CONTENT REGULATION AND HUMAN RIGHTS

EXECUTIVE SUMMARY

OUR STARTING POINT

Principles of good governance and human rights impel governments to understand and address public and private harms within their jurisdiction. Since policymakers and regulators around the world are increasingly concerned about various forms of online content and conduct, it is no surprise that many are considering how different forms of state action may help or hinder efforts to address those concerns.

The multistakeholder Global Network Initiative (GNI) reviewed more than twenty recent[1] governmental initiatives that claim to address various forms of online harm related to user-generated content — a practice we refer to broadly as "content regulation." We focused on proposals that could shift existing responsibilities and incentives related to user-generated content. Our analysis illustrates the ways that **good governance and human rights principles provide time-tested guidance** for how laws, regulations, and policy actions can be most appropriately and effectively designed and carried out. Because content regulation is primarily focused on and likely to impact digital communication and content, we use international human rights principles related to freedom of expression and privacy as our primary lens.

These historically validated human rights principles can help lawmakers find creative and appropriate ways to engage stakeholders, design fit-for-purpose regulations, and mitigate unintended consequences. **Governments that actively place human rights at the forefront of their deliberations and designs are not only less likely to infringe on their own hallowed commitments, they can also achieve more informed and effective outcomes**, balancing public and private responsibilities, designing appropriate incentives, enhancing trust, and fostering innovation.

1. This brief includes analysis of many, but not all of the content regulation initiatives that GNI members have identified as noteworthy up until the brief went to print in mid-September 2020.

WHAT WE FOUND

Although there are important differences between the various content regulation efforts examined in this brief, many share certain key characteristics. By definition, such initiatives alter the balance of responsibilities in the information and communications technology (ICT) ecosystem, introducing a degree of **legal uncertainty**, which can shift user understanding and expectations, disrupt information value-chains, and risk unsettling the playing field for ICT companies of all sizes and business models. While this is not, in and of itself, a reason to refrain from regulation, few governments have demonstrated sufficient efforts to fully understand the social and economic impacts of such disruption.

Many content regulation efforts also **require or otherwise strongly incentivize intermediaries to further rely on automated filtering systems** to proactively identify illegal or otherwise inappropriate content or conduct, notwithstanding the fact that such systems, in their current state, may result in over-removal and increase the risk of self-censorship.[2] Beyond this, a number of the initiatives reviewed would **force intermediaries to rapidly adjudicate the legality or permissibility of third-party content on their services**, creating unintended consequences and complicated implications for the rule of law, democratic process, accountability, and redress.

In addition, some of these initiatives implicitly or explicitly **require tracing and/or attribution of content, raising significant privacy concerns**. Lawmakers have been particularly challenged in their efforts to regulate private messaging services, many of which feature strong end-to-end encryption, which protects user content and security but can make content moderation by intermediaries challenging.

Finally, a number of these efforts **apply more broadly than necessary**. Some seek not only to address illegal expression more effectively, but also to regulate legal but harmful content. Others, whether explicitly or due to unclear or vague language, apply to companies of varying sizes across various layers of the ICT sector, unnecessarily creating the potential for liability among companies that are not well positioned to effectively or proportionately address content. And yet others assert the authority to regulate content extraterritorially, and even globally, heedless of the implications for users' rights in other jurisdictions and international comity.

WHAT WE RECOMMEND[3]

In order to identify effective and proportionate approaches to content regulation, **public authorities need to recognize that the ICT sector is perpetually evolving**. Services that facilitate sharing of user-generated content differ in important ways, and

2. See, Natasha Duarte and Emma Llansó, "Mixed Message? The Limits of Automated Social Media Content Analysis," November, 28, 2017, https://cdt.org/insights/mixed-messages-the-limits-of-automated-social-media-content-analysis/.
3. Note: A complete set of recommendations can be found in Appendix A at the end of this paper.

the ICT sector features an ecosystem of interrelated components upon which multiple industries, initiatives, and possibilities depend. This complexity counsels careful consideration of what state actions are most appropriate and narrowly tailored to address which specific challenges. Lawmakers must be clear about the priorities that inform their efforts and open to diverse approaches to achieving them.

Fortunately, many actors agree on the need to address legitimate public policy concerns around harmful content and conduct online while respecting human rights. Many ICT companies have come to recognize the value of clear, publicly defined laws and obligations, while civil society actors continue to provide constructive and often prescient advice drawn from the real-world experiences of the most vulnerable and marginalized communities. **Processes for legislative deliberation should therefore be open and non-adversarial, drawing on broad expertise** to ensure results are well thought out and evidence based. Unelected regulatory or oversight bodies should also prioritize transparency and consultation with diverse constituencies.

Furthermore, while governments can and should learn from each other, they should also recognize that **there are no off-the-shelf solutions to complex regulatory challenges**. Governments need to take the time to understand and consider actions that are consistent with international human rights obligations and appropriate and proportionate for their jurisdiction.

Although it is clear that ICT companies have responsibilities and important roles to play in addressing online harms, **lawmakers should resist the temptation to shift all legal liability from those generating illegal content to intermediaries**. Not only can this misalign company priorities, incentivizing invasive monitoring and over-removal of content, it often does little to address the underlying drivers of harmful content and conduct.

Laws and regulations governing the ICT sector should also be targeted and narrowly framed. Lawmakers should pay careful attention to the ways laws and regulations will impact companies with different business models, seeking to **foster a diversity of digital services and avoid raising barriers to entry**.

For all of these reasons, **when the decision is made to regulate, governments should build strong transparency, remedy, and accountability measures into their efforts**. Such measures allow policymakers and other relevant stakeholders to understand if content regulations are working as intended, including assessing the activities and effectiveness of unelected oversight or enforcement bodies. Where experience demonstrates that content regulation is not working as intended, governments must recognize and expeditiously rectify any issues that emerge.