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I. Why do we Need Accountability in Digital Governance?

At some point in the late 20th Century, accountability became the cure for all of society's evils. By now, we are used to calls for everyone from politicians to teachers to pop stars to answer for and be accountable for their conduct. Accountability's attractiveness in modern democracies (and even in non-democratic states) lies in its ability to demand something from public officials *without demanding too much*. What is demanded is that policy-makers explain their action. Accountability is thus one piece of the emerging 'culture of justification' under which coercion can only be legitimately demanded in modern societies where it is backed up by good reasons.¹ What is *not demanded*, however, is control. By most definitions of accountability, an official can happily explain and justify their action to others without being beholden to them or perhaps even having to correct their action at all.² Accountability is thus a promise to justify *without committing to a particular response to justification*.

The rise of accountability in the late 20th Century (and even as a sub-set of literature in political science) was therefore a perfect match for the equal rise of what public administration scholars have called the 'regulatory state'.³ This state (of which the EU is a major part) was accompanied by a series of decision-making and regulatory bodies normally intentionally insulated from direct political or electoral control. These bodies – from regulatory agencies to independent central banks – promised more credible long-term policies, uncorrupted by the short-termism of everyday politics. For such bodies, accountability was again the perfect answer to a deep-seated problem. How could 'insulation' from politics be justified in a fully democratic polity? It could be justified because such bodies were accountable.⁴ While they need not be controlled by external political actors, they still had to show and explain their conduct, according to the 'mission' for which they were established. Once again, accountability offered democratic control, but not too much of it i.e. not the type of control that would render the 'independence' of such institutions meaningless.

The regulatory state is not as fashionable a concept as it once was. Even one of its crowning achievements – independent central banks – are increasingly contested as making highly re-distributive decisions that place their political objectivity in doubt.⁵ Digital governance may, however, be arriving just in time to create a new home for the accountability craze. The last few years have therefore

1 S Gardbaum, 'Proportionality and Democratic Constitutionalism' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014).

2 For a typology of definitions, see M Bovens, T Schillemans & RE Goodin, 'Public Accountability' in *The Oxford Handbook of Accountability* (Oxford University Press, 2014).

3 G Majone, 'The rise of the regulatory state in Europe' (1994) 17 *West European Politics* 3.

4 C Scott, 'Accountability in the regulatory state' (2000) 27 *Journal of law and society* 1.

5 M Dawson, A Maricut-Akbik and A Bobić, 'Reconciling Independence and accountability at the European Central Bank: The false promise of Proceduralism' (2019) 25 *European Law Journal* 1.

seen a cacophony of calls for accountability in the digital realm, from dragging the founder of Facebook to answer questions before US congressional committees to the insertion of various accountability clauses into codes of practice and conduct regulating the digital sphere. The demand for accountability here mirrors the story of justification without control discussed above. On the one hand the call for accountability emerges from the sense that digital platforms and providers are an increasingly powerful force in our societies, un-subject to real democratic control.⁶ There is therefore growing recognition that the contestation and limitation of digital power is a pressing need.

On the other hand, there is an equal sense that subjecting the digital sphere to central public control is also undesirable. This relates to a number of fears, from the perception that the internet should be a space of non-domination, free from central political control, to the concern that treating digital platforms like other public actors would stifle growth and innovation.⁷ In this story, accountability once again appears as a potential mid-way solution. It holds out the promise of some level of contestation i.e. it minimally demands that those who exercise power digitally explain their actions and justify their role in the digital sphere in relation to users. It also however, promises *not to do too much* i.e. to fully *control* digital platforms and users, and thereby disrupt too restrictively the flow of information and ideas that constitutes digitalization's biggest promise.

The purpose of this contribution will not be to assess whether accountability is really capable of squaring this particular circle. Practice in other spheres, such as central banks, suggests that 'independence' and accountability inevitably sit in an uneasy and tense relationship, such to cast doubt on the notion that accountability can really deliver on the promise of legitimacy in the digital sphere without domineering control.⁸ Answering such questions depends on deep empirical work in this field, of which this article and researcher are not capable.

Instead, the purpose will be to consider and lay-out a theoretical framework. If we accept that actors in the digital sphere, such as ISPs or other providers, are under accountability duties, what are these duties? If we ask actors in the digital sphere to be accountable, what should we be asking of them? The purpose is therefore a modest one: to lay-out a framework for accountability in digital governance that accountability 'forums' e.g. citizens, parliamentarians and others, may use to hold the 'digitally powerful' to account. To do so, I will draw on a framework developed in the context of a parallel project (on accountability in EU economic governance).⁹

II. What does 'Accountability' require?

A. From Actors to Norms

6 See e.g. <https://www.citizen.org/article/techhearingaccountability/>; 'We have to hold Big Tech accountable' Interview with EU Competition Commissioner Margrethe Vestager', available at <https://londondaily.com/we-have-to-hold-big-tech-accountable-interview-with-eu-competition-commissioner-margrethe-vestager>.

7 S Ranchordas, 'Does sharing mean caring? Regulation innovation in the sharing economy' (2015) 16 *Minnesota Journal of Law, Science and Technology*.

8 See Dawson et al, above n 5.

9 M Dawson and A Maricut-Akbik, 'Procedural v Substantive Accountability in EMU Governance: Between Pay-offs and Trade-offs', forthcoming, *Journal of European Public Policy*. Available at [10.1080/13501763.2020.1797145](https://doi.org/10.1080/13501763.2020.1797145).

When it comes to accountability and its demands, there are plenty of competing definitions. A more promising approach may not be to define accountability, but instead to look to the goods it is trying to deliver. This alternative approach relates to an argument raised by Michael Goodhart in an important article on accountability beyond the national context.¹⁰ In a trans-national context, one of the traditional concerns of accountability research, focused on 'who is accountable to whom', is extremely difficult and arguably of limited normative value. To take the EU as an example, accountability in the EU setting is made extremely convoluted by the multi-level and pluralistic nature of the EU as a political system.¹¹ To use EU economic governance as an example, who is 'accountable' when a citizen is negatively affected by a recommendation made by the European level in an economic coordination process like the European Semester? Such recommendations are drafted by the European Commission but adopted by the Council. At the same time, they are soft law measures that ultimately have to be adopted by the Member State in question (often after a peer review process involving other Member States). A myriad of other institutions also play a crucial role in shaping economic governance, with some of these institutions, like the European Central Bank system, largely insulated from political influence. The web of EU decision-making thus makes it extremely difficult to identify a specific actor to be held accountable for a specific decision.¹² The larger problem is that *many* individuals and institutions are accountable (thus lowering the accountability duties of any *one* actor).

Goodhart's answer to this dilemma is to shift our focus. If accountability in trans-national governance cannot be to specific actors, there remain specific *norms* which shape the trans-national sphere. These norms are found in international Treaties and in general principles shaping the trans-national legal order such as human rights.¹³ Goodhart's approach shifts the focus of accountability research from a focus on actors and institutions to a focus on the normative 'goods' and principles which accountability is trying to serve in the global sphere. Even in circumstances where no one actor can be held accountable for collective decisions, all actors might nonetheless be bound to and answerable to certain norms, that individuals, states and groups may enforce. This enforcement may then be conducted through a variety of legal, political and administrative mechanisms from (in the EU case) the European Courts, to national Parliaments, auditing institutions, the European Ombudsman and a host of other sites of authority.

Transported to the digital sphere, when we ask public ask office holders to be 'accountable' (or ask Facebook to be accountable when it monitors user content), it may be most meaningful to start with the question: what are we really asking for when we make this claim? The point of this framework therefore is to unpack the normative claims citizens and public officials might be making when they ask for 'accountability' and, as a result, to allow us to distinguish between different forms of accountability also in the digital sphere. Drawing on the broader literature on accountability spanning the fields of law, political theory and public

10 M Goodhart, 'Democratic accountability in global politics: Norms, not agents' (2011) 73 *The Journal of Politics* 1: 45–60.

11 S Hobolt and J Tilley, *Blaming Europe?: Responsibility without accountability in the European Union* (Oxford University Press, 2014).

12 GJ Brandsma, E Heidbreder and E Mastenbroek, 'Accountability in the Post-Lisbon European Union' (2016) 82 *International Review of Administrative Sciences* 4, at 625.

13 Goodhart, above n 10, at 52.

administration, we might distinguish between four different such goods that accountability seeks to deliver.¹⁴

B. The Four Accountability 'Goods'

The first good that citizens may ask for when they ask for 'accountability' is openness. Liberal thinkers from Bentham onwards have long argued that public confidence in official action is likely to be increased where public policy is conducted under the public gaze (what he termed 'publicity').¹⁵ The openness of public policy has thus been linked to a number of public goods such as the avoidance of corruption¹⁶, the improvement of public knowledge and the republican demand that free citizens should enjoy 'non-domination' i.e. the ability to question and contest official action.¹⁷ We might want accountability therefore because we see it as a device to ensure that public action is open, transparent and contestable. This good, as pointed out in broader accountability literature, is logically the first of the accountability goods in that it is a pathway to other forms of accountability – without access to information about an organization or decision, it is impossible to probe further i.e. to demand justifications for failures or to follow-up on questions poorly answered.¹⁸

The second such good is non-arbitrariness. There is a deep tradition in accountability research of tying accountability to notions of the principle-agent relation in which accountability is a device for (political) principles to control (administrative) agents to whom they have delegated powers.¹⁹ This is a narrower instance of a broader good which accountability may seek to render, namely that those who wield public power should do so in a limited manner and that they should exercise coercion only to the degree that is necessary to achieve their goals.²⁰ Non-arbitrariness is also therefore linked to more general limits on public action such as human rights or due process guarantees that seek to regulate the relationship between the individual and the state.²¹ Accountability – by making officials answer for that conduct – provides a means by which arbitrary distinctions or applications of power can be identified, and later remedied. We might therefore ask for accountability because we see it as a device to restrain or control public power and ensure that those who have it do not abuse their authority beyond reasonable limits.

The third such good which accountability seeks to render concerns effectiveness. While openness and non-arbitrariness seem highly normative

14 For a similar attempt, with some diverging categories, see e.g. MJ Dubnick, 'Accountability and the promise of performance: In Search of the Mechanisms' (2005) 28 *Public Performance & Management Review* 376–417 at 366.

15 J Bentham, 'Of publicity' in M James, C Blamires, C Pease-Watkin (eds), *The Collected Works of Jeremy Bentham: Political Tactics* (Oxford University Press, 1999).

16 I Kolstad and A Wiig, 'Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?' (2009) 37 *World Development* 521–32.

17 RL Heidelberg, 'Political Accountability and Spaces of Contestation' (2017) 49 *Administration & Society* 1379–1402.

18 For this reason, Deirdre Curtin has labelled transparency a 'necessary but insufficient condition' for accountability. See D Curtin, 'Accountable Independence' of the European Central Bank: Seeing the logics of Transparency (2017) 23 *European Law Journal* 1–2, at 43.

19 See e.g. JD Fearon, 'Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance' in A Przeworski, SC Stokes, B Manin (eds), *Democracy, Accountability, and Representation* (Cambridge University Press, 1999).

20 Goodhart, above n 10.

21 TRS Allan, 'Accountability to Law' in N Bamforth, P Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 77–104, at 77.

values, accountability may be sought for more utilitarian reasons, namely that accountable officials are more likely to deliver high-quality services. From this perspective, accountability holds the promise of performance.²² By making an official answer for their conduct, and by offering the possibility to correct potential errors, accountability is also a mechanism to improve the efficacy and responsiveness of public policy.²³ Here, the premise is that the need to justify and even correct conduct will likely improve, and encourage reflection upon, the design of policy-making or implementation. In this sense, there are uses for accountability that go beyond those uses associated with democratic or human rights base norms: accountability is a key device to critically evaluate decisions and to establish the types of links between those creating policy and those affected by it necessary to improve a policy's implementation and effectiveness.

The final such good is one of publicness or that official action be oriented towards the common good. An important normative requirement for any public official is that they demonstrate the 'publicness' of their action i.e. that the decisions they took were in the public interest.²⁴ This involves demonstrating both that they were not personally enriched and that their decisions fairly balanced and took into account different societal interests and perspectives. Once again, accountability is a key device for ensuring the publicness of official action in this sense – when parliamentarians scrutinize government agencies, or Courts conduct judicial review, a key demand is that actors show how their activities forwarded the national or collective interest (with different accountability forums likely to disagree on what a fair balancing of societal interests would entail).²⁵ Accountability is thus a device to advance the normative good of public policy 'oriented towards the common good'. This last good might take on a specific meaning in the EU context, namely the typical normative demand that EU policy advance the *European interest* and not simply the interests of the largest or most powerful Member States.²⁶ Specific features of the EU system – such as the initiative power of the Commission – can in this sense be related back to some notion of accountability as a device to ground public power in the interests of the broader community (and not in specific 'factions' or sectional interests).

Importantly, these four goods help us to understand whether an actor has met the standards of accountability. Under this definition, therefore, an actor is accountable not because they filled some specific institutional duty e.g. because they answered questions before the European Parliament, but if they can demonstrate through such forums that their decisions were open, limited, effective and public i.e. because they met the normative requirements implicit in the notion of accountability. The 'duty' of accountability forums is then to, in turn, question, contest or confirm whether public actors meet these standards.²⁷ Accountability under this framework is therefore a process between an

22 Dubnick, above n 14, at 377.

23 WF West, 'Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis' (2004) 64 *Public Administration Review* 66–80.

24 J Waldron, 'Accountability and Insolence' *Political Theory* (Harvard University Press, 2016).

25 D Oliver, *Government in the United Kingdom*, 28.

26 On this notion of the 'spatial' dimension of EU constitutionalism, see M Dawson and F de Witte, 'Constitutional Balance in the European Union After the Europe Crisis' (2013) 76 *Modern Law Review* 5.

27 For an application of this framework empirically to a specific accountability process in the EU, see A Maricut-Akbik, 'Contesting the European Central Bank in Banking Supervision: Accountability in Practice at the European Parliament' (2020) 58 *Journal of Common Market Studies* 5.

accountable actor and an accountability forum in which these four goods are accounted for, contested and justified.

This framework of course requires conditioning when applied to the digital sphere. For one, it is a framework developed for the accountability of *public actors*. Many of its duties may be considered too burdensome when applied to the non-governmental sphere. To take one example, while evidencing that an official was not publicly enriched by a decision might be expected in the public sphere, corporations are in the business of enrichment and can be legitimately expected to profit from their activities. What this framework may require, however, is adaptation rather than re-invention. To re-visit that example, while, when asking companies to be accountable we might allow enrichment, we might still use accountability to cast doubt on illegitimate forms of enrichment i.e. those that breach laws, that deceive consumers or that violate ethical standards. More broadly, the normative demand for accountability is not tied to the state but rather to all actors in a society who exercise regulatory power, with non-governmental and corporate actors increasingly playing this role. More broadly, Goodhart's turn from 'actors' to 'norms' is equally needed in the trans-national digital sphere where identifying 'who is accountable to whom' is at least as perilous and difficult a task as in the EU economic context from which the framework above emerges. How then could this accountability framework – and the four goods it develops – be adapted to the non-governmental and digital context?

III. Accountability in the Digital Sphere

A. The Nature of the Digital Accountability Challenge

The larger context for considering this question concerns the increasingly fragmented nature of regulation in the digital sphere. As outlined by others²⁸, digital governance is marked by an increasing tendency towards self-regulation and the privatisation and delegation of regulatory authority in order to make-up for significant information asymmetries between users, companies and public authorities. To provide some examples, a consequence of the CJEU's infamous Google Spain decision is an obligation on internet service providers (ISP) to remove digital content relating to individuals that might be waived for overriding reasons of public interest.²⁹ Similarly, in some EU states, such as Germany, social media platforms may be under an obligation to remove (or maintain) content posted online to prevent the circulation of hateful or mis-leading information (to implement the infamous 'NetzDG'). To give a final example, sharing platforms such as Uber or AirBnB have all established dispute resolution mechanisms to regulate disputes between users and providers delivering services via their platforms.³⁰

In all of these examples, digital providers are not merely acting as 'producers' or market participants but as regulators or adjudicators, applying and determining the scope of important national and EU rules. They may even (see e.g. the case of removing 'hate speech') play a role in balancing public interest

28 See e.g. M Finck, 'Digital Regulation: Designing a Supranational Legal Framework for the Platform Economy' (2017) *LSE Law, Society & Economy Working Papers* 15; M Bassini, 'Fundamental Rights and Private Enforcement in the Digital Age' (2019) 25 *European Law Journal* 2.

29 Case C-131/12 *Google Spain* Judgment of 13 May 2014.

30 See <https://www.airbnb.com/help/article/767/what-is-the-resolution-center>.

considerations with important fundamental rights.³¹ Some scholars have gone as far as to characterise these developments as part of a larger privatisation or socialisation of constitutional functions³²; an example of what Gunther Teubner once described as 'societal constitutionalism'.³³ While such societal constitutionalism conjures up an image of a relatively fragmented and reflexive process of constitutional change, many of the actors establishing and shaping these 'constitutional' norms are of course large, or even oligopolistic, multinational corporations, with limited legal or political accountability either in the national context or in the trans-national one.

It seems of some significance therefore to build a framework for accountability which both goes beyond the mere 'legality' of what digital actors are doing and which also can be tested and assessed by others (from Courts to data supervisors, parliamentarians or citizens themselves). To return to some of the points raised in the section above, in the digital sphere, identifying a direct accountability relationship between a 'responsible' actor and the correct accountability forum to which they should answer may often be difficult. To provide an example, there is a significant debate among scholars and practitioners as to whether ISPs are 'moderators' of content or merely conduits who cannot be held responsible for how other users utilise their services. The flow of digital information may be such that accountability cannot be reduced to a concrete relationship of responsibility of *one actor*. Similarly on the side of the forum, if a digital actor abuses their authority – if for example, a social media platform fails in its duty to identify false or harmful information, what is the accountability 'forum' to whom they should answer for this failure? On the side of the forum too, there is not *one forum* but multiple actors who deserve justification for errors, abuses and decisions in the digital sphere.³⁴ The trans-national and pluralistic nature of the digital sphere makes the reliance of accountability on a specific relationship between actor and forum (the 'bread and butter of normal accountability' research) tenuous.

In this context, returning to the accountability framework discussed above may be useful. That framework focuses not on a specific relationship but on the general duties that those who exercise power in modern society hold. It focuses on the normative claims implicit in the demand of accountability; claims which different actors may and do use to seek account in the digital sphere across *multiple* forums (from Courts, to Parliaments, media interviews, administrative procedures and other processes of account-giving).

What kind of questions and tests might accountability 'forums' then ask when assessing whether digital providers have adequately conducted their regulatory tasks? Following the framework above, they might similarly demand that digital providers demonstrate that their decisions and actions were i) open, ii) limited, iii) effective and iv) public. The purpose of the sections below is to indicate how we might distinguish between these different elements when considering typical demands for accountability in the digital arena.

31 See e.g. M Susi, 'The Internet Balancing Formula' (2019) 25 *European Law Journal* 2.

32 See e.g. L Gill, D Redeker & U Gasser, 'Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights' (2015) 15 *Berkman Center Research Publication*, available at <http://dx.doi.org/10.2139/ssrn.2687120>.

33 G Teubner, *Constitutional fragments: societal constitutionalism and globalization* (Oxford University Press, 2012).

34 On these broader problems of accountability in 'network' or multi-level governance settings, see C Harlow & R Rawlings, 'Promoting accountability in multilevel governance: a network approach' (2007) 13 *European Law Journal* 4, 542-562.

B. Digital Accountability as Openness

The accountability requirement of openness speaks to the ability to contest regulatory authority and thereby to know and understand regulatory decisions. This relates to a basic insight of accountability research discussed above – I cannot challenge a decision or ask a decision-maker to justify what they have done if I do not know *what* they have done.³⁵ In the digital sphere therefore, a digital decision-maker provider is open if they are transparent about their decisions, if the basis for decisions is clear and if there are mechanisms to challenge and question decision-making. This openness might also concern the quality of the information that digital providers provide: do they, for example, provide and explain decisions in such a way that users and other ‘non-experts’ can meaningfully understand the basis of decision-making?

This relates to a number of complaints and disputes regarding many of the digital providers already discussed above. Many of the complaints regarding the enforcement of the NetzDG for example concern whether users have enough information to understand the underlying framework guiding the decisions of social media platforms to regulate and remove content.³⁶ Similar concerns animate discussions over the retention of data by digital providers. Public debate is often for example driven by transparency concerns over the way digital providers use and transfer data and whether particular algorithms might break EU rules, for example by building profiles of users or breaching competition rules.³⁷ Similarly, in the Covid-19 crisis, actors from the EU’s fundamental rights agency³⁸ to its data protection board³⁹ have raised doubts as to whether users who download contact tracing and other health-related apps have been given sufficiently transparent information about how data stored on those apps will be processed, used and stored. The underlying reason behind this of course is that – without such information – users cannot make an informed decision on whether to consent to their data being used (a legal requirement under EU data protection law).⁴⁰ Many of these types of concerns have found their way into resolutions of the European Parliament.⁴¹

When we ask digital providers to be accountable, a key part of what we are therefore asking of them to be open in the sense of providing basic information on the data, coding and reasoning underlying their actions. A digital actor is thus more accountable the more they are able to inform the public about their decisions, the more they are able to explain the reasoning behind decisions, and the more they are open to correcting decisions when faced with public scrutiny.

35 See Curtin, above n 18.

36 A Pia-Heldt, ‘Reading Between the Lines and the Numbers: An Analysis of the First NetzDG Reports’ (2019) 8 *Internet Policy Review* 2.

37 SK Mehra, ‘Antitrust and the Robo-seller: Competition in the time of Algorithms’ (2015) 100 *Minnesota Law Review* 1323.

38 EU Fundamental Rights Agency, ‘Coronavirus pandemic in the EU - Fundamental Rights Implications’, Bulletin 2, 28 May 2020.

39 European Data Protection Board, Guidelines on the use of location data and contact tracing tools in the context of the COVID-19 outbreak, 21 April 2020.

40 Art 4(11), Regulation (EU) 2016/679, General Data Protection Regulation.

41 See e.g. European Parliament resolution of 12 February 2019 on a Comprehensive European Industrial policy on Artificial Intelligence and Robotics, 2018/288/INI, paras 159-170.

C. Digital Accountability as Non-Arbitrariness

The second accountability requirement is one of non-arbitrariness. This relates to a further element of accountability research – accountability is a device to limit authority and ensure that ‘delegated’ powers are exercised to the ends for which they were delegated. Clearly in the digital sphere, we are often not dealing with delegation in a traditional public law context – the most powerful actors in digital governance are rarely states. Nonetheless, digital governance is not immune (and may even deepen) problems associated with the concentration of societal power, and the need to ensure that those exercising authority do so in a limited and proportionate manner. A digital actor is therefore non-arbitrary if they can show that their decision-making discretion is meaningfully limited.

In the digital sphere, two obvious accountability questions arise in relation this. The first concerns circumstances when digital providers exercising regulatory functions over-use their powers. To return to the example of *Google Spain*, Marco Bassini has powerfully argued that treating ISPs as content providers is likely to have a perverse effect.⁴² If such providers have to police content, the generation of which they have no control over, and if they face significant penalties for failing to remove certain types of content, they may be tempted to automatically delete content that is flagged by users. They would therefore significantly overuse their powers, threatening digital freedom of speech when doing so.

A second type of question regarding accountability as non-arbitrariness concerns whether digital providers, in exercising regulatory functions, are arbitrary in the sense of acting in a discriminatory manner. Do digital platforms discriminate against certain types of users? One recent study for example has argued that the sharing economy may hide forms of racial discrimination, with users with African-American names less likely to be accepted as guests on AirBnB.⁴³ This study is part of a larger debate: over whether the use of digital technologies will uncover and correct, or instead replicate, implicit biases found in ‘traditional’ processes of person to person decision-making.⁴⁴

The quest for accountability as non-arbitrariness therefore concerns whether digital providers observe meaningful limits on their action, and what accountability forums can do if they do not. Once again, many acts of digital accountability, such as challenges to digital decisions before Courts or Ombudspersons, or questioning of the high office holders of big-tech companies by parliamentary committees, speak to this variety of accountability. A digital actor is thus also more accountable if they can show that legal or ethical standards meaningfully *limit* their activity in such a way as to exclude arbitrary and discriminatory conduct.

D. Digital Accountability as Effectiveness

The third accountability requirement is effectiveness. Here the question is not whether digital providers are effective per se i.e. in achieving market goals, but

42 Bassini, above n 28, at 192.

43 B Edelman, ML Benjamin and D Svirsky, ‘Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment’ (2017) 9 *American Economic Journal: Applied Economics* 2.

44 See e.g. the discussion over automation of judging and other governmental activity in M Zalnieriute, L Bennett Moses and G Williams, ‘The Rule of law and Automation of Government Decision-making’ (2019) 82 *The Modern Law Review* 3, 425-455.

whether they are effective in reaching *public goals*. Are they for example effective regulators, thus justifying the transfer of regulatory authority to them (instead of that authority residing solely in *state* institutions)?

This question is of significant relevance in considering the extent to which digital actors should be provided with regulatory tasks to begin with, and therefore has prompted significant disagreement. Self-regulation carries the advantage of potentially providing quicker and more effective access to justice (under conditions where only online platform themselves are able to fully understand and control digital activities). While Courts remain the ultimate arbiters of whether fundamental rights are breached in the digital sphere, self-regulatory bodies, such as the dispute resolution mechanisms of online platforms, provide an avenue to resolve rights-based disputes in circumstances where the financial and practical hurdles of raising a claim in Court are considerable.⁴⁵

A second advantage to self-regulation might lay not in its benefits per se but in terms of the risks linked to excessive *state* intervention in digital life. Much of the politicization surrounding digital activism concerns protecting the freedom of the digital realm, including its freedom from state control. To provide an example, MEPs from the Pirate Party have frequently criticised national and EU efforts to increase state surveillance of digital technologies that protect the anonymity of users, such as encryption.⁴⁶ A wider concern is that efforts to more closely regulate digital activities are likely to lead to an increasing territorialization of cyberspace, thus increasing exposure of the digital sphere to the geo-political conflicts found in 'offline' life. In these examples, different political groups are seeking to contest or justify the usefulness and mix of public versus private regulation of the digital realm.

Such accountability questions may equally of course *critique* the transfer of regulatory authority to private actors. To examine the other side of the debate about digital self-regulation, by providing authority to internet platforms to resolve disputes, we are also of course delegating important public functions to actors who carry commercial interests (a point further elaborated below). Such platforms have frequently used their special status to exempt themselves from obligations incurred by offline equivalents (such as the obligation of sharing platforms such as Uber to meet standards of domestic and European labour law).⁴⁷ This leaves therefore an open question that different accountability forums – parliaments, Courts and citizens – may legitimately ask: is the delegation of regulatory tasks to digital actors 'worth it' in achieving regulatory goals more efficiently? Or alternatively, is private self-regulation inherently unable to achieve its regulatory goals?

Cumulatively, such questions demonstrate the importance of effectiveness concerns in driving the debate about accountability in the digital sphere. When thinking about the accountability of digital actors, we must also therefore include effectiveness as a criteria i.e. such an actor is more accountable if they can show that they can better meet regulatory tasks than available alternatives.

E. Digital Accountability as Publicness

45 See e.g. Facebook's recently established oversight board <https://about.fb.com/news/2020/05/welcoming-the-oversight-board/>.

46 See <https://european-pirateparty.eu/pirates-call-for-clear-rejection-plans-to-break-secure-online-encryption/>.

47 R. Dukes, 'Regulating Gigs' (2020) 83 *The Modern Law Review* 1.

The final accountability requirement is one of publicness. Here, the relevant standard is the common good or, what in a European context, might be seen as the good of Europe as a whole. Are digital actors, given that they are often private actors, acting in service of the public interest?

This last criteria may be the most difficult to operationalise. Definitions of the public interest are likely to vary widely between different citizens. This difficulty extends to accountability forums – what an individual MP considers to be in the ‘public interest’ is likely to be determined by the party of which she is a member (as well as a whole host of other subjective actors). At the very least, however, the public interest would seem to exclude action that is purely self-oriented, or the making of regulatory decisions according to purely commercial criteria. It also seems to exclude decisions that can only be defended from the perspective of one narrow section of society (or in the digital sphere, one technology) rather than in the interests of Europeans taken as a broader community.

Once again, accountability demands might concern either of these elements of publicness. The risk that commercial self-interest might unduly influence self-regulation is commonly contested legally, politically and administratively, not just in the EU but across the national context. If the drive for self-regulation is driven by information asymmetries, these same asymmetries make it difficult to assess whether digital actors perform regulatory their functions faithfully. To give an example, self-regulation gives rise to the danger that new industry standards established by large digital companies are established not to serve public interests but to impose high implementing costs, that new market entrants could not possibly meet (thereby restricting competition).⁴⁸ Accountability in this context (for example through hypothetical litigation questioning whether such implementing costs infringe EU competition rules) is designed to probe the plausibility of the claim of social media and other digital giants that they take their social and legal responsibilities seriously.

Moreover, many accountability claims in the digital sphere may concern the requirement that decisions can be defended across technologies and sectors. This speaks to the increasing concern of the European Commission and other EU-level actors for ‘technological neutrality’ i.e. that regulation should be neutral as to the different types of technology (digital or otherwise) through which EU rules might have to be applied.⁴⁹ Here, an appeal is made for regulators to act in the common interest, understood as equitable treatment between different market participants and the avoidance of arbitrary distinctions between technologies and sectors. What joins the two forms of accountability claim together is the concern whether public action *serves the public interest* or is instead biased in favour of private interests (or a small sub-set thereof).

A final consideration in distinguishing different accountability claims in the digital sphere is therefore to consider whether and how accountability is being used to tie public authority to the common good. A digital actor is thus more accountable if they are able to show why their regulatory activities are oriented towards the common good (and not just their own).

IV. Conclusion – Liquid Accountability?

48 O Lynskey, ‘Regulating Platform Power’ (2017) *LSE Law, Society & Economy Working Papers* 1.

49 See Directive 2009/140/EC amending Directives 2002/21/EC, 2002/19/EC and 2002/20/EC on the Authorisation of Electronic Communications Networks and Services, at Recital 34.

As discussed in this short paper's introduction, accountability for non-governmental actors operating in the digital sphere seems a pressing need. Yet, digital governance challenges accountability in serious ways. Normal definitions of accountability see it as a relation between an actor with accountability duties and a forum with corresponding rights.⁵⁰ In digital governance, however, it is often not clear which actor is which. From the side of the actor, regulatory duties (and thus accountability obligations) are increasingly exercised by companies. These companies often deny, however, that they have real control (see as an example the claim that ISPs do not control the content they transmit). From the side of the forum, often national publics are irrelevant. The users (and thus accountability 'rights holders') of digital products are a fragmented web of consumers that have weak solidarity, and so are likely to have difficulties in mobilising to hold private actors to account. The web is thus a classic case of what Nico Krisch has called 'liquid authority': authority that seems to dissolve as soon as you try to concretise it. This type of authority creates in turn 'liquid accountability' i.e. a lack of clarity over who has to justify what and to whom in the digital sphere.⁵¹ In this unclear space all sorts of abuses of power may emerge.

It is in this context that a framework for accountability in the digital sphere is needed; a task for which this short paper has attempted to make a small contribution. In a context where multiple actors and forums may be involved in the game of accountability, defining accountability standards, and distinguishing between the different normative claims underlying accountability, becomes a more important exercise. Further operationalising this framework, and understanding the empirical realities of accountability in the digital sphere, remains an important and needed scholarly contribution to the democratisation of the digital sphere. This paper thus hopes to complement the more detailed legal and empirical chapters found in the rest of this collection.

50 See M Bovens, 'New forms of accountability and EU-governance' (2007) 5 *Comparative European Politics* 1.

51 N Krisch, 'Liquid Authority in Global Governance' (2017) 9 *International Theory* 2.



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