

A TYPOLOGY OF SOCIAL MEDIA REGULATIONS IN EUROPE AND THEIR POSSIBLE FUTURE DEVELOPMENT

András KOLTAY¹

ABSTRACT

Social media, search engines, and application platforms are the most important online gatekeepers from the perspective of freedom of expression. These routinely make 'editorial' decisions to make certain content inaccessible or to delete or remove it (either to comply with a legal obligation, to respect certain sensitivities, to protect their business interests or at their own discretion). Through such decisions, they directly influence the flow of information. The regulation of gatekeepers also determines the extent to which they are able or obliged to intervene in the process of publishing user content. The number and scope of regulations continue to grow, and the nature of these regulations is diversifying, even more so for online gatekeepers than for traditional media, and this imposes a wide range of rights and obligations on them. The paper reviews the regulations governing social media platforms in Europe, as gatekeepers, which have the greatest impact on the public sphere, typifying the regulations and considering possible directions for their future development.

KEY WORDS

*internet regulation
social media
freedom of expression
self-regulation
co-regulation*

1. The role of gatekeepers in online communication

Although the Internet seemingly promised direct and unconditional access to anyone possessing the right to free speech who wishes to participate in public discourse, in practice, it is not possible to publish an opinion without gatekeepers, even online. Gatekeepers refer to anyone whose activities are necessary for others' opinions to be expressed publicly. These include Internet service providers, blog providers, social media platforms, search engine providers, application vendors, web stores, news portals, news

1 | Professor, University of Public Service in Budapest; Pázmány Péter Catholic University in Budapest, Hungary, koltay.andras@uni-nke.hu.



aggregating sites, or content providers of websites that decide on users' comments on posts. Some gatekeepers wield greater influence, may significantly impact public communication and may be unavoidable. In contrast, others have a minor impact, and the smaller ones are invisible to the public. A common feature of gatekeepers is that they can influence the public sphere even as a non-state actor, in most cases much more effectively than the government itself.² As private actors, gatekeepers are generally not bound by the constitutional protection of freedom of expression; they may set their standards of freedom of expression within their field of operations.

Social media, search engines, and application platforms are the most important online gatekeepers from the perspective of freedom of expression. These routinely make 'editorial' decisions to make certain content inaccessible or to delete or remove it (either to comply with a legal obligation, to respect certain sensitivities, to protect their business interests or at their own discretion). Through such decisions, they directly influence the flow of information. The activities of these gatekeepers may also aim to arrange how content is presented, changing the emphases between them (the 'findability' of the content), and creating a personalized offer for the user. Thus, as Uta Kohl notes, the most important questions concerning the principle of Internet gatekeepers concern the active or passive nature of their role in the communication process, the nature of their 'editorial' activity, and the similarity of this activity to the actual editing.³ The role of gatekeepers is not passive; they have become key players in the democratic public sphere, are actively involved in the communication process, and can thus make decisions on what their users can access and what they cannot, or what can be accessed only with substantial difficulties.

The regulation of gatekeepers also determines the extent to which they are able or obliged to intervene in the process of publishing user content. The number and scope of regulations continue to grow, and the nature of these regulations is diversifying, even more so for online gatekeepers than for traditional media, and this imposes a wide range of rights and obligations on them. This paper will review the regulations governing social media platforms in Europe, as gatekeepers, which have the greatest impact on the public sphere, typifying the regulations and considering possible directions for their future development.

2. Legal regulation of social media

| 2.1. Regulations affecting the internet

Attempts to regulate the World Wide Web in the European Union (EU) have so far fallen into two categories: the regulation aimed specifically at certain Internet services and regulation that is generic in scope but also applies to Internet services. In addition to the areas harmonized by EU law, individual states may adopt specific rules as long as they do not present an unjustified obstacle to the free movement of services within the EU.

2 | Laidlaw, 2015, p. 39.

3 | Kohl, 2016, pp. 85–87.

The 2007 amendment to the AVMS Directive regulated audiovisual on-demand media services (also) available on the Internet,⁴ and the material scope of the Directive was extended to video-sharing platforms in the 2018 amendment.⁵ The main purpose of the Directive is to facilitate the free, cross-border flow of media services and, in some cases, to establish specific rules on the content of services, covering television (i.e., the 'traditional' subject of media regulation) and on-demand and other similar audiovisual services. However, it is not comprehensive and detailed but instead reflects a broad European consensus in this field regarding the protection of minors, the suppression of hate speech, and the definition of a framework for commercial communication.

The regulation of the information society and e-commerce services in Europe was based on a Directive adopted in 2000.⁶ The material scope of this Directive extends to information society services, that is, a 'service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.' This also applies to intermediary services, which are categorized by the Directive into the simple transmission, caching, and hosting. In addition, the scope of the Directive may extend to any other service falling under broadly defined concepts, such as web stores, search engines, and even social media sites. The Directive also aims to create a single European market in the regulated field and, above all, to establish common rules of a consumer protection nature (thus not containing a provision on the content of regulated services). In addition, the obligations imposed on intermediary service providers in relation to infringing content are of paramount importance.⁷

Regulations affecting freedom of expression have also been adopted in the fields of copyright,⁸ advertising law,⁹ and data protection. Although not specifically designed for internet services, they also bind to them.¹⁰ The platforms are also partly covered by the scope of contracts, consumer law,¹¹ and competition law.¹²

According to the case-law of individual states and the European Court of Human Rights, speech restrictions in the offline world may generally be applied in an online environment. The validity of the rules established in the traditional media world and the scope of the relevant legislation (mainly civil and criminal codes) generally cover factual communication

4 | Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) ['AVMS Directive'], art. 1.

5 | AVMS Directive, as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 ('new AVMS Directive').

6 | Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce', E-Commerce Directive), art. 2(a), with reference to art. 1(2) of Directive 98/34/EC.

7 | E-commerce Directive, arts. 12–14.

8 | Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

9 | See, e.g., Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

10 | Regulation (EU) 2016/679, General Data Protection Regulation.

11 | Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive).

12 | Arts. 101 and 102 of the Treaty on the Functioning of the European Union.

via the Internet (defamation, invasion of privacy, hate speech, etc.).¹³ According to the former, this may have consequences not only for the speaker but also for the service provider involved in the publication of the infringing content. Although the real responsibility for the infringing content lies primarily with the publisher of the content (in some cases primarily upon failure to remove the infringing content¹⁴), their indirect liability may be established. As such, these speech restrictions necessarily apply to several activities.

| 2.2. Regulation of social media

Under EU law, social media platforms are considered to be hosting service providers, as the users of such services store, sort, and make their own content available in and through the system. This means that, pursuant to the E-Commerce Directive, the platforms are required to remove any violating content after they become aware of its infringing nature,¹⁵ but they may not be subject to any general monitoring and control obligation.¹⁶ It is open to question whether a platform may be required, under Art. 14 of the Directive, to remove not only a specifically identified piece of content but also all other identical or 'similar' content that might be made available in the future. The strict ban on the general monitoring obligation appears to have been questioned by the judgment of the Court of Justice of the European Union in *Glawischnig-Piesczek v. Facebook*,¹⁷ in which the Court ruled that it was not contrary to EU law to oblige a platform provider such as Facebook to delete entries identical to, or, under certain conditions, with the same or similar content as a previously defamatory entry. According to the judgment,

Directive 2000/31, in particular Article 15(1), must be interpreted as meaning that it does not preclude a court of a Member State from:

- | ordering a host provider to remove information which it stores, the content of which is identical to the content of information which was previously declared to be unlawful, or to block access to that information, irrespective of who requested the storage of that information;
- | ordering a host provider to remove information which it stores, the content of which is equivalent to the content of information which was previously declared to be unlawful, or to block access to that information, provided that the monitoring of and search for the information concerned by such an injunction are limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content, or
- | ordering a host provider to remove information covered by the injunction or to block access to that information worldwide within the framework of the relevant international law.¹⁸

13 | Infringements on the internet, e.g., limitation of obscene opinions: *Perrin v. the United Kingdom*, no 5446/03, decision of 18 October 2005; for violation of good reputation, see *Times Newspapers Ltd. v. the United Kingdom (Nos. 1 and 2)*, no 3002/03 and 23676/03, judgment of 10 March 2009; *Mosley v. the United Kingdom*, no 48009/08, judgment of 10 May 2011; in terms of protection of copyrights, see *Ashby Donald and Others v. France*, no 36769/08, judgment of 10 January 2013.

14 | E-commerce Directive, arts. 12–14.

15 | *Ibid.*, art. 14.

16 | *Ibid.*, art. 15.

17 | Judgment of 3 October 2019 in case no C-18/18 *Eva Glawischnig-Piesczek v. Facebook Ireland Ltd.*

18 | *Ibid.*, para. 53.

In addition to the E-Commerce Directive, more general pieces of legislation also apply to communications via social media platforms, including legislation on data protection, copyright, protection of personality rights, public order, and criminal law. Such legal provisions may also introduce obligations for hosting service providers in the context of removing violating content.

The offline restrictions of speech are also applicable to communications made through social media platforms.¹⁹ Common violating behaviors in social media can be fitted into a more traditional criminal category (i.e., one that was adopted in the context of the offline world) almost without exception, which makes the introduction of new prohibitions unnecessary.²⁰ However, this duality gives rise to numerous difficulties, as, on the one hand, such limitations are defined as part of the national legislation of every country (and the law of free speech is also far from being fully harmonized among EU member states) and, on the other hand, social media are a global phenomenon by nature, meaning that they transcend national borders. For instance, an opinion that is protected by freedom of speech in Europe might constitute a punishable blasphemy in an Islamic country.

Since harmful content can be made available worldwide and shared on a social media platform quickly, the absence of a uniform standard can lead to tension and violence.²¹ It seems that there is no ideal solution, as neither the limitation of freedom of speech nor the forcing of one's norms onto others appears acceptable. Robert Kahn uses the Holocaust as an example to demonstrate that the limitation of free speech can only be enforced with limited effect (in part due to the lack of consolidated standards), meaning that any offensive content can easily find its way into countries that ban such expressions. In the era of Facebook and YouTube, it is unlikely that such problems could be addressed (Geoblocking could offer some kind of solution, but it is also ill-equipped to counter unique and quickly spreading pieces of content).²² Kahn believes that stricter restrictions would not solve the problem, arguing that the distinctive features of communication through social media should be accepted, as it should also be acknowledged that such problems and challenges arising from social media platforms cannot be solved perfectly from a legal perspective.

Based on the amendment adopted in 2018, the material scope of the AVMS Directive has been extended to include video-sharing platform services.

'Video-sharing platform service' means a 'service as defined in Articles 56 and 57 of the Treaty on the Functioning of the European Union; the principal purpose of the service or a dissociable section thereof is devoted to providing programmes or user-created content to the public in order to inform, entertain or educate, via electronic telecommunications networks within the meaning of Article 2(a) of Directive 2002/21/EC, for which the video-sharing platform provider does not have editorial responsibility and the organisation of the stored content is determined by the provider of the service, including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing.'²³

19 | Rowbottom, 2012, pp. 357–366.

20 | Social Media and Criminal Offences, House of Lords (2014), <https://publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/3702.htm>.

21 | Kohl, 2017.

22 | Kahn, 2019.

23 | New AVMS Directive, art. 1(1)(aa) (the precise identification of the provisions takes place in relation to the 2010 AVMS Directive, indicating the numbering of the Directive amending the Directive).

Although the original proposal would not have extended the scope of the Directive to social media platforms in general (as far as the audiovisual content uploaded to the site is concerned), it became clear during the legislative process that they could not be exempted from the Directive by focusing on portals used to share videos only (such as YouTube).²⁴ The amended recital to the Directive states

Video-sharing platform services provide audiovisual content which is increasingly accessed by the general public, in particular by young people. This is also true with regard to social media services, which have become an important medium to share information and to entertain and educate, including by providing access to programmes and user-generated videos. Those social media services need to be included in the scope of Directive 2010/13/EU because they compete for the same audiences and revenues as audiovisual media services. Furthermore, they also have a considerable impact in that they facilitate the possibility for users to shape and influence the opinions of other users. Therefore, in order to protect minors from harmful content and all citizens from incitement to hatred, violence and terrorism, those services should be covered by Directive 2010/13/EU to the extent that they meet the definition of a video-sharing platform service.²⁵

This means that, despite its somewhat misleading name, a video-sharing platform also includes audiovisual content published on social media. An important aspect of the newly defined term is that service providers do not bear any editorial responsibility for such content. In contrast, service providers do sort, display, label, and organize such content as part of their activities; they do not become media service providers themselves.

Arts. 28b(1)–(2) of the amended directive provides that Arts. 12 to 15 of the E-Commerce Directive (in particular, the provisions on hosting service providers and the prohibition of introducing a general monitoring obligation) remain applicable. The Member States must ensure that video-sharing platform providers operating within their respective jurisdictions take appropriate measures to ensure:

- | the protection of minors from programs, user-generated videos, and commercial audiovisual communications that may impair their physical, mental, or moral development;
- | the protection of the public against programs, user-generated videos, and commercial audiovisual communications that incite violence or hatred against a group of persons or a member of a group;
- | Protection of the public against programs, user videos, and commercial audiovisual communications containing content that constitutes a criminal offense under EU law, such as public provocation to commit a terrorist offense as set out in Art. 5 of Directive (EU) 2017/541, offenses concerning child pornography as set out in Art. 5(4) of Directive 2011/93/EU of the European Parliament and of the Council, and offenses concerning racism and xenophobia as set out in Art. 1 of Framework Decision 2008/913/JHA.
- | compliance with the requirements of Art. 9(1) of the AVMS Directive (general restrictions on commercial communications and others related to the protection of minors)

24 | Robinson, 2017.

25 | New AVMS Directive, recital, para. (4).

with respect to the commercial audiovisual communications they market, sell or arrange.

What constitutes an ‘appropriate measure’ shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected, and considering the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users who created, transmitted, and uploaded the content as well as the general public interest.²⁶

According to the Directive, such measures should extend to the following (among others):

- | defining and applying in the terms and conditions of the video-sharing platform providers the above-mentioned requirements,
- | establishing and operating transparent and user-friendly mechanisms for users of video-sharing platforms to report or flag up to the video-sharing platform provider concerned the content objected to,
- | with a view to protecting children, establishing and operating age verification systems for users of video-sharing platforms with respect to content that may impair the physical, mental, or moral development of minors,
- | providing parental control systems with respect to content that may be harmful to minors,
- | providing users with easy-to-use controls to identify violating content,
- | establishing and operating transparent, easy-to-use, and efficient procedures to manage and settle disputes between video-sharing platform providers and users,
- | providing information and explanations by service providers regarding the protective measures,
- | implementing measures and controls aimed at media awareness and providing users with information regarding such measures and controls.²⁷

While the new provisions of the Directive appear rather verbose and detailed, the major platform providers have already begun making efforts to comply with the requirements that have now become mandatory. The regulations only apply to a narrow range of content (i.e., audiovisual content), and the government is granted control over the operation of platform providers only with regard to a handful of content-related issues (child protection, hate speech, support for terrorism, child pornography, or denial of genocide). The content of this type is commonly banned or removed upon notice by the platforms under their own policies. However, not all content prohibited in Europe is banned by such policies. Once the provisions of the Directive are transposed into the national law of EU member states, platform providers will be required to take action under both the E-Commerce Directive and the AVMS Directive. These two pieces of legislation act mostly in parallel, as the former requires infringing content to be removed in general, while the latter defines certain specific types of the infringing content and lays down detailed rules for their removal. Beyond this, the new AVMS Directive lays down numerous provisions that both facilitate the application of the rules and work as procedural safeguards.

26 | New AVMS Directive, art. 28b(3).

27 | *Ibid.*

Art. 28a(2) seeks to settle jurisdiction-related matters concerning the principle of establishment, a general principle of EU media regulation, and provides the following:

A video-sharing platform provider which is not established on the territory of a Member State pursuant to paragraph 1 shall be deemed to be established on the territory of a Member State for the purposes of this Directive if that video-sharing platform provider:

- (a) has a parent undertaking or a subsidiary undertaking that is established on the territory of that Member State; or
- (b) is part of a group and another undertaking of that group is established on the territory of that Member State.

It remains to be seen how the Member States will apply the rules resulting from the new AVMS Directive after its implementation, how the national provisions can be harmonized regarding the detailed rules, and how the major platform providers can be forced to cooperate (which is a regulatory requirement for each member state).

The legal situation is much less complex in the United States, as the Section 230 Communications Decency Act protects social media platforms against government interference. If a platform only provides the framework needed to upload content, it cannot be held responsible for the possibly infringing nature of that content, even if it encourages users to speak and if it sorts user content.²⁸ However, providers are required to remove criminal material qualified as a federal crime, as well as any material that breaches the law on intellectual property. If a platform controls, generates, actively edits, or modifies users' content, then it loses its immunity.²⁹ The scope of exceptions from this rule can also be extended, as happened in 2018, since when the law permits taking action against websites, including hosting service providers, which promote trafficking in human beings for sexual exploitation.³⁰

| 2.3. Self-regulation

Legislation is the primary, but not the only, means of regulating the conduct of legal entities. Self-regulation may be more effective in achieving the goals underlying the regulation of platforms. There is no clear definition of self-regulation; instead, it serves as a collective category for alternative (extra-legal) regulatory approaches. By self-regulation, here I mean a system of rules created and supervised by bodies set up by market and industry actors, but formally operating independently of them.

Self-regulation is a bottom-up construction, the essence of which is that each sector develops its own rules of conduct and ethics, which each recognizes as binding upon itself, and those who violate these rules are threatened with sanctions. The main feature of self-regulation is its voluntary nature: the industry players concerned are free to decide whether they want to participate in self-regulation or submit themselves to the self-regulatory mechanism. They may have not only moral reasons for this – in the free market; these reasons have little influence anyway, but also a well-conceived interest in participating: they may wish to present the image of a socially responsible company or hope that effective self-regulation can act to pre-empt stricter and mandatory state

28 | Tushnet, 2008, p. 1009.

29 | Jackman and O'Connell, 2017.

30 | Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA). See Jackman, 2018.

measures or legislation. Such considerations also drive Facebook, which has not brought about industry self-regulation, but created a self-regulatory mechanism that oversees its own operation only; it set up a supervisory body independent of the platform and of the state and other industry players.³¹ Facebook's new self-regulatory body, set up in the spring of 2020, is the Oversight Board, previously referred to by Mark Zuckerberg as the 'Supreme Court of Facebook,' which is not intended to serve as an appeal forum for individual cases but as a body that sets general benchmarks for freedom of expression.³² An essential element of self-regulation is the separable nature of the regulated and the regulator: The Oversight Board (the regulator) will therefore be considered self-regulatory if Facebook (the regulated) submits itself to its decisions.

The advantages of self-regulation over codified law are its flexibility and ability to adapt more rapidly, while its clear disadvantages are its lack of credibility (it is created with the participation of industry actors and is not completely independent of them) and uncertain effectiveness, since it lacks actual binding force and participation in it, and its submission to decisions made as a result of supervision is left to stakeholders. I also consider self-regulation supported by codified legal regulation as a form of self-regulation, where legal rules prescribe the framework, but self-regulatory organizations are entrusted with both the creation of norms (codes) and supervision, and the state cannot control their operation (an example of this is the English press's statutory self-regulatory system³³).

| 2.4. Co-regulation

Co-regulation is a joint effort by the state and industry, which combines a system of codified law and self-regulation. Co-regulation is also an umbrella term because there are many possible forms and shades of cooperation between the state and the industry concerned. In practice, it is also characterized by being voluntary; that is, individual market participants are not obliged to participate. In principle, mandatory co-regulation could be envisaged, where the state requires market players to participate, but there are no examples of this in the media and content industry across Europe, at least not in general terms. At the same time, the rule implementing specific co-regulation in the E-commerce Directive provides for action against infringing user content on social media (see next section). Parallels can be drawn with various professional chambers, such as the bar or the chamber of notaries, where membership is compulsory for members of the profession and rules may be set by the state and also by the regulatory body authorized by it.

Co-regulation may facilitate the enforcement of legal obligations and the supervision of their observance, or it may completely replace legal regulation, provided that the parties also develop the norms to be complied with within the framework of co-regulation. In the latter case, it is also conceivable that the state only imposes an obligation on a branch of industry to operate such a system, which establishes a norm setting and compliance body or organization (ideally also independent of each other), with the state checking its legality and the adequacy of its operation.

31 | Kelly, 2020.

32 | Klonick, 2020, p. 2432.

33 | The Royal Charter on Self-Regulation of the Press (2013), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final_Royal_Charter_25_October_2013_clean__Final_.pdf (2020.03.28.).

The AVMS Directive also recognizes the significance of self- and co-regulation and requires member states to promote and incentivize the establishment of such systems. In this context, this highlights that measures aimed at attaining public interest objectives in the media service sectors are more effective if they are taken with the active support of service providers.³⁴

| **2.5. Mandatory co-regulation on judging user behavior**

Participation in co-regulatory schemes is generally voluntary for service providers, but, on a single important issue, regulations still subject them to specific co-regulation at the European level. This implementation of co-regulation obliges platforms to participate in monitoring the legality of user behavior. The regulation is binding on the platform, but aims to take action against infringements committed by users. The platform's liability is not for publishing infringing content but for failing to take action against it.

Art. 14 of the E-commerce Directive provides for a broad exemption for platforms so that if they made infringing content available, it was not their own content. They were not originally aware of the infringing nature of that content; they will not be held liable as long as they take action to remove or terminate access to it immediately after becoming aware of the infringing nature. However, in the event of failure to do so, they may be held liable for their own conduct. In this way, codified legal regulation forces the platforms into a decision-making role concerning user content, expecting them to decide on the illegality of the content, conditional upon their awareness of it. The consequence of this procedure may be the removal of content.

The assessment of what constitutes an 'infringing' nature raises a very important issue. The removal obligation is independent of any judicial or other official procedure to establish the infringement, and the hosting provider must act before such a decision is made, if any legal proceedings are instituted. It is therefore up to it to decide on the infringement itself, and this decision will be free from the guarantees of the rule of law (while it may also affect the freedom of expression). It may encourage the provider to decide against retaining content in any case of a concern to cover itself. This co-regulation, enforced by legal regulation, may be seen as a specific form in which the enforcement of codified legal norms (restrictions on freedom of expression) is monitored by a private party (the platform), which simultaneously enforces sanctions (deletion of content).

| **2.6. Private regulation**

For social media, private regulation is how the platforms themselves create rules and oversee them in a process that they also create themselves. These rules do not, of course, oblige the platform itself, but its users. Private regulation is thus an additional extra-legal regulation of user behavior, which may overlap with codified legal regulation, but which is not a necessary feature. Platforms may enforce the private regulation of their users through their contract with them, so these rules have a legally binding force between the parties. Furthermore, because it primarily concerns content published and shared by users, it directly affects the freedom of expression. For example, the 'Oversight Board' established by Facebook may be considered private regulation, as its activities affect the freedom of expression of platform users. If Facebook also submits to its decisions, the Board's operation towards the platform may be considered self-regulation (see section

34 | AVMS Directive, art. 4a.

2.3), the rules of operation of the Board are established by Facebook, its members are appointed by Facebook, and its competence extends exclusively to the Facebook platform. The establishment of the Oversight Board is another step towards constructing a 'pseudo' legal system that is developing in parallel with the state legal system.

Platforms have the right to create these rules, which stems from their right to property and the right to freedom of the enterprise. There are relatively few restrictions on private regulation of this kind, although platforms are also required to comply with restrictions on freedom of expression (e.g., with regard to the advertisements they may accept) or to comply with the requirements of equal treatment of their users. In addition to their rights, private regulations may impose restrictions on the opinions published on the platform. Jack Balkin calls this phenomenon private governance,³⁵ while others prefer to use the less euphemistic term private censorship.³⁶ As Balkin has warned, it seems unreasonable to attempt to discuss compliance with government regulations separately from private regulations, considering that the threat of government regulation incentivizes platform providers to introduce private regulations, because the providers are interested in avoiding any troublesome interference by the government.³⁷

Platform providers also have other motives for adopting private regulations. Of course, the most important of these is the economic nature. Platform providers are interested in ensuring that their users feel safe while using their platform, and are not confronted with insulting, upsetting, or disturbing content. The moderation and removal of such content do not take place in line with the normal limitations on free speech, meaning that a piece of content may be removed by this logic even if it would otherwise be permitted by law. In contrast, another piece of content may remain available even if it violates the limitations of free speech. A major problem with private regulation is that it may be both stricter and more lenient than government regulation, and as a result, the way it regulates content is unpredictable. Another major issue is that no adequate decision-making procedure is in place regarding the removal of pieces of content, meaning that the constitutional safeguards commonly available in legal proceedings are absent (for instance, the appropriate notification of the users concerned, the opportunity to appeal, public proceedings, transparency about the identity of the decision-maker, the requirement that decisions be made in writing and can be read, etc.). Over time, due to pressure from various sources, platforms are taking steps towards transparency, but they still have a long way to go in this regard.

The removal of undesirable content for the platform concerned is not the only means of implementing private regulations. A far more powerful means of implementing it is the editing and sorting of the content presented to individual users, as well as the promotion and suppression of certain pieces of content, the impact of which is not limited to individual pieces of content but to the entire flow of content on the platform (in the case of Facebook, it happens in their news feeds). This is not 'regulation' or 'censorship,' because it does not require a normative decision on the 'adequacy' of the content (examined in the light of the private regulation code), but it fundamentally affects the chances of each item of content to reach the public and so it may be considered as a kind of editing that generally has a greater overall impact on the fate of each piece of content than private regulation itself. All of this is done for the purpose of providing personalized services

35 | Balkin, 2018, p. 1182.

36 | Heins, 2014, p. 325.

37 | Balkin *supra* note 34, 1193.

and serving individual user needs (as guessed by the platform), relying on information collected about each user, their previous online presence, and their platform-generated profile. Thus, each user, unknowingly and, indeed, without explicit consent, influences the content of the service they receive, while the platform actively exerts influence over the user's intent and is capable of influencing the user, while at the same time having an impact on content producers, measurable in terms of money and opinion-forming power. The resulting consequences have an impact on the decisions that users make as consumers and also on the discussion of public affairs, access to information, and the diversity of opinion – in other words, the quality of the democratic public sphere.

3. Possible future regulatory models

Although the future of social media regulation is uncertain, certainly possible optional regulatory models are emerging within the framework of our current knowledge. In the following section, I outline models for the possible future regulation of social media. These may be further cross-bred with each other, that is, many other variations are conceivable, just as a new, previously unknown regulatory solution may emerge in the distant future.

| 3.1. 'Pure' legislation

'Pure' legislation means when the commanding norm is set by the state legislator and the related liability system is operated entirely by the state, through the courts and investigating authorities, without the participation of social media platforms. These include the rules contained in major codes of law and the systems of their oversight (civil and criminal codes), as well as, for example, the data protection regime. On their own, however, these rules are not suitable as a full, prompt, and effective remedy for violations committed through social media. The three possible legal, regulatory models are outlined below:

3.1.1. *The European media authority model*

It is conceivable to use a European model of a media authority, in which the norm is set by the legislator and the authority can react faster than the judicial system, with the authorities applying a system of sanctions for infringements and monitoring the operation of media service providers, whose decisions may be reviewed and possibly overturned by a court. However, applying a traditional media regulation model of this kind to social media is not realistic, as it assumes a kind of control over content that makes the mere publication (making available on the platform, that is, uploading by a user) of illegal content punishable in and of itself, as is the case in the context of broadcasting content by radio or television. This approach is unsustainable for social media platforms. In their present form of operation, it is not the platform that decides on publishing a given piece of content. For this reason, any sanction triggered by the act of publication might compel social media platforms to implement preliminary (pre-publication) monitoring to prevent and eliminate any possible violations in time. This would raise concerns, not only because it would bring about fundamental changes in the functioning of the platforms, but also because the overall implementation of such preliminary monitoring seems impossible

for the more popular platforms at this point, owing to the substantial volume and diversity of user-generated content, even with the use of various algorithms. At the same time, the monitoring of behaviors that are prosecuted under criminal law is very much present on the platforms, for example, content showing child pornography and support for terrorism is pre-screened. If, over time, it becomes technically possible to control all data traffic, the decision on issues that are difficult to judge (restrictions on political opinions, protection of personal rights, etc.) should not be left to artificial intelligence. The flood of content and the potential problems alone preclude using the traditional authority model, which is time-consuming – even if it is faster than court proceedings – compared to the dynamics of online communication.

3.1.2. Adopting the US model to the European landscape

A regulation similar to Section 230 of the CDA in the US does not seem conceivable in Europe. This rule provides a general exemption for social media platforms, except for certain high-profile violations specified in the law: they are not generally obliged to remove infringing content even if they are noticed. As Marcelo Thompson points out, American regulations are based on the assumption that a platform does not interfere with communication between users (unless it is required to remove illegal content and apart from important situations determined by law), because it has no incentive to do so.³⁸

Under US law, the issues related to government censorship are handled reassuringly for the most part, since platform operators are not incentivized to comply with the government's attempts to influence their users, either through the promise of benefits if they play along with such attempts, or the threat of sanctions if they refuse to do so. At the same time, however, it does not allow the damage caused by the exercise of freedom of expression to be dealt with through statutory law, at least with regard to the liability of platforms, but allows private regulation to be exercised, without providing legal guarantees for the activities of gatekeepers. The European legal approach is incompatible with the application of this model.

3.1.3. The general prohibition of private regulation

Another possible paradigm, the elimination of the independent decision-making powers of social media platforms over content might bring about a regulatory scheme that is simpler and more predictable than any form of co-regulation. While limiting the liability of platforms, the US approach does not preclude platforms from making their own decisions to delete user content. Relieving such liability only reinforced the decision-making power of platforms, and they, in fact, had plenty of incentives to interfere with user communications (e.g., by trying to create a safe space for users or in pursuit of a political agenda, etc.). As a result, the limits of debates and public discourse on a platform are defined through private regulation, as opposed to government regulation, unless the power of social media platforms is restricted in some form.

A possible solution to this problem would be to consider platforms as public utilities or public forums to which the service provider is obliged to guarantee equal access. In such a situation, a social media platform would not be permitted to restrict the freedom of communication, just as a phone service provider is prohibited from restricting the content of conversations conducted through its network. The idea of prohibiting private regulation

might seem attractive at first. It is not unprecedented even in the world of online gatekeepers, as the concept of network neutrality in the context of Internet access providers serves quite similar purposes.

If it were banned by law, what would happen to the platforms' obligations in Europe to remove infringing content from their systems? Requiring platforms to judge the illegal nature of a given piece of content would mean that they are subject to an obligation that is not easy to perform and for which private regulation (i.e., extensive removal of the content) is encouraged. Under this model, it would be reasonable to relieve platforms from any liability for illegal content in general (similar to the US approach), or to require platforms not to remove any content unless it is ruled to be illegal by a court (or other authority).³⁹ Unlike the elimination of private regulation, a regulatory change in this direction would probably be welcomed by social media platforms. Generally, the platforms argue that intermediary service providers should not be expected to examine and judge content and that they should be required to send notifications to a competent body, 'ideally a court or other independent and impartial body qualified and with legitimacy to make these kinds of decisions.'⁴⁰

The elimination of private regulation from two directions (both on the side of platforms and the side of reporting users) would probably be beneficial for free speech. However, it would also jeopardize the success of taking action against dangerous and harmful content since it would eliminate the possibility of taking prompt and decisive action against it, which is currently quite an attractive possibility for injured parties. This issue could be solved by permitting platforms to take action upon receipt of user reports (i.e., removing a piece of challenged content if it appears illegal *prima facie*), but doing so could also compromise the model and open the door to private censorship. Another possible solution would be to accelerate legal procedures aimed at determining whether a given piece of content is illegal. However, this does not seem feasible under the existing framework of courts and media authorities, meaning that the establishment of new and rapidly responsive bodies would need to be feasible, which would be uncertain.

| 3.2. Co-regulation

The operation of social media in Europe is currently governed by a specific system of co-regulation. The norms setting the prohibitions are made by individual states and EU legislative bodies, based on the E-commerce Directive, the removal of content that may be considered infringing under the Directive is the responsibility of the platforms if they receive a notice. This system can be considered co-regulation because it is entirely up to the platforms to assess the infringing nature of the content. If the request for deletion is rejected, but the content, following a decision by an authority, is still considered infringing, the platform is liable if it is not deleted. It is not only the Member State regulation implementing the E-commerce Directive based on this system of liability but also laws adopted independently by member states tightening the obligations of platforms,⁴¹ such

39 | Chandler, 2006-07, p. 1117.

40 | Internet Service Providers' Association (UK), 2018.

41 | Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz -- NetzDG) Artikel 1 G. v. 01.09.2017 BGBl. I S. 3352 (Nr. 61), <https://www.gesetze-im-internet.de/netzdg/BjNR335210017.html>.

as the German and French acts.⁴² However, the co-regulatory system can be further refined and detailed.

3.2.1. *Details and clarification of the current liability regime*

According to the EU's approach to regulating platforms, the notice-and-takedown rule of the E-commerce Directive continues to be the basis for regulation. The recommendations and communications issued by the EU, as well as the 2018 amendment to the AVMS Directive, aim to establish a suitable legal and regulatory framework for the decision-making powers and, occasionally, an obligation of platforms under the supervision of government authorities, as a means of tackling the challenges that may arise.

The 2018 Recommendation of the Committee of Ministers of the Council of Europe raises the issue of regulating platforms,⁴³ encouraging them to respect the freedom of speech, ensuring that there is a clear (legal or ethical) basis for their interference with content,⁴⁴ and guaranteeing transparency and accountability⁴⁵ with special regard to the application of their content-related policies so that they also comply with the principle of non-discrimination.⁴⁶ It is also recommended that every user be guaranteed the right to an effective remedy and dispute resolution (regardless of whether or not the users are concerned about protecting their freedom of speech or the possible violation of their rights by the free speech of others).⁴⁷ It has even been suggested in the EU Commission that the deadline for removing illegal content could be shortened; there could be a requirement for pieces of especially dangerous content, such as speech-promoting terrorism, to be removed within one hour after receipt of a notice.⁴⁸

These proposals of the EU, the recommendation of the Council of Europe, and the voluntary undertakings of the market actors concerned would, however, leave the notice-and-takedown procedure established by the EU's E-Commerce Directive essentially unchanged. Even in most EU documents, it is recommended that platforms voluntarily use means beyond state law. Jacob Rowbottom argues that this strategy aims to handle the problem by implementing a regulatory framework in which the regulatory body does not define its content-related expectations accurately or enforces such expectations consistently. Instead, platforms may develop their own rules and procedures related to the content, while the regulator oversees and controls these internal procedures to ensure adequate standards.⁴⁹

Procedural strengthening of the notice-and-takedown procedure and stronger state oversight is, therefore, the simplest and most obvious regulatory approaches. The government (like any other user) may request the removal of illegal content only. However, the

42 | Loi visant   lutter contre les contenus haineux sur internet. Assembl e nationale, www.assemblee-nationale.fr/15/pdf/ta/ta0310.pdf. The French law was declared unconstitutional by the Conseil constitutionnel in June 2020, cf. D cision n  2020-801 DC du 18 juin 2020.

43 | Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries. Council of Europe, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14.

44 | *Ibid.*, s. 2.1.3.

45 | *Ibid.*, s. 2.2.

46 | *Ibid.*, s. 2.3.

47 | *Ibid.*, s. 2.5.

48 | Google, Facebook, Twitter Face EU Fines over Extremist Posts. *BBC*, <https://www.bbc.com/news/technology-45495544>

49 | Rowbottom, 2018.

illegal nature of a piece of content needs to be assessed based on constitutional standards for free speech, and this requirement may make platforms face difficult issues in interpreting the law. Nonetheless, formal procedural guarantees and increased transparency in the decision-making processes of social media platforms would be welcome development. In cases determined by government legislation, platforms may still take action to manage any harm or damage caused by free speech by removing illegal content and platforms may also introduce additional restrictions and hence may also remove lawful content that is inconsistent with their internal policies by using the means of private regulation.

3.2.2. Further possibilities for strengthening co-regulation

The European Commission submitted its legislative proposal titled the Digital Services Act (DSA), on December 15, 2020.⁵⁰ The proposal is not aimed at altering the liability regime of platforms, as set out in the E-commerce directive. Nevertheless, the DSA stipulates new obligations on the platforms. The obligations are:

- | providing information to authorities based on orders,
- | designating points of contact and legal representatives,
- | indicating restrictions in terms,
- | publishing annual transparency reports,
- | managing notices on illegal contents,
- | providing reasoning for decisions,
- | maintaining a complaint management system,
- | the right to turn to an out-of-court body (out-of-court dispute settlement)
- | processing the notices on illegal content submitted by trusted flaggers with priority,
- | suspending the services to recipients that frequently provide manifestly illegal content,
- | reporting suspicions of criminal offenses,
- | the publication of more detailed transparency reports,
- | user-facing transparency of online advertising.

The DSA also contains the special obligations for 'very large online platforms' for managing systemic risks. The proposal can be considered as another step forward in strengthening the co-regulatory system established by the E-commerce directive.

Other co-regulatory models are also conceivable. Setting the general standards and procedural frameworks may remain the state's duty, but the development of detailed rules and the oversight of the operation of the platforms may be outsourced to an industry co-regulatory body. This approach also combines the advantages and disadvantages of the state and self-regulatory systems. According to the refined version of this model, the setting of the detailed rules beyond the legal framework may remain with the platform (as with the notice and takedown procedure), but its decision may be appealed to a public authority, whether or not the complainant claims damages for the violation of personal or other rights.

In September 2018, leading broadcasters and internet access providers in the United Kingdom requested that the government establish independent regulatory oversight of

50 | Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC. Brussels, 15.12.2020, COM(2020) 825 final, 2020/0361(COD).

social media.⁵¹ Traditional media outlets may find it difficult to accept that social media platforms, their indirect market competitors, can operate in a significantly more lenient legal environment. Strong co-regulation based on enhanced cooperation between private and government actors may cover numerous aspects of the operation of social media platforms. Such aspects include enhanced government control over private regulations implemented by platforms, introducing various requirements for promoting diversity on the platforms, and introducing government oversight of decisions made by platforms regarding user-generated content.

This model can also be extended to platform decisions taken within the framework of private regulation. Thus, in principle, it would not be only decisions taken to abide by the E-commerce Directive, and acting in proceedings for infringement of restrictive legal norms, but also the application of the platforms' own codes and directives, which may be subject to review by a public authority. The downside of this, in addition to the effect of the strengthening state intervention, is the necessarily slower reaction time in official proceedings.

If the legal system was to move towards broader state intervention or co-regulation with a stronger state role, the scope for private regulation would correspondingly narrow because the state would be able to impose obligations on platforms that would affect the constitutional implementation of freedom of expression. The method of handling the damages caused by free speech would be changed uniquely by increasing government involvement. On the one hand, reducing the gap between private regulation performed by platforms and government regulation would safeguard against remedying the damages in an excessive manner that could jeopardize free speech. On the other hand, making the procedures by platforms more similar to other formal proceedings would sacrifice the advantages of such procedures (i.e., speed and efficiency) for the sake of free speech.

| 3.3 Self-regulation

Although social media platforms are not currently subject to self-regulation, larger platforms are increasingly accepting the need to introduce such a regulatory system, primarily to avoid stricter state regulations. One possible model of self-regulation would be to keep standard-setting and compliance monitoring as the platform's task, while an independent self-regulatory body could be approached to appeal against the platform's decisions. This is similar to the concept of Facebook's Oversight Board, with the addition that the latter is a body that reviews only the decisions of a single platform.⁵²

In the current regulatory environment, requiring an external, independent review of the content decisions taken by platforms would be the most realistic, and still a very significant step, even if it was not performed by a state body (authority or court). This model is somewhat similar to the self-regulation of the press, which, it may be noted, remains inadequate across Europe, despite some shining examples. Industry actors could work together to set up an independent decision-making and sanctioning body of independent experts,⁵³ but its authenticity, effectiveness, speed, and power are all open questions.

Press self-regulation in its purest form differs from the previously mentioned approaches in that both standard setting and its oversight are in the hands of an industry self-regulatory body. Publishers of press products submit to content regulatory codes and

51 | Lomas, 2018.

52 | Gilbert, 2020.

53 | Laidlaw, 2008, pp. 142/143.

board decisions. For example, the UK's Press Complaints Commission worked. The *News of the World* scandal of 2011 and the subsequent overhaul of the self-regulatory system suggest that this system was not sufficiently effective. The foundations of the system that replaced it is laid down in statutory law (Royal Charter), but participation in the charter remains voluntary and does not bring benefits that would offset any disadvantages for publishers.⁵⁴ (In addition, the Independent Press Standards Organisation, a self-regulatory body set up independently by major publishers, is not covered by the Charter.) In the absence of binding nature and a strong, enforceable system of sanctions, the new system is subject to a number of criticisms.⁵⁵

The self-regulatory model, while participation in it remains non-mandatory, with possible benefits at least is capable of making it worthwhile participating in, and may also be applied to platforms once the weaknesses identified above have been addressed.

4. Conclusions

The legal relationship between gatekeepers and their users (which is not affected by the constitutional doctrines of free speech) is governed by law through the contract concluded by and between the parties. However, it does not seem possible to enforce the principles and doctrines of free speech in the online world with the same fervor as possible offline. Even so, this should not necessarily be considered a bad thing. The law is always changing; the constitutional recognition of free speech itself is a fairly new and modern development, and with the emergence of the Internet, the law of free speech is entering a new era of its development, the exact stages of which are not clear at this point.

Government decision-makers and shapers of public policy need to adopt a systematic approach that takes into account the distinctive features of and changes to gatekeepers' activities, providing an accurate definition of what gatekeepers are expected to do and what they might expect from the law, as well as precisely setting the duties and scope of liability of gatekeepers.⁵⁶ The impact of gatekeepers on the public sphere and the strengthening of private regulations necessitate the use of new, creative, and innovative regulatory methods and institutions, the invention of new ways of setting and enforcing rules,⁵⁷ and the degree of cooperation between public and private actors, which is unprecedented in this field.

54 | House of Lords, 2015.

55 | Cohen-Almagor, 2014.

56 | Bunting, 2018, p. 185.

57 | *Ibid.*, p. 186. Cf. Hadfield, 2017, p. 9.

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