We’ve heard a lot today about the legal complexities and controversies about intermediary liability and responsibility. I’m not going to presume to add to a roomful of lawyers’ knowledge of the law. Instead I want to consider proactive obligations from a regulators’ perspective – that is, as a strategy that might be adopted by bodies with regulatory functions to influence intermediaries’ activities to achieve policy goals. I’ll talk about some of the other approaches that are emerging, which I have described in my Oxford research as ‘procedural accountability’, and consider whether these might represent a more fruitful regulatory strategy towards intermediaries than both notice-and-action regimes, and proactive obligations.

Let me start by clarifying how I’m using the term ‘regulation’. There’s no consensual definition in either the academic literature or in material produced by regulators and governments. In a recent paper entitled What is Regulation?, Barak Orbach describes various usages dating back to the drafting of the US Constitution: to regulate was “to adjust by rule or method;” “to direct, including prescribing certain measures; to mark out a certain course; to order; to command.”¹ So, direct, prescribe, order, command; this is perhaps the most intuitive concept of regulation - as - command - and - control; the laying down, and enforcement, of rules that dictate what individuals, companies and groups may or may not do. In fact Black’s Law Dictionary defines regulation as “the act or process of controlling by rule or restriction.”

Sometimes, though, a somewhat looser, more flexible sense emerges. Anthony Ogus, in a classic study of regulation first published in 1994, defines regulation as law by which “the state seeks to direct or encourage behaviour which...would not occur without such intervention.”² The UK’s Better Regulation Commission also defined regulation widely as “any government measure or intervention that seeks to change the behaviour of individuals

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or groups.” More recently, Chris Hodges, in his work on ethical business regulation, is concerned with “how public regulators in a contemporary Western European democracy should seek to affect the market behaviour of traders...regulation should be viewed as producing desirable behaviour by the people involved.” This sense of regulation recognises that its ultimate goal is not the regulations themselves, but the behaviour they induce; and that there are many ways of inducing preferred behaviour, not just directing or commanding.

The main way of regulating online intermediaries in current European law is of course notice-and-action regimes. These are regulatory in both the senses I described. First, they’re directive, although only with respect to specific items of content: they command intermediaries to review items of content that are notified to them, and to take them down if they break the law or the intermediaries’ own terms of use. But they also have encouraged proactive behaviour that’s not mandated by the law itself: in setting norms about intermediaries’ responsibilities, creating a body of cases that make those norms concrete, and making intermediaries bear the costs of judging those cases, notice-and-action regimes encourage intermediaries to take voluntary steps to reduce the supply of harmful or illegal content even without notification. In other words, by requiring intermediaries to act after-the-fact on notified content, notice-and-action has induced before-the-fact activity by intermediaries, to seek and screen out illegal content before publication, even though the E-Commerce Directive explicitly prohibits them from being put any under obligation for general monitoring for illegal content.

Notice-and-action regimes are extensively used. Facebook said in 2017 that it deleted 66,000 posts per week, on average over two months in 2017, notified to it as hate speech. In total it receives two million requests for content removal per week. YouTube receives 1.4m flags per week. Google gets about 3,000 requests per week, asking for a little over 10,000 URLs to be delisted, under the so-called right to be forgotten.

But these numbers are dwarfed by the volume of content that is now removed by intermediaries’ automated tools. Facebook said at an event recently that 99% of content it removes, it identifies itself. Google is reported to have said that 83% of extremist content it takes down is removed by automated tools.

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3 Better Regulation Commission, 1997
This provides the background to the drift towards proactive monitoring obligations that we see in current regulatory debates; on the one hand, the view that notice-and-action is not working, and on the other, that technology now permits a more effective pre-emptive response.

And if the technology exists, policy-makers might well say, why not impose it? The European Council in June 2017 stated that it "expects industry to ... develop new technology and tools to improve the automatic detection and removal of content that incites to terrorist acts." These calls were echoed by statements issued at subsequent G7 and G20 summits. Indeed the E-Commerce Directive always recognised the possibility of voluntary measures to block content pre-notification; recital 40 says the Directive “should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology”.

But the trend is towards positive obligations to undertake such measures. The draft revised AVMS Directive obliges video-sharing platforms to “put in place appropriate measures to protect minors from harmful content; and protect all citizens from incitement to violence or hatred.” The Commission’s draft Copyright Directive makes similar proposals, and specifically refers to content recognition technologies, to prevent access to copyrighted content identified by rights-holders. And its most recent Recommendation on illegal content says measures to tackle terrorist content ‘should’ include automated proactive measures; it advises that taking proactive measures does not automatically lead to the intermediary losing the benefit of liability exemption under Article 14. However, Delfi established that at least in certain circumstances publishers can be held liable for failing to remove illegal content without notification.

It’s not for me to take a view on the merits of these specific cases and regulations, others here are much more expert on the particularities. The main point I want to make is that these proactive obligations, as currently framed, and indeed the notice-and-action regimes that preceded them, are just not very good regulation.

Better Regulation principles, defined in the UK over twenty years ago, require that regulation is proportionate – that the state only intervenes when necessary, that remedies match the risk, and costs are identified and minimised. Well, if any assessment has been carried out of the scale of the risk and impact of illegal content of different types, the costs
of automated monitoring technology relative to the benefits, and the impacts on competition between platforms, I haven’t seen it.

And there are certainly costs – not just to intermediaries themselves, but to industry and society more generally. Proactive monitoring could work well for illegalities that can be detected easily, cost-effectively and precisely. But these conditions don’t apply to the kind of content we’re talking about here, which is heavily context-dependent, difficult to identify and about which reasonable people may disagree. Errors and dispute are inevitable. There’s a high risk of false positives, of suppression of legal and socially valuable content – and the tougher the sanctions on intermediaries, the higher the risk, because sanctions only skew incentives in one direction; there are no penalties for inadvertent removal of legal material.

Accountable regulation requires decisions that are subject to public scrutiny, and capable of being appealed. But proactive obligations delegate legal and ethical decision-making to private companies, with little restriction on how they make those decisions, and few guarantees of transparency. Such measures concentrate platform power, rather than constrain it. They may create barriers to entry, by requiring new competitors to develop complex and expensive detection tools relatively early in their growth phase. And they may not work – they may drive harmful content into less tractable environments, or just not be that good at differentiating legal and illegal.

We want legislators to be careful about making vague law that empowers third parties to decide what is and isn’t legal content. But the risk is law that is the opposite of careful: that throws problems over the wall to technology firms, based on unproven assumptions about technological capabilities, little visibility of intermediaries’ policies and processes, and no systematic approach to oversight, impact assessment and review. As far as I can tell there have been few evaluations of notice-and-action regimes by public authorities, in terms of systematic assessments of their effects, ex ante or ex post, that take all their costs and benefits into account. It’s worrying that the same might apply to proactive obligations.

The risks I’ve discussed are I think well understood. But there’s another set of problems with both notice-and-action regimes and proactive obligations which perhaps get less attention: the single-minded focus on harms of online content, and consequent lack of consideration of intermediaries’ potential role in spreading the benefits of online communication. The regulatory debate is framed in terms of harms and constraints. But there is an equally important agenda about how intermediaries can enhance media diversity, create safe spaces for online exchange, promote digital inclusion, facilitate the discovery of content that
meets public service objectives, and so on; whether their incentives, in governing their communities, are aligned with these objectives; and if not, how they can be encouraged to pay them more attention. These are equally valid regulatory concerns but they only rarely feature in European policy debates.

So proactive obligations have significant in-principle drawbacks, from a better regulation perspective. However, a number of other approaches to intermediary regulation can be identified. These strategies are driven by the recognition that intermediaries do have a vital role to play in securing internet benefits and mitigating risks, but that individual intermediary initiatives are often insufficient to deliver legitimacy and accountability. They move the regulatory task, away from scrutinising content and threatening sanctions, to coordinating, assessing and validating the efforts of intermediaries to meet policy goals.

We can distinguish two such strategies. These aren’t mutually exclusive, and don’t necessarily directly replace notice-and-action regimes or proactive obligations. Indeed they may be complementary.

The first is multi-stakeholder initiatives, a comfortingly inclusive, if somewhat woolly, concept, characterised by collaboration involving platforms, policy-makers, civil society and other interested parties. Some examples are generally deemed, I think, to have been a success – perhaps the Internet Watch Foundation is the most obvious case. More recently, examples include the Global Internet Forum to Counter Terrorism, or the Partnership on Artificial Intelligence to Benefit Society.

The model appears to be voluntary, either industry-led or significantly industry-driven. However, they often originate in government pressure on industry to act; such action is the price of avoiding more intrusive regulation. Andrew Puddephatt, chair of the Internet Watch Foundation, has produced a useful checklist of success factors: good multi-stakeholder models have a clear remit, a precise definition of the problem or opportunity to be addressed, and a shared goal; independent governance; the ability to make binding decisions about content or sources to be blocked or promoted; transparency about performance relative to goals. Whereas notice-and-action and proactive obligations have generally been applied to illegal, harmful content, this and the subsequent approaches could also be considered to engage the potentially beneficial impacts of online content.

One advantage of the multi-stakeholder approach is the ability to take a global approach to global problems. Potentially, solutions brokered in one jurisdiction can be exported to
others. But this can cause problems where differences in legal frameworks and social expectations exist between jurisdictions. And these initiatives can be slow, and wasteful. Large numbers of senior people spending significant amounts of time to make consensual progress on difficult issues have to be very confident that a good outcome can be achieved to justify the effort. Moreover, the processes themselves can lack transparency and accountability – concerns have been expressed about whether ‘multi-stakeholder initiatives’ are or become vehicles to further the interests of the participants. It can be unclear who, if anybody, is seeking to identify and further the public interest in these initiatives.

The second strategy I think of as ‘procedural accountability’, an admittedly inelegant term for a collection of efforts that focus on the processes by which intermediaries make rules and govern information markets, rather than the content itself or the tools they use to manage it. In these approaches, rather than specifying particular technological solutions or directly scrutinising content outcomes, regulators set standards for intermediary procedures – for example, standards for objective and problem definition; assessment of impact of chosen solutions; stakeholder engagement; moderator training and support; dispute resolution and appeal processes; transparency reports. This provides a way for intermediaries to achieve legitimacy through procedural means – that is, by developing processes, policies and systems using methods consistent with principles of good governance. Such regulatory strategies might work well where disputes about policy are inevitable; desired outcomes are hard to specify; and it’s hard to assess the impacts of algorithms and platform features. In such cases, following due process may be a better indicator of responsible decision-making than decision outcomes themselves.

Companies already voluntarily put in place some types of procedural accountability, for example, ethics committees and transparency reports. But as with the previous case, government usually lurks in the background. There are procedural elements in a number of current policy and legislative proposals. For example, in the German network enforcement law, companies can avoid sanctions for failing to act within prescribed time limits by referring notified content to an approved industry self-regulator, a common model in German regulation. These self-regulatory bodies must meet certain standards and be approved by the German ministry of justice, but the state does not itself participate in content decisions. The Copyright Directive and Recommendation on Illegal Content have procedural requirements, including obligations to establish complaints and redress mechanisms, transparency requirements about automated technologies used and their
success rate, and guidance that intermediaries should provide information to both notifiers and content providers regarding their decisions.

In the UK, the Code of Practice on Search and Copyright signed last year by Google, Bing and rightsholders, provides an example of regulators playing an active procedural role – they convened the parties and worked to agree measures of success in actions to reduce infringing material appearing in search results, an approach to evaluation and reporting, with the IPO commissioning research to track progress. However, this also provides an example of the risks of procedural approaches; there is no requirement of redress for websites who can show they have been wrongly classed as infringing. All stakeholders need to be represented in procedural accountability initiatives, including those who will push the case for freedom of expression, consumer interests and competition.

Procedural accountability does not of course resolve the difficult issues at the heart of online content regulation: the trade-off between different interests, the difficulty of differentiating legal and illegal content and the importance of context, which mean content decisions will inevitably be contested. But by establishing due process, independently defined and ideally independently validated, intermediaries may be able to legitimise their content policies and practices without the need for regulators to specify the particular tools and specific outcomes by which they manage their communities.

Procedural accountability has the advantage that it need not be restricted to harmful content, but can include more positive initiatives. For example, both Facebook and Google announced initiatives to increase the discoverability of ‘trustworthy’ content in the wake of controversies about so-called ‘fake news’, including promotion of more ‘trustworthy sites’. Regulators should be cautious about influencing intermediaries’ decisions about which sites are promoted, but there are many procedural questions that will determine whether their choices are aligned with public interest objectives, and do not inappropriately restrict competition. For example, regulators may want to consider: have the intermediaries provided robust evidence of the existence and nature of problems? Have they defined appropriate measures of success? Have they put in place processes to monitor the effectiveness of their policies, and iterate if needed? Have they provided good evidence for the selection of criteria for ‘trustworthiness’? Are their policies likely to systematically favour some providers over others? Are there opportunities for appeal and redress?

I don’t want to understate the challenges of these approaches. Procedural accountability requires dialogue between regulators, intermediaries and stakeholders, and both parties...
must adapt and develop the insight to have meaningful exchange. It is unclear whether today’s regulators have the capacity and expertise necessary to have such dialogue. Regulators may have insufficient information about market conditions and user behaviours to assess intermediaries’ own analysis of problems and solutions. Consequently, they may require too much process over too many issues, imposing unjustified cost and complexity on commercial providers. And in evaluating intermediary policies, regulators may (consciously or unwittingly) prioritise special interests, including the protection of incumbent business models, over social welfare and consumer benefit, especially if consumer costs and benefits are hard to assess. They should remember that platforms have strong incentives to balance the interests of their users to the overall value of their markets; procedural obligations should be restricted to cases where there are significant externalities that platforms are demonstrably failing adequately to address, to the significant disbenefit of consumers and citizens.

In conclusion, I suggest the limitations of notice-and-action regimes and proactive obligations are well known. Relying on them as the primary means of regulating online content intermediaries may not be effective, and poses significant risks. But other approaches are available; these emphasise a different approach to regulation, based on co-regulation and collaborative governance, rather than command-and-control. In further work, I hope to address what changes to law, institutional mandates and regulatory capabilities might be needed to put this different approach into practice more systematically. I’d welcome comments and questions.