

The risks of the increasing intervention of big intermediaries in Internet content

Submission to the consultation launched by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on platform content regulation to the Human Rights Council - 2018¹

More than two decades after the opening up of the world wide web for the general public and the beginning of its commercial services, the Internet no longer has the freshness and air of novelty that marked its first fifteen years of wide use. The initial profusion of services that competed to provide better and more innovative solutions to internet users has been replaced by the stabilization and consolidation of a handful of platforms and applications that dominate a significant part of the traffic of information and content in the network.

Evidence shows a trend towards greater concentration in the hands of a few transnational corporations as a result of the dynamics of the current Internet business model. This accumulation of power is not only a result of the success of services and goods provided to users, but also the characteristics of a "network economy": the global scale of the business, the ability to raise capital for the necessary investments, and the mergers or purchase of other competing or complementary companies, among others. The dispute over the radio spectrum and the Internet of Things (IoT), and especially the ability to monetize the resulting *big data*, lead to processes that are deepening the current level of concentration.

Concern over concentration in the area of OTT services is justified, and beyond aspects of economic competition, given that several of the business corporations that have significant market power and a dominant position on the Internet are owners of platforms that enable the free flow of information and other relevant content such as social networks, search engines, communication applications and video sharing platforms. In this concentrated environment, the potential risks to access, diversity and pluralism of ideas and information that have already been mentioned become exacerbated.

Since the first half of the 20th century most advanced democracies have embraced the notion that regulation in the communications sector acts as a fundamental guarantee of democracy due to the central role that a pluralistic and diverse public sphere has for its proper functioning. The quality of democracy and a vigorous civic debate depend largely on the variety of information and views competing in the public space and available to citizens.

¹ The Latin American Observatory of Regulation, Media and Convergence (OBSERVACOM) is a non-profit, professional and independent regional think tank, composed of experts and communication researchers committed to the protection and promotion of democracy, cultural diversity, human rights and freedom of expression. OBSERVACOM addresses public policies and regulations on audiovisual communication services, the Internet and other information and communication services in a digital and convergent environment, focusing on aspects related to access, diversity and pluralism.

In a scenario centralized by the traditional media, it was clear that the market on its own did not guarantee the fundamental diversity, pluralism and freedom of expression needed by democracy. With the emergence of the Internet, it seemed that part of the rationality that gave meaning and foundation to democratic regulation might have been lost. In fact, some important players in the digital ecosystem claim that regulation of the Internet is not only dangerous but should not exist, as it is no longer necessary nor possible.

However, after the initial phase of more decentralized and open network operation, new bottlenecks formed and the Internet embarked on a growing centralization among just a few actors of the digital ecosystem that has affected its potential to serve all of humanity: this was underlined by the creator of the World Wide Web, Tim Berners Lee. The trend towards concentration and threats to freedom of expression on the Internet show that diversity and pluralism - and even the notion of an open and free Internet - need regulatory guarantees so that they can be maintained as values and paradigms of modern digital communications.

This may not lead, however, to weakening the role of intermediaries. Without intermediaries, it would be humanly impossible to enjoy the enormous potential available in the network of networks. Companies that provide platforms and applications on the Internet play a key role in terms of access to an open and free Internet, given the task they perform as intermediaries between users and the content available on the network.

However, and paradoxically, this new and vital role makes them a potential risk for freedom of expression and the free flow of information on the Internet. Such intermediaries no longer provide just technical support and "transit routes", but often affect the content that circulates through such routes. Not only are they able to monitor all content produced by third parties, but they can also intervene in them, ordering and prioritizing their access and, therefore, determining what content and sources of information a user may or may not view. They can also block, eliminate or de-index content – such as speeches protected by the right to freedom of expression - as well as users' accounts or profiles. These actions can be imposed by external pressures from government authorities or other private actors, but also by the decisions taken by the intermediaries themselves.

Moreover, the growing incidence of intermediaries as a gateway to the information content available on the Internet has also generated a change in the flow of resources within the digital economy that would seem to be indirectly affecting diversity and pluralism, while negatively impacting economic benefits that producers of traditional information content receive, especially those that have high fixed costs, such as those that carry out investigative journalism and hard news.

Based on these facts, OBSERVACOM presents its contribution to the debate on content regulation in the digital age:

BIG INTERMEDIARIES MUST BE SUBJECT TO PUBLIC OBLIGATIONS

The real possibilities of access, diversity and pluralism in a free and open Internet are concentrated among a few intermediaries or private corporations, whose platforms and services -for example, social networks- occupy the role of new public spaces. All this takes place, however, in the absence of transparency and accountability. To what extent is it possible to impose public obligations on private stakeholders?

A central argument for such obligations is that human rights must have horizontal effectiveness. Member States have to respect and promote human rights in their vertical relations with citizens. But also companies, in their horizontal relationships with users, are obliged to respect such rights. The United Nations Human Rights Council (UNHCR) expressly acknowledged this obligation in 2011 by approving the "Guiding Principles on Business and Human Rights".

This perspective is also justified when it is confirmed that the main platforms have a significant market power, and offer services that can be considered essential. Their market share and impact on essential services such as searches, social networks and audiovisual platforms endows them with an undeniable public dimension and requires, at the very least, regulations that guarantee diversity and pluralism.

INTERMEDIARIES SHOULD NOT BE LIABLE FOR THIRD-PARTY CONTENT WHEN NO INTERVENTION HAS OCCURRED

States should promote and protect the exercise of freedom of expression by adopting legislation, policies and administrative practices that provide an adequate regulatory environment for OTT service providers, in order to deal with threats and unlawful pressures of content removal, filtering or blocking by State authorities and other private actors.

Regulation should incorporate the notion that "no one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so ('mere conduit principle')" as set down in the Joint Declaration on Freedom of Expression and Internet 2011.

This does not mean that intermediaries do not have "any responsibility" for the exchange of content through their platforms. Unlike conduits they are not mere technical services and do undertake interventions when prioritizing or amplifying certain contents of third parties, for example, without being pressured by the State to do so.

THE CONTENT INTERVENTION BY INTERMEDIARIES IS ONLY JUSTIFIABLE IN FLAGRANTLY ILLEGAL CASES AND FOLLOWING STRICT CRITERIA

The removal, de-indexing or blocking of content of intermediaries by their own decision is justifiable in flagrantly, clearly and unequivocally illegal cases (such as child pornography) because the volume of content exchanged and the speed and dynamics of exchange, which may, on the one hand create an irreparable damage and, on the other hand, make it difficult for conflicts between parties to be treated only under the judicial power of each country. However, this content treatment should only be valid if it:

- Has transparent and accountable rules and criteria to handling content, both for general rules and for individual cases;
- Is based on public criteria defined by co-regulation (State and private sector, with multisector participation) aligned with international standards expressed in United

Nations, regional instruments on human rights and freedom of expression and the Manila Principles on the liability of intermediaries;

- Is limited to what is necessary and essential to deal with cases that involve evident risk of serious violation of fundamental rights;
- Does not substitute the public mediation of conflicts established by the due legal and judicial process of each country;
- Involves adequate mechanisms for notification and review of decisions for its users.

THE PLATFORMS NEUTRALITY SHOULD ALSO BE A BASIC PRINCIPLE OF THE INTERNET

Inter-American standards include the principle of net neutrality as an indispensable condition for freedom of expression on the Internet. The objective is, as mentioned above, to ensure that "freedom of access and choice of users to use, send, receive or offer any content, application or legal service through the Internet is not conditioned, directed or restricted by means of blocking, filtration, or interference".

The same principle should be extended to other intermediaries - that is to say not just ISPs – and with the same purpose of ensuring diversity, pluralism and access to a free and open Internet. This is important because many of these platforms - and the algorithms they use - are increasingly responsible for fundamental decisions about the content that people access.

The level of potential or real interference with Internet content places a huge responsibility on intermediaries who -and if no democratic regulation is in place- in fact become a form of private regulators never witnessed before. This situation is aggravated by the weakness of democratic states to regulate phenomena that transcend their administrative boundaries.

The concept of "neutrality" also holds true for these actors of the digital ecosystem, as OTT service corporations have the potential to affect freedom of expression "by conditioning, directing or restricting" content "through blocking, filtering, or interfering" if they do not act in a neutral way with respect to the information and opinions that circulate through their platforms and applications.

The fact that this ability to be a *gatekeeper* lies in the control of a physical or virtual layer of access, should not affect the principle that gave rise to the notion of net neutrality and placed it as a key issue in the agenda for freedom of expression of the Internet. In fact, it was no necessary to identify any systematic and widespread evidence of a violation of freedom of expression based on political or ideological reasons on the part of ISPs to identify a serious problem for this fundamental right, and to conclude that it was a basic principle which should be regulated through the adoption of national laws.

