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SPECIAL FEATURE

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Regulating content as communications converge

ABSTRACT

This article was compiled as a joint interview with the two authors, who have different views from one another. They answer in turn the question of how broadcasting and Internet content are regulated today, then they consider whether convergence will need to bring converged regulation, and then they each outline their views on how this should be done. Finally, they do a critique of one another's ideas.

KEYWORDS

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Q. How would you each characterize the way broadcasting and the Internet are regulated, in terms of content, today?

Roger Darlington: Broadly speaking, I would suggest that, in most democratic countries, broadcasting is regulated around some concept or definition of offence. So 'excessive' or 'inappropriate' bad language, violent behaviour or sexual activity, and such anti-social practices as smoking, drinking and drug-taking are prohibited or confined to certain times or certain channels. Therefore, essentially the test of acceptability is offence.

Historically the justification for this approach has been relatively objective factors like the scarcity of spectrum and the limited number of channels, and more subjective considerations such as authority's wish to control what citizens see and hear and citizens' wish that someone protect the vulnerable, most especially children.

Implicit in this approach has been an assumption that the society in question has a broad set of values shared by the overwhelming majority of citizens that enables one to determine without too much controversy what is and is not offensive, and that the bodies making these decisions can be trusted to reflect this consensus in their decisions.

Even in democratic countries which might be expected to have very similar approaches to what is 'offensive', it is noticeable how the United States is much more relaxed about violence than sex and how France is much more casual about sex than say the UK. Also it is often asserted – rightly, I think – that values have changed and that we all see more sex and violence on television than we used to do.

I would suggest that, by contrast, in most democratic nations 'regulation' of the Internet simply borrows from general law and that, as far as is practical, what is illegal offline is regarded as illegal online. This would include criminal content such as child abuse images (what many – wrongly, I believe – call child pornography), 'extreme' adult pornography, race hate material and inducement to violence or other activities, which are of themselves illegal such as drug-taking, fraud or robbery. It would also include content such as libel or copyright infringement. Therefore, the test of acceptability is domestic law.

The main problem here is that, while most law is domestic, the reach of the Internet is truly global. Furthermore, the Internet has a more opaque delivery mechanism than broadcasting and it is more difficult, but usually not impossible, to ascertain who is responsible for the content and who can be legally obliged to amend or remove it.

In theory, Internet content can be 'regulated' through a much lower test than illegality, since all providers of Internet connection and all hosters of Internet content have terms and conditions of use – often known as abuse policies – which would enable them contractually to remove all sorts of 'offensive' material. But, in practice, companies are reluctant to act on such complaints, both because they fear being accused of censorship (especially in the United States which ironically hosts more child abuse images than any other nation on the globe) and because such processes could be complicated and time-consuming to operate on any significant scale.

Damian Tambini: Broadcasting is regulated in a radically different way to telecommunications or the press. The peculiar status of broadcasting is justified on the basis of two interrelated arguments. We can call these the 'social compact' theory, and the 'sociological consequences' theory.

Broadcasting regulation can be presented in terms of a 'social compact' whereby broadcasters that receive public resources such as funding, cheap or free access to the airwaves, or prominence on programme guides can and should be subject to higher standards and a greater degree of public scrutiny. If regulation is seen in these terms, there is an argument that when the technical tools of regulation have declined in significance, and no longer apply to all audio-visual delivery mechanisms, regulation should be relaxed. Because control of market entry is lost, the state is no longer able to extract a quid pro quo in terms of content rules, and the compact unravels.

An alternative to this idea of a social compact is to see broadcasting regulation in terms of the social features of the medium. In this view, broadcasting has been subject to regulation because of the sociological consequences associated with broadcasting, namely that it tends to be particularly public, invasive, pervasive and influential. In this view, if some media services – including new services that become particularly influential – have high levels of impact then they should be subject to content regulation.

These two theories are not mutually exclusive. But which regulatory response to convergence is suggested generally depends on whether the focus is on the social compact or the social impact of a given medium.

Broadcasting content in most countries is regulated negatively in terms of a broadcast code or codes which set out standards and taboos limiting what can be broadcast. Historically these have been based on social and religious conventions (moral justifications). Regulation has been effective because the sanction for breaching codes is loss of the permission to use spectrum. Increasingly, definitions of what should be restricted are based on demonstrable harm rather than moral conventions. Negative content regulation is becoming more relaxed due to a combination of increased user control (through PIN protection and user filters) and more liberal social mores. Positive content regulation – e.g. obligations to provide educational, news, regional or other 'socially desirable' forms of content – faces a different set of challenges. Currently in the UK, for example, the 'spectrum for service compact' based on trading scarce electromagnetic spectrum for funding of services deemed of public value is breaking down not because of a collapse in the value of the spectrum, but because alternative delivery mechanisms – and a proliferation of channels – mean that spectrum no longer leads to sufficient advertising revenue to fund programming. States can no longer effectively control market entry for audio-visual content. This has consequences both for negative and for positive content regulation.

As content regulation changes and develops, it does so in the context of rights to free expression. In the European Convention on Human Rights there is an explicit recognition that broadcast licensing, in particular, is permissible, but all restrictions of freedom of expression must be prescribed by law and necessary in a democratic society. This legal framework accepts that regulation of expression may be necessary – for example, to protect national security or for 'the protection of health or morals' – but restrictions that may be considered necessary and justified will shift because of technological, market and sociological changes.

Internet content is not regulated in this way – because until fairly recently it has had none of the social features of pervasiveness, influence or invasiveness, and because it receives nothing from the state by way of public resources or funding. As a result, freedom of expression tends to prevail, and the Net is regulated only by the general law (as relates, for example, to intellectual property, obscenity, defamation). Internet services (at least in Europe) are not subject to content standards regulation apart from self-regulation, and Internet service providers (ISPs) have no liability for the content they host unless they are aware that it is illegal. Some forms of illegal content (notably child pornography) are subject to filtering on the basis of agreements between self-regulatory bodies such as the Internet Watch Foundation, ISPs and law enforcement agencies. The Audio-Visual Media Services Directive has extended some aspects of broadcast regulation to 'television-like' services on the Internet, and websites provided by press and broadcasting companies

(which represent most, in terms of audience for news) tend to be bound by the codes, voluntary and statutory, that regulate those media.

Q. As broadcasting and the Internet converge, do you think content regulation approaches also need to converge, and if so, why?

Roger Darlington: Regulation of broadcasting and the Internet cannot be the same. It would be both technically impossible and socially unacceptable. The issue is whether the sharp differences in regulation and the fundamentally different tests of what is acceptable should continue. My own view is that, over time and with consumer education, we should move to a less differentiated model. Why?

First, the current broadcasting model is no longer appropriate. Effectively there is no scarcity of spectrum or channels – the volume of content and the range of choice is now enormous. In many countries, there is no longer a real consensus about what constitutes offence – we are much more cosmopolitan and much more variegated in our tastes and values, and what would outrage one family would be no problem at all to another.

Second, the current Internet model is no longer adequate. When the Net was used by a few thousand academics and nerds, maybe we did not need to worry too much about its content. But now the Internet is a mass medium – indeed it is *the* mass medium – with some two billion users. To limit 'regulation' simply to material which is illegal is not facing up to some serious challenges of Internet content – such as sites that promote anorexia, bulimia, self-harm of suicide – or to the wishes of consumers for some more protection and guidance.

Third, convergence now means that regulation based on device – one system for broadcasting because it is delivered on radio and television sets and another system for the Internet because it is delivered on a computer – is wholly inappropriate and unsustainable. Already one can have a split screen with the broadcasting of a television programme as the main picture and a live Twitter feed about the programme on a smaller section of the screen. Tablet computers (like the iPad) and Internet Protocol Television are accelerating the convergence of content delivery.

Damian Tambini: Broadcasting and the Internet have already converged. Broadcast content regulation is being watered down (that applying to commercial broadcasters in particular), and where consumers can more effectively regulate their own services (through PIN protection, for example) the argument that the state should restrict freedom of expression and the right to receive ideas will inevitably be undermined. However, it is possible to take this set of arguments too far, and to exaggerate the extent and rate of change. In the UK, for example, ITV and to a certain extent Channel 4 as commercial public service broadcasters have been involved in a long-term negotiation with the regulator, Ofcom, about how their public service obligations should be watered down, as they reported having financial difficulties due to competition with Internet services and the proliferation of consumer choice. However, since 2008 advertising revenues have recovered, and it seems that ITV's regional obligations may be more affordable than previously assumed. As for negative content regulation, freedom of speech concerns would tend to render problematic restriction of content considered to be distasteful or inappropriate for

children to the extent that parents are able to protect children and such material is not invasive – that is, it does not enter households uninvited.

How you approach Internet content depends on whether you favour the 'social compact' theory or the 'sociological impact' theory. Internet delivery of audio-visual material does not engage a social compact: it does not require scarce spectrum or other forms of government-controlled bottleneck or essential facility that could also serve as a point of control. Yet as various forms of Internet protocol delivery become mass services – YouTube for example – questions are raised about the sociological consequences of these media. Can they be harmful to society or to the individual? As they have more impact should they be more tightly regulated?

It goes without saying that this is a western-centric account. Most of the world's population lives in countries in which a different model of Internet regulation is being developed. This involves both central filtering by state organizations (with collaboration from western communications companies) and informal and formal licensing schemes for service and content providers.

Q. How then do you each think a converged content regulation system should be designed?

Roger Darlington: If we are going to have a more converged approach to content regulation, then essentially we have three broad choices.

First, we could regulate broadcasting the way we regulate the Internet, so that all content would be accessible unless it was illegal. This would throw open what was permissible on television to an extent which I believe would be politically and socially unacceptable. Our screens would be awash with sex and violence and not just when we 'pull' it down from the Net, but when it is 'pushed' at us by broadcasters.

Second, we could regulate the Internet the way we regulate broadcasting, so that anything offensive on the Net would have to be blocked or limited in some way. In a global medium, where every user has the opportunity to create content, this would be technically impossible (although it is feasible in a particular totalitarian regime like China or Iran). Furthermore, it would change the whole concept of the Net and radically diminish the rich and varied content that we currently enjoy.

Third, we could seek some sort of middle way that uses a different test of acceptable content – one that is not so strict and subjective as offence or taste or decency, but one that is not so limited and difficult to enforce as illegality. What could such a test be? I would suggest for debate the test of harm.

But how one would define harmful content?

I offer the following definition for discussion and debate: 'Content the creation of which or the viewing of which involves or is likely to cause actual physical or possible psychological harm'. Examples of material likely to be 'caught' by such a definition might be glorification or trivialization of violence, incitement to racial hatred or acts of violence, and promotion of anorexia, bulimia or suicide.

Often when I introduce such a notion into the debate on Internet regulation, I am challenged by the question: How can you draw the line? My immediate response is that, in the UK (as in most other countries), people are drawing the line every day in relation to whether, and, if so, how and when,

one can hear, see or read various forms of content, whether it be radio, television, films, videos and DVDs, or newspapers and magazines. Sometimes the same material is subject to different rules – for instance, something unacceptable for broadcast at 8 p.m. might well be permissible at 10 p.m., or a film which is unacceptable for a certificate in the cinema might receive a classification in a video shop.

Therefore, I propose in relation to Internet content that in each country we consult bodies which already make judgements on content about the creation of an appropriate advisory panel for the Net and that we then create an independent panel of individuals with expertise in physical and psychological health who would draw up an agreed definition of harmful content and be available to judge whether material referred to them did or did not fall within this definition.

What would one do about such harmful content?

- There should be no requirement on ISPs to monitor proactively content to which they are providing access to determine whether it is harmful.
- Reports of suspected material from the public should be submitted to a defined body.
- This body should immediately refer this material to the independent panel which would make a judgement and a recommendation as to whether it was in fact harmful.
- A database of sites judged to be harmful should be maintained by the defined body.
- ISPs should be invited to block access to such sites on a voluntary basis.
- The independent panel should be as transparent as possible about the definition of harm being used, which sites have been suggested to it as falling within the definition, and the nature of and reasons for their decision in the case of each reference.
- Each ISP should be transparent about its policy in relation to blocking or otherwise of such content and set out its policy in a link from the home page of its website, as many sites do now in relation to privacy policy. If an ISP was not prepared to follow the recommendations of the panel, it would have to justify this to its customers.

Once we have effective regimes for illegal and harmful content, respectively, one has to consider that material which is offensive – sometimes grossly offensive – to certain viewers of television programmes or users of the Internet. This is content which some users would rather not access or would rather that their children not access.

Now identification of content as offensive is subjective, and reflects the values of the user who must therefore exercise some responsibility for controlling access. The judgement of a religious household would probably be different from that of a secular household. The judgement of a household with children would probably be different from that of one with no children. The judgement of what a 12-year-old could access might well be different from what it would be appropriate for an 8-year-old to view. Tolerance of sexual images might be different to that of violent images.

It is my view that, once we have proper arrangements for handling illegal and harmful content, it is reasonable and right for government and industry to argue that end-users themselves have to exercise prime responsibility

and control in relation to material that they find offensive, but we should provide users with effective techniques and tools that they can use to exercise such control and actively educate users over the use of such techniques and tools.

For television, this would involve warning information in the electronic programme guide and PIN protection for adult channels and possibly use of warning symbols on-screen during transmission. For the Internet, this would involve use of filtering software and better understanding of search engine options and privacy settings on social networking sites. In both cases, there should be public programmes to promote media literacy.

Therefore, regulation of broadcasting and the Internet would increasingly focus on illegal and harmful content, progressively leaving offensive content as a matter essentially for viewers and surfers to block if they thought that appropriate for their family or household. This would suggest a convergence of the regulation of broadcasting and the Internet to a model which, compared to the present situation, would involve a lot less regulation for broadcasting and a bit more regulation for the Internet.

Two issues are crucial here:

- This could not be done overnight. Consumers have strong expectations regarding broadcasting regulation, and these expectations would have to be managed through some kind of transitional process.
- We could not simply abandon most broadcasting regulation without empowering viewers to make informed choices by provision of proper tools and better media literacy.

Damian Tambini: More than ten years ago I proposed some principles to guide policy on content based on a sliding scale of consumer expectation and market share (CEMS): what I called the CEMS scale (Forgan and Tambini 2000). The basic principle is simple. Where consumers expect regulation, for example when services receive public funding, and where audiences and therefore the impact of the media are largest, stronger content regulation should be applied. The principles of the Communications Act 2003 reflect such a framework, with a 'tiered' approach to content regulation such that higher obligations apply to broadcasters in receipt of public funding and spectrum subsidies and lower obligations on more purely commercial broadcasters. But these basic principles are yet to be formalized in the regulatory system beyond broadcasting licensees.

During the process of convergence it is true that consumer behaviour and expectations will continue to change. The key question is whether the current 'tiered approach' is a staging post on the way to further deregulation or whether it represents a stable outcome. I favour the latter: human society and collective identities have always involved agreed public and moral taboos, and the ability to agree on them is important part of the societal conversation. The power of media organization with high market share entails responsibilities and requires checks and balances must be checked.

In terms of negative content regulation, people are learning – however slowly – to be responsible for their own consumption and to choose their own content. Now that reasonable-quality video is available to growing numbers of consumers on a variety of non-regulated platforms, pressures to liberalize broadcasting content regulation will continue and there is a strong argument for leveling the regulatory playing field.

Positive content regulation, based on the notion that there are some forms of content that the market will under-provide, is a different question. It is my view that the citizenship and social role of communication is such that there will always be failures of the market. Citizens would be ill-served if the media system consisted only of providers entirely controlled by market forces, just as they would by a system controlled only by the state or by the third sector. There are a number of ways in which powerful media organizations can and should be held to account, and the market is only one of them. Some aspects of broadcasting regulation – such as the requirement that the largest and most influential news sources have some kind of impartiality requirement – are likely to be necessary in the long term, if not permanently, regardless of whether current definitions of 'broadcasting' are sustained. A general basket of agreed ethical standards of fairness, tolerance and impartiality should apply to all larger providers on the basis of an impact theory.

The question is how such a system could be applied in practice. The 'levers' associated with the previous settlement – control of market entry through spectrum licensing – are not available. So if the CEMS scale were to be made more permanent, this would require more regular market reviews to ensure a clear understanding of market share, as well as monitoring of expectations and literacies of users. In short, a new social compact for the media based within the competition framework. If media companies are not prepared to shoulder a set of codified responsibilities that come with dominant gatekeeper power, they should be broken up.

Q. Roger, what are your comments on Damian's response?

Roger Darlington: There are strong similarities in the analyses from Damian and me:

- We both believe that convergence of broadcasting and the Internet is a reality that continues to develop through technological change and consumer behaviour – although this varies from country to country and household to household.
- We both observe that the current regulatory mechanisms are under strain and are increasingly hard to sustain or justify.
- We both take the view that a comprehensive, longer-term approach is preferable to fragmented and pragmatic initiatives from politicians and regulators.
- We both want to see the expectations and wishes of consumers take more precedence instead of decisions being taken for us by politicians or regulators.

However, we differ in the nature of the new regime that we recommend.

The essence of Damian's proposal is a sliding scale of content regulation for broadcasting based on consumer expectation and market share. The approach might have merit as a transition to the more radical model that I have proposed which would apply the same test of acceptability – basically, harm – to both broadcasting and Internet content.

However, I would challenge Damian's sliding scale approach on the following grounds.

First, by his own admission, the proposal was conceived a decade ago and technology, markets and – above all – consumers have moved on. Most especially,

what has changed is the advent of consumer-generated content. Ten years ago, we did not have YouTube, Facebook and Twitter. Intellectually we now have a new question to answer: Why should we regulate content from the BBC or NBC totally differently from content created by you or me?

Second, the sliding scale model seems to be targeted at broadcasting but appears to have no relevance to Internet content. So it is not really a framework for a converged world and would retain – although in a milder form – the dramatic differences between the regulation of the same sort of content presented through different delivery mechanisms or devices.

Third, it can be argued that a regulatory model based on consumer expectations and market share is unnecessary because it would have little, if any, practical effect. Consumers expect 'high' standards from the BBC and NBC, and those networks have large market share. It is for precisely those reasons that these organizations shape and control their content – whether it is a broadcast programme or a website – as they do, and not really because of formal regulations. They have a trusted brand and they wish to protect that brand across all platforms. If they step significantly 'out of line', there are pressures which are more significant than regulation, such as a political challenge to the level of the licence fee in the case of the BBC or the withdrawal of advertising clients in the case of commercial channels such as NBC.

Fourth, the sliding scale model would effectively give a free hand to minority players or broadcasters or channels (ignoring for the moment the practical issues around measurement of market share). If, for example, we have content that actively promotes anorexia or bulimia, why should we treat it differently because it is on a popular TV channel or a minority TV channel or a well-known website or in a little-used chat room? Fairness and consistency – plus practicality – should be at the heart of any regulatory system.

I want to see a regulatory model for content that meets the following criteria:

- It reflects the nature of the modern democratic society in which citizens and consumers are more educated, more media-literate, more differentiated in their values and views, more empowered to make their own decisions, and less deferential towards authority.
- It reflects the reality of what is happening in our markets and in our homes with consumers increasingly wanting to access content over multiple devices at any time in any place with logical and consistent rules.
- It treats the same content in the same way – whether it is broadcast by a major player or a minority channel, whether it is on television or the Internet, whether it is accessed over a television set, a computer or a converged device.
- It is a practical scheme that enables all creators, transmitters and hosts of content to know where they stand in terms of what is and is not acceptable, and, when such matters are disputed, there is a high-speed, low-cost, trusted and consistent mechanism for resolving such disputes.

I do not believe that Damian's sliding scale for broadcasters adequately meets these criteria. Therefore, I commend study of a model which has the same test for content that is broadcast and that is online, which has at the heart of that test the notion of harm, and which uses an expert panel to make quick,

consistent and transparent decisions. This will not happen overnight, and it will not be easy to win immediate and universal support – but this, I believe, should be the direction of travel.

Q. Damian, what are your comments on Roger's proposal?

Damian Tambini: Roger's suggestion is an example of one of the principal trends in Internet content regulation: the targeting of private and public 'points of control' in the Internet architecture in order to assert a degree of control over content, and restrict access to certain forms of illegal and 'harmful' content. Whilst I am very sympathetic with Roger's overall aims, I don't think his proposal is workable, for the following reasons.

1. Overall approach. Use of these co-regulatory structures, for example Internet hotlines and notice and takedown regimes, has been fraught with difficulties. They tend to be more complex and expensive than planned, and there are disputes about whether they should observe higher due process standards. The root of the conflict is that private self-regulatory bodies are performing a function that could be seen as a private editorial role, or it could be seen as a part of public censorship with implications for fundamental rights. Roger's structure leaves both possibilities open: if several large ISPs choose to block a site, the owners' fundamental rights are at stake, but they may each do so through a half-baked process with weak transparency and no right of appeal. If a public body exercised a similar censorship function we would be much more critical. In general, complex co-regulatory structures tend to be a pragmatic fudge: they are superficially more palatable as a form of censorship precisely because they don't really work.
2. Definition of harm. This is perhaps the most problematic issue. Whilst it may superficially appear to be a less 'subjective' question, Roger's notion of 'harm' is extremely difficult to assess. Consider the following question: Does most or all 'mainstream' hardcore pornography cause physical or psychological harm in creation or in consumption? After half a century of debate and research, the jury is still out, and a case-by-case assessment would be necessary. Some of those involved in the porn business will insist that it is a well-paid, enjoyable job, whilst others see it as based on coercion and necessarily involving risky, abusive, harmful behaviour. It would be the role of Roger's panel to adjudicate this question and to incorporate the views of culturally and religiously diverse members of society. Ditto for consumption of porn. Research on media effects is inconclusive yet there are clear arguments for harm, either in terms of addiction or psycho-sexual disorders, particularly for children. It is likely that a piece of content that is harmful for one user may be neutral – or even beneficial – for another. In a self- or co-regulatory framework it is crucial that adjudications are clear and legitimate. Many of Roger's panel's decisions would be neither, particularly if they are driven by complaints, which are likely to be highly politicized.
3. Voluntary blocking by ISPs. What gets blocked? Is it a piece of content or a site? A URL? Disputes about forms of Internet blocking and censorship often hinge on whether a block is proportionate, and what is effective.
4. Roger is right to demand transparency of his regulatory structure, but in the case of sites for blocking it can only be a limited transparency. If the blacklist is released it may drive traffic with obvious perverse consequences.

5. And doing this with anything approaching a necessary transparency would require huge resources. Television regulation grew out of the codes that the BBC applied to its linear radio and TV channels, and applied only to a handful of channels. The scale of media production and distribution today is entirely different. Today, almost every teenager in the country is a channel. The idea that you can have a complaints-driven notice and take-down system with a central review committee for current content seems to me to be entirely mistaken.

There are a few small- and medium-sized countries around the world where the Internet is most advanced and where, coincidentally there are established traditions of freedom of the press and of expression. I am thinking mainly about the north-western tip of the European Peninsula. It may just be possible that some stripped down version of your scheme could be introduced in these countries without too malign an effect – though for the reasons I outline, it is unlikely to be effective. But do not underestimate the implications of the norms you are creating with such a scheme. In countries with weaker traditions of media freedom, these regulatory frameworks will be held up as a global norm and copied, but with much looser and targeted definitions of harm (such as harm to the regime or to 'social harmony') and the democratic potential of the Internet further undermined. This is not 'their problem', but a global debate regarding how the global public good of the Internet should be managed.

You will say that these trifles are not a reason not to try to do anything about this. And I would agree that we need to think more about these matters. But I am afraid that in the unlikely event that it has any impact at all, your cure may be worse than the illness.

And am I right in thinking that you have defined broadcasting regulation only in terms of what broadcasters shouldn't do. For me, negative content regulation standards can be provided by communications providers, editors and brands to a large extent, and the largest players, particularly those with a dominant position, can sign up to a code. Positive content regulation facilitating access to socially valuable content and public services is also a challenge.

We should not run together material that is harmful to produce with material that is harmful to watch. Harming another person tends to be illegal, and it tends to be most effectively dealt with in the jurisdiction in which the harm takes place. Internet distributed evidence of harm should be gathered, and procedures for ensuring that it is acted upon is a matter for cooperation at the national and international level. And measures should be taken to ensure that businesses cannot be built on such content. Material that is harmful for some to watch yet freely available is something we are still learning as a society to deal with, and empowering users, especially parents, to continue to learn how to avoid harm is the way to proceed. My proposal is that we should focus on the larger players, and ensure that those spaces and channels that represent our most public, pervasive, invasive and influential media should be subject to higher standards. Market reviews, conducted as part of the general competition monitoring by Ofcom, could be used as a trigger for applying a public content obligations code. The code should outline positive and negative obligations, including access to educational and public services. These should be monitored by Ofcom in a co-regulatory manner as part of an enhanced 'competition plus' framework. If media providers achieve scale and power, they should be broken up or regulated to prevent abuse of that power.

This would also be a coherent response from the point of view of freedom of expression. For some, the notion of private censorship is a contradiction in terms: censorship is something carried out by the state. A small media company, whether that is an ISP, a channel or a platform, cannot control communication effectively because consumers have a choice of other providers. But when companies assume dominant positions in the market – as for example Google and Facebook do in some markets – that argument breaks down. Dominant aggregators and controllers of key points of control and gateways could, by taking material down, or blocking access to it, perform a form of censorship. Consumers' freedom of expression rights demand a response to that control just as much as they demand a response to state control. So a new approach to regulation which is based on an assessment of the market share of key gatekeepers, and is triggered by market reviews, is a more sensible way of approaching this.

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