



ELECTRONIC FRONTIER FOUNDATION eff.org



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Outline

About the project

- Shadow Regulation
- Outline of the project
- Project outputs

Positive agenda

- Multi-stakeholder model
- Criteria

Conclusion





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Summary of project

This project aims to call out the misuse of closed and opaque voluntary agreements* to regulate Internet content in areas such as:

- Intellectual property
- "Hate speech"
- Terrorism
- Child online protection

* Codes, principles, standards, MOUs





Voluntary agreements

Good things about voluntary agreements

- Internet is based on voluntary adoption of standards
- More flexible, faster, and cheaper than regulation
- Can be cross-jurisdictional and non-governmental

Bad things about voluntary agreements

- Used by governments to abdicate their responsibilities
- Industry writing the rules to govern itself
- Lack of transparency, accountability, and participation



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Critical agenda

Existing codes, MOUs and standards lack transparency and participation and bypass democratic processes.

Positive agenda

Any agreement intended to address a problem should be developed in an inclusive, balanced, accountable way.





Shadow Regulation examples

- Healthy Domains Initiative and MPAA Trusted Notifier
- LegitScript and Center for Safe Internet Pharmacies
- EU Digital Single Market upload filtering mandate
- IACC MarketSafe and RogueBlock
- EU hate speech code of conduct
- Trustworthy Ads Guidelines (TAG)
- U.S. IP Enforcement Coordinator's Promotion of "Voluntary" Agreements
- Copyright Alert System





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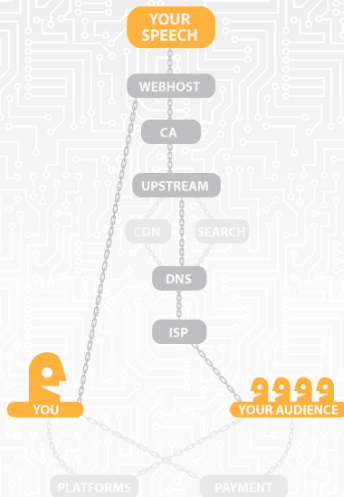
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Free Speech Weak Links





BEYOND REGULATION: *Reaching Solutions that Work for Users*

Not every problem on the Internet calls for cross-border rules or principles. If a group or process proposes to address such a problem that way, they should demonstrate at the outset why solutions can't be found at the local level or by directly empowering users. Then, they should comply with these criteria:



INCLUSION

We need to make sure that all stakeholders who are affected by Internet policies have not only the opportunity, but also the resources, to be heard.



BALANCE

Reaching the optimal solution requires letting the best ideas rise to the top, even if governments and corporations don't always get their way.



ACCOUNTABILITY

Institutions and stakeholders who participate in crafting rules, standards or principles for the Internet must be transparent and deserving of our trust.

Even if a just process has been followed, that doesn't mean users will accept the outcome. But if they do—voluntarily—that's good evidence of a successful solution. If the solution also needs to be formally enacted or enforced by an empowered body, there should be a clear way forward to make that happen, with equally clear limits.





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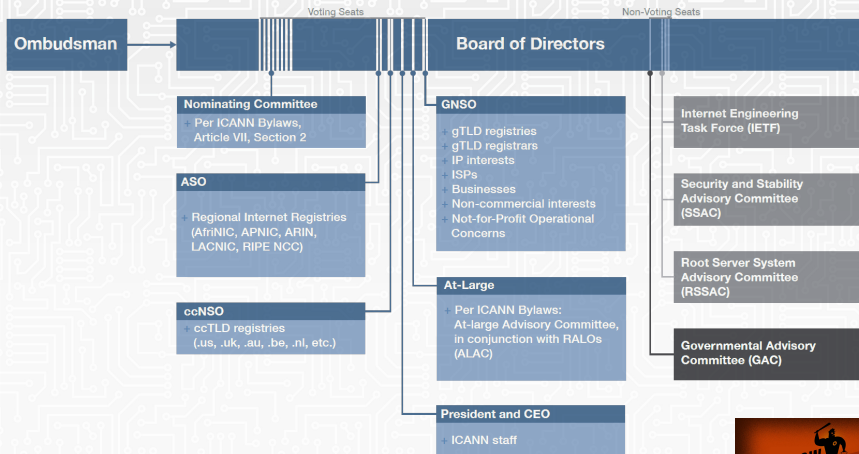
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ICANN multi-stakeholder model





Better examples

- Marco Civil da Internet
 - First draft of Brazil's "bill of right for the Internet" was released in October 2009
 - A partnership between the Ministry of Justice and the Center for Technology and Society of the Law School at the Fundação Getulio Vargas
 - Over 2009 and 2010 citizens commented on the bill using an online platform
- Magna Carta for Philippine Internet Freedom
- NETmundial Declaration
 - Three multi-stakeholder committees responsible for meeting organisation
 - Civil society representatives self-nominated
 - Remote participation and remote hubs
 - Plenary drafting session





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Beyond Regulation

Is there a need for cross-border rules or principles, that can't be met at the local level or by user empowerment? If so:

- **Inclusion**
 - Are the right stakeholders participating?
- **Balance**
 - How is their participation balanced?
- **Accountability**
 - How are the body and its stakeholders accountable to each other for their roles in the process?

Is the body an empowered space? If not, how (if at all) are its recommendations formally institutionalized?





Inclusion

Are the right stakeholders participating?

The body should have access to the perspectives of all those with significant interests in a policy problem or its possible solutions.

Why?

- Unlike with voting, including all affected individuals is less important than all affected perspectives.
- Often (not always) this involves aggregating those with common perspectives into stakeholder groups.
- Also requires resourcing those whose perspectives aren't heard.





Balance

How is their participation balanced?

There must be mechanisms to balance the power of stakeholders to facilitate them reaching a consensus on policies that are in the public interest.

Why?

- Roles of stakeholders will vary by issue.
- Roles can be determined *ex ante* under “constituency” model or dynamically under “deliberative” model
- Flattening of power imbalances is essential to avoid capture.





Accountability

How are the body and its stakeholders accountable to each other for their roles in the process?

Mechanisms of accountability must exist between the body and its stakeholders to demonstrate the legitimacy of their authority and participation respectively.

Why?

- All multi-stakeholder processes must be transparent
- Accountability can range from self-assessment to formal accreditation
- Legitimacy can also be drawn by acceptance of outputs





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Summary

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- This can be good or bad... but is bad when it is **secretive and exclusive**, or used for policy laundering





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- Inclusion of diverse stakeholders produces **more inclusive, better informed** outcomes





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- Increasingly Internet regulation is **shifting from laws** into voluntary agreements
- This can be good or bad... but is bad when it is **secretive and exclusive**, or used for policy laundering
- Inclusion of diverse stakeholders produces **more inclusive, better informed** outcomes
- Debased **multi-stakeholder model does not capture** everything this requires:
 - Inclusion
 - Balance
 - Accountability





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- Increasingly Internet regulation is **shifting from laws** into voluntary agreements
- This can be good or bad... but is bad when it is **secretive and exclusive**, or used for policy laundering
- Inclusion of diverse stakeholders produces **more inclusive, better informed** outcomes
- Debased **multi-stakeholder model does not capture** everything this requires:
 - Inclusion
 - Balance
 - Accountability
- Shadow Regulation project uses **positive criteria** to hold voluntary agreements to account

