

## Social Media Regulation: Models and Proposals\*

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The article deals with the topical issue of social media regulation. It is based on the libertarian theory of economic freedom because, in our understanding, it allows the elaboration of a future-oriented human rights based-on regulatory approach. This approach is premised on both freedom of speech and the right to private initiative protection in contemporary media environment. In the analysis, the recently structured Facebook and Instagram Oversight Board for Content Decisions are also discussed. The article presents arguments for the establishment of an internal body (arbitration) that can practically resolve disputes among participants and between participants and any social media platform on a regular basis. Such a body can also support the effective application of the media codes of conduct without governmental involvement and may strengthen self-regulation of platforms.

*Keywords:* social media platforms, social media regulation, arbitration, self-regulation

### Introduction

The issue of how to regulate social media platforms, including social networks, is gaining momentum among stakeholders. It is not an exaggeration to state that sometimes the arguments in favour of the regulatory option turn into regulatory obsession based on the claim that social platforms have a dramatic impact upon our lives and the lives of future generations. In these efforts, some specialists discern attempts to impose “overregulation” on social media without solid guarantees for freedom of expression and freedom of enterprise.

No doubt the impact of social networks is paramount today but just such an idea was also considered about the impact of broadcasting during the last century, provoking similar discussions. However, one cannot be sure how media landscape will evolve in the upcoming years and how or whether at all social media giants will maintain their powerful positions. Our purpose here is not to make a review of the opinions concerning Internet intermediaries’ regulation but to build on some ideas and suggest a practical solution for good social media regulation that does not affect freedom of expression and freedom of private undertaking.

The *OECD Observer* emphasizes “it is one thing to have regulation, it is quite another to have good regulation”. In *Principles of Good Regulation*, Organisation for Economic Co-operation and Development

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\* **Acknowledgement:** The article has been prepared as a result of the research and discussions carried out within the Compact, Horizon 2020, EU project (Compact: from research to policy through raising awareness of the state of the art on social media and convergence; Project Number 762128, call: H2020-ICT-2016-2017, topic: ICT-19-2017). The authors are much indebted to Rosemary Aud Franklin, AssocSr Librarian, University of Cincinnati, for providing valuable insights and polishing the text in the process of work.

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(OECD, 2002) suggested key principles of good regulation among which the following question is of relevance: “Is government action justified?” The answer should be that government intervention is based on explicit evidence that government action is “justified, given the nature of the issue, the likely benefits and costs of action (based on a realistic assessment of government effectiveness), and alternative mechanisms for addressing the issue” (OECD, 2002). Another variation of good regulation, which has become popular in the digital society, is smart regulation. The term is usually associated with the smartness of the digital technology but smart regulation efforts that in the EU aim simply at reducing the regulatory burdens in the EU legislation. The 10 point plan for EU smart regulation suggested by UK back in 2012 and supported by twelve other member states drew attention specifically to alternatives to EU-regulation (UK, 2012). In the same vein, a new OECD (2019) report “Better Regulation Practices Across the EU” says that regulatory policy must not only be “responsive to a changing environment, but also proactively shape this environment. It is also important to engage citizens and all stakeholders in the development of laws”. Fresh bottom-up proposals are welcome in this process.

In our article, we shall refer to good regulation being interchangeable to smart regulation. In our view, good regulation is a well thought out and effective model of regulation, non-intrusive and unbiased, which can reconcile different interests and requirements. Ideally, we should consider that better regulation practices enhance both the citizens’ interests allowing full implementation of their rights and businesses’ interests. With respect to social media platforms their regulation is indispensable to good regulation on the Internet and presupposes independence and minimal governmental involvement.

### **Social Media Regulation: A Brief Overview of Recent Sources**

Recently, various ideas regarding Internet intermediaries’ regulation have been thrown into the public space, expanding the debate between more liberal and more conservative minds.

Before any discussion about regulation may take place, it is necessary the nature of social platforms to be clarified—to what extent they are media or not, do these platforms perform a media function, should they be regulated as media or a totally new approach is needed, etc. The complexity of platforms prompts that there can be many regulatory challenges, which require a proper response. According to the Council of Europe’s background report on media freedom, regulation and trust issued on the eve of the ministerial conference on the media in Nicosia, Cyprus,

platforms and information providers are reconstituting the nature of what “media” are, but are not necessarily respecting established standards of media accountability, transparency and independence. The development of self-regulatory standards often takes place in terms of a loose negotiation between politicians and Internet intermediaries. (Council of Europe, 2020)

By and large, these new forms of regulation are risky since they may undermine media freedom and democratic values. They can be non-transparent, arbitrary and lacking the stability of the legal guarantees for the media. Thus, they can put at stake the independence of social platforms and free expression in particular. Measures that are tailored according to *ad hoc* conditions and inclinations can change the free nature of the whole Internet or

amount to a shift from a “neutral Internet” which acts as a mere conduit of information, to a hybrid Internet which is developing new approaches to curating, filtering, shaping, and in general gatekeeping Internet content in ways analogous to mass media. (Council of Europe, 2020)

The conclusion of the report is that the design of co-regulatory frameworks needs to be kept completely independent from executive control, from capture and from conflict of interest. In line with the human rights standards and the Committee of Ministers' recommendation on a new notion of media, if intermediaries are defined as "media", not only the responsibilities, but some of the privileges that comprise a part of that status should be available to them (Council of Europe CM Recommendation [2011] on a new notion of media).

Similarly, a report, dedicated to the changing paradigm of intermediary liability, claims that "as these platforms (social platforms—B.Z, V.D.) grew, it became increasingly difficult for them to self-regulate the large volume of content flowing through their pipelines" (Sflc.in, 2019, p. 1). The document deals with intermediary liability practices in India, where in 2018, the Draft Information Technology (Intermediaries Guide-lines [Amendment] Rules) ("Draft Rules") was proposed by the government to fight "fake news", terrorist content and obscene content, among others. The new rules placed more stringent obligations on intermediaries to pro-actively monitor content uploaded on their platforms and enable traceability to determine the originator of information. However, these attempts raise hard questions concerning predominantly the acceptable limits on freedom of speech on the Internet. In order to formulate appropriate answers, it should be recalled that in 2017, in a "Joint declaration on freedom of expression and 'Fake News', disinformation and propaganda", the United Nations Special Rapporteur on Freedom of Opinion and Expression, David Kaye (2017) stated that "general prohibitions on the dissemination of information based on vague and ambiguous ideas, including 'false news' or 'non-objective information', are incompatible with international standards for restrictions on freedom of expression, and should be abolished" (p. 3). The UK House of Commons, Digital, Culture, Media and Sports Committee came to analogous conclusions in its final report on disinformation and fake news. Alongside human rights protection deputies recommended expansion of digital literacy and greater transparency of social media companies instead of imposing new stricter rules on them (UK Parliament, 2019).

The more involved and granular the policing becomes, the more it will look like censorship, "which is what it will inevitably become" states one of the opponents of social media regulation Reynolds. He voices his concern that "to police content of social media speech beyond a very basic level of blocking viruses and the like is a bad idea" (Reynolds, 2019, p. 63). Better according to Reynolds is to police collusion among platforms, i.e., to apply antitrust scrutiny. As the pressure for regulation will inevitably soar, it is better to regulate in a way that preserves free speech and does not empower additionally tech oligarchs. This inference, however, does not mean that governments should meddle in social media business at all costs.

Considering the future of the Internet another report tackles the cross border legal challenges online and argues that from a general perspective, it is not easy to formulate concrete legal actions on the net (Internet and Jurisdiction, 2019). The authors make the admonition that "the regulatory environment online is characterized by potentially competing or conflicting policies and court decisions in the absence of clear-cut standards. The resulting complexity may be detrimental on numerous levels and creates 'high levels of legal uncertainty in cyberspace'" (Internet and Jurisdiction, 2019, p. 48). Free speech can easily fall victim of such uncertainty. The facilitation of freedom of expression, including cross-border expression, is the cornerstone of the liberal and borderless Internet. In the same vein, the UN has also emphasized that the right to freedom of expression on the net is an issue of increasing importance (United Nations, General Assembly, Human Rights Council, 2016).

In order to analyze the problems from various perspectives, the Global Status Report bases its findings on a comprehensive survey among its members. When asked what, if any, negative consequences they foresee if cross-border legal challenges on the Internet are not properly addressed, 59% of the interviewed experts pointed to the risks of the potential restrictions on expression stemming from badly or belatedly addressed cross-border legal issues. “This was one of the strongest concerns among the stakeholders” the authors point out. The report reminds of the huge volume of user-generated content that intermediaries have to deal with on a daily basis. The situation is unique and that is why the role of the Internet intermediaries must be approached “with fresh eyes, free from preconceived notions based on comparisons with the roles of offline intermediaries”. Policy-makers and the public should have reasonable expectations for media platforms’ activities and more precisely that they should not abide “by all laws in the world” (Internet and Jurisdiction, 2019. p. 61).

All these valuable observations drawn from different sources serve as a proof that regulation on the net and especially social media regulation represents one of the many intertwined problems generated by digitization. Apparently, efficient solutions related to Internet governance and working jurisdictional decisions can create the necessary safe and free environment that will allow regulation on the net to operate as good regulation and nurture social media efficient regulation. However, concrete regulatory approaches should balance various rights and be workable at the same time.

Against such background as a conceptual basis of our paper, we shall use the libertarian theory of economic freedom because, in our understanding, it permits a future-oriented, human rights based-on innovation, encouraging regulation to be created. To search for a suitable regulatory model, we get inspiration from the publications of the renowned Cato Institute, which has published a series of articles discussing intermediaries’ liability from a libertarian perspective. What is important about such approach is that it makes possible for policy-makers to elaborate frameworks that protect both freedom of expression and freedom of enterprise online. Further in our discussion, we shall pick some of the points in the article, “Why the government should not regulate content moderation of social media” by John Samples (2019), since we consider these insights are of more universal nature and can serve as a basis of comparison between US and European regulatory approaches. These points in our view do not only create a good ground to reconcile various rights when elaborating regulation but they also correspond well with Hayek’s theory of “spontaneous orders” (the grown or self-generating order) of which the Internet is an example. Hayek describes such order as one in which we “would have less power over the details” than “we would of one which we produce by arrangement” (Hayek, 2013, pp. 1300-1307). Respectively, the regulatory mechanisms that operate *vis-a-vis* social platforms should take into account their peculiarities and, at the same time, be adequate to the specific nature of the Internet.

### **The Libertarian Approach to Social Media: Basic Premises**

Tom Standage, deputy editor of *The Economist*, thinks two features of social media stand out—the shared social environment established on social media and the sense of membership in a distributed community in contrast to publishing. In addition, he underlines the undisputable fact that social media represent an economic institution that has “to generate revenue beyond the costs of providing the service” (Samples, 2019). However, each group of people involved in social media communication: users, consumers, advertisers, and managers are related to speech and their relationships create “the forum in which speech happens” and that is why concerns about speech on social media are central to any regulatory effort that should be undertaken. That is also the

reason why journalists and media leaders represent the most prominent group of those consulted about the Facebook Oversight Board for Content Decisions—a team of 40 experts who will review Facebook’s most challenging decisions to allow or remove content from Facebook or Instagram.

One of the regulatory options for social media companies is that similarity to publishers may prompt policy-makers to hold them liable for defamation but that is not the case in the US due to Section 230 of the Communications Decency Act (CDA), which explicitly exempts social media platforms from liability by stating that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”. The aim of the Congress was to encourage unfettered expression online, to further economic interests on the Internet and to promote the protection of minors by making interactive computer services and their users self-police the Internet for obscenity and other offensive materials.

Valuable for the discussion here is to clarify the stand the US Supreme Court has taken towards private forums of speech during years. The case-law has supported the independence of these forums to take their own decisions. “The history of public values and social media suggests a strong presumption against government regulation. The federal government must refrain from abridging the freedom of speech, a constraint that strongly protects a virtual space comprising speech” (Samples, 2019). The government has also generally refrained from forcing owners of private property to abide by the First Amendment. The conclusion rooted in American law and practice is that “those who seek more public control over social media should offer strong arguments to overcome this presumption of private governance”.

Other arguments supporting the principle of free, private initiative can also be put forward. One of the relevant questions is whether big tech companies enjoy a monopoly position due to the networks’ effects they exploit. Although a few tech companies dominate some markets, that does not mean these firms are leaders for good and can never be displaced. David S. Evans and Richard Schmalensee (2017) warned that “the simple networks effect story leads to naïve armchair theories that industries with network effects are destined to be monopolies protected by insurmountable barriers to entry”. According to the authors, the flaw here is that such theories, concentrated on successful firms at a point of time, observe their benefits from networking and conclude they would be market leaders forever. However, competition authorities should scrutinize online platforms when there is evidence they break the rules and harm consumers notwithstanding the network effects’ benefits they get.

More thoughts in favour of competition can be shared at this place. Giedrojć (2017) who has explored thoroughly competition and social order underlines that competition has especially valuable contribution to social change. “Even the best government regulation is insufficient for upholding liberal order. Competition is the ultimate solvent of power and indispensable dimension of open society” (Giedrojć, 2017, p. 13). There is no other creation than the Internet with all ensuing phenomena, such as networks and platforms that symbolizes better open society and its forward-looking paradigm. Having this in mind, it is not certain that governmental regulation of platforms will produce more competition in the online marketplace of ideas. Regulation may simply protect both social media owners and government officials from competition and back the status quo.

When commenting on the emergence of broadcasting in the last century economist Thomas Hazlett (2018) pointed to the fact that FCC carefully planned the structure and form of television service but it also severely limited the number of competing stations, which resulted in the soaring value of the licenses. Hazlett (2018) expands on this issue in his book “The political spectrum: the tumultuous liberation of wireless technology,

from Herbert Hoover to the smartphone”. He also quotes an expert who claims that “the effect of this policy has been to create a system of powerful vested interests, which continue to stand in the path of reform and changes” In our opinion, nobody wishes such system to be perpetuated on social media today because it will stifle diversity, put impediments to development and innovation and generally undermine liberty on the Internet.

Terrorism, disinformation, and hateful speech can be seen as strong grounds for governmental regulation of social media. In crisis, especially hierarchies and states are responsible for the security and stability of society. However, American courts have consistently refused to hold social media platforms liable for terrorist acts. In *Fields v. Twitter* (*Fields v. Twitter Inc.*, 2018 WL 626800 [9th Cir. Jan. 31, 2018]) and similar cases, plaintiffs failed to demonstrate that ISIS’s use of Twitter played an instrumental role in the attacks against them. Though they cannot be seen as uniquely instrumental in the realization of terrorist plans, any standard of liability that might implicate Twitter in terrorist attacks can prove to be overbroad (and inconsistent with the First Amendment or with any legal standard of certainty) and also encompass other services that are frequently used by terrorists. On the other hand, it is not uncommon social media to serve the public interest and to provide opportunities for counter speech and intelligence gathering.

Sometimes, state security services could ask social media platforms to refrain from removing terrorist accounts, as they provide valuable information concerning the aims, priorities, and the locations of terrorist actors. Therefore, social intermediaries are not in black only.

There can be two other potentially compelling reasons for government action preventing the harms caused by “fake news” and “hate speech”. The terms may prove vague, and their use may lead to legal confusion. The term “fake news” has come to public agenda relatively recently and different definitions have been created including variations as mis-, dis-, and mal- information with their respected consequences. The EC has also elaborated a definition of fake news but it is not mandatory for the EU member states. In *United States v. Alvarez*, the court refused to recognize a general exception to the First Amendment for false speech: “The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection” (*United States v. Alvarez*, 567 U.S. 709 [2012]).

In Europe, as a rule, scales tip towards more regulation and additional requirements for social media platforms, including the threat of huge fines being imposed. The broad framework formulated by the Council of Europe in the recommendation on Internet intermediaries provides that

laws, regulations and policies applicable to Internet intermediaries, regardless of their objective or scope of application, including commercial and non-commercial activities, should effectively safeguard human rights and fundamental, as enshrined in the European Convention on Human Rights and should maintain adequate guarantees against arbitrary application in practice. (Council of Europe Recommendation CM/Rec. [2018]2 of the Committee of Ministers to member States on the roles and responsibilities of Internet intermediaries)

In 2018, the European Commission issued recommendation on measures to effectively tackle illegal content online. The recommendation demands greater responsibility to content governance on the part of platforms. In cases of allowing illegal expression, the implementation of the agreed Code of Conduct against illegal hate speech online between the EC and tech giants (Facebook, Twitter, YouTube, and Microsoft), has not produced the expected results to the full. Though the fifth round of assessment in June 2020 reported overall positive outcomes, platforms are still lacking in transparency and are not providing users with adequate feedback on the issue of hate speech removals. Concerning fake news, the Commission suggests a complex of measures but still

considers that self-regulation can contribute to policy responses, provided it is effectively implemented and monitored. Actions such as the censoring of critical, satirical, dissenting, or shocking speech should strictly respect freedom of expression and include safeguards that prevent their misuse. The actions should also be in line with the Commission's commitment to an open, safe, and reliable Internet (European Commission, 2018). The long term EU intentions in this field are aiming at adopting a larger document—the Digital Services Act—to update the rules about online liability and define platforms' responsibilities *vis-a-vis* content. This means that legal regulation will prevail over self-regulation.

The European efforts to fight illegal hate speech are also an object of criticism. The main argument is that there is no single universally accepted definition of hate speech. According to some experts, it is debatable whether the competent EU bodies and national authorities should impose censorship and public control, as long as “the EU's broad concept of ‘hate speech’ covers many forms of expression which are varied and complex: Therefore, the approaches must also be appropriately differentiated” (Pana, 2018).

In 2018, the Economic Commission for Africa (ECA) proposed a new EU law requiring platforms to take down any terrorism-related content within an hour of a notice being issued. The law additionally forces platforms to use a filter to ensure it is not re-uploaded. Should they fail in either of these duties, governments are allowed to fine companies up to 4% of their global annual revenue. For a company, like Facebook, that could mean fines of as much as \$680 million (around €600 million). This is widely proclaimed as necessary measure, though again it is not without its opponents. Critics say that the instrument relies on an overly expansive definition of terrorist content, and that an upload filter could be used by governments to censor their citizens, while removing extremist content could prevent non-governmental organizations from being able to document human rights crimes in zones of conflict and tension (Porter, 2019).

In our view, such governmental initiatives are always met with suspicion by more libertarian oriented persons and groups. The risks of censorship behind as well as the elusiveness of terms will always provoke protests from human rights activists around the world who fear laws regulating hate and false expression could be abused to silence public debate and crack on the opposition in the authoritarian states. Therefore, the best option to preserve freedom of expression on the Internet is to encourage social platforms to put consistent efforts in self-regulation. The first attempt in this direction comes from Facebook. The company has designed a new regulatory mechanism spending two years (2018-2020) to collect and discuss input from stakeholders and experts globally.

### **The Facebook Oversight Mechanism**

In May 2020, Facebook announced the first members of the Oversight Board; the new structure is going to decide in the most difficult and significant cases regarding content. Behind the proposal is Mark Zuckerberg's (2020) idea that “online content should be regulated with a system somewhere between the existing rules used for the telecoms and media industries”.<sup>1</sup> When the Facebook chief executive officer (CEO) shared his thoughts

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<sup>1</sup> Speaking at the Munich Security Conference in Germany, Zuckerberg said Facebook had improved its work countering online election interference. Zuckerberg explained Facebook had employed 35,000 people to review online content and implement security measures. “I do think that there should be regulation on harmful content ... there's a question about which framework you use for this,” Zuckerberg declared during a question and answer session. Right now there are two frameworks that I think people have for existing industries—There's like newspapers and existing media, and then there's the telco-type model, which is “the data just flows through you”, but you're not going to hold a telco responsible if someone says something harmful on a phone line. I actually think where we should be is somewhere in between.

about a new system for content governance and enforcement for the first time, he referred to the worldwide impact Facebook exerts and the responsibility the platform has: “Facebook should not make so many important decisions about free expression and safety on our own”.

The Board which is central to the overall oversight mechanism will be free to choose and to consider cases referred to them by Facebook and users’ appeals following the existing appeals process. It will entertain cases in which Facebook has decided to leave up or remove content from Facebook or Instagram according to its Community Standards. To avoid conflicts of interest, current or former Facebook employees and government officials will not be able to serve as Board members, among other disqualifications.<sup>2</sup>

At first glance, the new Facebook model of regulation presenting a triad of relationships between the company, a board and a trust supporting the board and appointing board members, may resemble the structure of a public service media (PSM). However, Facebook is not a media in the true sense of the word and it differs from any other media system. There were, however, statements that the platform performs a public function, but this function is not explicitly the PSM function that we know from the legacy media era. We have already stressed in this article that the nature of every social platform together with the functions it discharges need clarification and to what extent (if at all) they are media in particular. In addition, a public function of a social media platform will be something new and its characteristics should be well studied and determined.

By and large, we view the new Facebook controlling mechanism as an encouraging attempt to establish a more responsible self-regulation of the platform. A more detailed review of its operation and results can be furnished when sufficient practice is accumulated. At the beginning, some details seem problematic and this has to be taken into account while observing the next steps of the Board.

- the Board is called “Facebook High Court” by M. Zuckerberg but it hardly bears the features of such body. For instance, there is no explicit requirement for lawyers to be members of the deciding panel. Conditions for Board members are very broad and are the following:

For the board to be successful, all potential members should embody certain principles, such as a commitment to the board as an institution. In addition, we are seeking candidates who are experienced at deliberating thoughtfully and collegially as open-minded contributors on a team, skilled at making and explaining decisions based on a set of policies, and familiar with matters relating to digital content and governance, including free expression, civic discourse, equality, safety, privacy and technology. Facebook will extend a limited number of offers to candidates to serve on the Oversight Board as co-chairs.

If and when those members accept the role, they will then work together with us to select, interview and make offers to candidates to fill the remaining board positions, over time. All members, including the co-chairs, will be formally appointed by the trustees.

Though not expressly required there are still a few lawyers elected to sit on the Board but if it is expected to perform as a High Court, it is not certain the legal expertise will be sufficient. In fact, the Charter does not provide for the procedural guarantees of the Board activities. Possibly, they will be outlined in greater detail in the Board guidelines. However, at this stage it is not clear what type of body has been structured—an adjudicating one or a policy commission.

- the Board will select cases to look at and such type of adjudication resembles private adjudication similar

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<sup>2</sup> According to the Facebook plan, the first few Board members will then, with Facebook, select additional members by the end of the year. A committee of the Board will continue selecting members next year. The selection process will include “rigorous vetting, interviews, and reference checks. Qualifications will be released to the public”.

to arbitration. It seems to be flexible and speedy. Under the arbitration system, however, disputing parties are allowed to choose the arbitrators. Each party chooses an arbiter and they both choose the third one who acts as a chair of the deciding body. There is no possibility of this type under the new FB regulatory scheme and, in fact, it lacks the advantages of the arbitration procedure.

- The Board will formulate policy advices to the company. In order to escape the shortcomings of sheer declarations it should be openly stated that such policy proposals will be based on constant and consistent court practice. It is doubtful whether non-binding recommendations can be effective tools for content management guiding of FB and for presenting models of measures that could be used by other platforms and bodies.

- the trust supporting the Board will be funded by Facebook. Under this condition, it is not certain that the whole mechanism will be financially and operationally independent. In arbitration disputes parties pay an arbitration fee and the procedure is carried out to their interest. The problem with costs is not well settled within the new FB mechanism. From a financial perspective and in order to guarantee independence, at least relative independence of the adjudicatory body, parties involved in the procedure may pay fees instead of leaving the overall funding being secured by FB.

- the first portion of board members will be appointed by Facebook and then they will propose future members—such approach towards the Board membership can also compromise its independence, since FB is powerful enough to impose its nominations from the very beginning.

Despite the pitfalls and unpredictable outcomes of the new regulatory approach undertaken by Facebook we think that this is a positive move towards strengthening self-regulation of the platform as well as of social platforms at large which may follow this example or modify it according to their needs. It is another story that through the Oversight Board FB pursues to a greater extent the protection of the company's public image and not that much the protection of the rights of its users. The Board case law is expected to be a valuable contribution to the theory and practice of media ethics and to the creation of more accountable social media. The public relies on FB Board to entrench the principles of human rights and rule of law and to promote high quality of content. Time will show whether such hopes have sufficient grounds.

### **Establishment of an Arbitration Mechanism at Social Media Platforms**

We now come to the crux of our work to propose an internal body for social media that can practically resolve disputes among participants and between participants and the social media platform on a continuous basis. Social media serve as organizations that provide a space for the creation and exchange of information among a huge number of users and perform as intermediaries or organizers of an information forum. They cannot be held responsible for the content of the information created and exchanged by third persons; however, since they facilitate debate, they should take steps to settle properly disputes related to the debate. A possible solution for them can be the establishment of an arbitration mechanism (tribunal) for resolving disputes through its institutionalization by the social media themselves. Such arbitration should be included in the terms and conditions offered to users. The arbitration mechanism will not be in contradiction with other bodies like the FB Oversight Board, for instance, since the latter will treat the most important cases only, while the former will operate routinely.

Inspiration for this idea can be found in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. The purpose of the Model Law is to entrench modern, fair, and harmonized rules on commercial

transactions and to promote the best commercial practices worldwide. The law is designed to assist states in modernizing their laws on arbitral procedure. It reflects universal consensus on key aspects of international arbitration practice having been accepted by states of all regions and systems (UNCITRAL, 1985). According to eminent Professor Roy Goode (2004), “arbitration is a form of dispute resolution in which the parties agree to submit their differences to a third party or a tribunal for binding decisions” (p. 1162).

We have to distinguish the roles of interested parties in this process. Within the sovereignty of states, in order to protect citizens, the obligation to defend national security and counter terrorism lies within the scope of states. In such cases, governments can adopt special laws protecting high public interests based on internationally recognized principles. States can also adopt multilateral conventions supported by enforcement mechanisms (as in the case of money laundering, cyber crime, drug trafficking, trafficking in human beings, etc. legislation). The elaboration of these pieces of legislation and conventions should be transparent, based on shared human rights values and include the efforts of various stakeholders. Outside these legitimate interests, it is not justified states to impose burdensome administrative requirements on structures like platforms, to curb freedom of private entities and meddle in business. Regulatory measures have to abide by the proportionality test the first part of which represents the principle of minimal impairment of the right or liberty. The attempts of a number of nation-states to set controlling, even censoring functions on social platforms, generate problems related both to the right to freedom of expression and the right to free initiative. On the one hand, government interference can suppress certain types of speech and have a chilling effect on expression in general or affect the economic independence of companies. Yet, on the other hand, there can be controversies between the participants in the information forum, as well as between the participants and the social media concerning content, and accordingly with claims for the removal of harmful and offensive content in which states should not step in.

The setting up of arbitration mechanisms at social platforms can be related to the specific features of social platforms and the Internet environment they operate in. The establishment of special dispute resolution bodies is not a novelty for organizations authorized to tackle Internet matters. For instance, the Internet Corporation for Assigned Names and Numbers (ICANN) helps coordinate the Internet Assigned Numbers Authority (IANA) functions, which are key technical services critical to the continued operations of the Internet’s underlying address book, the Domain Name System (DNS). The body pursues the Uniform Domain-Name Dispute-Resolution Policy which provides for “agreement, court action, or arbitration before a registrar will cancel, suspend, or transfer a domain name”. Expedited administrative proceedings can be initiated by the right holder through filing a complaint with an approved dispute-resolution service provider (ICANN, n.d.).

### **The Model of Stock Exchange Arbitration Mechanism**

Arbitration tribunals being institutionalized units of private, non-governmental adjudication are inherent in such self-governing and self-regulating business organizations, such as regulated markets for securities and other financial instruments. The most typical representative of these markets is the stock exchange. A stock exchange represents a club organization based on membership of securities traders. The stock exchange creates and enforces rules that regulate both the membership and the trade. Disputes shall be settled by special arbitrators organized at the stock exchange arbitration tribunal (court). The membership of the club is contractual and it is mandatory for any member to accept and abide by the so-called “arbitration clause”. The clause requires any dispute regarding financial instruments trading and club membership to be decided by the listed

arbitrators chosen by the parties accordingly. The arbitrators included in the public list are persons of high professional and moral standing. The stock exchange itself is not responsible for the arbitration decisions, since it is often involved in the disputes. The costs of the arbitration decisions (awards) shall be borne by the parties to the dispute. It is also a principle that the dispute settlement rules are created by the stock exchange itself.

### **Social Media and the Arbitration Model**

Social media is a business and club-like organization (see the opinion of Tom Standage on p. 5) and its rules are binding for the participants in the information forum. In this sense, it can be viewed as an institution similar to a stock exchange. This similarity allows the transposition of the arbitration model to social media and the setting up of such unit at social media platforms. Exchange underpins the operation of both entities (in the one case, it is about exchange of information and ideas, while, in the other, it is about exchange of special goods, such as securities and financial instruments) and their organization is rooted in the principle of membership of participants (terms and conditions acceptance). In the context of this similarity, the specific features of the stock market and of social media cannot be an obstacle to the establishment of an arbitration tribunal at the social media platforms. Arbitration is initially a mechanism for adjudication of commercial disputes but at the stock exchange traders represent many non-commercial persons. The users of social media services also comprise numerous non-commercial persons. In our view, there is no fundamental impediment to using this method by non-traders, if there is a contractual agreement for its implementation. The terms and conditions can bind users of their services through the incorporation of an arbitration clause.

By the arbitration procedure disputes about the content of the information on social platforms could be resolved in an impartial and professional manner by unbiased and professional arbitrators selected by the participants themselves. These arbitrators should be recognized media lawyers and professionals with high personal integrity.

The arbitration process for resolving disputes is significantly faster and cheaper than litigation. We shall quote again Professor Goode (2004) who stressed that due to its “consensual nature the arbitration mechanism avoids unnecessary delay or expense” (pp. 1174-1175).

Arbitration cases are in principle one-instance cases and in exceptional and rare instances only a court can challenge the arbitration awards. Renowned Professors Loss and Seligman (1995) draw attention to the fact that under US securities’ legislation

courts have limited power to review arbitration awards (at the stock exchanges—B.Z., V.D.) on such grounds as an award being made in “manifest disregard of the law”, or its being “completely irrational”, or “arbitrary and capricious”. A court can also void an arbitration agreement if it finds that there was fraud in the inducement of the arbitration clause itself. (p. 1139)

Therefore, the court is not completely isolated in the process of adjudication but can interfere to protect parties’ interests in exceptional cases when the arbitration threatens the stability of the legal order.

The arbitration settlement of disputes is an opportunity the mediating function of social media to be consolidated. Arbitration will also liberate the platforms from the tasks of censors and controllers of content imposed by legislation in some countries. The adoption of an arbitration clause may restore public trust in social media and strengthen their capability to self-regulate. The recognition of this method by the national states on whose territories the social media operates may be accomplished either by the adoption of appropriate legislation or by concluding multilateral international treaties.

The logic of creating and implementing such a model requires as a first step an arbitration unit to be established in nation states where social media operate. The arbitration institutionalization depends on the creation of a representative office in the territory of each state in which arbitration units can be set up.

### Conclusion

The proposition of an arbitration model of settling disputes at social media platforms comprises an approach that assures a wide space for self-regulation of social media. It can better safeguard both freedom of expression and free business initiative. At the same time, this model is also a form of media protection against unjustified and arbitrary state regulatory interventionism, which may easily jeopardize freedom of expression and economic freedom. Social media moderation can prove to be more effective than the increases in government power in conflicting cases. From a libertarian perspective, Samples (2019) shared his suspicion that when government imposes regulation on social media “government officials may attempt directly or obliquely to compel tech companies to suppress disfavored speech”, which may result in “public-private censorship” (Samples, 2019). The 2017, United Nations Educational, Scientific, and Cultural Organization (UNESCO) reported “Fostering Freedom Online: The Role of Internet Intermediaries” whose aim was to shed light on how Internet intermediaries both foster and restrict freedom of expression across a range of jurisdictions, circumstances, technologies, and business models came to similar conclusions. Three case-studies are included in the text as an illustration of how an Internet user’s freedom of expression hinges on the interplay between a company’s policies and practices, the government policy, and geopolitics. These inferences are in harmony with Hayek’s vision that “it is not freedom is an impracticable ideal, but because we have tried it the wrong way” (Hayek, 2013, pp. 489-496). Contemplating on these issues solutions that generate minimal risks for human rights online should be searched for. Hayek also reminds us to preserve “what is truly valuable in democracy”.

Having all these arguments in mind, one should recall that the UN Guiding principles on business and human rights (2011) require “business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted”. These mechanisms should be people-centered, easy to implement and generate mutual trust. In addition, it is worth remembering the advice of the European Court of Human Rights (ECHR) that

the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. (*Węgrzynowski and Smolczewski v. Poland [2013]* and *Editorial Board of PravoyeDelo and Shtekel v. Ukraine [2011]*)

Therefore, stake-holders have to discuss various options of good regulation and urge social media to establish and follow good practices in this regard.

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