The Internet: To Regulate or Not To Regulate

1. In this evidence, I make the following points that are relevant to questions 1, 2, 3, 5 and 7 in the Call for Evidence:

- There are both practical reasons and reasons of principle for imposing legal responsibilities on digital intermediaries. In some cases, action taken by an intermediary may be preferable to the imposition of liability on the initial author of content. (para.s 2-7)

- Intermediary regulation can raise issues under Article 10 of the ECHR. To strike a balance in determining when responsibility for content is appropriate, a number of processes and actions expected of an intermediary can be identified. (para.s 9-17)

- Regulation could be implemented by overseeing a company’s internal standards and procedures (‘meta-regulation’) or through the direct application of certain standards (or a combination of both). (para.s 18-19)

- While there is a tendency to consider intermediary responsibility in relation to content deemed to be harmful, there is a case for more pro-active ‘public service’ style obligations (with election communications being a possible starting point). (para.s 20-25)

Why target an intermediary? (questions 1 and 2)

2. There are various points in the chain of communication that can be a target for regulation or legal responsibility. First, there is the liability of the initial author or publisher of the content. Second, the intermediaries (that host content, provide access, or enable users to locate content) can be held responsible or regulated. Finally, there are some controls that target the reader or viewer, such as the possession offences relating to indecent images of children, extreme pornography and certain terrorist material. Imposing liability on the viewer or possessor of content should be reserved for the most extreme material, and will not be considered further here.

3. The general approach taken in the current law is to assign primary responsibility to the initial publisher of a statement. In defamation law, an action can be brought against a digital intermediary where it is not possible or appropriate to pursue the initial author or publisher (that is reflected in sections 5 and 10 of the Defamation Act 2013). More broadly, the E-Commerce Regulations 2002 provide for a scheme of conditional defences that protect intermediaries from the liabilities that are imposed on the initial publisher. In

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deciding whether intermediary liability is consistent with freedom of expression, the European Court of Human Rights also considers whether it is more appropriate to pursue the initial author.  

4. Despite the general preference for imposing liability on the original author or publisher, there are many reasons why the regulation of an intermediary is an attractive option for policy makers. First, there are practical reasons of efficiency. If harmful material is posted and re-posted by multiple individuals, it is easier to ask a gatekeeper to control the flow of such content than to bring a legal action against each individual publisher. Moreover, the initial publisher may not be identifiable and may be based outside the jurisdiction.

5. Aside from such practical matters, there are reasons of principle for targeting the intermediary. By providing a central part of the infrastructure for digital communications and offering services that determine the visibility of content, the intermediary can share some responsibility for any harms that arise from the use of the technology.

6. In some cases, targeting the intermediary (rather than the initial author) may be the more proportionate measure. For example, a person may make a casual or ill-judged remark in the course of a conversation on the social media, which is arguably defamatory or may fall foul of a criminal standard. Imposing legal liability for every such statement would risk inhibiting the flow of everyday conversations. There are already guards against such applications of the law, such as the serious harm requirement under s 1 of the Defamation Act 2013 and the Crown Prosecution Service guidelines for social media offences.

7. Such casual comments on the social media may still have some harmful consequences. A defamatory remark or intrusive image posted online can be widely circulated, may be ranked highly in search results and potentially follow a person for years to come. The responsibility of the intermediary may strike a balance between the free flow of conversation and any potential harm. For example, a system in which an intermediary removes content or makes it less prominent could offer a compromise by allowing a speaker to say what they want without attracting legal liability or criminal sanction, while also preventing that statement unduly damaging a person’s reputation or privacy for the indefinite future. The so-called ‘right to be forgotten’ can be seen as an experiment along these lines. While there are concerns that intermediary liability or regulation can lead to a system of private censorship, it is also important to recognise that it can offer a proportionate response to some types of problem.

A mixed system of controls

8. Under the current system, intermediaries are subject to a mixture of legal obligations and self-regulatory measures. Sometimes an intermediary can be a ‘publisher’ of third party material and thereby held legally responsible for that content. The question of whether the intermediary is a publisher has generated a complex range of decisions, in which courts make (sometimes strained)
analogies with traditional publishers or distributors. However, the general position is that intermediaries are subject to a system of conditional liability. Under the E-Commerce Regulations 2002, a host is held responsible only if it had knowledge of the unlawful content and failed to remove the material. Other types of regulation move away from comparisons with traditional publishers and focus more specifically on the services of the intermediary in processing information. Along these lines, the right to be forgotten established in Google Spain attaches responsibilities to the activities of the search engine (and not to the original publisher). The intermediary can also be subject to self-regulation, both through external bodies (such as the Internet Watch Foundation) and through the company’s own internal rules. The types of control are inter-related, and the conditional legal liability provides an incentive to devise and participate in systems of self-regulation.

**Article 10: Is media freedom at stake?** (question 5)

9. If intermediaries that host content are subject to liability, that can raise questions of freedom of expression and media freedom. When considering duties to monitor and take down content, the European Court of Human Rights has stated that the provision of a platform for third-parties to exercise their freedom of expression by posting comments is a journalistic activity of a particular nature. The Court reasoned that imposing liability on a host is to some degree analogous to punishing a journalist for reporting on the views of others. This means that any regulations or liabilities have to be compatible with Article 10 of the ECHR. The point is also important in so far as it recognises that certain intermediaries perform a type of media function in providing access to information and facilitating expression.

10. However, the protection of the hosting activity under Article 10 is conditional on the fulfilment of certain ‘duties and responsibilities’. While the European Court of Human Rights has drawn an analogy with ‘journalistic activity’, the duties and responsibilities cannot be the same as those expected of a traditional media company. At the heart of journalistic ethics is the responsibility to verify and check facts prior to publication. That would not generally be expected of an intermediary that hosts the content of others, which it does not endorse and may not be in a position to verify. However, it can be seen that a number of duties and responsibilities are evolving that are specific to intermediary activities. These duties and responsibilities can be promoted through regulatory measures and provide a starting point in striking a balance between freedom of expression, media freedom and other competing interests.

**Intermediary responsibilities** (questions 3-5)

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4 The condition can be established either in the legal definition of a publisher or through the defences available to the intermediary.
5 *Magyar Tartalomszolgáltatok Egyesülete v Hungary (2016)* 42 BHRC 52.
6 See the principle of *Jersild v Denmark (1995)* 19 EHRR 1.
7 The principle is well established when looking at the Article 10 rights of media bodies, see discussion in *Stoll v Switzerland (2008)* 47 EHRR 59 at [102]-[104].
11. There are several processes and responsibilities that may be expected of an intermediary and could be considered under a system of formal regulation.\(^8\) Some of the examples below are already required in the existing legal framework, while others are the subject of debate. The discussion below is not exhaustive and focuses only on processes. I do not consider what sorts of content should be regulated (whether it should be limited to extreme content and the infringement of individual rights, or whether more general standards should be applied).

12. **Notice and takedown.** An intermediary can be expected to remove and disable access to material once it has knowledge of the unlawful content. Where the intermediary does not host the content, then similar controls can be taken through filtering and blocking. This process is already well developed under the E-Commerce Regulations 2002.

13. **Monitoring.** An intermediary can sometimes be expected to take positive action to ensure that unlawful content is taken down prior to receiving a formal complaint. However, under European Union law there is a prohibition on requiring intermediaries to engage in ‘general’ monitoring to detect unlawful content.\(^9\) That prohibition ensures that the intermediaries are not subject to unduly onerous requirements (given the sheer volume of content published). However, technology may address some of those concerns (for example, making it easier to detect the posting of particular types of material or photographs) and is likely to develop in future.

14. In some circumstances, a more specific monitoring obligation can be imposed, such as a requirement to block certain identified content or websites.\(^10\) If such obligations are to be extended or considered in a regulatory system, then a key question is what should trigger a duty to monitor (whether the intermediary knows that unlawful content is likely to be posted in a certain area) and how onerous that duty should be? The role of monitoring obligations is something that could be revisited post-Brexit (depending on the final arrangements in relation to EU law).

15. **Transparency on the criteria for blocking or take down.** The role of the intermediary in taking down or blocking content can raise issues of private censorship (in which a private company decides what content is permissible). One minimal response to this is to demand a degree of transparency. Along these lines, the company can be expected to provide the criteria explaining on what basis content will be removed and blocked. Some transparency measures may go further, either by notifying a publisher when content has been blocked or removed, or informing the potential viewer why a webpage has been blocked (for example using a splash page). The expected level of transparency will depend on the legal interest and nature of the issue. A requirement to notify a publisher will be inappropriate where it infringes a privacy right, promotes evasion of a control or undermines the prevention of crime.

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\(^8\) This line of argument is developed in J Rowbottom, *Media Law* (Hart, 2018), chapter 7.

\(^9\) Directive 2000/31/EC, Article 15.

16. **Contesting decisions.** An intermediary may be expected to provide a right to contest a decision made in relation to the blocking or taking down of content. A key question in relation to such a process is the extent to which a system of appeal should have some independent oversight. Under some of the existing controls, there is an asymmetry. For example, if a search engine rejects a ‘right to be forgotten’ request, the complainant can take the complaint to the Information Commissioner or to the courts. The person responsible for the delisted content, however, does not have a corresponding right and can only make a request to the operator of the search engine to reconsider the decision. Similarly, in the conditional liability scheme under the E-Commerce Regulations 2002, a complainant may bring legal proceedings to pursue the host if there is a failure to remove the content once notice has been provided. By contrast, the original publisher of the content does not normally have a legally enforceable right to challenge the intermediary’s decision to remove or block the material. The rights of the publisher to challenge a decision (while not appropriate in every case) could be a possible issue to be addressed by a regulator.

17. **Fair terms in content selection.** In relation to some services, an intermediary cannot avoid making a selection between content. Part of its function is to prioritise information in a way that is useful to users. While the decisions are normally made by algorithm, such systems can nonetheless develop biases in the way content is prioritized. One role for a regulator might be to hear complaints about any such biases and to assess whether steps can be taken to avoid any unfair discrimination in its decisions. Alternatively, the intermediary may be expected to follow certain processes of consultation in relation to its systems, or be willing to hear challenges. More broadly, there may be a case for a positive expectation for intermediaries to prioritise certain types of content (for example, whether a news organisation fulfilling certain standards should sometimes benefit from a privileged position in the ranking of material).

**Methods of regulation**

18. The processes outlined above could be addressed through a combination of direct regulation and meta-regulation. Under a system of meta-regulation, the regulator could oversee the internal self-regulatory systems employed by the intermediary companies. Along these lines, the regulatory body could ensure that intermediary companies have adequate policies on transparency, notice and takedown, and an appeals process. The body could check to see that the forms for reporting unlawful content allows for the necessary information to be included, and that the process is clear to users.\(^\text{11}\) The meta-regulator could also ensure that the process of appeal is sufficiently independent of the initial decision-maker. Given the scale of digital publications, a regulatory focus on a company’s own internal processes is likely to be an attractive option (as opposed to the regulator handling all complaints directly).

19. Leaving such issues primarily to the industry raises the difficulty of private companies deciding what content is most likely to be seen. The intermediary may not be well placed to determine whether a defence in a defamation claim would succeed in relation to third party content, or to determine whether the

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\(^{11}\) The adequacy of such forms has been criticised in the course of litigation, see [JR20 v Facebook Ireland Limited](https://www.nica.ie/docs/doc/48/48-2017.pdf) at [41].
public interest justifies publication. In some circumstances, there is a case for a regulatory body (or a representative content panel) to provide a forum to hear certain complaints or hear appeals on some intermediary decisions. If such a regulator were developed, it could stand as a separate sector of media regulation (alongside Ofcom for broadcasters and self-regulation for newspapers) that develops specific norms and standards that are tailored to the activities of the intermediary.

**Public service obligations: elections**

20. Most of the discussion of intermediary responsibility tends to focus on minimising the dissemination of content deemed to be harmful. However, there is also an argument that the intermediary can play a more pro-active role in promoting certain positive outcomes. Such an approach to regulation has traditionally been applied to the broadcast media, partly on account of its capacity to reach a large audience and thereby promote a national forum for discussing public issues. Given the widespread use of certain intermediary services, an equivalent function could potentially be performed by the leading hosts, social networks and search engines. While this could be developed for various spheres of activity, elections may provide a useful case study, given that it is a defined context and takes place for a limited period of time. Moreover, election communications have been a key area of concern in relation to the digital media. There are a number of ways an intermediary could perform a public service function in an election. Below I set out some tentative suggestions.

21. **Delivering free election communications to a mass audience.** Certain digital intermediaries could offer free political messages for political parties and candidates (a digital equivalent to the system of election broadcasts). Under such a scheme, a video hosting site could require users to watch a short message before viewing the selected content. A search engine could provide links to the leading parties or candidates in response to certain queries during an election campaign (with results provided under a heading that clearly separates the ‘public service results’ from the ordinary search results).

22. The aim of such a scheme would not simply be to provide cheap advertising, but to offer something distinct from targeted paid political advertising. A party making use of the scheme could be required to offer the same message or advert across the whole country and thereby ensure that the national audience sees the same message. The scheme would also aim to ensure that voters receive communications from a range of parties. The question of allocating such free time could be decided by the regulator and the participating intermediaries (an equivalent to the Broadcasters Liaison Group). While the prospect of extending PEBs to the digital media is unlikely to generate much excitement, it is important to remember that the system on the broadcast media has been a key element in reducing the costs of an election.

23. **Transparency of election communications.** The intermediary could be required to publish information on the amount that it has been paid to carry political advertising and by whom. The intermediary may also require paid political advertisements to include a link to further information about the person responsible for the message.
24. A further way to improve transparency may be to provide a publicly accessible repository of political advertisements that the intermediary has been paid to carry (or at least of those where the level of advertising exceeds a certain threshold). Such a system could combat the concerns about micro-targeting, so that voters and monitors are able to check what the party and campaigners are saying to other demographic groups. This may not cover every type of election communication, but could enable some scrutiny of the messages.

25. *Equal opportunities and fair terms.* An intermediary offering an advertising service could be required to provide for equal opportunities in the terms and conditions for paid political advertising by parties and candidates.

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