

Smart regulation: Foundation, concept and development (of the basis) for its implementation

Laurent Ferrali,
ICANN

Abstract:

The Internet connects more than four billion people on the planet. Its meteoric development over the past twenty years has been accompanied by the development of threats against the foundations of many societies around the world. Various factors have limited the ability of states to intervene, but a strengthening of Internet regulation now appears to be a necessary, even for the most liberal states. In this context, the concept of “smart regulation” was put forward by French authorities at a UN meeting in November 2018.

The Internet now connects more than four billion human beings on the planet. Along with its astounding development over the past twenty years have come menaces against the very foundations of many societies around the world. Various factors have limited the capacity of nation-states to intervene, and a reinforcement of the regulation of the Internet now looms as a necessity, even for liberal governments. In this context, French authorities proposed the concept of “smart regulation” during the Paris meeting in November 2018 of the UN’s Internet Governance Forum (IGF). At the time, this forum was losing relevance, as was the more general idea of a multistakeholder governance of the Internet. No country seemed to want to organize this forum. This loss of interest, deemed symbolic by some observers, was evidence of a much deeper problem. Many governments had no interest in, or were even wary of, both multistakeholder governance and the IGF, even though this forum was not a decision-making body. For want of a country to host the forum, France finally accepted this task.¹

France’s proposal was among the efforts to revive the IGF so that annual meetings would be held (as had always been done since the first forum in 2006). The IGF could thus regain the political visibility that it had lost over the years. In the meantime, France had been, in many international meetings, ardently defending multilateralism, which had come under heavy fire. Although multilateral and multistakeholder approaches were sometimes seen as rivalrous, they were, for France, complementary. Organizing the IGF’s annual meeting offered France a podium for exhorting stakeholders in the governance of the Internet to work together for a more cooperative regulation of this network of networks.

At this meeting, President Macron’s speech addressed stakeholders: given the serious menaces stemming from certain uses of the Internet, it was becoming necessary to more effectively regulate the Internet. Recent events (cyberattacks, interference in elections, privacy violations, hate speech on line and, in general, the proliferation of unlawful contents) were literally challenging the legitimacy of governments, in particular their capability to keep order and effectively protect citizens. For sure, the threat of state-made regulations and the erosion of the idea of multistakeholder governance bolstered the president’s call for a cooperative regulation of the Internet.

¹ This article has been translated from French by Noal Mellott (Omaha Beach, France).

During the IGF meeting, the speeches made by the French president, the secretary of state in charge of the digital sector and the ambassador in charge of digital affairs proposed a “smart regulation” of the Internet in order to cope with these challenges. After describing the underpinnings of this concept, I shall raise questions about the conditions necessary for implementing it.

The concept of smart regulation

How effective has multistakeholder governance of the Internet been?

The implementation over several years of the concept of multistakeholder governance of the Internet has not sufficed to fight effectively against tendencies that menace the legitimacy of nation-states.

According to the definition made by the work group on Internet governance of the World Summit on the Information Society (WSIS), governance of the Internet means that nation-states, the private sector, “civil society” and international organizations (each pay in its role), jointly draft and apply the principles, standards, rules, decision-making procedures and programs for shaping the evolution and uses of the Internet. This concept of multistakeholder governance was worked out in 2003 during preparatory meetings for the WSIS. Nearly twenty years later, we must admit that it has not been capable of effectively managing this evolution and these uses so as to ward off threats against our societies. For instance, the UN’s sustainable development goals are far from having been attained, and the development of regulations has been stalled (mainly and sometimes without much success) on socially, politically and economically, harmful uses.

The risk of a purely governmental — and thus imperfect — regulation

The inability of the multistakeholder dialog to deal with the most threatening problems arising out of the development of information and communication technology (ICT) has placed some governments in a situation that restricts their capacity for protecting citizens and exercising sovereign powers. This situation, along with related, latent problems (such as taxes on ICT), has hampered the state’s ability to play its role and thus taints its legitimacy in the eyes of citizens. States have, therefore, no other choice but to make their own laws for regulating the Internet in order to prove that they can fully assume their role. Conscious of this, Emmanuel Macron’s plea reached out to stakeholders for a cooperative or smart regulation so as to avoid a form of regulation that governments alone would design and implement. In his opinion, government regulations would become an inevitable, ultimate solution if a cooperative, smart form of regulation were to fail.

Many stakeholders have been jarred by the idea that governments might start making decisions about the Internet. For the engineering community (ICANN, in particular), regulatory authorities have to clearly understand how the Internet works technically in order to keep decisions from having consequences or side-effects on connectivity and engineering operations. ICANN’s technical duties include managing the unique identifications (*e.g.* IP addresses and domain names) used for the Internet. This community and organization have a part in maintaining worldwide connectivity. Lawmakers should, therefore, take into account ICANN’s technical advice and fully profit from its expertise. The application of the EU General Data Protection Regulation, for instance, raised problems that ICANN then had to take up. The GDPR did not take into account the specific nature of the WHOIS protocol (including the need for access by various officials); and it failed to recognize that ICANN did not directly manage WHOIS databases.

The Internet’s technical complexity has to be taken into account if states want to institute an effective form of regulation without negative consequences on the Internet.

The priorities of smart regulation

President Macron pointed to three complementary priorities for the future regulation of the Internet:

- The protection of citizens (in particular of their data) and the regulation of contents. The president emphasized the benefits of updating the GDPR so as to better protect Europeans' personal data and fight effectively against online contents that arouse hate and terrorism.
- The stability and security of cyberspace, and confidence in it. The permeation of the Internet into all economic and social activities has coincided with a significant increase in cyberattacks and cybercriminality. Cybersecurity is a priority of the French government. The 2018 IGF was the occasion for the Paris Call for Trust and Security in Cyberspace.
- The preservation of the Internet's potential for creation, invention and economic development. This implies a regulatory framework that favors innovation.

All concerned parties must cooperate. In many cases, French authorities prefer a dialog and self-regulation. A motion at Christchurch, strongly supported by France, focused on the detection of terrorist contents and their suppression on major Internet platforms. Stakeholder participation is also justified when nation-states want to provide a legal response to certain menaces. In this case too, an effective multistakeholder dialog must be fostered.

How to develop the bases for a smart regulation of the Internet?

Once smart regulation has been defined, what are the conditions for implementing it? After setting regulation in the context of the Internet's development, I shall then discuss the need for a common vision of the sectoral and global issues related to digital technology.

Regulation is not contrary to innovation and the Internet's development

First of all, regulation of the Internet must not be seen as an obstacle to innovation. This preconceived idea has often been advanced by economic agents who are worried by some governments' regulatory intentions. True, innovation and the development of uses are mainly to be set down to the private sector and engineering community. The Internet's rapid growth around the world has long been based on an absence, or low level, of regulation in this sector. However this position, partly justifiable, calls for a more granular, contextual analysis.

We should not see the Internet as a whole. Its governance groups a number of stakeholders who intervene on various layers of this network of networks. Since uses have not been tightly regulated for several years now, it is essential to focus on the function of regulation in the development of these networks themselves. We cannot simply draw the conclusion that the absence of regulation has underlain the development of the ICT infrastructure. In many lands, the upsurge of networks benefitted from the adoption of a form of regulation that tolled the knell of the country's historical national monopoly. "Liberalizing" ICT set the conditions for more competition — a competition subject to general and sectoral regulations. The complementarity between this liberalization of ICT and competition law opened a competitive playing field where new Internet service-providers sprung up to rival the "historical" operators. This competition boosted innovation and spurred the development of connectivity in many countries. The Internet's physical infrastructure was developed thanks to an *ex ante* and *ex post* regulation in favor of more competition and thus of connectivity and innovation.

Although the regulation of uses has been more discreet, we are forced to admit that the growth of many unlawful uses and the lack of control by big platforms over their customers' uses do raise questions about whether this absence of regulation has been beneficial.

Working out a common vision of our destiny

Developing a smart form of regulation depends on all stakeholders actively and sincerely cooperating. In the first place, a joint vision must be worked out of the current problems, advantages and disadvantages, and future issues stemming from the growing use of ICT and the Internet. This approach takes the place of a defense of the private interests of stakeholders, whom we must rally around shared problems. This is the prerequisite both for cooperation among stakeholders and for understanding each party's role.

Various international initiatives have already been launched to work out a consensus on sectoral problems and on the uses of ICT so as to respond to global challenges.

The governments of France (on the question of cybersecurity) and New Zealand (on online violence and terrorism) have laid the basis for a common vision responses to the indicated issues. These initiatives have preceded or followed others, which are just as noteworthy, such as Microsoft's call for a digital Geneva convention or the reports by the Global Commission on the Stability of Cyberspace or the UN's High-Level Panel on Digital Cooperation. These efforts have laid the basis for a joint view of these challenges, and, too, of responses to them (in particular, unlawful uses and unequal access). What now needs to be done is to design the roadmap, formulate the objectives that will be binding on all stakeholders, and design indicators for monitoring this process.

Beyond the menaces directly stemming from unlawful uses of ICT and the Internet, we should give thought to the question of how digital technology can help make a better world. Our planet is facing global challenges. In response, the United Nations, in September 2015, adopted 17 sustainable development goals as priorities for the planet. Digital technology is obviously considered to be fundamental for reaching most of these goals. Various UN agencies are monitoring these goals via the World Summit on the Information Society (held yearly in Geneva) and designing the indicators for following up on them.

To open a multistakeholder dialog for cooperatively regulating the Internet, all parties should accept these observations related to global and sectoral issues. A shared viewpoint will provide the necessary condition for "transpartisan" discussions grounded on the acceptance of a common universal destiny.

The concept of smart regulation, proposed by French authorities during the annual meeting of the IGF in Paris in November 2018, is beneficial in more than one respect. First of all, multistakeholder governance of the Internet and multilateralism have failed to come up with adequate responses to major global and sectoral problems, even as new challenges are arising out of emergent forms of technology (artificial intelligence, the Internet of Things, blockchains, etc.). On account of this, all proposals for providing effective responses to current or future challenges are worth discussing. Secondly, inherent in smart regulation are the principles of the preservation of innovation and the effective participation of all stakeholders in both designing and implementing solutions. Stakeholders must accept to build a common destiny that reaches beyond their private interests. They will then have to agree on the procedures for working out and implementing the decisions for seeing to it that technological progress will be at the service of socioeconomic progress.