforms – as it did over the previous two centuries with the press – about how and to what extent they will serve society, and what regulatory deal they will get to facilitate this. The problem is that until now, this has been done in a fragmented way, with one conversation about copyright, another about child protection; one about hate speech and another about fakery; one about election advertising and another about data privacy.

The solution to the current impasse is not going to be a tweak here or there, but a policy response that is coordinated across multiple policy areas. Competition policy – shaping and structuring the market as a whole – must be considered alongside other forms of regulation, for whether the platforms develop an ethic of public value across each of these considerations will depend on their own voluntary behaviour. If they fail to do so quickly, society will rein them in.

If arms-length ethical standard setting fails, governments have many options. These include, at the extreme, break-up or nationalisation of platforms or punitive regulation. China and Russia have demonstrated that the structure of the internet does not prevent the licensing of social networks and control of their content. In liberal democracies that recognise fundamental rights, the regulatory solution will involve autonomous institutions, regulated in the public interest, but the detail of how regulation will work institutionally (what combination of self, co- and statutory regulation) is yet to be determined. Governments must rediscover the social objectives that lie behind regulation and develop a clearer vision for where they want to get to. This means negotiating a new "social compact" for platforms, which respects their autonomy, but gets the balance right between transparency, independence and accountability.

## TAXATION

Fiscal policy can be used to achieve social policy goals. There is a consensus in favour of high taxation on tobacco and alcohol, gambling and more recently sugar, because of the overwhelming evidence of detriment and negative social externalities associated with consumption of those products. On the other hand tax breaks are offered to goods considered beneficial, for example, controversially, all newspapers in the UK benefit from a VAT exemption.

Because they provide virtual services, there has been a history of ineffective enforcement and taxation of the platforms, and a degree of avoidance. As a result there has been a lot of discussion about using fiscal policy to achieve regulatory outcomes, but not a great deal of decisive action. This is due not only to difficulties of enforcement but because there is no consensus on the social benefits or costs associated with, for example, social media, search or the wider data and artificial intelligence (AI) services they enable. In this, the next few years are crucial, and a social policy driven tax regime that attempts to reinforce socially beneficial and undermine socially costly outcomes is likely to be designed.

In recent weeks and months this consensus has shifted: in part because of the growing realisation that data driven "surveillance capitalism"[5] may act to the detriment of individual wellbeing and fundamental rights including privacy; and in part because new evidence has emerged about worrying negative political and social consequences of platforms, including in the most sensitive areas

of elections and national security. These negative externalities are particularly difficult to assess: there is currently a very wide range of opinion on the cultural, political and economic benefits – and disbenefits – delivered by platforms.

In such an environment, calls for levies on platforms to fund various social goods including news, gain more traction. Policymakers in France and Germany have developed several iterations of digital taxes already, and US expert Victor Pickard recently called for a "public media tax" on Facebook's and Google's earnings to fund public interest journalism.[6] He calculated that a 1% tax on their 2017 net income in the US alone could yield $285m for independent journalism. A similar proposal has been advanced in the UK by campaigns such as the Campaign for Media Reform. The hazards of such an approach are obvious – the compromise of genuine independence – but the history of the BBC and other policy instruments demonstrate that it is entirely possible to provide public funding and protect media independence.[7]

### WHAT WOULD IT MEAN TO 'BREAK UP' FACEBOOK OR GOOGLE?

In the book, Digital Dominance,[1] edited by myself and Martin Moore, we conclude with a call to open up or break up the dominant social media platforms. We are by no means the first to advocate this obvious move. Emily Bell, one of our chapter authors has made the same point. With companies that have the economic features of network effects that lead to natural monopolies the choice, as summarised by Jonathan Taplin, is whether to regulate them as monopolies or break them up.[8]

> **We are therefore currently at a decision point. Break up or regulate as monopolies?**

Experts such as Patrick Barwise are of the view that the economic properties of platform markets are such that normal processes of competitive creative destruction may not work: data driven dominance enables social media to become entrenched and see off competitive entrants *(see article on page 22 of this issue)*. We are therefore currently at a decision point. Break up or regulate as monopolies? Break-up is, in addition to punitive taxation, the big stick held in the background as a discussion goes on about what kind of regulation might work.

### WHAT KINDS OF STRUCTURAL SEPARATION WOULD ADDRESS THE PUBLIC POLICY CONCERNS?

If it does come to breaking up platforms how would that work? This is not science fiction. Various forms of structural separation remedies are available in communications regulation; incumbent former telecoms monopolies in Australia, Japan and the EU have over the past decade been required by national regulators to progressively separate internal divisions – such as wholesale from retail divisions.[9] Classically, the history of US antitrust has shown that both in the energy sector and in communications with the breakup of AT&T, regulators and Congress have been prepared to break up unacceptable concentrations of economic and political power when this becomes necessary.

The signs from Brussels and Washington are that momentum is building for such a break-up. This could take the form of a separation between the different operations of the platform company, for example between the advertising, personal data, content production and user generated content departments. And if a structural solution cannot be found, regulators can shape behaviour. One could imagine a public interest intervention requiring some form of divestment or structural separation combining competition and public interest concerns, but this would in all likelihood require new legislation.

### REAL TRANSPARENCY AND ACCESS TO DATA

Academics have called for access to data and more transparency with increasing militancy; participants at a conference in Amsterdam[11] and more recently in Perugia[12] have demanded better access. Regulators, too, need to know more about the process of opinion formation. This inevitably raises questions about the autonomy and independence of internet publishers and would require legal and constitutional restraints under the European Convention on Human Rights. Facebook recently announced that it was setting up or facilitating the setting up of an independent body – a council of academics and civil society representatives that would be granted access to data. Although this is a useful delaying tactic for Facebook it is difficult to see how it will work in practice: given commercial and personal confidentiality such a body could not be granted unfettered access to

## HOW DOES COMPETITION LAW NEED TO CHANGE?

A related issue is the fact that existing competition law and antitrust have been developed and applied in a way which creates difficulties in dealing with concentrations of market power in platforms. There are various problems: one is that consumer interests are often constructed in narrow terms and in particular in relation to price. Lina Khan points out in her excellent essay[10] that Amazon's long-term strategy of achieving market dominance through low prices, while sacrificing short and medium term profits has had the additional benefit to Amazon of providing some immunity from competition law as it appears to regulators that Amazon's low prices indicate the degree of consumer benefit.

Martin Moore's work makes clear that the history of antitrust in the US is a history in which competition law and regulation has much wider social objectives than price alone. While there is a need for a good deal of caution in offering regulators or politicians wide discretion in examining the public interest benefits of private actors such as internet platforms, it is entirely possible to design regulatory systems that ensure regulated companies protect a wide range of public benefits. Drawing on the history of media regulation in particular, and the combination of sector specific public interest benefits with general competition benefits, it should be possible to arrive at new forms of regulation.

Facebook's systems and they would ultimately be in the position of making requests for data to Facebook. In these circumstances, data could be formatted. This is no substitute for the kind of statutory body with licensed access to private data within clearly defined terms, as advocated by US experts such as Frank Pasquale.[13]

### REDEFINE PLATFORMS AS MEDIA?

Journalists are fond of calling for a level playing field between internet intermediaries and news media and in particular calling for the redefinition of platforms as publishers. What this would mean in practice is to change the liability structure for internet intermediaries, something previously regulated from Brussels. The UK's culture secretary, Matt Hancock, recently announced that the government would be consulting on this, as the UK could develop its own policy after Brexit.

This is not a new issue. Back in 2011 the Council of Europe called for a "new notion of media"[14] in which internet publishers would assume many of the responsibilities and obligations of media and also benefit from privileges and exemptions enjoyed by media. While this kind of policy shift is attractive in principle, in practice it may be an immensely complex affair particularly in UK where there is no overarching definition of what a publisher in fact is. In France and Germany there is more clarity regarding the obligations, for example of transparency that pertain to publishers in general. There is a consensus building on both sides of the Atlantic that the very wide exemptions and immunities granted to internet intermediaries are not sustainable and provide an unfair subsidy to the platforms. The question is, what to replace them with. How tough to be on the platforms?

### TOUGH DATA PROTECTION FOR SOCIAL NETWORKS?

The platform business model is essentially based on exploitation of personal data. Platforms can offer smarter advertising and a range of ancillary services because they know more about you than their competitors do. But personal data regulation is being tightened, and how this is carried out, particularly in Europe, has the potential to shift the dial on whether their business model works. The GDPR, in force across Europe now, is a major paradigm shift in the regulation of social networks, and regulators will face a number of decisions about how to exercise the considerable discretion they have in implementing it. How they do so will depend in part on what range of complaints they receive, and the wider policy discussion around platforms is bound to have an impact.

Campaigners fought hard for a right to data portability with social networks in mind. But in practice an effective right to data portability will depend on a range of interpretations: will it in fact be possible for you to download your entire Facebook history, photos and friends, delete them from Facebook and transplant them into a competitor social network? That is the policy solution that would fuel real competition, but it is one that Facebook and others will fight to prevent.

## COPYRIGHT

One of the key bones of contention between platforms and news publishers is the extent to which platforms are able to exploit news created by others for advertising revenue. States can pass laws which alter the balance of power between publishers and platforms. The EU's current proposal for a press publisher right is one such proposal. What this would do is introduce another layer of protection, in addition to existing copyrights and database rights, by creating a broad right of ownership in news. Such proposals could, however, create significant negative outcomes: for example by undermining the free flow of quality news and ideas, and arguably creating space in the market for fake news.

In redesigning the copyright regime, states are effectively switching the dial that determines flows of revenues either to publishers or to platforms. But they are doing so without a debate about which of the two deliver real social value. The fake news issue is a smear with which traditional media can daub the platforms, but let's not forget that the press is not perfect, and in the UK, a broad swath of the country's newspapers is acting in a contemptuous manner towards parliament and its royal charter.

### PROTECTING DEMOCRATIC LEGITIMACY

Election laws also need to be radically reformed. Part of this is about having spending limits that are easier to enforce and would prevent the kind of money laundering, shell companies and benefits in kind that are alleged to have occurred in relation to the EU Brexit referendum and part of it is about new offences relating to deliberate attempts to mislead voters through targeted advertising. Some have called for outright bans on political advertising in social media: this may be going too far as there are likely to be significant benefits to various forms of targeted communication.

In the longer term we need to have a debate about propaganda. It was the rise of totalitarianism in the mid-20th century that gave rise to the paradigms of media freedom and media pluralism protection within the Council of Europe system. The rise of AI and data driven algorithmic propaganda poses new challenges not merely at the level of new centres of powerful corporate authority, but at the level of each individual citizen whose autonomy is challenged by the ability of propagandists to know and understand their identities, interests, intimate ideas and behavioural proclivities. The platforms have an important role to play in this and what they do matters to all of us. It is not acceptable for monopoly players, or even big players in oligopolistic markets, to enjoy the role of censors and editors without transparent ethics and accountability.

### WHAT DOES ALL THIS MEAN FOR INTERNET FREEDOM?

We have come a long way since the late and recently lamented John Perry Barlow made his celebrated Declaration of the Independence of Cyberspace in 1996. It was Hillary Clinton in 2011 who made the key intervention in defining the new US doctrine of internet freedom. The platforms have, as one might expect, embraced this notion for their own self-interested objectives, for example claiming that intermediary liability shields, and protection from various forms of transparency obligation are crucial to freedom of expression. It is certainly the case that opposition and dissent in authoritarian countries can benefit from free internet services including global access, but it is also the case that internet freedom, like press freedom needs to be understood as instrumental – i.e. as conditional on serving particular democratic ends – and institutional, implying social responsibility with regard to the institutions of democracy.

Internet freedom, like the other freedoms of communication, is by no means absolute. Individual human rights of freedom of expression will continue to be claimed and defended online as well as offline. Internet platforms, particularly those that enjoy monopoly or dominant positions are likely to operate as censors or pseudo-censors through their ability to block, filter, or make more prominent certain forms of content. So it is time that the communicative gatekeeping role of internet players was regulated and regularised alongside that of other publishers. The maintenance of a separate regime for internet-only players is unsustainable.

## HOW TO MANAGE REFORM

Macho phrases like "open up" or "break up" rightly raise the hackles when one considers the history of media freedom. We do not want governments kicking Facebook's doors down, any more than we want them smashing printing presses or journalists' laptops. This is why process matters. If any political party or government attempts to design the constitutional settlement for platforms, history tells us they will not be able to do so without attempting to create a media system tilted in their own favour.

Almost a century ago when radio was in its infancy, the Sykes and Crawford Committees in the UK set out the framework that would establish the BBC. These were independent commissions involving parliamentarians along with other experts. Such processes were elitist of course, but as a basic model it remains the way forward as it is not limited to parliament. There must be an independent committee of inquiry to investigate platforms, and this should cover not only regulation, privacy and child protection, copyright, fake news and hate speech but the entire range of issues where the role of platforms, not of the internet per se, is raised. Institutions such as the UK House of Lords are a good place to start, but the process needs to be more open, more civil society led, and more plugged into the huge range of international initiatives in this space.

The "open up" part of the deal must mean being subject to data transparency requirements and to regulatory institutions that are independent of the state. Facebook's announcement that it will create data access for academics is not enough. There is an opportunity for Facebook and Google to set some global standards. While the reality of the state in China or Iran would not permit genuine independence, working through institutions such as the Global Network Initiative, platforms could develop a framework for revealing data to genuinely independent third-sector bodies with oversight of civil society and academia. This would not compromise rights to freedom of expression and privacy in the context of state oversight.

As this process of negotiation unfolds, it is crucial to have a clear and shared notion of the wider citizen interests that are at stake. Politicians need to decide whether, for the purposes of tax and competition law, Facebook is more like tobacco, or more like public broadcasting. In some ways the UK is coming to the party late – other countries have been involved in trying to operate at a constitutional level. Brazil, for example, passed a constitution for the internet in 2014. But the Brazilian authorities have had difficulties enforcing these abstract laws without a firm grounding in constitutional traditions and the support of civil society. They also lack the global authority that the UK has enjoyed as a long-established democracy.

> **Multiple overlapping inquiries resulting in uncoordinated tweaks to regulation here or there cannot continue.**

So it is worth asking at this stage how such a negotiation between states and the powerful global platforms can work. The platforms, and particularly Facebook, now accept that they are not only dominant in some markets but that they are powerful monopoly players playing an important social role in society and should be subject to various forms of social regulation. They do not want to be subject either to rules that do not meet global norms of human rights or subject to a complex patchwork of rules in different markets.

There has been no credible threat of global regulation. The existing global institutions, such as the Internet Governance Forum (IGF) and other bodies under the UN umbrella simply don't have the enforcement power and operate as talking shops and coordination mechanisms. The first step must be taken by national parliaments, and the UK is well placed to do that. But the current approach of multiple overlapping inquiries resulting in uncoordinated tweaks to regulation here or there cannot continue. An independent commission should address the platforms with one voice, and a clear message. The debate about the overall social value of the platforms is prior to the multiple overlapping questions about how they should be regulated.

The debate will need to take into account the relationship to declining legacy media. In the UK, one option might be to re-open what the Royal Charter on Self-Regulation of the Press might be for. The government is at an impasse, but it has created a valuable legislative and regulatory machine in the Press Recognition Panel[15] and the incentives of the Crime and Courts Act.[16] Perhaps one role for such a commission is to redefine what this regulatory framework is for, and make sure that it deals with a wider range of social ills – and social benefits – delivered by this new breed of platform publisher.

Whatever the content of the eventual deal between the platforms and democratic societies, it is clear that the first proposal must be for a vehicle that is up to the task of carrying out a multi-year negotiation with a credible threat of the full range of policy tools, competition, fiscal and regulatory, that governments can ultimately call on.

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