Chapter III

Regulatory Dilemmas Around Social Media

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Abstract This chapter aims to answer whether there is a need, or even a necessity, for legal regulation of social media today. It is also necessary to analyse by what methods (whether 'hard' regulation is necessary or whether self-regulatory solutions are sufficient) and at what level (national, regional, international) such regulation should be introduced in order to, on the one hand, ensure the effectiveness of such solutions, given the specificity of social media functioning, and, on the other hand, respect freedom of speech. While today there is no doubt that some regulation of social media is necessary, one should call for it to be done with great caution. Furthermore, this is true both in terms of the scope of such regulation and the method and reach. In considering the need for appropriate regulation in this area, it is argued that the temptation to regulate the activities of such platforms may lead to a restriction of freedom of expression, with the measures adopted serving to censorship and restrict public debate.

Keywords: • social-media • regulation of social media • self-regulation

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1 Introductory remarks

This article will examine whether there is a need or necessity to regulate how social media operates. If such a need or necessity indeed exists, it would be warranted to consider the methods ("hard" regulations or self-regulatory solutions) with which to fulfil them and the levels (national, regional or international) at which they should be implemented, to make sure the solutions are effective in the complex social-media environment. The analysis was primarily based on comparative, inductive and deductive methods, and on legal exegesis.

2 Literature review and theoretical framework

The emergence and turbulent development of social media have been a unique phenomenon of the digital era (Kreft 2016: 17). These media have come to exemplify "demassified" means of communication (Toffler 2002: 447; Dziemba 2009: 53–61; Grzesik-Robak 2009: 27–35; Młynarska-Sobaczewska, Preisner 2008: 113–127; Palmer, Eriksen 1999: 32) and blurred boundaries between the producers (senders) and consumers (recipients, audiences) (Veltman 2006: 3–47; Kowalski 2003: 23–30; Krzysztofek 2007: 223–224), allowing users to both receive and create content. Essentially, social media operates on the principle of users' sharing content(Zafarani et al. 2014: 1). Communications become personalised as everyone can receive content in a one-to-many or one-to-one model. Legal authors and commentators offer many definitions of the social media phenomenon. For example, according to one interpretation, the term refers to "a group of web applications based on the ideological and technological foundations of Web 2.0, designed to facilitate the creation and exchange of user-created content (Kaplan, Haenlein 2010: 59–68). As of January 2022, about 62.5% of the world's population had access to the Internet, and 58.4% used social media (Digital 2022). Indeed, being online today is largely about using social media.

Whilst there are many types of social media, they all – regardless of their operational form, platform, concept and rules – have several commonalities. First, they represent a type of personalised communication. Second, content creation on social media happens when one user communicates with another. Third, they nonetheless manage to attract large audiences. For instance, all social media allow using bots, algorithms and fake accounts to distribute content and create – in a premeditated and purposeful manner – an illusion that certain subjects or persons arouse great public interest. Providing a pathway for content to circulate freely around the world, these networks can facilitate major manipulation and disinformation campaigns. Hence, there is a paradox in which social media provide immense opportunities for freedom of speech, all the while having the potential to jeopardise it. It is important to stress that social media platforms and administrators differ from traditional media. A significant difference is that they neither create any content nor interact with its authors. They only provide the digital space to share information and opinions. This leads some to argue that such platforms should not be accountable for the content published in discussions and user interactions. One may

wonder what it is about social media that makes it a vehicle for hate speech and a trigger of infodemics. Is it only about the illusion of anonymity? Or perhaps the ease of content creation is the culprit?

Whatever the answer, the key lies in determining whether social media is a private or public space. On the one hand, the biggest media platforms (such as Facebook, Instagram and X) are mostly US-based corporations (TikTok being the exception) with specific commercial objectives. In this regard, they should effectively enjoy economic freedom, with minimum state intervention in the form of a general legal framework for operating a business. On the other hand, they often become the main platform for public debates on critical issues such as elections. Since social media can win elections and influence public opinion, it may be necessary to regulate them (Patterson, 2020; Kumm, 2023;Stahl (2020)**.**

3 Freedom of speech protection standards from the analogue era

With the development of human rights standards, the 20th century – the era of analogue media – saw the establishment of guarantees for the freedom of the press and speech. These were enshrined in various documents adopted by the UN, UNESCO, the Conference on Security and Co-operation in Europe and the Council of Europe, and in the European Court of Human Rights case law (Gardocki 1993: 111). States followed suit by implementing similar safeguards in their respective legal systems. However, most of these regulations came into use in the era of analogue media, usually long before the dawn of the Internet and social media. Hence, there are legitimate doubts about their applicability in the digital age.

The aforementioned international regulations guarantee universal freedom of opinion and expression. They describe it as the freedom to hold undistorted opinions, and to seek, receive, and impart information and many ideas through whatever medium, regardless of frontiers. This means that international law affords the right to hold and – notably – share opinions. Freedom of speech is a basic human right. It is essential to the functioning of democratic societies and vital for the growth and development of states and individuals. Freedom of speech should encompass not only neutral but also derogatory statements. It should also be noted that these norms apply to various media regardless of the technology they rely on to distribute their content (Skrzypczak 2019: 81–92). Freedom of speech is, however, not an absolute right and may be subject to restrictions in specific circumstances. It is also important to remember that, under Article 19(3) of the International Covenant on Civil and Political Rights, the exercise of the rights provided for in this paragraph carries special duties and responsibilities. It may, therefore, be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals. Similarly, Article 10(2) of the European Convention on Human Rights stipulates that "the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to

such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

4 Do we need to regulate social media?

For some time now, an important and considerable debate has been taking place on whether it is necessary to introduce regulations on how social media operates (Tully 2014: 53–172; Paslawsky 2017: 1486; Khan 2021; Tan 2021; Barrett 2021; Brannon 2021; Kayode-Adedeji, Oyero, Aririguzoh, 2018: 393–439; Scaife 2021). More recently, the discussion became more heated, mainly due to the 2021 events in the US. To recall, on 6 January 2021, supporters of the outgoing US President Donald Trump stormed the Capitol. Twitter blocked two tweets by Trump on the grounds of them being "potentially misleading" (Wall, Mooppan et al. 2021; Varis 2021; Garcia, Hoffmeister 2017). He responded by accusing Twitter of meddling with the campaign. This did not solve the problem. On the contrary – the platform blocked Trump's official account, boasting a considerably large following of 88 million users (Kreft 2021: 13). Facebook and Instagram followed suit (Ohlheiser, Guo 2021). In addition to banning Trump's account, Twitter took many other measures, including blocking over 70,000 accounts linked to the QAnon conspiracy theory, while Facebook started blocking posts containing the "Stop the Steal" slogan. Other platforms implemented different solutions to remove content and adopted internal reforms. For instance, YouTube targeted Trump's account by removing videos instigating violence and imposed a seven-day ban on uploading new content to Trump's account. Meanwhile, Stripe stopped processing payments for Trump's campaign website. A fierce debate ensued on whether digital platforms had the right to censor public debate without any judicial authorisation. The main concern was when left to their own devices, they could effectively influence election results (Palmer 2021). Were we, in fact, dealing with a "privatisation" of censorship in these cases? Twitter's then CEO Jack Dorsay admitted, at one point, that he was not proud of blocking Trump's account but that this was a good decision for the platform (Diaz; Kreft 2021: 16). The overall response to the situation was negative, with social platforms facing serious accusations of being a breeding ground for "extremism, disinformation and sociopaths managing profit-driven algorithms – the viruses behind the Capitol epidemic we have witnessed" (Kreft 2021: 16; Galloway 2021). For many, Facebook's and Twitter's bans were long overdue but there was also a large group condemning these steps as freedom of speech violations. These people were asking when it was warranted for these essentially private entities to "de-platform" individuals – especially well-known public figures such as Trump – and how they should go about it. It was the platforms that took the blocking measures in the case in question. Some believe it was sufficient evidence that self-regulation in their industry was adequate (Garcia, Hoffmeister 2017). However, there is a view that social media have transformed from the growth factor they once were into what is now a public-

order disruptor fuelling the "us versus them" sentiment. According to some opinions, it was not a coincidence that the political leaders who thrived on social media were those pursuing a divisive agenda. It is stressed that one of these platforms – Facebook – is currently the biggest news distributor in the world although the news they provide is principally anger- and hatred-driven lies. This is attributable to the fact that such messages catch on and spread faster than neutrally dull facts. The "a lie told a million times becomes a fact" adage seems to apply here. There is no truth without facts. Without truth, there can be no trust. Without them, democracy as we know it is "dead" (Ressa 2020).

Similarly, a 2021 UN study showed that online hate speech, especially on social media, was a growing phenomenon worldwide.

It is important to note that major US corporations mostly own social media. In the United States of America, there is a long tradition – dating back to the First Amendment – of protecting free speech, even if considered offensive. Conversely, many European democracies approach freedom of speech differently and have no qualms about legislating bans on hate speech.

As a result, demands for regulating this aspect of social media have been increasingly common and forceful (Ressa 2020:17; Fox 2021). The task, however, would be laden with numerous challenges and dilemmas. A popular view among legal authors and commentators is that in the analogue era, responsibility for guaranteeing freedom of speech rested with two types of entities: states and international organisations. In today's digital age, a third actor comes into play – private corporations which own global communication platforms. In the analogue era, states and international organisations played a key role. Now, the balance of responsibility is shifting to corporations holding influence over content published on their global platforms. These include mainly content aggregators, such as social media platforms, which can limit some content and activities if they deviate from their internal rules and – as shown by practice – marketing strategies (Papernik 2022). At the same time, proponents of regulating this area have expressed their concern that regulators might feel tempted to restrict freedom of speech and to legislate measures that effectively censor and stifle public debate. It is important to remember here that most of the major players in the social media realm are private entities – corporations formed under US law but operating on a global scale. This raises serious questions about whether, at what level – international, regional or national – and how to regulate these platforms effectively. Another dilemma relates to what type of regulation would be the most appropriate – hard law or soft law combined with self-regulatory measures. An alternative option would be to refrain from legislative steps and instead focus on promoting safe use practices on social media (Balkin, 2018).

5 Global regulatory framework

It is important to note here that, in September 2018, the International Commission on Information and Democracy was appointed to define the rules governing the global information and communication space, guided by the principle that it is "a common good of humanity". French President Emmanuel Macron introduced this initiative during the G7 Summit in Biarritz. Later, at the meeting of the Alliance for Multilateralism as part of the 2019 UN General Assembly, he put it forward as the Partnership for Information and Democracy (Deloire 2021). The same year, the Forum on Information and Democracy was formed. Established within its framework and led by Maria Ressa and Marietje Schaake, the Working Group on Infodemics offered several specific recommendations on the information and communication space (Report of Forum ID 2020).

The first group of recommendations addresses the need for public regulations governing the sector. For one thing, these would force Internet service providers to be transparent. First, transparency requirements should apply to all core digital platform functions within the public information ecosystem – content moderation, content ranking, content targeting and social influence building. Second, regulators responsible for enforcing transparency requirements should be able to exercise robust democratic control over these entities and have them audited. The third point is that sanctions for non-compliance should entail substantial fines, compulsory disclosures about the sanctions, possible legal consequences for CEOs, and administrative measures, such as denying access to a given country's market.

The second set of suggestions recognises the need for a new model of meta-regulations on content moderation. For platforms, this means the obligation to follow the rules enshrined in human rights – primarily equality and non-discrimination. Furthermore, they should fulfil the same pluralism requirements as radio and television broadcasters. Platforms must hire more moderators and allocate a certain percentage of their income to improve their content monitoring capabilities. The third group of recommendations calls for a new approach to designing social networking platforms. The central concept here is to establish a Digital Standards Enforcement Agency to enforce safety and quality standards of digital architecture and software engineering. The Forum on Information and Democracy has declared its readiness to commence work on a feasibility study for such an agency. Another proposition is that all conflicts of interests of platforms should be prohibited to avoid the information and communication space being governed or influenced by commercial, political or any other interests. Moreover, a co-regulatory framework – based on self-regulatory standards – should be established to promote journalism that serves the public interest.

The last group of recommendations calls for safeguards in closed messaging services when they enter a public space logic. These would limit some functions to curb the virality of misleading content by imposing opt-in features to receive group messages and measures to combat bulk messaging and automated behaviour. Furthermore, Internet

service providers should be more diligent in informing users of the origin of the messages they receive, especially those that have been forwarded. Finally, platforms should reinforce notification mechanisms of illegal content by users and appeal mechanisms for those users who were banned.

6 EU regulations

Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act 2020), passed by the European Parliament on 20 January 2022, is likely to play a critical role. The key significance of this piece of legislation primarily stems from its European-wide range (albeit "limited" to 27 EU Member States), and from its effectiveness and potential to set global trends. It appears that:

[...] a regulation instead of a directive is the right choice, better aligning with the goal of establishing harmonised and coherent regulations for the digital market across the EU. Previous experience implementing and applying the E-Commerce Directive in individual EU States and the growing adverse phenomena and activities online suggested the need to design laws more in tune with the ever-changing business and technological realities. This would serve to equalise competitive opportunities and give digital operators on the EU market a firmer legal ground, as well as preserve the "country of origin" principle. Consequently, there would be more incentive for European companies to develop their services and expand digitally in the UE beyond their domestic markets (PIIT 2021).

As noted in the rationale for the draft regulation, the reason for the changes is the conclusion that:

[…] since the adoption of Directive 2000/31/EC (the "e-Commerce Directive"), new and innovative information society (digital) services have emerged, changing the daily lives of Union citizens and shaping and transforming how they communicate, connect, consume and do business. […] At the same time, the use of those services has also become the source of new risks and challenges, both for society as a whole and for individuals using such services […] The coronavirus crisis has shown the importance of digital technologies in all aspects of modern life It has clearly shown the dependency of our economy and society on digital services and highlighted both the benefits and the risks stemming from the current framework for the functioning of digital services (Digital Services Act 2000).

Several important reasons have been stressed to explain the need for such regulations. First, they aim to provide effective solutions and mechanisms to counter illegal online content. Second, they are designed to create a fair and safe e-commerce environment. Third, their purpose is to ensure fairness in online advertising. Furthermore, it is necessary to regulate these three aspects at the EU – as opposed to national – level. It is also believed that the legislation would help protect the fundamental rights of citizens enshrined in the

EU Charter of Fundamental Rights. Measures will be proportionate to the type and size of the intermediary service providers and will include the gradation of their obligations. By placing systemic risk analysis obligations on online platforms, the regulation will facilitates risk management. It will also promote cross-border cooperation and, last but not least, afford a relatively firm legal ground to digital service providers, effectively driving the industry's growth (Soppa-Garstecka 2021: 5–9). In this context, it is stressed that, with these regulations in place, there will be greater democratic control and better monitoring of platforms, as well as a lower systemic risk of manipulation and disinformation.

Like Directive 2000/31/EC, the draft Regulation starts by defining instances under which Internet service providers are exempt from liability (Baran 2021: 19-27). This includes services such as mere conduit, caching and hosting. Such exemption from liability may also apply when voluntary proceedings are instigated on an own initiative basis. Similar to Article 15 of Directive 2000/31/EC, draft Article 7b stipulates that Member States may not impose on these providers a general monitoring obligation or an obligation to actively seek facts. However, they may establish obligations to counter illegal content (Article 8) and provide information (Article 9) to competent judicial and administrative public authorities. In Chapter III, the Regulation defines due diligence obligations for a transparent and safe online environment. Section 1 sets out obligations applicable to all providers of intermediary services: to designate a single point of contact to enable them to communicate directly, by electronic means, with Member States' authorities, the Commission and the Board (Article 10); providers which do not have an establishment in the Union but which offer services in the Union are obliged to designate a legal representative in the EU (Article 11); the obligation to include, in their terms and conditions, any restrictions that they impose regarding the use of their service in respect of information provided by the recipients of the service, and to act responsibly in terms of applying and enforcing these restrictions (Article 12); transparency reporting obligations for the removal of, or the disabling of access to, information considered illegal content or content incompatible with providers' terms and conditions (Article 13). Section 2 of this Chapter includes additional obligations applicable to hosting service providers. The plan is to make these providers obliged to introduce reporting mechanisms for alleged illegal content (Article 14); if a hosting service provider decides to remove certain information provided by the recipient of the service or disable access to it, it will be obliged to provide the recipient with a statement of reasons (Article 15).

The next part of the draft Regulation sets out further responsibilities. These, however, do not apply to micro-business or small-sized enterprise online platforms. All other platforms must ensure an internal complaint-handling system for decisions relating to alleged illegal content or information that is incompatible with their terms and conditions (Article 17). This includes the obligation of online platforms to cooperate with certified out-of-court dispute settlement bodies to resolve any conflicts with users of their services (Article 18). Furthermore, online platforms must prioritise notices submitted by trusted flaggers (Article 19) and take specific measures to counter inappropriate use (Article 20).

They are, additionally, required to inform law enforcement agencies of any suspicion of serious crimes involving a threat to the life or safety of persons (Article 21). Furthermore, online platforms are required to receive, keep, make the best efforts to assess the reliability of, and publish information about traders using their services, where such platforms allow consumers to conclude distance contracts with such traders (Article 22). Moreover, online platforms must organise their online interfaces so traders can comply with their obligations regarding pre-contractual information, compliance and product safety information under applicable Union law (Article 22(a)). They are also required to publish reports on their activities involving the removal of, and disabling access to, information considered illegal content or information that is incompatible with their terms and conditions (Article 23). This section also includes online platforms' obligations relating to online advertising transparency (Article 24). In the following part, the Regulation lays down obligations related to how so-called huge online platforms manage systemic risk (within the meaning of Article 25). They will be required to perform systemic risk assessments regarding the operation and use of their services (Article 26), take sound and effective measures to mitigate systemic risk (Article 27), and be subject to independent third-party audits (Article 28). Here, an additional obligation is imposed on very large online platforms using recommendation systems (Article 29) or having online advertisements displayed on their online interfaces (Article 30). What is more, the Regulation sets out the terms under which such content aggregators are to provide the Digital Services Coordinator of the establishment or the Commission, as well as vetted researchers, with access to data (Article 31). It also enforces the requirement to appoint compliance officers to ensure compliance with the obligations laid down in the Regulation (Article 32), in particular, additional transparency reporting obligations (Article 33).

Section 5 includes provisions on due diligence obligations – that is, processes in respect of which the Commission shall support and promote the development and implementation of harmonised European standards (Article 34); a framework for the development of codes of conduct (Article 35), and a framework for the development of detailed codes of conduct on online advertising (Article 36). The Regulation also contains a provision on crisis protocols for extraordinary circumstances which affect public safety and health (Article 37) (Soppa-Garstecka 2021: 27–29).

7 National regulatory attempts

We should mention that some countries have attempted to regulate liability for online content. For instance, in 1996 – before the emergence of social media – the US Congress passed the Communications Decency Act. Section 230 of this law protects online intermediaries against liability for user-published content, except for copyright infringements and child-trafficking content. Under Section 230, online platforms may also remove user speech. Also in the US, in September 2022, the State of California passed Assembly Bill 587, imposing specific transparency standards on social media platforms and making them subject to remedies in cases of disinformation, hate speech,

etc. (Assembly Bill (2022) No. 587). In September 2023, the X Corp (formerly Twitter) social media platform sued the State of California for passing this law, arguing that it represented a violation of the First Amendment of the Constitution of the United States, i.e., the right to freedom of speech and the Constitution of California (Case 2023).

Adopted in 2017, the German law *Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken* (*Netzwerkdurchsetzungsgesetz/Network Enforcement Act*, NetzDG, 2017) represents a particularly notable piece of legislation. Among other things, this Act introduced the obligation for social media networks to implement an effective and transparent complaints-handling procedure. In addition, these entities are required to publish transparency reports on implemented procedures, complaint figures and removed content. Moreover, the law obliges social networks with over two million registered users in Germany to remove "clearly illegal" content (such as posts, images, and videos) within 24 hours from notification. For content that is not obviously illegal, however, providers have a maximum of seven days to decide how to handle the case.

In Poland, on 15 January 2021, the Ministry of Justice put forward the Draft Act on the Protection of Freedom of Speech on Social Networking Services (Draft Acton the Protection of Freedom of Speech on Social Networking Services 2021). The legislation still awaits passage as the bill has not been submitted to the Polish Parliament. With this bill, the Polish legislators aim to create an environment that supports freedom of speech, ensures the right to receive true information, improves the protection of human rights and freedoms on social networking services that are accessible in the territory of the Republic of Poland and have at least a million registered users, as well as ensures that social media websites comply with the freedom to express opinions, acquire and disseminate information, express religious convictions, world views and philosophy of life, and the freedom to communicate. Under the draft Article 2, this normative act will: set out the rules for scrutinising businesses providing services by electronic means through social networking services with at least a million registered users such that it is possible for public authorities to guarantee that the users of these services enjoy their right to freedom of speech and access to factual information; define rules governing service providers' liability for publishing illegal content on social networking services, as well as service provider's obligations related to guaranteeing freedom of speech and access to factual information; specify rules under which service providers are to conduct internal control procedures to handle user complaints against content that is unlawful and against good morals, or that infringes the right to freedom of speech or access to true information; as well as rules governing proceedings before public administration bodies and court proceedings in the event of restricted access to an electronic service provided through a social networking service.

The statutory definitions of certain terms provided in draft Article 3 essentially determine the subjective and objective scope of this Regulation. Accordingly, the term "online networking service" is understood as a service provided by electronic means allowing users to share any content with other users or the general public and has at least a million

registered users in Poland. "Disinformation" is defined as false or misleading information produced, presented or disseminated for profit or against public interest. "Criminal content" means content that glorifies or incites certain prohibited acts (i.e., the acts referred to in Articles 117–119, 127–130, 133, 134–135, 137, 140, 148–150, 189–189a, 190a, 194–204, 222–224a, 249–251, 255–258, 343 of the Penal Code), or fulfils the definitional elements of a prohibited act. "Unlawful content" is content infringing personal interests, disinformation, criminal content, and content against good morals, including, in particular, content that promotes or glorifies violence, suffering or humiliation. Under the proposed law, "restricted access to content" means any acts and omissions to facilitate any forms of restricting access to content published in a social networking service, including removal of user-published content that is not unlawful and restricting access to content through algorithms or tags used by the service provider to indicate possible violations in the published content; "restricted access to the user profile" means removing or disabling access to the user profile, restricting or disabling the option to share content with other users on the user profile, including through the service provider's use of algorithms reducing the visibility of user-shared content or tags indicating possible violations in the published content.

Moreover, the bill envisaged the appointment of the Freedom of Speech Council – a public administration body watching over social networking services' compliance with laws governing the freedom to express opinions, to acquire and disseminate information, to express religious convictions, world views and philosophy of life, and also the freedom to communicate. The Council would serve in six-year terms, and its members would be allowed to stand for re-election to further terms. According to the proposal, the Council's chair would be elected by the Polish Parliament with a 3/5 majority of votes, subject to at least half of the statutory number of MPs being in attendance. If none of the candidates receives the 3/5 majority of votes, there is a revote, with the Polish Parliament appointing the chair with a simple majority. Council members would also be appointed by the Polish Parliament with a 3/5 majority vote, subject to at least half of the statutory number of MPs being in attendance; however, should a candidate for Council membership fail to receive the 3/5 majority of votes in the first vote, or if there is more than one candidate for Council membership and none of the candidates has received the 3/5 majority of votes, there would be a revote at the Polish Parliament, except that this time a simple majority would decide the result.

The proposed law lists several new obligations for social media platforms. First, the draft Article 15 prescribes that service providers receiving more than 100 user complaints – on account of their providing access to unlawful content, restricting access to content or restricting access to user profiles – per calendar year will be required to issue biannual reports, in Polish, to disclose how these complaints were dealt with. These reports would be published on the respective social networking services a month after the end of the relevant half-year at the latest. Second, service providers would have an obligation to designate one or more – but no more than three – national representatives to transact on their behalf all court and out-of-court business, handle complaints in internal control

procedures and provide institutions and authorities with any answers and information they may request for the purposes of their proceedings. Moreover, under the bill, service providers would have to implement effective and intelligible internal control procedures in Polish to handle matters raised in user complaints. Users dissatisfied with how their complaints were handled in internal control procedures would have the option to complain to the Council. After completing its complaint procedure, the Council would make a decision with which it would either order the provider to restore access to the restricted content or user profiles – on account of its finding that such restricted content or profiles do not represent unlawful content – or refuse to restore access to the restricted content or user profiles on account of its finding that they represent unlawful content.

Under Article 29 of the draft Act, service providers would not have the right to yet again restrict access to the content examined by the Council. According to the proposed law, service providers breaching the Act would face fines ranging from PLN 50,000 to PLN 50 million. Specifically, such fines would be imposed on service providers defaulting on their obligation to: 1) issue the report referred to in Article 15(1); 2) designate the national representative referred to in Article 16(1); 3) immediately notify the President of the Office of Electronic Communications about the designation or replacement of the national representative, stating their personal details as referred to in Article 16(3); 4) immediately notify the President of the Office of Electronic Communications about any changes in the personal details referred to in Article 16(4); 5) publish the complete personal details, as referred to in Article 16(5), in its social networking service in such a manner that they are clearly visible and directly and permanently accessible; 6) provide the individuals involved in internal controls with the training referred to in Article 17(1); 7) implement an effective and intelligible internal control procedure in Polish to handle the matters referred to in Article 19(1); 8) publish in its social networking service the Rules and Regulations of the service, accessible by all users and setting out the internal control procedure referred to in Article 19 (2); 9) ensure a clearly visible , directly and permanently accessible method of sending complaints in internal control procedures, as referred to in Article 19(3); 10) comply with the Council's decision ordering that the restricted access to content or user profile be restored, as referred to in Article 25(1); and 11) comply with the prosecutor's decision ordering that access to criminal content, as referred to in Article 37(2), be disabled. Service providers would also be subject to fines should their national representatives fail to comply with the obligations to 1) handle a user complaint in an internal control procedure, in the manner referred to in Article 20; 2) provide institutions and authorities with any answers and information they may request for their proceedings; and 3) participate in training courses organised by the President of the Office of Electronic Communications and concerning the current legal situation regarding user complaints handled in internal control procedures.

The party dissatisfied with how the matter was resolved may request reconsideration by the Council. If any criminal content is identified, the prosecutor may request the service provider or its national representative to provide any necessary information, including, in particular, user identification data and the relevant publications posted on the social

networking service. If the criminal content is found to include pornographic content involving minors or content glorifying or inciting terrorist acts, to entail the risk of serious harm or to cause difficult-to-remedy consequences when left accessible, the prosecutor may immediately order the service provider to disable access to such content. Additionally, the party concerned would have the option of complaining against the prosecutor's decision, with the district court having jurisdiction over the prosecutor's office which issued the contested decision. On a side note, the bill's final provisions propose several useful solutions. One of them would be particularly welcome – the John Doe lawsuit – a special lawsuit filed against an unidentified defendant to protect personal interests.

8 Concluding remarks

At this point, the necessity for certain regulations governing social media is absolutely clear. However, regulators must proceed with considerable caution regarding the scope, method and range of regulations. Proponents of regulating this area have expressed concern that regulators might feel tempted to restrict freedom of speech and legislate measures that effectively censor and stifle public debate. Still, if there were any doubts about the need for regulatory measures involving social networking platforms, there should be none by now. This includes international, regional and national regulations alike. Finally, there is the question of which type of regulations would be the most appropriate in this case. Would hard law or soft law in combination with self-regulatory measures work enough? Or would it be better to focus more on promoting social media safety skills? Perhaps the best solution would be to combine all three.

References:

Balkin, J.M. (2018) How to regulate (and not regulate) social media, *Journal of Free Speech Law*, available at: https://www.journaloffreespeechlaw.org/balkin.pdf (February 17, 2024).

Baran, A. (2021) Wyłączenie odpowiedzialności dostawców usług pośrednich w świetle Aktu o usługach cyfrowych, In: Konarski, X., Wasilewski, P. & Baran, K. (eds.) *Akt o usługach cyfrowych. Kompendium*, available at: https://www.piit.org.pl/__data/assets/pdf_file/0022/17707/akt_o_uslugach_cyfrowych_kompendium.pdf (February, 17 2024).

Barrett, P. (2020) *Regulating Social Media*, available at: https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/5f58df637cbf80185f372776/1599659876276/NYU+Section+230_FINAL+ONLINE+UPDATED_Sept+8.pdf (February 20, 2022).

Brannon, V.C. (2019) *Free Speech and the Regulation of Social Media Content*, available at: https://sgp.fas.org/crs/misc/R45650.pdf (February 20, 2022).

Briggs, S. (2018) *The Freedom of Tweets. The Intersection of Government Use of Social Media and Public Forum Doctrine*, available at: http://blogs2.law.columbia.edu/jlsp/wp-content/uploads/sites/8/2019/04/Vol52-Briggs.pdf (February 20, 2022).

Case (2023) *X CORP. v. Bonta District Court, E.D. California*, available at: https://www.courtlistener.com/docket/67776396/x-corp-v-bonta/ (February 17, 2024).

Diaz, J. (2021) *Jack Dorsey Says Trump's Twitter Ban Was 'Right Decision' But Worries About Precedent*, available at: https://www.npr.org/2021/01/14/956664893/twitter-ceo-tweets-about-banning-trump-from-site?t=1645378363608 (February 17, 2022).

Digital (2022) *Global Overview Report*, available at: https://datareportal.com/reports/digital-2022-global-overview-report (Febaury 25, 2022).

Dudek, W. (1991) *Międzynarodowe aspekty mass mediów* (Katowice: Uniwersytet Śląski).

Dziemba, R. (2009) Nowe media a koncepcja „piątej władzy", In: Jeziński, M. (ed.) *Nowe media i polityka. Internet, demokracja, kampanie wyborcze* (Toruń: Wydawnictwo Adam Marszałek), pp. 53-61.

Fagan, F. (2018) Systemic Social Media Regulation, *Duke Law & Technology Review*, available at: https://scholarship.law.duke.edu/dltr/vol16/iss1/14/ (Febaury 17, 2022).

Fox, Ch. (2021) *Social Media. How Might It Be Regulated?*, available at: https://www.bbc.com/news/technology-54901083 (Febaury 20, 2022).

Garcia, R. & Hoffmeister, Th. (2017) Social Media Law in a Nutshell, *School of Law Faculty Publications*, (21), available at: https://ecommons.udayton.edu/law_fac_pub/2 (Febaury 17, 2024).

Gardocki, L. (1993) Europejskie standardy wolności wypowiedzi a polskie praw karne, "*Państwo i Prawo*", (3), pp. 111–156.

Garlicki, L. (1997) Art. 10. Wolność wyrażania opinii, In: Gardocki, L. (ed.) *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarzt. 1*. (Warszawa: Wydawnictwo C.H. Beck), pp. 583-648.

Grzesik-Robak, A. (2009) Media tradycyjne wobec nowych rozwiązań technologicznych – szansa czy zagrożenie, In: Jeziński, M. (ed.) *Nowe media i polityka* (Toruń: Wydawnictwo Adam Marszałek), pp. 160-165.

Hudson, D.L.Jr. (2017) *Hate Speech Online*, available at: https://www.freedomforuminstitute.org/first-amendment-center/primers/fake-news-primer/ (Febaury 17, 2024).

Jabłoński, M. & Wygoda, K. (2002) *Dostęp do informacji i jego granice* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego).

Jaskiernia, A. (2005) Swoboda debaty politycznej w mediach w świetle standardów Rady Europy, *Studia Medioznawcze*, 4(23), pp. 90-104.

Kamiński, I.C. (2005) Media w europejskiej konwencji o ochronie praw człowieka i podstawowych wolności, In: Barta, J., Markiewicz, R. & Matlak, A. (eds.) *Prawo mediów* (Warszawa: Wydawnictwo LexisNexis), pp. 33-75.

Kamiński, I.C. (2009) Karta Praw Podstawowych jako połączenie praw i zasad – strukturalna wada czy szansa?, In: Wróbel, A. (ed.) *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym* (Warszawa: Wydawnictwo Wolters Kluwer Polska), pp. 38-39.

Kaplan, A.M. & Haenlein, M. (2010) Users of the World, Unite! The Challenges and Opportunities of Social Media, *Business Horozins*, 53(1), pp. 59-68, https://doi.org/10.1016/j.bushor.2009.09.003.

Kayode-Adedeji, T., Oyero, O. & amp; Aririguzoh, S. (2017) Regulating the Social Media for Global Relationships, *"New Trends and Issues Proceedings on Humanities and Social Sciences"*, 4(10), pp. 426-433.

Kaznowski, D. (2013) Social media – społeczny wymiar Internetu, In: Królewski, J. & Sala, P.(eds.) *Marketing. Współczesne trendy. Pakietstartowy* (Warszawa: Wydawnictwo PWN), pp. 81-103.

Khan, I. (2021) *How Can States Effectively Regulate Social Media Platforms?*, available at: https://www.law.ox.ac.uk/business-law-blog/blog/2021/01/how-can-states-effectively-regulate-social-media-platforms (Febaury 17, 2024).

Kowalski, T. (2003) Wprowadzenie do analizy struktury przemysłu nowych mediów, *Studia*

Medioznawcze, 3(13), pp. 23-30.
Kreft, J. (2013) *Władza platform. Za fasadą Google, Facebooka i Spotify* (Kraków: Universitas).
Kreft, J. (2017) *Koniec dziennikarstwa jakie znamy. Agregacja w mediach* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego).
Krzysztofek, K. (2007) Status mediów cyfrowych: stare i nowe paradygmaty, In: Fras, J. (ed.) *Studia nad komunikacją popularną, międzykulturową, sieciową i edukacyjną* (Toruń: Wydawnictwo Adam Marszałek), pp. 83-99.
Kumm, M. (2023) *Market Imperatives and the Public Sphere: Constitutional issues concerning the regulation of social media*, available at: https://www.wzb.eu/en/events/market-imperatives-and-the-public-sphere-constitutional-issues-concerning-the-regulation-of-social (February 17, 2024).
Mikułowski-Pomorski, J. (1988) *Informacja i komunikacja. Pojęcia, wzajemnerelacje* (Ossolineum: Wrocław-Warszawa-Kraków-Gdańsk-Łódź).
Młynarska-Sobaczewska, A. (2003) *Wolność informacji w prasie* (Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa Dom Organizatora).
Młynarska-Sobaczewska, A. & Preisner, A. (2008) Rozwój technologiczny a przyszłość demokracji, In: Gizicka, D. & Gizicki, W. (eds.) *Człowiek i społeczeństwo wobec wyzwań współczesności. Aspekty kulturowe i społeczne* (Toruń: Wydawnictwo Adam Marszałek), pp. 34-45.
NetzDG (2017) *Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken* (*Netzwerkdurchsetzungsgesetz*, available at: https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html (February 23, 2022).
Ohlheiser, A. & Guo, E. (2021) *Twitter Locked Trump's Account. Insiders Say It Needs to Go Further*, available at: https://www.technologyreview.com/2021/01/06/1015830/twitter-trump-suspension-ban/ (February 17, 2024).
Oleksiuk, I. (2000) Wolność wypowiedzi w Internecie, *Studia Medioznawcze*, (1), pp. 97-108.
Palmer, A. (2021) *Facebook Will Block Trump from Posting at Least for the Remainder of His Term*, available at: https://www.cnbc.com/2021/01/07/facebook-will-block-trump-from-posting-for-the-remainder-of-his-term.html (February 17, 2024).
Palmer, J. W. & Eriksen, L. (1999) Digital News – Paper, Broadcast and More Converge on the Internet, *The International Journal on Media Management*, 1(1), pp. 125-135.
Papiernik, O. (2021) Sygnalistka nie zostawia suchej nitki na Facebooku. Zagraża zdrowiu, *Dziennik.pl.*, available at: https://technologia.dziennik.pl/sprzet/artykuly/8287958,sygnalistka-facebooku-zagrozenie-zdrowie-zarzuty.html (February 23, 2022).
Paslawsky, A. (2017) The Growth of Social Media Norms and the Governments' Attempts at Regulation, *Fordham International Law Journal*, 35(5), pp. 1486-1490.
Patterson, K. (2020) *Why regulating the public sphere matters more than ever*, available at: https://pec.ac.uk/blog/why-regulating-the-public-sphere-matters-more-than-ever (February 17, 2024).
PIIT (2021) *Stanowisko Polskiej Izby Informatyki i Telekomunikacji w sprawie projektu regulacji Digital Services Act – dokument COM(2020) 825*, available at: https://www.piit.org.pl/__data/assets/pdf_file/0021/17238/PIIT_-Stanowisko_regulacje-DSA_22.01.2021.pdf (February 17, 2024).
Raport of Forum ID 2020 (2020) Forum of Information & Democracy, *Working group of infodemics*, available at: https://informationdemocracy.org/wp-content/uploads/2020/11/ForumID_Report-on-infodemics_101120.pdf (February 17, 2024).
Report (2021) *Online hate increasing against minorities*, available at: https://www.ohchr.org/en/stories/2021/03/report-online-hate-increasing-against-minorities-says-expert (February 17, 2024).

Ressa, M. (2020) *Report on Infodemics. Working Group on Infodemics. Policy Framework*, available at: https://informationdemocracy.org/wp-content/uploads/2020/11/ForumID_Report-on-infodemics_101120.pdf (February 17, 2024).

Sadurski, W. (1998) Wolność prasy w systemie praw człowieka (wybrane zagadnienia), In: Zubik, M. (ed.) *Obywatel – jego wolności i prawa. Zbiór studiów z okazji 10-lecia Rzecznika Praw Obywatelskich* (Warszawa: Wydawca Biuro RPO), pp. 75-93.

Sadurski, W. (1992) Prawo do wolności słowa w państwie demokratycznym, *Państwo i Prawo*, (10), pp. 3-10.

Scaife, L. (2018) *The Effective Regulation of Social Media*, available at: http://kar.kent.ac.uk/65920 (February 17, 2024).

Skrzypczak, J. (2019) The Right to Freedom of Opinion and Expression in the Universal Declaration of Human Rights – a Contemporary Perspective, In: Sungurov, A., Fernández Liesa, C.R., Barranco Avilés, M. del C., LlamazaresCalazadilla, M.C. & Pérez De La Fuente, Ó (eds.) *Current Issues on Human Rights* (Madrid: Dykinson), pp. 81-92.

Sobczak, J. (2008) *Prawoprasowe. Komentarz* (Warszawa: Wolters Kluwer).

Soppa-Garstecka, M. (2021) 10 powodów, dla których Europa potrzebuje Aktu o usługach cyfrowych, In: Konarski, X., Wasilewski, P. & Baran, K. (eds.) *Akt o usługach cyfrowych. Kompendium*, available at: https://www.piit.org.pl/__data/assets/pdf_file/0022/17707/akt_o_uslugach_cyfrowych_kompendium.pdf (February 17, 2024).

Soppa-Garstecka, M. (2021) Nakaz podjęcia działań przeciwko nielegalnym treściom oraz nakaz udzielania informacji, In: Konarski, X., Wasilewski, P. & Baran, K. (eds.) *Akt o usługach cyfrowych. Kompendium*, available at: https://www.piit.org.pl/__data/assets/pdf_file/0022/17707/akt_o_uslugach_cyfrowych_kompendium.pdf (February 17, 2024).

Stahl, T. (2020) Privacy in Public: A Democratic Defense, *Moral Philosophy and Politics*, https://doi.org/10.1515/mopp-2019-0031.

Tan, C. (2018) *Regulating Content on Social Media: Copyright, Terms of Service and Technological Features* (UCL Press), https://doi.org/10.2307/j.ctt2250v4k.

Toffler, A. (2002) Odmasowione środki przekazu. Maryla Hopfinger (przeł.), In: Hopfinger, M. (ed.) *Nowe media w komunikacji społecznej w XX wieku* (Warszawa: Wydawnictwo Oficyna Naukowa), pp. 441-447.

Tully, S. (2014) People You Might Know. Social Media in the Conflict Between Law and Democracy, In: Patmore, G. & Rubenstein K. (eds.) *Law and Democracy. Contemporary Questions* (Canberra: ANU Press), pp. 53-172.

Veltman, K.H. (2006) *Understanding New Media* (Calgary: Augmented Knowledge & Culture).

Wall, J., Mooppan, H., Joshi, S., Taibleson, R., Mc Intosh, S. & Utrecht, J. (2020) *Donald J. Trump, v. Knight First Amendment Institute At Columbia University*, available at: https://www.supremecourt.gov/DocketPDF/20/20-197/150726/20200820102824291_Knight%20First%20Amendment%20Inst.pdf (February 17, 2024).

Wasikowski, T. (1983) Informacja i komunikowanie masowe w stosunkach międzynarodowych, *Sprawy Międzynarodowe*, (2), pp. 75-93.

Zafarani, R., Abbas, M. & Liu, H. (2014) *Social Media Mining. An Introduction* (Cambridge: University Press).