2014 Learning Forum - Geneva

Transparency and Human Rights in the Digital Age

1 December 2014

The afternoon discussion on Transparency and Human Rights in information and communication technology (ICT) hosted by the Geneva Internet Platform (GIP), with the participation of industry, government, and civil society representatives, covered two key issues:

- The state of transparency reporting by companies and governments
- The interaction between companies and users in response to live events

The discussion was held in the framework of the Telecommunications Industry Dialogues that the Global Network Initiative (GNI) launched in 2013. So far, three members of Industry Dialogue have published transparency reports and all member companies have committed to reporting publicly on requests for data, where legally allowed. As Milka Pietikainen of Millicom pointed out in the opening remarks, transparency is broader than the number of requests for data sharing; it concerns all policies and processes that companies implement and how these apply to real-life situations. Following the Snowden revelations of June 2013, an increasing number of institutions have turned their attention to privacy in the digital age and transparency has reached the top of the agenda not only for the companies involved in cooperation with national security agencies, but also for their competitors. In response to user concerns, there is a push to set higher standards for the industry overall. Jovan Kurbalija, Head of the GIP, welcomed the initiative of holding in-depth discussions across policy silos in the spirit of the GIP and engaging digital actors across the spectrum to address burning issues and foster collaborative solutions. Geneva is important in this discussion, both for the wide array of Internet-related issues decided on here, and for the high presence of diplomats belonging to small(er) permanent missions, for which one person covers more than five issues at the time.

Panel 1 : What is the state of transparency reporting by companies and governments, and what’s missing?
Annette Fergusson, Senior Sustainability Manager, Vodafone Group
Anna Lekvall, Deputy Director, Dept. of International Law, Human Rights and Treaty Law, Ministry for Foreign Affairs of Sweden
Dr Stefan Heumann, Deputy Director, European Digital Agenda, StiftungNeueVerantwortung
Peter Micek, Senior Policy Counsel, Access

Moderated by Jens-Henrik Jeppesen, Director for European Affairs, Center for Democracy and Technology

Opening the first panel, Jens-Henrik Jeppesen referred to a comparative study on systematic government access to personal data in 13 countries around the world, published by the Center for Democracy and Technology (CDT) in November 2013. While the work on this commenced in 2012, the Snowden revelations added urgency and relevance to the project. Overall, the greatest difficulty was that of obtaining precise information about laws and practices, in
particular as many were undocumented and unofficial. Restricted access made it difficult to understand what data types and volumes are accessed by which government agencies. Without a modicum of information, there can be no public discussion about the control and use of the data.

The emerging practice of issuing transparency reports was welcome by all panellists. One example of this was discussed extensively, namely the Vodafone Law Enforcement Disclosure Report, covering the 29 countries in which the company has operations. Annette Fergusson, Vodafone’s Senior Sustainability Manager, highlighted the achievements of the report in terms of (1) contextualising the policy frameworks and challenges around secrecy in the target countries; (2) analysing the demands for communication traffic data and interception at country level; and (3) annexing the summary of legal provisions (under a Creative Commons licence). The report raised significant media interest in all countries concerned, as well as beyond (in particular in the USA), receiving an overwhelming response from stakeholders.

In Germany, where there are advanced discussions around privacy, there is a need to review the mechanisms for data collection and whether such instruments are used in the way they were intended, as explained by Stefan Heumann, Deputy Director, European Digital Agenda, Stiftung Neue Verantwortung. Both a rational debate and more knowledge on data collection are needed. While the German authorities have been publishing some data, the effort has not been comprehensive and the reporting is segmented across sector lines. Thus, companies still need to push the government, even when partial data is available. The Vodafone report worked well in Germany, as it put pressure on other companies to follow suit. 2014 was a first step, but there is much more that transparency reports can do.

For Access, which has recently established a Transparency Reporting Index, it is important to go back to the UN Guiding Principles for Business and Human Rights, which stress that companies are not the only ones responsible; there should be a collaboration with the other stakeholders, too. Establishing a threshold for sufficient reporting is difficult. This was recently seen in the case of the US government trying to reach an agreement with six companies regarding the release of granular data. What is currently missing is the national security reporting.

After the Snowden revelations, the Swedish government, recognised as a promoter of human rights around the world, had to ‘look more carefully at itself’, as Anna Lekvall from the Swedish Ministry for Foreign Affairs put it. One area of concern is integrity in the digital world, which is being addressed by a parliamentary committee recently set up in the context of renewed discussion about digital vulnerabilities. But can transparency reports be a positive lever for non-democratic states? In view of the exponential growth of the Internet, many governments, including non-democratic ones, still want to be good players and show that they are making progress, so ‘there is no either/or’, said Anna. Transparency remains a very challenging area for countries that are not strong on the rule of law. One approach is to analyse how similar sensitive issues are dealt with. New norms are created constantly and all states are part of international society, therefore there is a continuous balancing act for non-democratic governments to show
that they are part of the international community; ‘leading by example’ in this area can change behaviour. Lekvall concluded that multistakeholder cooperation is the new norm for human rights in the digital age.

The open discussion touched on many points:

- The potential creation of win-win scenarios for the authorities, companies, and users to benefit from increased transparency - what is at stake here is legitimacy.
- There is a need to give attention to freedom of expression (in particular content limitations, restricting access to services), in addition to reporting about governmental requests. Extra-legal, self-regulatory regimes around copyright, intellectual property, and adult content, as well as the enforcement of terms of service remain opaque. As Peter Micek from Access explained, in this area companies can move toward the ‘right to remedy’, as it is within their control.
- There is also a need to harmonise reporting on the corporate side and similarly on the government side; coordination between companies and between different government agencies is needed in order to guarantee that the same action does not get reported multiple times.
- Inconsistent publishing of statistical info is not a sustainable foundation for transparency and cannot lead to a meaningful debate on it. The matrix for collecting data and reporting needs to be defined together, otherwise the numbers are not comparable and their usability is very limited.
- Occasional translucency can be accepted, provided it does not hide abuses (the office dealing with child pornography in Germany cannot publish a list of blocked websites, but needs to find a different way to respond to allegations of overblocking).
- More discussion is needed around content takedown on issues that fall off the radar in current transparency reporting, such as hate speech.
- When the government asks companies not to publish particular data, transparency can still be pursued by providing a united front with other companies; digital security practices should be stated even before entering the market, so governments are generally informed about the standards to adhere to; risks and threats to employees on the ground are not uncommon;
- National action plans on business and human rights have started to be developed (commitment by the USA and Germany); they do not represent a silver bullet, but they could be a home for the public venting of governmental measures to disclose data.
The second panel scoped the user perspective in the evolving practice of transparency reporting and the direct ways in which users are affected: (1) in censorship practices, (2) in surveillance and privacy, and (3) in network takeovers or shutdowns. There is a broader debate about transparency in Internet governance. The recent Geneva Internet Conference held a workshop on aiming for full transparency, accepting occasional translucency, suggesting practical ways for differentiating between disclosure and secrecy contexts. Jovan Kurbalija explained that empathy is needed in order to overcome the breakdown in communication and foster the understanding of the reasoning behind a particular approach. Yet, evidence-based policy-making seems to pose another dilemma: paralysis by complexity. The ultimate objective might not be achieved due to the inflation of data, Kurbalija noted. Streamlining reporting (combining governmental and business perspectives) might be a practical step in this direction and a conversion point for the Geneva institutional landscape.

When asked about the challenges and risks that companies face when they try to communicate to users about governmental requests for data, the representative of Millicom, operating in emerging markets across Africa and Latin America, explained that companies usually hold several licences from governments, thus exerting power over their operations. In particular contexts, the entire business model might be at risk, with instances of threats for taking away licences and threats to personnel experienced by many private actors. Under these circumstances, baby steps are taken: engaging in discussions with the government directly, capacity development among employees and pushing back on requests that do not follow legal procedures.

At Microsoft, which has more than 500 million users around the world, the focus is on helping people understand why they do what they do when taking action in response to a particular request. This is key for building trust, and Dan Bross noted that the company communicates regularly with affected users and engages in exchanges with the user to the extent that this is allowed. Moreover, it has incorporated a Frequently Asked Questions on the website to present information clearly to the users. Microsoft only issued its first transparency report in 2013 (after Google and Facebook), but it has built on the experience of the others to make its reporting better.

Responding to a question about how transparency reporting could be done differently, Jane Møller Larsen of International Media Support, an organisation working with journalists across 40 countries (prioritising former Soviet Union and African states) challenged the notion of the ‘user’,
more likely to be a young person belonging to the ‘new guard’, no longer reading paper reports with information presented in an academic manner. It is important to distinguish between types of users and types of formats that would appeal to them, so that the information contained in a transparency report is accessible and understandable to the young. The licence agreements signed by companies with different governments remain completely opaque, yet pushing for more transparency around these would also serve advocacy purposes and the cohesion of the range of activities businesses engage in, thus reducing the number of illegitimate demands.

How can different stakeholders learn from each other and streamline their work around transparency? Milka Pietikainen suggested continuing the sharing of best practices, as the Industry Dialogue has started to do: ‘It is vital to understand each other’s operating context for building trust and for learning.’ Jovan Kurbalija concluded that cross-fertilisation might be the way forward, as ‘binary issues have to be addressed in an analogue way’, with realistic expectations.