

# SAFEGUARDING PROGRESS:

## The risks of internet regulation

By Matthew Lesh, Sam Dumitriu and Philip Salter

BRIEFING PAPER

### EXECUTIVE SUMMARY

- Technology is improving our lives, connecting people, creating communities and contributing to Britain's economy to the tune of £170bn a year.
- The policy environment is becoming increasingly hostile to technology, undermining the free exploration of ideas and innovation that is essential to economic progress.
- If policymakers want to encourage entrepreneurship they should embrace a culture of 'permissionless innovation'.
  - Permissionless innovation means allowing entrepreneurs to experiment with new business models and technologies, and only intervening when there are clear, demonstrable harms to the public.
  - Growing calls to regulate the internet risk undermining progress and threaten the future of the internet and the digital economy.
- Platform liability exemptions are essential to the fabric of the internet, and promote free speech and enterprise.
  - The exemption of platforms, such as Google and Facebook, from liability for the activity of their users was essential for the development of the internet, and digital innovation, and has delivered massive benefits for consumers.
  - Laws forcing platforms to be liable for user content to restrict hate speech have prompted social media companies to engage in excessively risk-averse moderation, threatening freedom of expression. Further measures such as the EU's new Copyright Directive threaten the capacity of 'creators' to remix copyrighted content and share memes, while the Online Harms White Paper is a serious threat to free expression.
- Internet red tape undermines small business, competition, and entrepreneurial activity
  - There is intense competition within the technology sector, including between large online platforms and from startups and small businesses. Platforms help stimulate entrepreneurial activity by providing Corporate Venture Capital and opportunities for exit.
  - Controls such as excessive data regulations, by creating barriers to entry and excessive costs, are particularly harmful to startups and small-to-medium sized enterprises (SMEs) that have lesser financial capacity for compliance.

**Matthew Lesh** is the Head of Research at the Adam Smith Institute. He regularly appears across radio, television and print to discuss technology policy issues and freedom of expression. He previously founded a mobile application development startup. He has a Bachelor of Arts (Degree with Honours) from the University of Melbourne and a Masters in Public Policy and Administration from London School of Economics.

**Sam Dumitriu** is Research Director for The Entrepreneurs Network, and was previously the Head of Research at the Adam Smith Institute. At the ASI, he specialised in policy relating to emerging technologies, the gig economy and tax reform. He regularly writes for major newspapers (including *The Times*, *The Daily Telegraph*, and *CityAM*), is a frequent contributor to CapX, and has appeared as an expert commentator on the *BBC*, *Sky News*, and *Channel 5 News*.

**Philip Salter** is the founder of The Entrepreneurs Network. Philip was previously Business Features Editor of City A.M. where he wrote a weekly column on entrepreneurship and interviewed many of Britain's leading entrepreneurs. He is a frequent speaker at conferences, writes a column for Forbes on entrepreneurship and appears regularly elsewhere in the media.

The digital sector is a substantial contributor to Britain's economy; it makes our lives better through useful services and connecting us together like never before imaginable. There are over 220,000 digital businesses spread out across the country, and the sector contributes an estimated £170bn to the UK's economy.<sup>1</sup> Internet companies alone are estimated to be responsible for 400,000 jobs and 80,000 businesses, and growing twice as fast as the rest of the economy in recent years.<sup>2</sup> In the years ahead, the technology sector is expected to grow as a share of the economy as British society becomes increasingly knowledge-driven.

Britain is the leading location in Europe for the technology industry. The UK tops the European league tables for: venture capital, attracting £6.3 billion in 2018 and £3 billion in 2017, and sales and IPOs worth £90 billion (\$119 billion) since 2013.<sup>3</sup> In 2018, London was the number one destination in Europe for technology workers. Analysis finds that it is the most popular destination for tech migrants and has more software developers than any other European city.<sup>4</sup>

New technologies, from smartphones to social media and medical innovations, have given us better, more connected lives. Emerging technologies, from drones and driverless cars to lab grown meat, 3D-printed prosthetic limbs, and superfast 5G mobile internet, will make people's lives better and create high paying jobs.<sup>5</sup>

Despite the huge consumer benefits, there is a growing backlash against the technology and internet sector. The 'hipster antitrust' movement has called for large tech companies to either be heavily regulated or broken up.<sup>6</sup> In the UK, concern about "powerful new companies" led to the Furman Review into technology markets and competition.<sup>7</sup> Home Secretary Sajid Javid, launching the Government's Online Harms White Paper declared that the internet is a "hunting ground for monsters".<sup>8</sup> Health Secretary Matt Hancock has raised concerns about social me-

1 Tech Nation 2017, *Tech Nation*, Accessed at: <https://technation.techcityuk.com/>

2 Christopher Hooton, "Measuring The UK Internet Sector," *Internet Association*, March, 2019.

3 LLB Reporter, "UK tech leads Europe with almost \$8bn of VC investment and exits worth \$40bn during 2018," *London Loves Business*, December 20, 2018, <https://londonlovesbusiness.com/uk-tech-leads-europe-with-almost-8bn-of-vc-investment-and-exits-worth-40bn-during-2018/>

4 London & Partners, "London Is Top European Hub for Global Tech Talent," *London & Partners' Media Centre*, February 7, 2019, <https://www.londonandpartners.com/media-centre/press-releases/2019/london-is-top-european-hub-for-global-tech-talent>.

5 For further discussion on the potential of technology see Matthew Lesh, "Policy Priorities in 2019: Into The Future—Why Everything Will Be Awesome," *Adam Smith Institute*, January 1, 2019, <https://www.adamsmith.org/blog/a-future-worth-fighting-for-2019>.

6 James Pethokoukis, "On 'Hipster Antitrust': The Rush to Heavily Regulate or Even Dismantle Big Tech Is Really Premature," *AEIdeas*, September 28, 2017, <http://www.aei.org/publication/on-hipster-antitrust-the-rush-to-heavily-regulate-or-even-dismantle-big-tech-is-really-premature/>.

7 HM Treasury, "Former Obama advisor to examine digital competition in the UK," *Gov.UK*, August 2, 2018, <https://www.gov.uk/government/news/former-obama-advisor-to-examine-digital-competition-in-the-uk>.

8 Martin Beckford, "Sajid Javid slams Instagram, Facebook and YouTube for 'being complicit in murder and abuse being plugged online'," *The Sun*, 9 April 2019.

dia and mental health and threatened “new legislation where needed”.<sup>9</sup> The House of Commons Science and Technology Committee has recommended that social media companies should have a legal duty of care in relation to young people’s mental health.<sup>10</sup> Labour Deputy Leader Tom Watson has called for a “new legal duty to remove illegal content” and “a legal duty of care in the services they provide to children”.<sup>11</sup> The Parliament’s Digital, Culture, Media and Sport Committee has called for increased liability on social media companies to address illegal and harmful content.<sup>12</sup> The report’s recommendation for the introduction of a ‘Code of Ethics’ for technology companies was subsequently adopted in the Government’s Online Harms White Paper. The Information Commissioner’s Office has proposed an ‘Age appropriate design code’ that would require websites to treat everyone like children by default.<sup>13</sup> There have also been proposals from security agencies to undermine encryption, seriously threatening user privacy and free speech.<sup>14</sup> Meanwhile, the European Union have introduced and proposed new regulations and taxes, such as a 3% levy on digital revenues and the new Copyright Directive. Chancellor Philip Hammond has threatened a new Digital Services Tax if there is no international agreement on taxing tech companies.<sup>15</sup>

These moves are based on the flawed premise that large technology companies are monopolists in a Wild West unregulated industry spreading harmful content and need to be punished in the form of further taxation and regulation. In fact, these companies are providing useful services to consumers, are heavily competitive, and come under the purview of a wide array of existing laws. A recent paper analysing the economic contribution of free internet services found that GDP substantially underestimates the benefits to consumers. They estimated that Facebook alone is worth US\$600 per a year to each user, adding \$20 billion a year of value to the US economy that goes unaccounted for in the usual statistics.<sup>16</sup>

It is concerning that policymakers are specifically targeting and attempting to limit a growing industry. Tech sector success should be celebrated and encouraged, not excessively regulated and condemned. There also appears to be a ‘moral panic’ driving excessive internet speech regulation.<sup>17</sup>

Furthermore, regulatory proposals tend to be targeted at the technology giants with limited consideration given to the disproportionate impact of regulation on

<sup>9</sup> <https://twitter.com/MattHancock/status/1089864139835670528>

<sup>10</sup> House of Commons Science and Technology Committee, “Impact of social media and screen-use on young people’s health,” *Parliament*, January 31, 2019.

<sup>11</sup> Tom Watson, “Tom Watson Speech on Fixing the Distorted Digital Market” (February 6, 2019).

<sup>12</sup> Digital, Culture, Media and Sport Committee, “Disinformation and ‘fake news’: Final Report,” *Parliament*, February 18, 2019.

<sup>13</sup> Matthew Kilcoyne, “ASI responds to ICO’s Age-appropriate design code,” *Adam Smith Institute*, April 15, 2019.

<sup>14</sup> Alex Hern, “Apple and WhatsApp condemn GCHQ plans to eavesdrop on encrypted chats,” *The Guardian*, May 30, 2019.

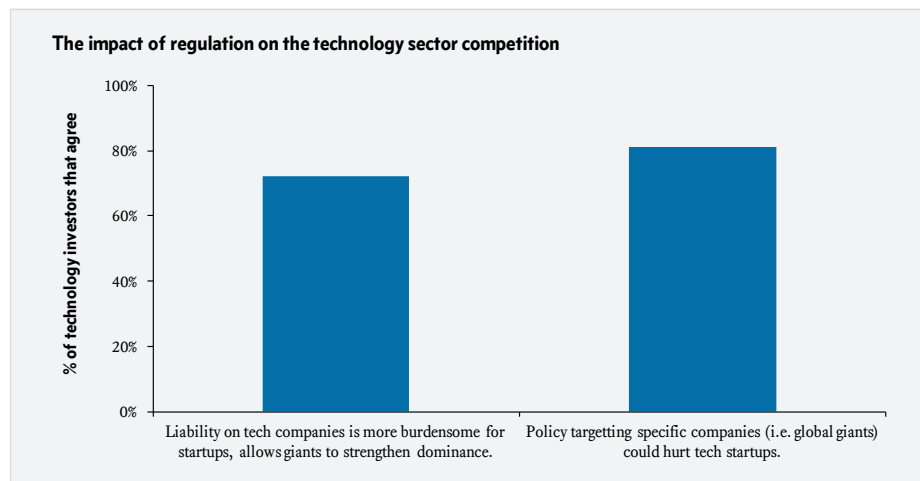
<sup>15</sup> “UK Could Go It Alone on Digital Services Tax - Hammond,” *Reuters*, October 2, 2018.

<sup>16</sup> Erik Brynjolfsson et al., “GDP-B: Accounting for the Value of New and Free Goods in the Digital Economy,” Working Paper (National Bureau of Economic Research, March 2019).

<sup>17</sup> Matthew Lesh, “The Moral Panic Behind Internet Regulation,” *Quillette*, 30 April 2019.

startups, small and medium-sized enterprises. In practice, regulation strengthens the market position of the tech giants by creating new barriers to entry. Large incumbents are better able to adapt to increasing regulatory burdens because they have the financial capacity. Startups on the other hand have less capacity to both influence the creation of regulation as well as less revenue and fewer users to spread the regulatory compliance costs.

A survey of tech investors across the UK, France, Germany and Ireland found serious concerns about the growing impact of regulation.<sup>18</sup> Eighty-one per cent of tech investors agreed that ‘policy and/or legislation in order to target specific companies (i.e. global giants) could lead to poor outcomes that inadvertently hurt or hinder tech startups’.<sup>19</sup> Meanwhile, 72% of tech investors agreed that “Placing liability on tech companies would be more burdensome for startups/ scaleups than the global giants, potentially allowing the giants to strengthen their dominance”.<sup>20</sup> Excessive internet regulation damages startups, consumers, and the UK’s tech sector.



This paper has three sections. Firstly, the case for a disposition of ‘permissionless innovation’ to guide British policymaking in relation to technology and regulation is presented. An openness to tech innovation will go a long way to helping move the cultural needle, spurring the necessary dynamism to encourage economic and social progress. Secondly, the case is made to protect platform liability exemptions to safeguard innovation, free speech and competition. Finally, the negative impact of excessive internet regulation on startups and small businesses is outlined.

## EMBRACING PERMISSIONLESS INNOVATION

Innovation is the key driver of growing living standards, and social, cultural and economic progress.<sup>21</sup> One cross-country study found as much as 75% of the differ-

<sup>18</sup> Allied For Startups, “The Impact of Regulation on the Tech Sector” (Brussels, Belgium: *Allied For Startups*, December 2018).

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*

<sup>21</sup> Matt Ridley, *The Rational Optimist: How Prosperity Evolves* (New York: *Harper*, 2010); Steven Pinker, *Enlightenment Now: The Case for Reason, Science, Humanism, and Progress* (*Viking*, 2018).

ence in incomes can be explained by innovation-driven productivity differentials.<sup>22</sup> Innovation means more products for lower prices, more interesting and dynamic jobs, greater health and happiness. The internet is at the centre of innovation and the technological ecosystem.

Overregulation and red tape prevents businesses from starting, creating jobs, innovating and creating consumer benefits. It is incumbent upon governments to create the minimal necessary regulation to achieve certain desirable goals. There is a substantial risk that new proposals designed to tackle ‘online harms’ will lead to over-regulation - that is, regulation that fails to achieve its stated goals while creating unintended consequences. This risks stifling innovation, entrepreneurship, and competition. The challenge for policymakers then is to create an environment which encourages innovation.

Culture has a real and meaningful impact on the level of innovation.<sup>23</sup> Harvard economic historian David Landes wrote that “If we learn anything from the history of economic development, it is that culture makes all the difference.”<sup>24</sup> The differential of entrepreneurship and innovation between the United States and Europe can be attributed, in large part, to cultural differences, that are reflected in policy.<sup>25</sup> Nine of the world’s ten most innovative companies are US based, none of them are based in Europe, according to a survey of 869 innovation leaders and managers by PwC.<sup>26</sup> Over the last sixty years, fifty two large new companies have developed in the United States, compared to just twelve in Europe.<sup>27</sup> After accounting for population differentials, a large company is ten times more likely to develop in the United States than in Europe.<sup>28</sup>

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**22** Arti Rai, Stuart Graham, and Mark Doms, “Patent Reform: Unleashing Innovation, Promoting Economic Growth, and Producing High-Paying Jobs” (Washington, D.C.: U.S. Department of Commerce, April 13, 2010).

**23** See Deirdre N. McCloskey, *The Bourgeois Virtues: Ethics for an Age of Commerce*, (Chicago, Ill.: University of Chicago Press, 2007); Joel Mokyr, *The Lever of Riches: Technological Creativity and Economic Progress*, New Ed edition (New York: Oxford University Press, U.S.A., 1992); Lawrence Harrison and Samuel Huntington, *Culture Matters: How Values Shape Human Progress* (New York: Basic Books, 2001).

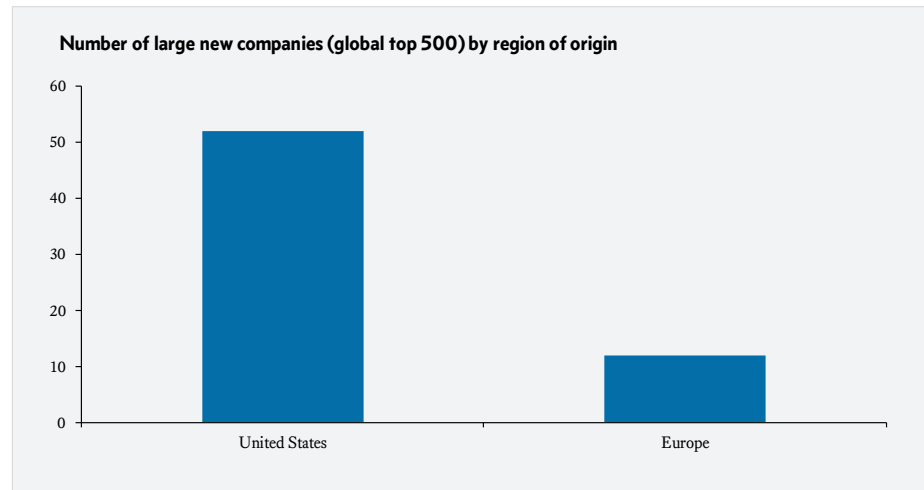
**24** David S. Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor*, unknown edition (New York: W. W. Norton & Company, 1999).

**25** For discussion of the different American and European approaches to regulation, see Ryan Hagemann et al., “The Policymaker’s Guide to Emerging Technologies” (Washington, DC: Niskanen Center, November 13, 2018).

**26** Strategy& PwC, “2018 Global Innovation 1000” (PwC, October 2018).

**27** A large new company is a top 500 company in the world as measured by market capitalisation that was established since the second half of the 20th century, see Nicolas Veron, “The Demographics of Global Corporate Champions,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, July 15, 2008)

**28** This calculation was developed for this report based on Nicolas Veron’s findings.



This difference can be at least partly explained by the different American and European approaches to innovation. Stephen Ezell and Philipp Marxgut wrote for the Information Technology & Innovation Foundation that:

“The United States maintains the world’s most vibrant innovation culture, where risk and failure are broadly tolerated, inquiry and discussion are encouraged, and the government’s role in business plays a less prominent role... there are elements in the European innovation culture that need improvement: a simpler regulatory environment, a broader availability of risk capital, and more tolerance of risk and change being critically important.”

Policymakers need to create an institutional environment of what Adam Thierer calls ‘Permissionless innovation’.<sup>29</sup> Thierer writes that “For innovation and growth to blossom, entrepreneurs need a clear green light from policymakers that signals a general acceptance of risk-taking—especially risk-taking that challenges existing business models and traditional ways of doing things.” Policymakers do not have the knowledge to predict which innovations will provide the most benefit to consumers and profitable business models. Instead of trying to pick winners, the role of government is to establish an institutional framework and culture that allows entrepreneurs to create innovative products. By default, business experimentation should be permitted – unless there is a strong and clear case of serious harm to society. Issues with new technologies should be addressed as they develop, not prospectively preventing the development of new technologies in the first place. In simple terms, innovators must be given leeway to innovate.

A strong example of these principles in governmental policy is the Clinton Administration’s Framework for Global Electronic Commerce in 1997:<sup>30</sup>

1. The private sector should lead;
2. Governments should avoid undue restrictions on electronic commerce;

<sup>29</sup> Adam Thierer, *Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom* (Arlington, Virginia: *Mercatus Center at George Mason University*, 2014).

<sup>30</sup> Clinton Administration, “The Framework for Global Electronic Commerce,” 1997.

3. Where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce; and
4. Governments should recognise the unique qualities of the Internet.

Permissionless innovation is the opposite of the precautionary principle: the prevention of activity that may prove risky, even if that risk is not established scientifically by the evidence.<sup>31</sup> This reverses the onus of proof by requiring innovators to show an active lack of harm – this is difficult to do before the risk has been taken or tested. The precautionary principle is often used by existing industries to oppose new technologies based on an unproven, theoretical risk – therefore hiding their own self interest in a supposed public interest that does not exist.<sup>32</sup>

The development of the internet and the many successful tech companies took place in the context of permissionless innovation.<sup>33</sup> Companies such as Google, Facebook, and Amazon did not have to ask for permission merely to exist - they had to follow standard, existing laws. This was key to the success of the internet, as former Federal Trade Commission Commissioner Maureen K. Ohlhausen said: “the success of the internet has in large part been driven by the freedom to experiment with different business models, the best of which have survived and thrived, even in the face of initial unfamiliarity and unease about the impact on consumers and competitors”.<sup>34</sup>

Governments should do all they can to encourage a culture of permissionless innovation. Governments cannot change culture overnight, nevertheless, policymakers can take steps to encourage innovation and risk-taking. The first step, as outlined by Thierer, is for policymakers to articulate and defend risk taking, and commit to avoid regulating new ventures. In other words, policymakers should explicitly commit to an innovation agenda.<sup>35</sup> This provides the minimum impetus for investors to innovate. In the Harvard Business Review, Larry Downes of Georgetown University wrote that it is essential for European policymakers to realise that ‘the lack of regulation’ is key to creating economic value in the internet economy.<sup>36</sup>

Furthermore, it is necessary to actively identify the barriers to technological progress, such as previous bans on ride sharing services like Uber and occupational licencing. Policymakers should also seek to use existing common law and legisla-

<sup>31</sup> For a list of humorous historic cases of individuals attempting to limit innovations see *PessimistsArc*, “Pessimists Archive Podcast,” 2019.

<sup>32</sup> For further discussion of how existing industries use regulation in their own benefit, while claiming a broader public interest, see Adam Smith and Bruce Yandle, *Bootleggers and Baptists: How Economic Forces and Moral Persuasion Interact to Shape Regulatory Politics* (Washington, D.C.: *Cato Institute*, 2014).

<sup>33</sup> Swanson, Bret. “The Exponential Internet.” *U.S. Chamber of Commerce Foundation*, May 14, 2012.

<sup>34</sup> Ohlhausen, Maureen K. “The Internet of Things: When Things Talk Among Themselves.” Speech presented at the FTC Internet of Things Workshop, November 19, 2013.

<sup>35</sup> Thierer points to the example of the Clinton administration’s 1997 Framework for Global Electronic Commerce, which stated that the Internet should be market driven and not heavily regulated, see Clinton Administration, “Framework for Global Electronic Commerce,” 1997.

<sup>36</sup> Downes, Larry, “How More Regulation for U.S. Tech Could Backfire,” *Harvard Business Review*, February 9, 2018.

tion, rather than seek to create new legislative instruments, in response to legal challenges raised by technology. The common law, a British invention, is particularly well suited to respond to new legal issues when they develop using existing legal precedents.

Thierer outlines ten policy principles for permissionless innovation:

1. Articulate and defend permissionless innovation as the general policy default.
2. Identify and remove barriers to entry and innovation.
3. Protect freedom of speech and expression.
4. Retain and expand immunities for intermediaries from liability associated with third-party uses.
5. Rely on existing legal solutions and the common law to solve problems.
6. Wait for insurance markets and competitive responses to develop.
7. Push for industry self-regulation and best practices.
8. Promote education and empowerment solutions and be patient as social norms evolve to solve challenges.
9. Adopt targeted, limited legal measures for truly hard problems.
10. Evaluate and reevaluate policy decisions to ensure they pass a strict benefit-cost analysis.<sup>37</sup>

Britain's exit from the European Union presents risks and opportunities. On the opportunity side, it is now possible for the UK to rethink approaches to technology regulation. The heavy focus on the precautionary principle, avoiding risk and supporting incumbents, evident in European Union policy making must be rejected.<sup>38</sup> Instead the UK should adopt pro-tech, pro-innovation policies through a permissionless innovation agenda.

The following sections of this paper explores some of the threats to innovation posed by various regulatory proposals. The following section addresses the issue of whether internet companies should be treated as publishers or as libraries; the next section explores the question of internet competition.

## **LIBRARIES, NOT PUBLISHERS: PROTECTING THE FABRIC OF THE INTERNET, FREE SPEECH AND ENTERPRISE**

Liability immunity for online platforms was essential for the growth and development of the internet. Today, however, there are increasing demands to make platforms liable for the content posted by users. The undermining of the liability immunity is damaging to the very fabric of the internet, and will undermine free speech, innovation, and competition.

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<sup>37</sup> Adam Thierer, *Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom* (Arlington, Virginia: *Mercatus Center at George Mason University*, 2014).

<sup>38</sup> Giandomenico Majone, "The Precautionary Principle and Its Policy Implications," *JCMS: Journal of Common Market Studies* 40, no. 1 (2002): 89–109.

The EU's e-Commerce Directive states that 'Internet intermediaries' or 'platforms', such as Google and Facebook, are exempt from secondary liability resulting from the illegal activity of their users, much like a library is not responsible for the content of the book on its shelves. That is, individuals are legally liable for their actions rather than the platforms they have used. The platforms are, however, responsible for taking down illegal content upon notification. By way of analogy, online platforms are treated as libraries rather than publishers. While a publisher of a libellous book may be liable, a library that innocently disseminates the book is not.

The EU's e-Commerce Directive is the equivalent of Section 230 of the Telecommunications Act of 1996. Derek Khanna, a Visiting Fellow of Yale Law School's Information Society Project, described Section 230 as the law "that cleared the way for the modern Internet".<sup>39</sup> This law created a good Samaritan exemption that enabled platforms to moderate content without being treated as a speaker or publisher – therefore enabling practically all social media, from Facebook and Twitter to Wikipedia, eBay, Reddit, Craigslist and Digg. It also protects countless smaller services. If platforms were entirely liable for the content posted by their users these services are unlikely to exist, due to the constant risk of litigation.

Discussing Reddit, Derek Khanna writes:

"Let's assume the company's founders arranged a meeting with their Congressman and asked them to change the law to facilitate their market model for a message board on the Internet. What would most Congressmen think? Assuming they didn't get stuck with the Senator who referred to the Internet as "a series of tubes," it is likely that their elected representative would respond, "This is such a small market, and a silly idea, so why would we bother changing the law for you?" And yet, today Reddit is a billion dollar company and according, to one study, 6% of adults on the Internet are Reddit users (myself, included)."<sup>40</sup>

There are substantial economic benefits to limited liability for platforms. Internet intermediaries are key to the functioning and growth of the internet. These services provide immense user benefits including the ability to access cheaper and more goods, services and entertainment. They also give us the ability to freely communicate, access information, and build communities across the globe. The cost of pre-moderating every post and legal liability costs from what users post would make establishing platforms such as Facebook and Twitter completely unviable.

Without these protections, consumers would inevitably have lower quality online services. A NERA Economic Consulting report for the *Internet Association* found that reducing liability protections would result in an annual loss of \$44 billion to

<sup>39</sup> Derek Khanna, "The Law That Gave Us the Modern Internet—and the Campaign to Kill It," *The Atlantic*, September 12, 2013.

<sup>40</sup> Khanna.

the US economy and eliminate over 425,000 jobs each year.<sup>41</sup> Liability protections are necessary to protect startups developing new products from facing gigantic legal expenses. Surveys indicate that there would be a decline in interest in investing in new online platforms, that could compete with the existing technology giants, if there was an increased liability risk.

If anything, the intermediary liability protections should be explicitly expanded to new technologies. For example, just like a printer manufacturer is not legally liable for the words printed by their product's users, the manufacturer of a 3D printer should not be liable for the products made with their printers. The same principle of liability protection can and should be expanded to the developers of other new technologies, such as drones, robotic technologies, and AI.

### UNDERMINING OF PLATFORM LIABILITY IMMUNITY

This essential underlying principle of the internet, that platforms should not have ultimate legal liability for the actions of their users, is being worryingly undermined on several fronts, including under the pretence of preventing 'hate speech', tackling harm to children, responding to terrorism, and privacy and copyright issues.

In 2016, the European Union's Commission presented the 'Code of Conduct on Countering Illegal Hate Speech Online' to Facebook, Microsoft, Twitter and YouTube.<sup>42</sup> While the code itself is technically voluntary, there was substantial pressure on major technology companies to sign up, which they did. The Code was developed by the European Commission without public consultation or democratic process, and with unclear definitions of the meaning of 'hate speech'.<sup>43</sup> The Code requires that the companies review notifications of alleged illegal hate speech within 24 hours. The latest monitoring report concluded that the companies are assessing 89% of content within 24 hours and 72% of content deemed to be illegal hate speech is being removed (up from 40% and 28% two years ago when the Code was first launched).<sup>44</sup> While some may applaud the removal of certain content, the impact of this code and other encouragement to address 'hate speech' on free expression should not be ignored, as will be discussed further below.

Since a 2014 ruling by the European Court of Justice, search engines have been required to provide a so-called 'Right to be Forgotten'. Following a request by an affected individual, search engines must remove 'inadequate, irrelevant, no longer

<sup>41</sup> This is based on estimates of the decline search usage, because of the increased advertising necessary to raise the revenue to monitor content, and the increased cost of cloud storage if they had to monitor all the content that was uploaded, see Christian M. Dippon, "Economic Value of Internet Intermediaries and the Role of Liability Protections" (Washington, DC: NERA Economic Consulting, June 5, 2017).

<sup>42</sup> Vera Jourová, "Code of Conduct on Countering Illegal Hate Speech Online: First Results on Implementation" (Brussels, Belgium: European Commission, December 2016).

<sup>43</sup> Paul Coleman, CENSORED: How European "Hate Speech" Laws Are Threatening Freedom of Speech, 1st edition (Kairos Publications, 2012).

<sup>44</sup> Vera Jourová, "Code of Conduct on Countering Illegal Hate Speech Online: Fourth Evaluation Confirms Self-Regulation Works" (Brussels, Belgium: European Commission, February 2019).

relevant or excessive' results.<sup>45</sup> This 'right' undermines freedom of expression and the public's access to information by hiding otherwise published material.<sup>46</sup>

In 2017, Germany passed *Netzwerkdurchsetzungsgesetz* (NetzDG), better known as the Facebook Law, which requires large platforms to take down 'obviously illegal' content within 24 hours of notification or face fines up to €50m. This forces the platforms to become judges, which is patently beyond their capacity, and encourages platforms to delete a substantial quantity of content rapidly when in doubt of its legality to avoid the fine. The social media companies have struggled to determine what is actually illegal, satirical, or hurtful but legal speech. Shortly after the law coming into force in 2018, there were reports of Twitter deleting the accounts of far-right politicians and suspending an anti-racist German satirical magazine.<sup>47</sup> It also has the unintended effect of hiding away unlawful content before it can be tracked and saved for legal purposes.<sup>48</sup> A broad left-right coalition, including The Free Democratic (FDP), Green and Left, have all called for the law to be replaced.<sup>49</sup>

In September 2018, the European Commission released a proposal for regulating the dissemination of terrorist content online.<sup>50</sup> The proposal comes in response to concerns that terrorists are using online platforms to radicalise and is premised on the notion that platforms have a responsibility to protect the security of society at large. Nevertheless, international human rights organisations and three Special Rapporteurs of the United Nations have raised concerns about the implications of the proposal on human rights and freedom of expression.<sup>51</sup> Amnesty International, Electronic Frontier Foundation and 23 other organisations released a joint letter saying the regulation goes overboard with unclear definitions and forces companies to make 'rapid and unaccountable decisions on expression through automated means' potentially leading to false positives.<sup>52</sup> The letter also warned that the removal of content related to human rights abuses, including those uploaded by victims, damages efforts by human rights defenders to track and expose terrorist activities.

In the United Kingdom, there have been growing calls and various proposals to increase liability on platforms. The Government is currently reviewing liability for intermediaries as part of the Internet Safety Strategy. In May 2018, the Government

<sup>45</sup> European Commission, "Factsheet on the 'Right to Be Forgotten' ruling (C-131/12)" (Brussels, Belgium: *European Union*, 2014).

<sup>46</sup> Julia Powles and Enrique Chaparro, "How Google Determined Our Right to Be Forgotten," *The Guardian*, February 18, 2015, sec. Technology.

<sup>47</sup> Alexander Pearson, "German Opposition Parties Call to Replace Online Hate Speech Law," *Deutsche Welle*, August 1, 2018.

<sup>48</sup> Bernhard Rohleder, "Germany Set out to Delete Hate Speech Online. Instead, It Made Things Worse," *Washington Post*, February 20, 2018.

<sup>49</sup> Alexander Pearson, "German Opposition Parties Call to Replace Online Hate Speech Law," *Deutsche Welle*, August 1, 2018.

<sup>50</sup> European Commission, "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Preventing the Dissemination of Terrorist Content Online" (Brussels, Belgium: *European Commission*, September 2018).

<sup>51</sup> Association for Progressive Communications, "Joint Letter Opposes Proposed EU Regulation On 'preventing the Dissemination of Terrorist Content Online,'" January 2019.

<sup>52</sup> Association for Progressive Communications.

published their response to the Internet Safety Strategy Green Paper which stated that “Online platforms need to take responsibility for the content they host” and that “We are developing options for increasing the liability online platforms have for illegal content on their services.”<sup>53</sup> The response also included a draft social media code of practice, which is required by the Digital Economy Act 2017. The code of practice outlines principles for social media providers to adhere in relation to legal but potentially harmful conduct such as bullying, insulting, intimidating or humiliating.<sup>54</sup>

In April 2019, the Government released the Online Harms White Paper declaring that it wanted to lead the world in internet regulation.<sup>55</sup> This approach was criticised by media lawyer Mark Stephens who said “We are the first Western regime to consider this. The only other countries doing this are Saudi Arabia, China, Turkey, Azerbaijan and Russia.”<sup>56</sup> The White Paper calls for the imposition of a broad and unspecified “duty of care” on internet companies to prevent “illegal and harmful activity”, placing liability on platforms for content posted by their users - potentially in contradiction with the EU’s e-Commerce Directive. This is set to be enforced by a new online regulator, potentially with the power to level fines, jail time for senior executives or even site blocks.

The scope of services and content included in the Online Harms White Paper is extremely broad. The system of regulation is set to apply to any site where users interact, including discussion forums, messaging services, search engines, online retailers, travel websites, and potentially even news websites with comment sections (though the government subsequently stated news websites themselves would not be in scope it is possible their content could be impacted on social media sites and search engines). Additionally, the Government is not just targeting “illegal” material, it also wants to censor “unacceptable content,” that is to say, legal speech and difficult to define concepts such as “trolling”, “intimidation”, “extremist content”, and “disinformation”. The lack of certainty in definitions – one man’s trolling is another man’s important argument – will lead to perverse results. Will we be allowed to criticise politicians with memes? Would humorously edited photos of the Vote Leave’s campaign bus come under “disinformation”? Are questions about the makeup of the UK’s immigration intake akin to “extremist content”?

Furthermore, a number of parliamentary committees, commentators, and non-government reports have similarly proposed increasing liability on social media platforms for users’ content and further empowering regulators.<sup>57</sup> For instance, Dame Frances Cairncross’ review of the media industry has called for a new “news

<sup>53</sup> HM Government, “Government Response to the Internet Safety Strategy Green Paper” (London, UK, May 2018).

<sup>54</sup> [legislation.gov.uk](http://legislation.gov.uk), “Digital Economy Act 2017,” 2017.

<sup>55</sup> For further discussion of the Online Harms White Paper see Matthew Lesh, “Why does the Government want Britain to be a world leader in censorship?” *CapX*, 9 April, 2019; Matthew Lesh, “The Moral Panic Behind Internet Regulation,” *Quillette*, 30 April 2019.

<sup>56</sup> Katherine Rushton, “Fears for free speech amid crackdown on ‘harmful’ web posts,” *Scottish Daily Mail*, 8 April, 2019.

<sup>57</sup> For a list see Open Rights Group, “Internet Safety Strategy,” January 2019.

quality obligation” on online platforms, to be overseen by a powerful new regulator.<sup>58</sup> The Government’s response to the inquiry went even further than the recommendations of the report, stating that “platforms must identify and quickly remove the deliberate spread of misinformation on their services” – this is despite the difficulty in separating misinformation from opinion and the serious implications for free speech.

The Parliament’s Digital, Culture, Media and Sport Committee Disinformation and ‘fake news’ report, released in February 2019, similarly goes further.<sup>59</sup> The report recommends the introduction of a ‘Code of Ethics’ for technology companies overseen by independent regulator which has the capacity to launch legal action against companies. The committee explicitly recommends the introduction of a new category of social media companies which tightens liability for “harmful or illegal content on their sites.” Notably, as the report is written, it would extend content that social media companies are mandated to remove, from content that is currently illegal, to also include content that is harmful – a concept that is extremely broad and difficult to define.

Lord Bew’s Committee on Standards in Public Life recommended that social media companies should be liable for death threats and abuse directed towards politicians.<sup>60</sup> In 2019, in response to the tragic suicide of 14 year old Molly Russell, Health Secretary Matt Hancock declared that “social media providers have a duty to act” to remove harmful content. Hancock also threatened “new legislation where needed”. This campaigning is based on the notion that social media is responsible for an uptick in mental health issues, particularly among teens.<sup>61</sup> However, the claim that there is a causal relationship between social media usage and depression and anxiety has been undermined by some recent studies.

For example, Amy Orben and Andrew K. Przybylski of the University of Oxford have found from analysis of three large data sets with 355,358 records that the association “between digital technology use and adolescent well-being is negative but small, explaining at most 0.4% of the variation in well-being”.<sup>62</sup> They conclude that “these effects are too small to warrant policy change.” The moral panic about social media may prove reminiscent of previous falsified claims that link violent video games to aggressive behaviour – when in fact more recent studies show no

<sup>58</sup> Matthew Lesh, “A Fake News Quango Would Threaten Free Expression and Democracy,” *CapX*, February 12, 2019.

<sup>59</sup> Digital, Culture, Media and Sport Committee, “Disinformation and ‘fake news’: Final Report,” *Parliament*, February 18, 2019.

<sup>60</sup> Peter Walker, “UK ‘Reaching Tipping Point’ on Abuse of Politicians,” *The Guardian*, July 16, 2017, sec. Politics.

<sup>61</sup> The linking of social media usage to mental health issues was popularised by Jean Twenge. *iGen: Why Today’s Super-Connected Kids Are Growing Up Less Rebellious, More Tolerant, Less Happy--and Completely Unprepared for Adulthood--and What That Means for the Rest of Us*. Simon and Schuster, 2017.

<sup>62</sup> Amy Orben and Andrew K. Przybylski, “The Association between Adolescent Well-Being and Digital Technology Use,” *Nature Human Behaviour* 3, no. 2 (February 2019): 173.

correlation and some evidence that video game playing actually reduces violent incidents.<sup>63</sup>

A further example of efforts to undermine platform liability immunity with unintended consequences is the United States' FOSTA-SESTA law, which makes platforms liable for facilitating prostitution. There have also been calls to replicate FOSTA-SESTA in the UK.<sup>64</sup> Since FOSTA-SESTA was passed in the US, online platforms such as Reddit and Craigslist responded by closing discussion boards and removing all personals ads.<sup>65</sup> There are fears among vulnerable sex workers that the law will impede their ability to share 'bad client' lists on online platforms and will lead to riskier encounters.<sup>66</sup> There is evidence to suggest Craigslist substantially reduced the incidence of female homicide. One study found that following the introduction of 'Erotic Services' (ERS) section on Craigslist the female homicide rate declined by 10-17%, "with the reduction driven by street prostitution moving indoors and by helping sex workers to screen out the most dangerous clients."<sup>67</sup>

VerifyHim, the biggest dating blacklist on earth, recently announced that it was "working to change the direction of the site".<sup>68</sup> According to tech advocacy group Engine: "Tech companies (large and small) regularly partner with law enforcement, the National Center for Missing and Exploited Children, and other anti-trafficking organisations."<sup>69</sup> Dr Kimberly Mehlman-Orozco, a US human-trafficking expert witness who has served on many civil and criminal cases, believes that FOSTA-SESTA will make it harder for law enforcement to monitor sex trafficking cases, as advertisements shift from cooperative US-based open access websites to un-cooperative overseas based websites.<sup>70</sup>

### THREAT TO FREEDOM OF EXPRESSION

The growing pressure on platforms to censor content is a serious threat to freedom of expression. Under publisher (rather than library) treatment, online platforms face substantial risks including large fines, civil lawsuits and other criminal sanctions for the words and content of their users. Consequently, risk-averse firms are responding by over-policing content, chilling controversial but legal speech. In a free society, the government should not infringe on the basic ability for individuals to freely explore their ideas. As John Stuart Mill argued in *On Liberty*, speech is an

<sup>63</sup> See Christopher J. Ferguson, "Do Angry Birds Make for Angry Children? A Meta-Analysis of Video Game Influences on Children's and Adolescents' Aggression, Mental Health, Prosocial Behavior, and Academic Performance," *Perspectives on Psychological Science* 10, no. 5 (September 1, 2015): 646–66; Christopher John Ferguson, "The Good, The Bad and the Ugly: A Meta-Analytic Review of Positive and Negative Effects of Violent Video Games," *Psychiatric Quarterly* 78, no. 4 (December 1, 2007): 309–16.

<sup>64</sup> AJ Dellinger, "The UK Wants Its Own Version of FOSTA/SESTA That Could Push Sex Workers Off the Internet," *Gizmodo*, July 7, 2018.

<sup>65</sup> Nitasha Tiku, "Craigslist Shuts Personal Ads for Fear of New Internet Law," *Wired*, March 23, 2018.

<sup>66</sup> Kitty Stryker and Sara David, "6 Sex Workers Explain How Sharing Client Lists Saves Lives," *Broadly*, April 2, 2018.

<sup>67</sup> Scott Cunningham, Gregory DeAngelo, and John Tripp, "Craigslist Reduced Violence Against Women," February 2019.

<sup>68</sup> Tiku, "Craigslist Shuts Personal Ads for Fear of New Internet Law."

<sup>69</sup> The Engine Team, "Testifying on Section 230," *Engine*, October 2, 2017.

<sup>70</sup> Kimberly Mehlman-Orozco, "Legislation Aiming to Stop Sex Trafficking Would Hurt Investigations," January 2018.

extension of the ability to think freely and have an idea; restricting speech assumes a false sense of infallible superior knowledge, prevents criticism necessary to develop ideas and find the truth, and that censorship leads to the dismissal of ideas without consideration of their full merits.<sup>71</sup>

Modern platforms have been placed in a difficult situation. They both want to protect the ability of their users to explore ideas, ensure their users are safe and the platform is not used for nefarious purposes, as well as remain compliant with growing legislation and community expectations. In response to this challenge, online services have hired large numbers of workers to moderate their platforms. A 2014 estimate suggested that over 100,000 people worldwide are employed as content moderators.<sup>72</sup> In recent years, these numbers have grown substantially. YouTube has pledged to deploy 10,000 staff to take down violent extremist content and content that endangers children.<sup>73</sup> In February 2018, it was reported that Facebook alone has 7,500 moderators.<sup>74</sup> By December 2018, Facebook declared that it had increased the number to around 15,000 – more than Snapchat and Twitter’s combined total employee headcount.<sup>75</sup>

The *New York Times* reported that every Tuesday morning several dozen Facebook employees determine the latest rules of acceptable speech, raising concerns that “the company was exercising too much power”.<sup>76</sup> Leaked documents revealed:

“...numerous gaps, biases and outright errors. As Facebook employees grope for the right answers, they have allowed extremist language to flourish in some countries while censoring mainstream speech in others.”

There were also questions raised about the ability of individuals employed as moderators, largely unskilled outsourced workers, who must apply hundreds of rules to individual posts in mere seconds. This media commentary is revealing a key contradiction in the discussion about online speech: on the one hand, people are complaining that online platforms are ‘exercising too much power’, and on the other, they want to empower and require the companies to exercise even more arbitrary power.

One example of a mistake in the leaked documents is an instruction to moderators to delete any post which denigrates an entire religion in India in accordance with the country’s blasphemy law – in fact, however, India’s law only prohibits blasphem-

<sup>71</sup> John Stuart Mill, *On Liberty* (Project Gutenberg, 2011).

<sup>72</sup> Adrian Chen, “The Laborers Who Keep Dick Pics and Beheadings Out of Your Facebook Feed,” *Wired*, October 23, 2014.

<sup>73</sup> Robert Mendick, “YouTube Boss Pledges to Step up War on Violent Extremism with 10,000-Strong Internet Police Force,” *The Telegraph*, December 5, 2017.

<sup>74</sup> Alexis Madrigal, “Inside Facebook’s Fast-Growing Content-Moderation Effort,” *The Atlantic*, February 7, 2018.

<sup>75</sup> Max Fisher, “Inside Facebook’s Secret Rulebook for Global Political Speech,” *The New York Times*, December 27, 2018, sec. World.

<sup>76</sup> Fisher.

my in certain circumstances such as when a speaker intends to inflame violence. In another case, Facebook is making decisions on where to draw the line to complement national laws that forbid promoting fascism, meaning social media companies are making decisions traditionally left to courts. Facebook is being encouraged to be excessively censorious to limit the risk of litigation. George Mason University economics professor Tyler Cowen argues that in the end nobody will be satisfied by the decisions social media companies make to censor or not censor certain content – for some it will always be too strict, for others too liberal.<sup>77</sup>

Under Germany's NetzDG, firms are not liable for illegal content but must take down 'obviously illegal' content (such as hate speech or pro-Nazi propaganda) within 24 hours of notification and other illegal content within 7 days. The law has faced criticism for incentivising Facebook and Twitter to remove legal political speech. For instance, the German satirical magazine *Titanic* had their Twitter account suspended after parodying the anti-Muslim comments of an Alternative für Deutschland (AfD) politician. Germany's biggest newspaper *Bild* called for the law to be abolished immediately and claimed the law was turning far-right politicians into "opinion martyrs".<sup>78</sup> The law has also been criticised by the Association of German Journalists, who warn that the law is leading platforms to err on the side of caution by blocking more content than is necessary.<sup>79</sup>

In an ideal system, platforms are empowered to pro-actively moderate distasteful or illegal content, while allowing for the free exchange of ideas. As private companies they should be able to set their own rules as to the acceptability of non-illegal activity. Shifting liability to platforms or creating strict penalties for inadequate compliance leads to over-eager regulation and the censorship of useful services or legal speech. There have been growing concerns that platforms are becoming excessively censorious in a politicised manner. Crowdfunding platform Patreon was criticised following the removal of Carl Benjamin, known as 'Sargon of Akkad', for violating policies on hate speech.<sup>80</sup> This led to the boycott of the platform by 'intellectual dark web' figures including neuroscientist and philosopher Sam Harris, psychology professor Jordan Peterson and podcast host Dave Rubin. While this particular decision may have been primarily publicity driven, the growth of regulation adds to pressure to these companies to close down their platforms to controversial voices.

A free society depends on the utmost protection of controversial speech, particularly in the new public square of online communication. In the face of the threat of further regulation, platforms are inclined to take a more censorious stance. While these are private companies, and should accordingly be able to decide (within the law) what content appears on their platform, it is worrying that government inter-

<sup>77</sup> Tyler Cowen, "Why Internet Censorship Doesn't Work and Never Will," *Bloomberg Opinion*, January 3, 2019.

<sup>78</sup> Philip Oltermann, "Tough New German Law Puts Tech Firms and Free Speech in Spotlight," *The Guardian*, January 5, 2018, sec. World news.

<sup>79</sup> "Germany Looks to Revise Social Media Law as Europe Watches," *Reuters*, March 8, 2018.

<sup>80</sup> Benjamin Goggin, "Crowdfunding Platform Patreon Defends Itself from Protests by 'Intellectual Dark Web,' Publishes Slur-Filled Posts from Banned YouTuber," *Business Insider*, December 18, 2018.

vention is encouraging the closing of substantial parts of the new public square to certain voices.

On the other side of the ledger, if some platforms interpret the rules excessively broadly (for instance, websites that engage in low-level curation or moderation) then there is a risk that websites may under-police content to maintain existing platform liability exemption treatment. There are also risks that harmful content will shift to overseas and uncooperative websites. A prominent example of such a website is Gab, a ‘free speech’ social networking site known to host ‘extremist material’ including active accounts by Alex Jones, Milo Yiannopoulos, and Britain First. The site was connected to the far-right perpetrator of the Pittsburgh synagogue shooting.<sup>81</sup>

### **THREAT TO COMMERCE, COMPETITION, STARTUPS AND ENTREPRENEURSHIP**

In response to raising concerns about content, the existing platforms are developing more advanced moderating systems. Google, for example, has developed technologies to proactively block illegal content. Content ID allows rights holders to tag content and then immediately blocks uploads of copyrighted content. However, not all tasks are equally automatable. Speech tends to rely on unspoken context that may be extremely difficult for algorithms to pick up on. For instance, an AI may incorrectly mark a sarcastic comment as a threat.

Nevertheless, the shift from human moderation, where costs scale with the size of the platform, to algorithmic moderation, where costs are fixed and there are large economies of scale, further advantages large incumbent platforms over insurgent startups. Larger firms can spread the high fixed cost of developing automated moderation system across a far larger number of posts, users, and revenue. This could make investing in startup platforms less attractive and exacerbate funding gaps.

Imposing liability for user-generated content on online platforms poses significant risks of undermining competition and entrepreneurship. As discussed, if individual user liability did not exist it is unlikely that many of the platforms that now provide immense user benefit could exist in the first place. In the contemporary context, even developing moderation capacity, scale, and resources, that the existing large platforms have, is a barrier to entry for new firms.

Startups challenging the incumbent tech companies do not have the revenues required to hire the army of moderators and develop the AI. If the requirements were strengthened further this could become an insurmountable barrier. More regulation places the existing players in a privileged position because they could grow to scale without the burdens. The imposition of new liability requirements cements the market place of existing platforms – who are more likely to be able to adapt to the changing rules – and discourage investors from supporting competitors to the tech giants. A survey of tech investors found that 68 per cent of investors agreed

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<sup>81</sup> Chris Graham, “What Is Gab? Social Media Site Used by Pittsburgh Synagogue Shooting Suspect ‘Being Forced Offline,’” *The Telegraph*, October 28, 2018.

that ‘change to liability could make us reassess whether to invest in local platform businesses’.<sup>82</sup>

### CASE STUDY: THE COPYRIGHT DIRECTIVE

A substantial challenge to liability arrangements is contained within the European Union’s recently passed Copyright Directive. This Directive is a threat to freedom of expression and access to information and competition. The internet has provided immense opportunity for content creators to grow their audiences and access whole new streams of revenue. This includes new services such as Apple Music, Netflix, and YouTube that provide streaming of a multitude of content at a low cost to the consumer. Nevertheless, concerns have been raised by content owners about compensation and ownership, particularly user uploaded content. The Copyright Directive attempts to resolve some of these ownership issues, however issues have been raised about freedom of expression and competition.

Article 13 of the Copyright Directive would make online platforms, like Google search, YouTube, and Facebook, liable for copyright infringement. This is problematic because content copyright ownership is often unclear and often contested. In response to these uncertainties platforms will be inclined to block access to content to minimise potential legal liability. A wide array of stakeholders, including both platforms and even rights owners, have warned of the disastrous unintended consequences on the creative industry of the Copyright Directive. If platforms are forced to block substantial amounts of new content it is likely to mean less revenue for copyright owners and less content for users.

The Electronic Frontier Foundation has called the proposed Copyright Directive “an existential threat to the future of the Internet”.<sup>83</sup> Bitkom, who represent 2,600 small to medium German businesses called the proposal an “an attack on freedom of expression”.<sup>84</sup> A coalition of European creatives, including the International Confederation of Music Publishers, the International Federation of the Phonographic Industry, and the Independent Music Companies Association, have said it would leave creators “worse off” and “go against copyright principles”.<sup>85</sup> They concluded that “We would rather have no Directive at all than a bad Directive.”

Google has said that the biggest YouTube video of all time, Despacito by Luis Fonsi and Daddy Yankee which has been viewed almost 6 billion times, would have been blocked in Europe under Article 13:

“This video contains multiple copyrights, ranging from sound recording to publishing rights. Although YouTube has agreements with multiple entities to license and pay for the video, some of

<sup>82</sup> Allied For Startups, “The Impact of Regulation on the Tech Sector.”

<sup>83</sup> <https://www.eff.org/deeplinks/2019/02/german-french-deal-rescue-eu-copyright-directive-everyone-hates-it-everyone>

<sup>84</sup> <https://www.bitkom.org/Themen/Politik-Recht/Urheberrecht/Bitkom-zu-den-Trilogverhandlungen-ueber-die-EU-Urheberrechtsreform>

<sup>85</sup> <https://www.musicbusinessworldwide.com/article-13-disaster-for-music-biz-joy-for-youtube-as-labels-call-for-eu-copyright-bill-to-be-cancelled/>

the rights holders remain unknown. That uncertainty means we might have to block videos like this to avoid liability under article 13. Multiply that risk with the scale of YouTube, where more than 400 hours of video are uploaded every minute, and the potential liabilities could be so large that no company could take on such a financial risk.”<sup>86</sup>

YouTube have claimed that they may be required to cut off access to videos that are viewed more than 90 billion times a month. The necessity of this directive is unclear. There are existing systems in place to automatically identify the usage of copyrighted material, such as music in YouTube videos, and compensate creators with a proportion of the advertising revenue. Across the EU, YouTube alone has paid content owners over €800m last year and has paid the music industry €1.5bn from advertising revenue alone. Nevertheless, even the existing automated systems, that would have to be adopted in a harsher and more widespread manner, can also be problematic in the case of false positives, which lead to content removal.

Furthermore, Article 11 of the Copyright Directive would require platforms such as Google and Yahoo to enter commercial deals with publishers to link to content and display snippets. This has become colloquially known as the ‘link tax’, since it would require search engines to pay merely to link to news content. This is problematic for news aggregators, such as Google News, because they do not in themselves generate substantial revenue. Following the introduction of similar laws by Spain in 2014, Google shut down Google News search in Spain and traffic to news websites declined.<sup>87</sup> Google has warned that the Copyright Directive may lead to shutting down of Google News across Europe.<sup>88</sup> This would substantially reduce web traffic to news websites, which, according to a Deloitte study, is worth on average between €0.04 and €0.08 to publishers per user.

Proponents of Article 11 have suggested that it is necessary to help smaller publishers who are struggling to stay afloat in the digital era. However, it would also be practically impossible for platforms to enter agreements with the thousands of publishers, and therefore even if agreements are struck these would inevitably be with the larger news sites to the detriment of smaller ones. In the likely scenario that deals are not struck, users will have access to fewer viewpoints. Payments are likely to help large publishers rather than small ones. A German study concluded that almost two-thirds of revenue would go to a single publishing group, compared to less than 1 per cent of revenue for smaller publishers.<sup>89</sup> The European Innovative Media Publishers, who represent smaller publishers across Europe, have warned that Article 11 creates barriers to entry and would make it harder to “grow online, reach new audiences and develop new markets”.

<sup>86</sup> <https://youtube-creators.googleblog.com/2018/11/i-support-goals-of-article-13-i-also.html>

<sup>87</sup> Dominic Rushe, “Google News Spain to Close in Response to Story Links ‘Tax,’” *The Guardian*, December 11, 2014, sec. Technology.

<sup>88</sup> Waterson, “Google News May Shut over EU Plans to Charge Tax for Links,” *The Guardian*, November 18, 2018, sec. Technology.

<sup>89</sup> Friedhelm Greis, “Leistungsschutzrecht: So viel Geld würden die Verlage von Google bekommen - Golem.de,” *Golem.de*, September 7, 2018.

The notion that there is a lack of competition and innovation in the tech sector is a patent myth. There are not only thousands of insurgent startups developing new technologies, competition between the large tech firms is aggressive. Furthermore, behaviour is only anti-competitive if the consumer is actually harmed, most clearly demonstrated by an intention to increase profits by charging excessively high prices. The mere existence of sectors where a single firm has a large market share are not necessarily evidence of a lack of competition or substantiated consumer harm. There is a danger, however, that the increasing quantity of regulation will make it harder for startups to challenge incumbent players.

### **TECHNOLOGY, COMPETITION AND BARRIERS TO ENTRY**

There is a growing narrative claiming that the technology sector is dominated by a small number of large companies, innovation is declining and consumers are losing out.

Labour's Deputy Leader Tom Watson has claimed that "power is consolidated by large companies merging and acquiring smaller competitors" and said that "We should take seriously the calls to break them [large tech companies] up if it is in the public interest."<sup>90</sup> Watson went on to call for the introduction of a technology regulator to look at breaking up alleged monopolies.<sup>91</sup> In the UK, the Treasury commissioned Harvard academic and former Obama advisor Jason Furman to review digital competition, leading to a number of recommendations including a 'code of competitive conduct' and the updating of merger policy.<sup>92</sup> The EU has pursued tech companies for alleged violations of antitrust laws.<sup>93</sup> Meanwhile, the Australian Competition and Consumer Commission is currently undertaking the world's first digital platforms inquiry.<sup>94</sup>

The claims that the internet sector is uncompetitive and there is consumer harm that justifies government intervention is not supported by the evidence. The Progressive Policy Institute's competition and concentration study found that the technology, telecom and e-commerce sector, known as the digital economy, shows signs of substantial competitive pressures and less concentration than other parts of the American economy.<sup>95</sup> The study concludes that "the tech/telecom/ecom-

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<sup>90</sup> Watson, "Tom Watson Speech on Fixing the Distorted Digital Market."

<sup>91</sup> Reuters, "We'll Take on Social Media Giants, Opposition Labour Party Says," *Reuters*, February 6, 2019.

<sup>92</sup> Jason Furman, "Unlocking digital competition: Report of the Digital Competition," *HM Treasury*, March, 2019.

<sup>93</sup> Jennifer Rankin, "Google Fined £3.8bn by EU over Android Antitrust Violations," *The Guardian*, July 18, 2018, sec. Technology.

<sup>94</sup> Australian Competition and Consumer Commission, "Digital Platforms Inquiry," *Australian Competition and Consumer Commission*, November 28, 2017.

<sup>95</sup> Michael Mandel, "Competition and Concentration: How the Tech/Telecom/ Ecommerce Sector Is Outperforming the Rest of the Private Sector" (Washington, DC: *Progressive Policy Institute*, November 2018).

merce sector convincingly outperforms the rest of the non-health private sector on every important economic metric, benefiting customers and workers”. This high level of benefit indicates a thriving market, not an overly concentrated market leading to high prices or a lack of innovation.

The mere existence of dominant platforms – such as Google and Facebook – does not in itself justify additional regulation. The core principle of competition policy is that government should intervene if there is a harm to the consumer caused by anti-competitive behaviour. Internet companies are providing immense value to consumers at zero or low cost, compete intensely, and invest heavily in research and development. It is contestable that the existence of a large market share inherently means the existence of market power. If many of these platforms, such as Google or Facebook, began charging consumers for their products they would immediately lose most of their users. The fact that some companies have amassed substantial positions in the market by providing a high quality service is no reason to punish them in itself.

It has become conventional wisdom to argue that Big Data and ‘Network Effects’ have created winner-take-all markets that transformed Facebook and Google into natural monopolies. In an article for the journal *Regulation*, Professors David S. Evans and Richard Schmalensee claim that the case has been overstated.<sup>96</sup> Evans and Schmalensee argue that the ability for consumers to use multiple social networking services all at once (multi-homing) (e.g. Facebook, Snapchat, Instagram, Twitter, Tumblr, and Slack) exposes large online platforms to competition.

The Niskanen Center has outlined three reasons that network effects and the benefits of monopoly are weaker in the digital age:

“(1) diminished switching costs due to the proliferation of physical devices and digital platforms, (2) more localized network effects that advantage smaller networks over their larger competitors; and (3) the incentives for users to go off-platform for repeat business or high-value transactions.”<sup>97</sup>

Niskanen also point to the relatively limited capital investment required to create a competitor to a technology giant, “anyone with a computer and Internet access can launch a startup and compete in the market,” in comparison to the cost of building a factory or stock of inventory. For example, the existence of Amazon Web Services (AWS) and other cloud computing technologies mean that startups do not even need to spend upfront on computing infrastructure, lessening further the required capital to challenge existing companies.<sup>98</sup> When companies do expand, there is a thriving venture capital market seeking out new products and services to invest substantial sums of money to disrupt existing players.

<sup>96</sup> David S. Evans and Richard Schmalensee, “Debunking the ‘Network Effects’ Bogeyman,” SSRN Scholarly Paper (Rochester, NY: *Social Science Research Network*, December 1, 2017).

<sup>97</sup> Ryan Hagemann et al., “The Policymaker’s Guide to Emerging Technologies” (*Niskanen Center*, November 2018).

<sup>98</sup> Will Rinehart, “Is there a kill zone in tech?” (*Tech Liberation*, November 2018).

The relatively short history of the internet already provides evidence that incumbents can be challenged and fears of monopoly are overblown. Not too long ago MySpace was seen as an unassailable monopoly. In 2007, *The Guardian* published an article headlined ‘Will MySpace ever lose its monopoly?’:

“John Barrett of TechNewsWorld claims that MySpace is well on the way to becoming what economists call a ‘natural monopoly’. Users have invested so much social capital in putting up data about themselves it is not worth their changing sites, especially since every new user that MySpace attracts adds to its value as a network of interacting people.”<sup>99</sup>

These concerns proved greatly exaggerated. Today of course, other platforms have won out against MySpace by providing a higher quality service. The switching cost proved to be relatively low. For instance, WhatsApp could amass 400 million active users before being acquired by Facebook despite Facebook Messenger possessing a significantly larger user base. More recently, social media platform TikTok, which allows users to share short videos, has amassed over 1 billion downloads since launching in 2016, seriously challenging the likes of YouTube and Facebook.<sup>100</sup>

Technology companies are constantly competing against the potential for disruption by an upstart and other large online firms, and even more broadly for screen-time of their users. Some large online platforms possess a large market share in a single narrowly defined market, however, this does not necessarily mean there is a lack of competition, particularly within market subsections.

Though Google handles 75% of global search requests, they still compete intensely with other general search engines (such as Bing), travel sites (such as Expedia), social networks search (such as Twitter), restaurant sites (such as OpenTable), mobile applications and devices which provide direct access to content (such as Amazon Echo), and the more lucrative product search markets (where Amazon has greater market share). This is a particularly salient challenge because the costs of changing search engine are practically zero for the user. The vast majority of Google’s revenue comes from a relatively small number of searches, such as insurance and travel, which are intensely competitive online fields. For example, on travel search Google competes with the likes of SkyScanner, Kayak and Expedia. There are similar competitor comparison and sales sites across Google’s most profitable search types. If anything, Google is at a disadvantage because it mostly has to interpret search requests that could be for a whole range of things (flights, information about a place, or a map) whereas a specialised search and price comparison sites specifically know what you want, (e.g., flight information).

On the other side of Google’s core product, the provision of advertising services, Google competes with a multitude of other online, and offline, advertising serv-

<sup>99</sup> Elena Crescia, “TikTok: the video app taking over the internet,” *The Guardian*, March 11, 2018.

<sup>100</sup> Victor Keegan, “Victor Keegan: Will MySpace Ever Lose Its Monopoly?,” *The Guardian*, February 8, 2007, sec. Technology.

es. Google must compete with not only Facebook and Twitter advertising, but also non-digital advertising options such as TV, radio, print and outdoor advertising. The extent of competition in this market is indicated by the decline in online advertising prices by 40% since 2010, while television advertising costs have remained unchanged.<sup>101</sup> In social media more broadly 80% of social media users report using YouTube, 78% also use Facebook, 46% use Twitter, and 27% use Snapchat.<sup>102</sup>

It has also been widely suggested in recent history that Amazon is a “monopoly”.<sup>103</sup> President Donald Trump has claimed in 2016 the company has “a huge antitrust problem”.<sup>104</sup> Amazon has a wide array of online competitors, ranging from individual sites such as eBay to aggregator Google Shopping. Furthermore, the notion that Amazon is monopolist narrowly considers the markets in which the company competes. Amazon is the largest player in the e-commerce market. However, e-commerce is an artificial distinction that does not consider how people shop and compare. Amazon’s rivals are not just online. They are also competing against a wide variety of bricks and mortar retail options, ranging from Tesco and Boots to John Lewis. Amazon has 4 per cent of the overall retail market in the United Kingdom, and maintain falling margins on their sales.<sup>105</sup> Tesco, Sainsbury’s, Asda, and Morrisons are all larger players.

The textbook economics model of perfect competition (many buyers, many sellers, homogenous products) is not directly applicable to many cases of real world competition. University of Liege’s Professor Nicolas Petit argues “the antitrust monopolists may be firms engaged in a process of fierce holistic competition.”<sup>106</sup> Instead they compete through innovation and finding new and low-end footholds in markets. “The disruptor targets the fringe of a market – customers not served or with low profitability – and progressively moves upmarket to erode the profitability of the incumbent,” Petit explains.<sup>107</sup> At the most fundamental level, platforms compete for eyeballs, user time spent on their platform. Facebook does not just compete with Twitter in the social network market, they are more broadly in competition with other services such as Netflix, video games, and television, in the entertainment space.

In early 2019, Netflix declared in their results announcement that their biggest competitors are not other broadcasting companies, such as HBO or Amazon video, but rather Fortnite (a video game that earned \$2.4 billion in 2018). Netflix explained that they compete for attention in a competitive marketplace:

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**101** Mandel, “Competition and Concentration: How the Tech/Telecom/ Ecommerce Sector Is Outperforming the Rest of the Private Sector.”

**102** We Are Social, “Digital in the UK: Global Digital Report 2019” (London, UK: *We Are Social*, January 2019).

**103** Mandel, “Competition and Concentration: How the Tech/Telecom/ Ecommerce Sector Is Outperforming the Rest of the Private Sector.”

**104** Reuters, “Trump says Amazon.com has ‘a huge antitrust problem’,” *Reuters*, May 13, 2016.

**105** GlobalData Retail, “Amazon Is Now the UK’s Fifth Biggest Retailer,” *Verdict*, February 28, 2018.

**106** Nicolas Petit, “Technology Giants, the Moligopoly Hypothesis and Holistic Competition: A Primer,” SSRN Scholarly Paper (Rochester, NY: *Social Science Research Network*, October 20, 2016).

**107** Petit.

We compete with (and lose to) Fortnite more than HBO... There are thousands of competitors in this highly fragmented market vying to entertain consumers... Our growth is based on how good our experience is, compared to all the other screen time experiences from which consumers choose.<sup>108</sup>

Internet companies guard against creative destruction, that is, losing their user bases and going the way of MySpace, by investing heavily in research and development. To do this they must constantly improve the quality of their products to stay competitive in various markets. The largest R&D spender in the world is Amazon (\$22.6bn) followed by Alphabet (\$16.2bn), the parent company of Google.<sup>109</sup> In 2018, Facebook spent US\$7.8bn on research and development, representing 19.1% of its total revenue. This is a higher proportion of revenue spent on R&D than research-intensive pharma companies such as Roche (18.9%), Novartis (17.0%), or Pfizer (14.6%). Four of the world's top ten most innovative companies are internet companies (Amazon, Alphabet, Facebook and Netflix) and the remaining companies are technology companies with a heavy internet component (Apple, Microsoft, Tesla, Samsung, General Electric, and Intel).<sup>110</sup>

Regulation, nevertheless, can entrench incumbents and protect powerful market players. The relative cost of regulatory compliance falls as a firm becomes larger. Assigning liability to online platforms or imposing stricter data regulation may increase the risk associated with investing in tech firms at an early stage and restrict consumer choice.

### **BIG TECH COMPANIES STIMULATE ENTREPRENEURIAL ACTIVITY**

It has become commonplace to assert that the decision by large tech firms to purchase smaller companies is anticompetitive and reduces innovation. Labour Deputy Leader Tom Watson, for example, has declared that “Competition has been replaced by corporate power. Google has bought 215 business since 2000. Facebook has bought 69 businesses since 2007.”<sup>111</sup> In fact, the buying up of insurgent startups actually stimulates entrepreneurial activity within the UK by providing corporate venture capital and opportunities for exit - that is, the opportunity to leave the business by selling it onto a major company.

One factor for anyone deciding to start a business is when they will exit to realise the value of their risk and hard work. As Petit explains: “IPO is indeed a rather exceptional exit route for startups. Instead, many technology startups ambition is exit through M&A with a larger firm. This is the path followed by Android, Skype, Huffington Post, WhatsApp, Instagram, Oculus, Minecraft, Beats, Twitch, Waze, LinkedIn and others”.<sup>112</sup> This is a particularly important consideration for the

<sup>108</sup> Netflix Investors, “2018 Quarterly Earnings - Fourth Quarters Earnings - Letter to Shareholders” (January 2019)

<sup>109</sup> Strategy& PwC, “2018 Global Innovation 1000” (PwC, October 2018).

<sup>110</sup> Strategy& PwC.

<sup>111</sup> Watson, “Tom Watson Speech on Fixing the Distorted Digital Market.”

<sup>112</sup> Petit, “Technology Giants, the Moligopoly Hypothesis and Holistic Competition.”

founders of fast-growth firms, which are more likely to be more productive – anything that hinders the flow of M&A activity would have an impact on high-value entrepreneurial activity.

The purchasing of British companies by major tech companies has helped stimulate the economy. Facebook, for example, has acquired the following UK companies: ‘Lightbox.com’, a photo sharing company (May 2012); Monoidics, an automatic verification software company (July 2013); Ascenta, a high altitude unmanned aerial vehicle company (March 2018); Surreal Vision, an augmented reality company (May 2015); Two Big Ears, a spatial audio company (May 2016). Alphabet (formally Google) has acquired the following UK companies: PlinkArt, the virtual search engine (April 2010); Phonetic Arts, the speech synthesis company (December 2010); BeatThatQuote.com, the price comparison service (March 2011); DeepMind Technologies, the artificial intelligence (AI) company (January 2014); spider.io, the anti-click fraud company (February 2014); Rangespan, the e-commerce company (May 2014); Dark Blue Labs & Vision Factory, an AI company (October 2014).

The large size of technology companies is also stimulating investment in companies and basic research. The large platforms also have venture capital arms, which invest significant capital into the UK. For example, Alphabet’s GV (formally Google Ventures) recently invested \$14.5m into the UK-based augmented reality (AR) firm Blue Vision. In 2017, GV took part in \$25m investment round of Currencycloud, a UK payments startup.

### **CASE STUDY: GDPR, PRIVACY, DATA PROTECTION LAWS**

An example of how regulation helps incumbents more than startups is the imposition of data regulations in the name of protecting privacy. While people do tend to indicate that they value privacy in surveys, the revealed preference of consumers is that they are willing to provide their data in exchange for a free service.<sup>113</sup> Data regulations, which focus on the stated rather than revealed preferences of consumers, impose substantial costs on small and medium businesses, damage entrepreneurship and all without providing significant benefits to consumers.

Policymakers have failed to appreciate the negative impact that privacy regulations can have on competition and technology entrepreneurship. Craig Mundie explained in Foreign Affairs in 2014 that:

If, in 1995, comprehensive legislation to protect Internet privacy had been enacted, it would have utterly failed to anticipate the complexities that arose after the turn of the century with the growth of social networking and location-based wireless services. The Internet has proven useful and valuable in ways that were difficult to imagine over a decade and a half ago, and it has created privacy challenges that were equally difficult to imagine. Legisla-

<sup>113</sup> B. A. Huberman, E. Adar, and L. R. Fine, “Valuating Privacy,” *IEEE Security Privacy* 3, no. 5 (September 2005): 22–25.

tive initiatives in the mid-1990s to heavily regulate the Internet in the name of privacy would likely have impeded its growth while also failing to address the more complex privacy issues that arose years later.<sup>114</sup>

It is important to assess the burden of data protection legislation upon small and medium businesses (including startups and scale-ups). Poorly drafted or gold-plated legislation can advantage large incumbent businesses at the expense of smaller firms.

For instance, since May 2012 websites are required to notify users that they use cookies. The pop-up warnings, which are now seen on most websites, can be intrusive and impose time costs upon users. The compliance costs were substantial as firms were forced to redesign their websites to include cookie notices. The Information Technology and Innovation Foundation estimated that the directive cost UK firms as much as €600m, based on a projected compliance cost of €900 per website.<sup>115</sup> Few consumers reported concerns about Cookies to the Information Commissioner's Office (ICO). According to the ICO's own methodology, it "received just 38 'concerns' about cookies through the reporting tool on its website between April and June 2014. By comparison, it had 47,465 complaints about unwanted marketing communications, which puts the cookie issue into perspective".<sup>116</sup>

The EU's General Data Protection Regulation (GDPR) is imposing even higher costs on all businesses and in particular SMEs. The regulation requires companies to gain explicit consent from users to gather personal information and send targeted marketing communications. According to W8 Data, only 25% of existing customer data met the requirements specified under the GDPR.<sup>117</sup> As a result, firms without requisite consent audit trails were required to send out mass repermissioning emails. However, response rates vary, and firms have lost significant amounts of marketing data. The total cost of complying with GDPR has been estimated to be US\$7.8 billion for Fortune's Global 500 companies; cost that is inevitably passed onto consumers and other businesses in higher prices.<sup>118</sup>

<sup>114</sup> Craig Mundie, "Privacy Pragmatism," *Foreign Affairs*, February 12, 2014.

<sup>115</sup> Daniel Castro and Alan McQuinn, "The Economic Costs of the European Union's Cookie Notification Policy" (Washington, D.C.: The Information Technology and Innovation Foundation, November 6, 2014).

<sup>116</sup> Graham Charlton, "The EU 'Cookie Law': What Has It Done for Us?," *Econsultancy* (blog), August 26, 2014.

<sup>117</sup> Emily Tan, "GDPR Will Render 75% of UK Marketing Data Obsolete," *Campaign*, August 10, 2017.

<sup>118</sup> iapp, "Global 500 Companies to Spend \$7.8B on GDPR Compliance," November 20, 2017.

“...compliance costs have been astronomical; individual “data rights” have led to unintended consequences; “privacy protection” seems to have undermined market competition; and there have been large unseen — but not unmeasurable! — costs in for-gone startup investment. So, all-in-all, about what we expected.”<sup>119</sup>

Since the introduction, the GDPR has already led to €56 million in fines and over 281,000 cases. The right of access to data has enabled hackers to easily download all a users’ information; the right to be forgotten has led newspapers to remove all content from their archives, and the right to data portability has increased the exploits in online system. GDPR led to thousands of US news sites blocking European users, with a year later over 1,100 still inaccessible.<sup>120</sup> The associated costs with complying with the GDPR has had a substantial impact on investment in startups in Europe, with one study finding technology venture capital declined by as much as 50% in the immediate aftermath of the GDPR implementation.<sup>121</sup> Meanwhile, dozens of firms, such as Brent Ozar and Klout, have left the European market altogether.<sup>122</sup>

There is evidence to suggest that the loss of marketing data and need to gain consent under GDPR has lead SMEs to increase their reliance on Facebook and Google’s advertising platforms. Google, for instance, “told website owners and app publishers that they would be required to gain consent for targeted ads on behalf of each of their digital ad vendors or risk being cut off from Google’s ad network”.<sup>123</sup> Facebook and Google have direct relationships with consumers, which makes it easier to gain explicit consent. This is not the case for smaller AdTech vendors that have B2B relationships with publishers, such as newspapers. Publishers are required to gain the consent of users on behalf of AdTech vendors that the user will never have heard of.

The law change is leading advertisers to shift marketing spend from smaller providers and towards Google and Facebook. There was an immediate uptick in digital advertising spending on Google immediately following the introduction of GDPR.<sup>124</sup> Joachim Schneidmadl, chief operating officer for Virtual Minds AG, which owns German AdTech firms, was quoted in the *Wall Street Journal* saying “They are moving their money where there is clear, obvious consent. The huge platforms

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**119** Alec Stapp, “GDPR After One Year: Costs and Unintended Consequences,” *Truth on the Market*, May 24, 2019.

**120** <https://data.verifiedjoseph.com/dataset/websites-not-available-eu-gdpr>

**121** Jian Jia, Ginger Zhe Jin, and Liad Wagman, “The Short-Run Effects of GDPR on Technology Venture Investment,” Working Paper (*National Bureau of Economic Research*, November 2018).

**122** Alec Stapp, “GDPR After One Year: Costs and Unintended Consequences,” *Truth on the Market*, May 24, 2019.

**123** Sam Schechner and Nick Kostov, “Google and Facebook Likely to Benefit From Europe’s Privacy Crackdown,” *Wall Street Journal*, April 24, 2018.

**124** Schechner and Kostov, “Google and Facebook Likely to Benefit From Europe’s Privacy Crackdown.”

are really profiting.”<sup>125</sup> Some AdTech firms are responding to the GDPR by leaving the European Union altogether. According to the Wall Street Journal, Drawbridge, which helps marketers track users as they switch from one device to another, abandoned its ad business in Europe as a result of GDPR, shutting its London office, said a spokesman for the California-based company.<sup>126</sup>

Regulation typically imposes greater relative costs upon smaller firms compared with large firms. As Facebook CEO Mark Zuckerberg stated at a Congressional hearing: “A lot of times regulation by definition puts in place rules that a company that is larger, that has resources like ours, can easily comply with but that might be more difficult for a smaller startup.” Research from London Business School’s Professor Anja Lambrecht found that EU e-privacy regulations reduced venture capital inflows to Europe relative to the US.<sup>127</sup> She states, “our results are consistent with a view that tighter privacy policies may negatively affect VC investments into firms in online advertising, online news, and cloud computing.”

Post-Brexit, there will be trade-offs however between regulatory divergence and the ability to move data from between the UK and the EU. In the Financial Times, European Leader Writer Alan Beattie argues that, “well-meaning motives about fixing a serious problem of genuine public concern are being distorted by cynical policymaking and thus facilitating covert protectionism in the form of rules requiring data to be held locally”.<sup>128</sup> If the UK leaves the Single Market and loosens the GDPR’s requirements, British businesses may lose the ability to move data between the UK and EU. If this is the case, the benefits of reducing regulatory burdens will likely be outweighed by reduced access to European markets.

## CONCLUSION

The internet is providing us with ways to access information, communicate, purchase products and entertain ourselves like never before in human history. It is a key driver of improved living standards, and behind the creation of substantial economic activity, including many high paying jobs and entrepreneurial activity in the UK and across the world.

Recent rhetoric about the internet, however, has tended to focus on dangers and unfounded claims of harm and lack of competitiveness. It is important that policy debates be guided by an understanding of what drives prosperity.

In order to be successful, it is essential that Britain adopts a policy disposition towards permissionless innovation and avoids regulating in ways that undermines the benefits of the internet and entrenches monopolies and limits competition.

<sup>125</sup> Schechner and Kostov.

<sup>126</sup> Schechner and Kostov, “Google and Facebook Likely to Benefit From Europe’s Privacy Crackdown.”

<sup>127</sup> Anja Lambrecht, “E-Privacy Provisions and Venture Capital Investments in the EU” (Brussels, Belgium: *Centre for European Policy Studies*, December 2017).

<sup>128</sup> Nick Kostov and Sam Schechner, “Google Emerges as Early Winner From Europe’s New Data Privacy Law,” *Wall Street Journal*, May 31, 2018.

If the Government wants to achieve an open, competitive and entrepreneurial on-line space they would do well to follow these Five Principles for Permissionless Innovation:

1. Identify and remove barriers to entry and innovation;
2. Protect freedom of speech and entrepreneurship by retaining immunities for intermediaries from liability;
3. Rely on existing legal solutions, the common law, and competitive pressures to solve problems.
4. Push for industry self-regulation and best practices.
5. Adopt targeted, limited legal measures for truly hard problems based on evidence.