

How to regulate platforms?

Sébastien Soriano, chairman of the Autorité de Régulation des Communications Électroniques et des Postes (ARCEP)

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Summary:

Owing to its philosophy of total decentralization, the web (2.0 or even 3.0) has conquered the world and is in the hands of a few giant intermediaries. Thanks to their formidably efficient models of “disintermediation” (or rather “reintermediation”), on-line platforms are now the masters of the digital economy. The stakes are so high that a form of regulation is to be worked out. In a world market where innovations are accelerating (as in the digital economy), poorly designed regulations would come at too high a cost. How to co-construct new, agile forms of regulation? This is necessary for confidence to reign in a sector that is preparing the ground for tomorrow’s economy.

A business model is “eating the world”

It all starts with a definition...

The concept of a digital platform refers to a wide range of situations (search engines, appli stores, the “sharing economy”, etc.).¹ What is specific to this whole range (in comparison with “Internet 1.0” and e-commerce) is the offer to bring into relation users, applications or contents developed by third parties. Several definitions of the word “platform” have been recently formulated. Let us hold herein to the one proposed by Article 49 of the French Act n°2016-1321 of 7 October 2016 for a “Digital Republic”: “*platform operator* [refers to] *any natural or juristic person offering professionally, whether with remuneration or not, an on-line communication service based on: the listing or ranking, by using computer algorithms, of contents, goods or services proposed or posted on line by third parties; or the bringing of several parties into relation for the purpose of selling a good, providing a service or exchanging or sharing contents, goods or services*”.²

¹ Article translated from French by Noal Mellott (Omaha Beach, France). References have been updated for this translation.

² The Lemaire Act on a Digital Republic: Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique, *Journal officielle*, 235, 8 October 2016. Available at: https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=93D0CE3168F6783F5F64419E5328D436.tpdila14v_1?cidTexte=JORFTEXT000033202746&categorieLien=idea

Masters of the digital economy

Dominant owing to their model of “disintermediation” (or rather “reintermediation”), which eliminates the usual intermediaries between consumers and sellers, new “barbarians” are now roiling the lines of force in the established social order. Besides “uberizing” businesses, they are short-circuiting traditional intermediaries in pursuit of the total decentralization advocated by the Internet’s founding fathers (for example, Paul Baran), who promised to build a horizontal, decentralized world or even launch a “third industrial revolution” (a phrase popularized by Jeremy Rifkin). More than ever, “*software is eating the world*”, to borrow from Marc Andreessen, cofounder of Netscape.

This model has been so successful because it offers users an incomparable level of service. Owing to the formidable alliance with the power of the “multitude”, in the words of Henri Verdier and Nicolas Colin,³ it maximizes the network effect (or “network externality”), *i.e.*, the increase in the collective value of a good or service as new users connect to the network. Furthermore, it capitalizes on the data produced by users as a source of productivity.

But there is another side to the coin. Consequent to this success, the web is now, contrary to its founding philosophy, creating new gatekeepers. This is not the least of paradoxes!

Once a new type of platform has been installed, we very often observe a winner-takes-all effect: one player catches a major share of the market in question, benefits from a synergy on neighboring markets thanks to his increasing performance, and reigns as a master over whole swaths of our economy. This might seem theoretical; but a loss of ranking on Google Search, a delisting on App Store or a negative criticism on TripAdvisor are likely to significantly affect a firm’s growth.

Louis Pouzin, a French engineer deeply involved in creating the Internet, has unhesitatingly talked about “information colonization”. The problem can only become worse as our economies undergo the digital transformation.

At stake: The country’s digital transformation

The stakes are so high that a new form of regulation is to be designed. However, in the digital realm more than elsewhere, laws should be touched “*only with a trembling hand*”, as Montesquieu recommended. In a market in the throes of a transition and an acceleration of innovation, as is happening in the digital economy, a poorly conceived regulation risks curbing innovation and, ultimately, working in favor of the current platform operators instead of controlling them. Let us look at the checks and balances that might offset the power of on-line platforms.

Existing checks and balances

In the digital economy, vested positions, even the most dominant ones, are precarious. Ruthless competition takes place among players who are trying to attract consumers. The history of the web is full of stories about Goliaths (Altavista, Myspace, etc.) who, despite their reputation of invincibility a few years previously, are now easier to dodge.

³ Nicolas Colin & Henri Verdier, *L’Âge de la multitude. Entreprendre et gouverner après la révolution numérique* (Paris: Armand Colin, 2015).

This competition between platforms is a major check and balance for preventing abusive market practices. Analyzing its effects is complicated however. Despite full competition in the quality and price of services supplied to consumers, questions arise about the other sides of these platforms: business-to-business (B2B) relations, the interface with workers in the sharing economy, etc.

Applying existing laws and regulations

On-line platforms are not outside the laws on competition, personal data, commerce or consumer protection, not to mention specialized legal measures for e-businesses or the security of information systems.

Nonetheless, the digital economy, since it is worldwide, raises new issues about the territorial scope of laws. For this reason, the European Commission (henceforth EC) is, as part of its strategy for a Digital Single Market, trying to update various legal measures for the digital era: the e-commerce directive, the regulation on the protection of personal data, the Network Security and Information Directive, the Audiovisual Media Services Directive, the measures for electronic communications targeting businesses such as Skype or WhatsApp, etc.

The issue of trust

Delisting goods or services, changing the general sales conditions, modifying Application Programming Interfaces (APIs)... these unilateral practices by platforms can be a matter of life or death for the firms that have to grapple with them. Nonetheless, it is difficult to assess their impact, because these problems are still tenuous. Furthermore, the small or medium-sized firms or start-ups that have to put up with them are often more concentrated on business than regulatory issues. A trend is, however, clearly perceptible: many stakeholders (companies and nonprofit organizations) are voicing a growing concern.

Even as the digital realm is expanding over more and more branches of the economy, society's dependence on a few web giants' actions is a major cause of concern. The playing field for tomorrow's economy is at stake. As Jean Tirole⁴ has recalled, the government's first role in the economy is to create the trust necessary for transactions. For public authorities, the task is not to build a great wall of regulations but, above all else, to maximize, for all parties, security and confidence so as to free the forces of innovation.

The principle of an open Internet

The introduction at the end of 2015 of a new regulation for the Internet has signaled a major shift of paradigms. The EU's Open Internet Regulation⁵ lays down rules for access-providers with the objective of Internet neutrality, whereby providers are to "agnostically" transport contents.

These rules are mainly preventive. They do not, in general, stem from anomalies observed in the comportment of economic agents. To be clear, this principle mainly asserts the political decision to make the Internet a commons, a free space for exchanges, connections and innovation.

⁴ Jean Tirole, *Économie du bien commun* (Paris: Presses Universitaires de France, 2016).

⁵ European Parliament and the Council of the European Union, "Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open Internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union" (2015/201/EC) 25 November 2015. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015R2120&rid=2>

The hard core: Net neutrality

The aforementioned regulation introduces the principle of an open Internet. This means that each user (cybernaut, firm, website, application, etc.) has free access (via its connection to the Internet) to all available on-line information or contents and that users may freely contribute to the Internet. To uphold this principle, rules have been laid down for operators. The duty of seeing to their application has been assigned to national regulatory authorities (in France, ARCEP, the Autorité de Régulation des Communications Électroniques and des Postes).

This decision to regulate is a strong policy signal, since it places limits on the market and on the choices available to economic agents. The eventual tendency of telecommunication operators to reach agreements with GAFSA (the Web giants: Google, Apple, Facebook and Amazon) for accelerating the transmission of their contents is stymied. This principle has served as the grounds for the Indian regulatory authority (TRAI) to keep Facebook from launching Free Basics.

The debate on digital platforms in France and Europe

We are witnessing the start of the history of the Internet, as digital “pipelines” have moved toward on-line platforms and applications. Given the decisive importance of a handful of web giants in matters relating to the access to knowledge and culture, several parties are now calling for thought about whether these new rules of protection should be extended to digital platforms.

Whether or not to regulate will ultimately be a choice about the society we want, a choice stemming from policy decision-making. French lawmakers have, been active: the Macron Act introduced in the Consumer Code a clause targeting certain on-line platforms. Furthermore, Section 3 of the recently passed Lemaire Act on a Digital Republic imposes an “*obligation of loyalty*” on platforms.

At the EU level, no consensus has yet been reached — neither on the need for a specific regulation nor even on the principles to be instituted. The EC is working on this topic.⁶ A public hearing on the economic role of on-line platforms was held in September 2015. The odds are high that this question will interest European MPs in the coming years.

A specific regulation on digital platforms? Points for thought...

Were a new set of regulations to emerge for platforms, it should obviously not copy what already exists for regulating infrastructures such as telecommunications, energy or transportation. New forms of regulation are yet to be invented to adapt to the accelerated pace of innovations and the worldwide reach of operators.

A construction necessarily European

Interventions targeting on-line platforms must fit into an approach that is at the very least European, since, by nature, the digital ecosystem and its players tend to be global. As the French Conseil d’État has emphasized, introducing national legal measures would raise problems about their compatibility with the EU’s.⁷

⁶ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe” COM(2015) 192 final, 6 May 2015. Available at:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192>

⁷ Conseil d’État, “Étude annuelle 2014: Le numérique et les droits fondamentaux”, in particular pp.272-274. Available via:

<http://www.ladocumentationfrancaise.fr/rapports-publics/144000541-etude-annuelle-2014-du-conseil-d-etat-le-numerique-et-les-droits-fondamentaux>

Furthermore, national interventions would encounter the problem of players installed outside the country. The risk is that this interventionism would mainly affect French platforms (Le Bon Coin, pagesjaunes.fr, Blablacar, etc.) and load them with an additional regulatory handicap in competing with the American and Asian giants. This does not mean that national law would not apply to the giants but that they are ever ready to undertake litigation to postpone application.

Actions by national authorities risk leading to the creation of disparate legal arrangements in Europe; and this could splinter the Digital Single Market.

Toward a fast-track procedure

Beyond any principles introduced in substantive law, questions will arise about how to implement them. The existing institutional framework has led to incoherence. In the investigation of Booking.com, for example, French and Italian lawmakers contradicted the decisions of their competition authorities, which had reached an agreement with each other.

Besides, interventions through the courts or the EC are not fast enough. Given the pace of innovation in the digital economy and the technical nature of interventions, response time is a crucial parameter for a regulation to be applicable. In the case of lawsuits opposing platforms to start-ups or small and medium-sized firms, a regulation should provide for settlement within a few months. This is not now the case. For instance, the notification to Google of the charges brought by the European Commission in April 2016 came after an investigation that lasted five years. An *ad hoc* procedure limited in time (from three to six months) and reserved for small companies could be adopted. By comparison, ARCEP, to set fair conditions in matters related to techniques and rate schedules, has four months to settle differences between telecommunication operators. A limitation of this sort would let authorities respond quickly to small firms or start-ups that have problems with the listing of their goods or services by GAFA.

Agility and co-construction: Rating platforms instead of regulating them

The adoption of national regulations with binding obligations seems premature; but it would be worthwhile, starting now, to collect and publish information so as to have an inventory, analysis and comparison of on-line platforms' practices. In this regard, the National Digital Council has made an interesting proposal for a rating system that, through comparative quantitative studies, would bring pressure to bear on the platforms.⁸

Given the variety of platforms and the complexity of this issue, a profusion of information and tests is necessary instead of total centralization. To be effective, a rating system would have to operate following a "state-platform logic" while relying on an open network of contributors. The government could limit its role to being an information hub, a certifying third party who sees to it that the information published is sincere and reliable. Since public authorities could obtain information directly from the platforms, a sort of safety net would exist for keeping the platforms from cutting off access to useful data. Such an arrangement would help us "objectify" these problems and move beyond our current lack of understanding. It could serve as the basis for coordinated actions at the EU level.

⁸ Conseil National du Numérique, "Ambition numérique: Pour une politique française et européenne de la transition numérique", June 2015. Available via: <http://www.ladocumentationfrancaise.fr/rapports-publics/154000400/index.shtml>

Europe has many aces in the hole to play in this new economy: a highly competitive telecommunications sector, internationally renowned centers of innovation, talents wooed by the whole world and, of course, entrepreneurial successes (Criteo, Spotify, King Digital, Sigfox...) that provide alternatives to the giants. These initiatives must be supported by adopting offensive strategies on investments in innovation and start-ups, and by changing mentalities so as to foster risk-taking and cooperation. Parallel to this approach, a strategy for promoting (and, if need be, protecting) our values is also necessary if we want our model to not only survive but also be carried on and renewed thanks to (and through) the digital revolution.