ARTICLE 19

International Standards Series

Taming Big Tech

A pro-competitive solution to protect free expression

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ARTICLE 19

ARTICLE 19 works for a world where all people everywhere can freely express themselves and actively engage in public life without fear of discrimination. We do this by working on two interlocking freedoms, which set the foundation for all our work. The Freedom to Speak concerns everyone's right to express and disseminate opinions, ideas, and information through any means, as well as to disagree with, and question power-holders. The Freedom to Know concerns the right to demand and receive information from power-holders for transparency, good governance, and sustainable development. When either of these freedoms comes under threat by the failure of power-holders to adequately protect them, ARTICLE 19 speaks with one voice through courts of law, through global and regional organisations, and through civil society wherever we are present.

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Executive summary

In this policy, ARTICLE 19 outlines how open markets, competition, and users' empowerment can help address current freedom of expression challenges in online content curation. We offer practical solutions on how to achieve these objectives through a pro-competitive instrument: the unbundling of the provision of hosting and content-curation services.

In recent years, social media platforms have become important actors in how we exercise the right to freedom of expression. Their reach and influence are undeniable; they have become platforms where people can connect, engage, communicate, campaign, and share ideas, information, and opinions. While platforms enable users' engagement, they also extract, collect, and sell unprecedented amounts of data. Their business models have contributed to the dissemination of various kinds of problematic content, including 'hate speech' and forms of 'disinformation'. Many policy proposals in the area of social media companies focus on what they allow or remove from their platforms. However, this is only part of the problem.

In this policy, ARTICLE 19 discusses other issues that have received less attention so far: the risks posed by extreme concentration on social media markets, and the reduction of exposure diversity on social media platforms. We believe the excessive market power that big social media platforms hold should be a global concern. Acting as gatekeepers, they have a direct impact on the dynamic of content distribution, as well as on media diversity and freedom of expression on social media markets. ARTICLE 19 believes that, to fix these challenges, it is necessary to diminish this concentration of power in the market and abolish gatekeeping. This will lower barriers to entry for alternative players, and will empower users.

These goals might be achieved in more than one way. In this policy brief, we explore a pro-competition regulatory solution rather than a control-oriented solution: the unbundling of hosting and content-curation services on large social media platforms. We believe this will lead to better protection of freedom of expression, pluralism, and diversity, as well as to far more open, fair, and decentralised digital markets that enable the free flow of information in society.

We are fully aware that pro-competitive measures that reduce the power of large social media platforms and diversify the landscape are only part of the solution. They must go hand in hand with content-curation services that comply with international human rights standards. These two solutions are not mutually exclusive; they must complement each other. We need to protect both freedom of expression and media diversity on social media markets.

This policy is divided into three parts. First, we outline the relevant international human rights and freedom of expression standards, followed by the key problems and concepts with regards to social media markets. Lastly, we explore our unbundling of services proposal in greater detail.

Key recommendations

1. States should put in place measures to counterweight excessive concentration on social media markets. They should introduce asymmetric regulation that imposes the unbundling between hosting and content curation on large platforms.

2. Independent regulatory authorities should enforce asymmetric regulation that imposes the unbundling of services.

3. Independent regulatory authorities should ensure that the unbundling rules are implemented in an effective way.

4. The unbundling of services should be shaped as a form of functional separation.

5. Complementary human rights-based content-curation rules should be introduced for all players, with respect to the principle of proportionality.

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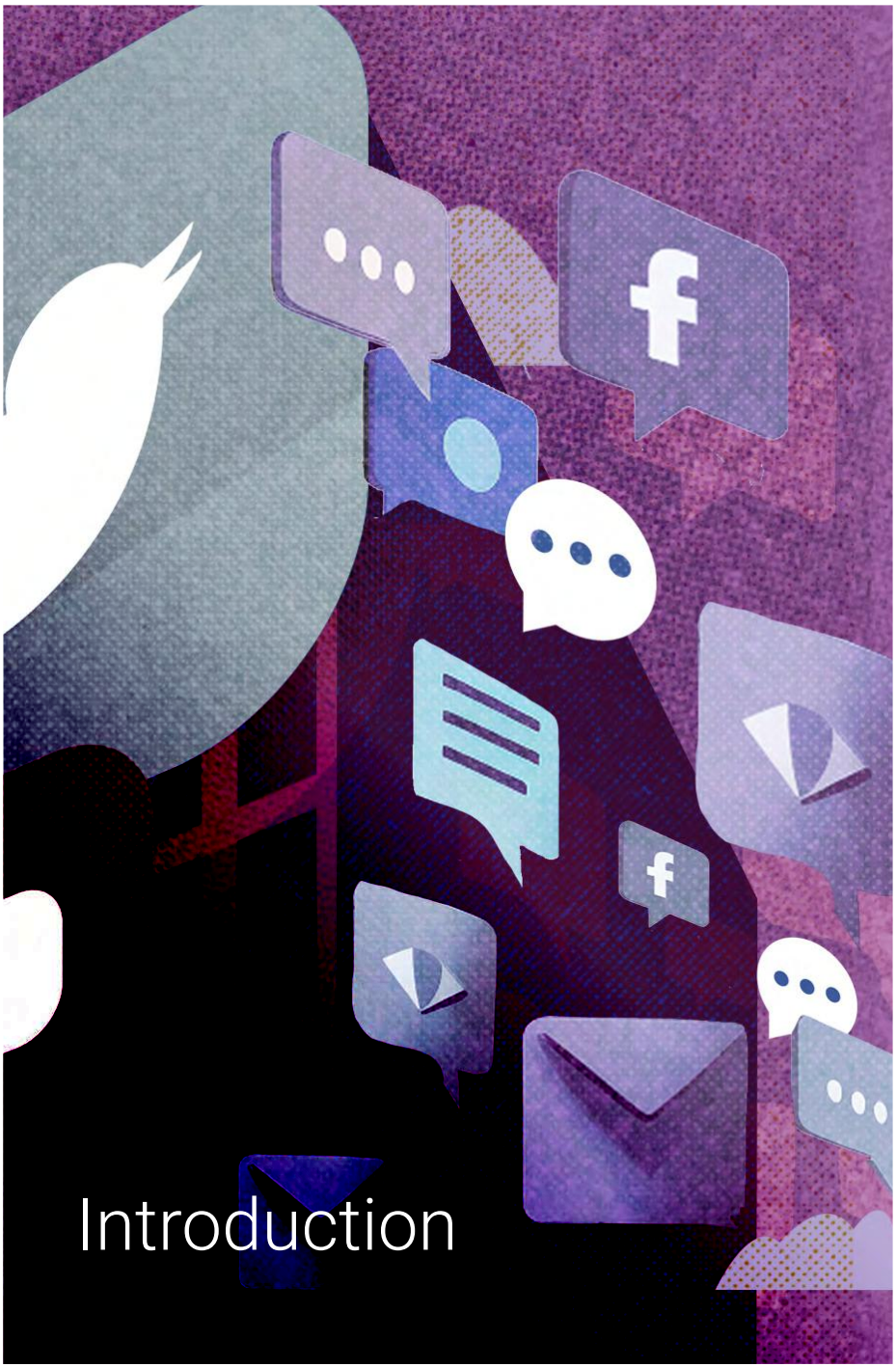


Introduction

Introduction

Over the last two decades, social media platforms have been tremendous enablers for exercising the right to freedom of expression and information online. At the same time, they have collected massive amounts of users' data, built users' profiles, and drawn users in with targeted behavioural advertising. By focusing on users' engagement, social media platforms' business models have contributed to accelerating the dissemination of various kinds of problematic content, including 'hate speech' or various forms of 'disinformation'. They have also provided spaces for new forms of online harassment, abuse, and intimidation of many users.

At the moment, many States around the world are looking for ways to address these problems through legislative and regulatory interventions. Worryingly, a number of these interventions might do more harm than good to users' rights, and could denature the internet as a free and open space for all. Many current proposals either focus on specific types of content (e.g. 'hate speech', 'disinformation', or 'terrorism');[1] adopt a 'follow the money' approach, concentrating on the relationships between social media platforms, news producers, and advertisers;[2] or combine a targeted intervention on selected services that digital platforms provide with a broader intervention on behaviours that platforms with a certain degree of market power put in place.[3]

What seems to be missing is a more far-reaching approach, which looks at not only content-moderation systems but also the market failures in social media markets that significantly amplify the challenges we face.

Some regulatory proposals that look at market failures focus on the phenomenon of 'gatekeeping'.[4] Gatekeepers control business actors' access to users and can raise barriers to entry for competitors. Other actors who want access to the same users, have to accept the conditions those gatekeepers impose. As such, they determine the competition dynamics in the market and the after-markets, and deprive users of viable alternatives. Regulatory initiatives in this area totally disregard, or inefficiently address, the fact that gatekeepers on social media markets (i.e. the large social media platforms) also have a strong impact on users' freedom of expression.

ARTICLE 19 is concerned that social media gatekeepers act as not only 'economic' gatekeepers but also 'human rights' gatekeepers. They impact how people exercise their rights in the digital ecosystem, in particular the right to freedom of expression and information and the right to privacy.[5] At a community level, social media platforms with high market power can also exert a decisive influence on public debate. This is due to recommender systems that online media outlets and social media platforms use, and the commercial relationship between these outlets and platforms. This raises concerns for diversity and pluralism online. It is of utmost importance that media freedom and media pluralism are as guaranteed online as they are offline.

We are therefore convinced that, to adequately address the current challenges related to content curation, one has to look beyond how content curation is – or should be – provided. Equal attention must be devoted to the market power of those providing content curation. Any regulation in this area must also address how platforms' behaviour influences the dynamics in the market where this service is provided. Addressing only content curation, or only platforms' behaviour on the market, will not efficiently solve the problems at stake.[6]

ARTICLE 19's recommendation for solving these problems is twofold:

- First, we insist that content-curation systems should comply with international standards on freedom of expression. We also believe that conditional immunity from liability for third-party content must be maintained, but its scope and notice and action procedures must be clarified. We address these issues in our separate comprehensive policies on internet intermediaries[7] and on platform regulation.[8]

- Second, we argue that market failures play a fundamental role in potentially all content-curation challenges, either as causes or as facilitating factors. These problems are addressed in this policy brief, where we offer a regulatory proposal to deal with them, relying on the use of a traditional pro-competitive regulatory tool.

This policy is divided into three parts:

- First, it sets out the applicable standards for positive obligations of States to promote the right to freedom of expression, particularly as it relates to a plurality of sources, market concentration, and exposure to diversity.

- Second, it lays down the key issues that arise in relation to content curation on social media platforms, where gatekeepers are the root cause of the problem.

- Third, it proposes a likely pro-competitive regulatory solution to solve or minimise the impact of those issues, and ARTICLE 19 makes recommendations for regulators and companies.

Applicable international human rights standards

Applicable international human rights standards

Guarantees to the right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR)[9] and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[10] Similar guarantees to the right to freedom of expression are further provided in the regional treaties.[11]

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive, or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice. In 2011, the UN Human Rights Committee, the treaty body monitoring States' compliance with the ICCPR, clarified that the right to freedom of expression also applies to all forms of electronic and internet-based modes of expression.[12] Similarly, the four special mandates on freedom of expression highlighted, in their 2011 Joint Declaration on Freedom of Expression and the Internet, that regulatory approaches in the telecommunications and broadcasting sectors could not simply be transferred to the internet.[13] In particular, they recommended the adoption of tailored approaches to address illegal content online, while pointing out that specific restrictions for material disseminated over the internet were unnecessary.[14]

Positive obligations to promote the right to freedom of expression

Importantly, under international human rights standards, States are under not only a so-called 'negative obligation' to refrain from violating the right to freedom of expression but also a 'positive obligation' to ensure the enjoyment of the right. This means that they must also take active steps to create an enabling environment for the enjoyment of the right to freedom of expression.[15] This includes, for instance, measures preventing monopolisation or undue media concentration, or ensuring that minority groups can make themselves heard through the media.

Risks posed by excessive concentration

Media concentration can undermine freedom of expression in a variety of ways.[16] A reduced number of media owners can result in a reduced diversity of viewpoints being permitted to express themselves through the media.[17] In addition, the economies of scale achieved by large media conglomerates also mean that smaller outlets have to reduce their expenditures and are no longer capable of supporting investigative journalism.[18] Moreover, advertisers will choose to go with the largest media conglomerates, further adding to the predicament of smaller competitors. Big players will then face no competition, which, in turn, can lead to a reduced level of quality and innovation, and higher prices for consumers.[19]

For these reasons, several international bodies have long recognised that the right to freedom of expression implies a duty for States to prevent excessive concentration in the media sector. Among others, the UN Commission on Human Rights has called on States to: 'encourage a diversity of ownership of media and of sources of information, including through … effective regulations on undue concentration of ownership of the media in the private sector.'[20]

In their 2002 Joint Declaration, the UN, Organization for Security and Co-operation in Europe, and Organization of American States special mandates on freedom of expression noted 'the threat posed by increasing concentration of ownership of the media and the means of communication, in particular to diversity and editorial independence.'[21]

Several international instruments further underline the duty of States to prevent media concentration. The African Declaration of Principles on Freedom of Expression and Access to Information calls on States to adopt effective measures to avoid undue concentration of media ownership, although such measures should not be so stringent that they inhibit the development of the media sector as a whole.[22]

Although internet intermediaries do not directly affect the plurality of media sources in the sector, they have a significant impact on the distribution of content and have the ability to influence the public debate. They can also affect the business models of traditional media and put their sustainability at risk.[23] Hence, excessive concentration on the social media market (i.e. at the content-distribution layer) can pose risks to concentration at the creation layer. For these reasons, the Council of Europe, in its 2018 Recommendation on media pluralism and transparency of media ownership, reminded States that they have an obligation to guarantee media pluralism on the current media markets, which include internet intermediaries.[24] The Council also reminded States that relevant regulation of the media should take into account the adverse impact that the possible anti-competitive behaviour of online gatekeepers can have on media pluralism.[25]

Exposure diversity

Currently, algorithm-based content-curation systems impact the diversity of content each user is exposed to. For instance, in his 2018 report to the General Assembly, the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression (Special Rapporteur on FoE) highlighted that algorithms of social media and search platforms determine how

widely, when, and with which audiences and individuals content is shared. He also highlighted that 'social media newsfeeds display content according to subjective assessments of how interesting or engaging content might be to a user; as a result, users might be offered little or no exposure to certain types of critical social or political stories and content posted to their platforms'.[26]

Because of the lack of transparency that surrounds the functioning of these systems, users are not aware that platforms reduce, limit, and shape what they can see. This interferes with their individual agency to seek and share ideas and opinions across ideological, political, and societal divisions. At a societal level, the reduction of exposure diversity has an enormous impact on the free flow of information, and contributes to the polarisation of discourse. To address this challenge, the Special Rapporteur on FoE recommended that companies signal to individuals where and when algorithms – and artificial intelligence more generally – play a role in displaying or moderating content, and give them the notice necessary to understand and address the impact of artificial intelligence systems on the enjoyment of their human rights.[27]

The Council of Europe has also dedicated attention to this phenomenon. The 2018 Recommendation on media pluralism calls on the Council of Europe Member States to 'improve the transparency of the processes of online distribution of media content, including automated processes; assess the impact of such processes on users' effective exposure to a broad diversity of media content; [and] seek to improve these distribution processes in order to enhance users' effective exposure to the broadest possible diversity of media content'.[28]

Key concepts and problems

Key concepts and problems

Content curation and moderation

In this policy, we use these key terms as follows:

- **Content curation** refers to the process of deciding which content should be presented to users (in terms of frequency, order, priority, discoverability, and so on), based on the platform's business model and design. It includes the promotion, demotion, and other forms of ranking of the content.[29] It should be noted that social media platforms curate content by using algorithmic recommendation systems, which tend to maximise users' engagement.

- **Content moderation** refers to removals or suspensions of content, or the cancellation or suspension of an account that a court or an independent adjudicatory body has declared illegal or that is not admitted under the platform's terms of services. Content moderation also includes content flagged as illegal or subject to removal notice.

Significant market power

It has been repeatedly affirmed that big social media platforms have too much power.[30] Market power is traditionally understood as the level of influence a company has on determining market price or other relevant aspects of a service or product.

Several existing regulatory frameworks deal with companies with significant market power, to which they attribute specific consequences and obligations. When rules are imposed only on players with a certain degree of market power, we refer to this as 'asymmetric regulation'.

Competition rules refer to the concept of 'dominance' to indicate a company with the de facto ability to prevent effective competition on the market and to behave in a manner independent of competitors, customers, and suppliers. Various thresholds are used to identify the dominant position, depending on the specific regulatory framework (for example, US rules define dominance in a slightly different way from the EU rules[31]). Some scholars have also developed the concept of 'significant media market power' to refer more specifically to the dynamics in the media sector.[32]

When looking at possible rules for determining significant market power of internet intermediaries, policy makers, regulators, and others have suggested various concepts, as well as various thresholds. These include 'very large online platforms' (defined based on the number of average monthly users – 45 million or more in the EU);[33] 'gatekeepers' (defined based on the combination of three quantitative parameters – annual turnover, average market capitalisation, and average monthly users – for at least three financial years);[34] 'significant market status';[35] and 'structuring digital platforms'.[36]

For the purposes of this policy, ARTICLE 19 suggests that the following factors, at the least, could be considered when assessing the degree of market power of each platform:

- the number of the platform's users;
- the platform's annual global turnover; and

- the platform's capacity to play a role in access to the market (gatekeeping) or the functioning of the market ('regulatory role').[37]

In this policy brief, the terms 'large' social media platforms and 'gatekeepers' refer to those platforms that show a certain degree of market power, according to the above factors – and that should therefore be subject to the asymmetric rules (see below).

High concentration, barriers to entry, and gatekeeping

Social media markets show high concentration and are dominated by only a few companies.[38] Moreover, social media markets present high barriers to entry and do not appear easily contestable. In other words, it is not easy for potential competitors, especially small local ones, to enter the market and challenge the incumbents' market power. Large social media platforms are more able to attract users than smaller platforms, because the number of users on a platform directly increases the benefits of that platform to the user. This network effect raises significant barriers to entry to competitors.

Large platforms also benefit from economies of scale: the incremental cost of a new user is very marginal in comparison to the large fixed costs to build the platform. The scope also favours large platforms; their presence across a range of services (hosting, instant messaging, etc.) allows them to accumulate vast amounts of data from consumers, which competitors without similar scope cannot collect.

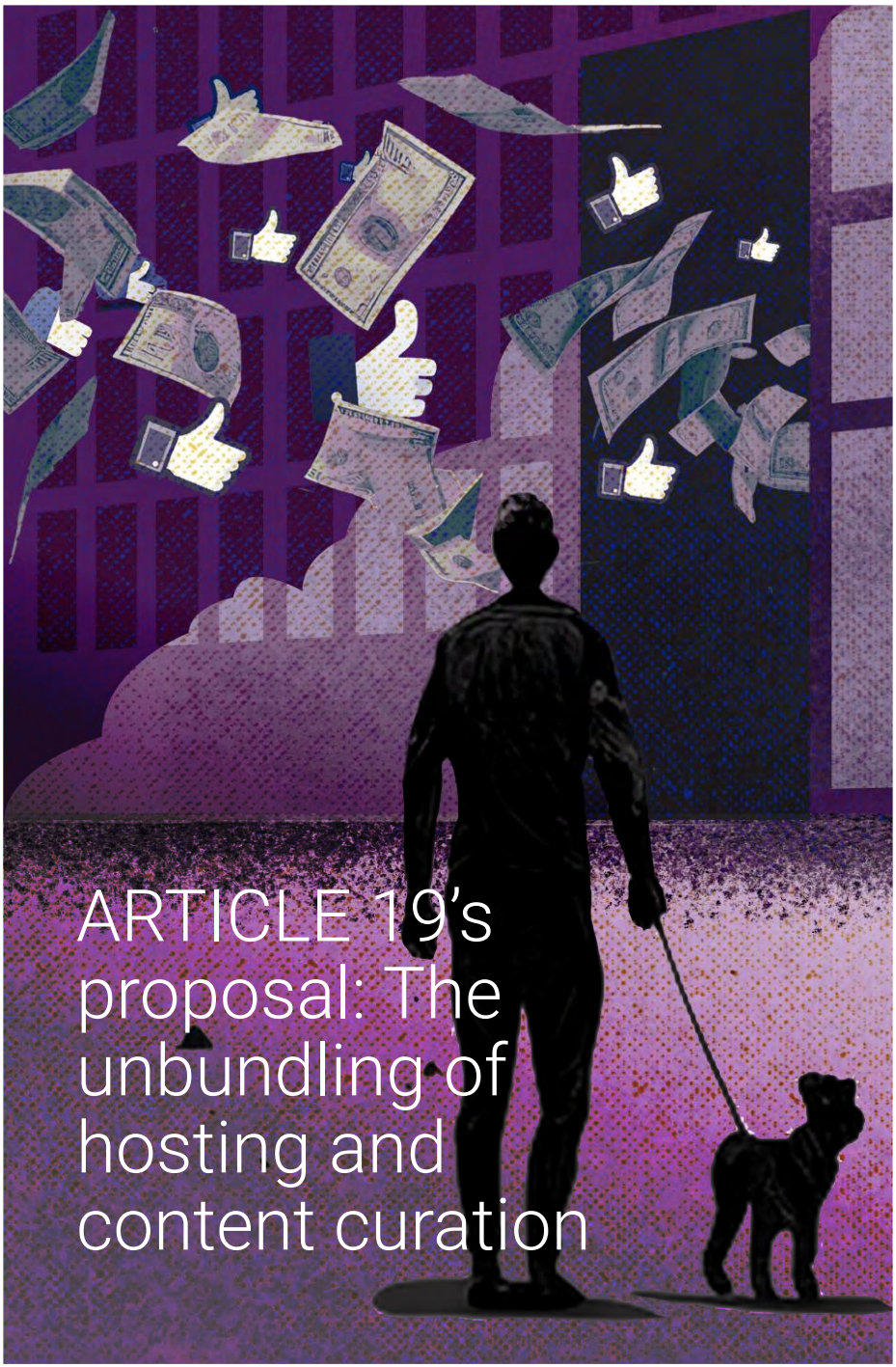
High concentration and barriers to entry shield large platforms from competition in the market, and these large platforms are able to act as gatekeepers. As such, they can exclude rivals or impede entry, control online advertisers' access to their users, and control users' access to online content via their content-curation algorithms.[39]

Social media gatekeepers can adopt business models and practices that are not driven by demand. They can also lower the quality of the content-curation service offered to users without suffering any competitive pressure. Users do not have viable alternatives, and platforms keep the costs of switching (including the time and effort needed to switch, the loss of contacts and connections, etc.) artificially high.[40]

As a result, existing gatekeeping social media companies manage to dictate content-curation rules in the market. Social media companies also constitute a bottleneck in the distribution of content, which greatly affects users' diversity of exposure. What is distributed by or shared on these few platforms is visible to a vast public, while what is not distributed by or shared on them might not be visible to the majority of individuals.

The gatekeepers' key role in distribution is ever-more problematic because these large platforms decide what to distribute based on a profit-maximisation logic. In other words, they promote the content that engages users the most, because they can then monetise users' attention with advertisers. Platforms have no incentive to expose users to all content potentially available – only to the tiny portion of it that will keep them more engaged.[41] Therefore, the platforms design their content-curation activities accordingly.[42] As a result, the personalisation of content is not performed based on criteria such as diversity of content or diversity of sources; instead, the platforms' end goal is maximising engagement and maximising profit. Hence, it can be argued that the algorithmic amplification optimised for engagement shrinks users' exposure diversity[43] and, at the societal level, has a strong impact on the flow of information, potentially being capable of influencing or dictating the agenda of public debate.[44]

To conclude, we argue that high concentration, barriers to entry, and gatekeeping positions on social media markets are important reasons why large platforms can adopt unsatisfactory content-curation practices and reduce users' exposure diversity without facing any significant trade-offs. Therefore, to guarantee freedom of expression and exposure diversity on those markets, we need not only content-curation standards based on international human rights but also measures to reduce market concentration, lower barriers to entry, and diminish and decentralise social media platforms' gatekeeping power. Only by combining these two lines of intervention can we adequately achieve our goals.



ARTICLE 19's proposal: The unbundling of hosting and content curation

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As we outlined earlier, high concentration in social media markets – coupled with consistent barriers to entry for competitors, and the gatekeeping role of large platforms – plays a fundamental role in the structural competition problems and freedom of expression challenges we need to address in those markets. ARTICLE 19 believes that, if we want to fix these problems, we must diminish the concentration of power in the market, lower the gatekeeping powers of large platforms, and reduce barriers to entry for alternative players.

There might be various instruments that could be used to achieve these objectives. ARTICLE 19 suggests doing this through the 'unbundling of hosting and content curation' activities on large platforms ('the unbundling of services').

The concept of 'the unbundling of hosting and content curation'

The vast majority of social media platforms provide hosting and curation activities as a 'bundle'. This means that two services – hosting a profile on the platform (with pictures, videos, and a variety of content that one can upload) and content curation – are offered together as one. The bundle has a strategic economic value for the platform; it also contributes to the 'lock in' of users, who do not look for the content-curation service outside the platform. By offering both services together, large social media platforms manage to both protect themselves from competitive pressure and deprive users of alternatives; they are able to hold their gatekeeping position safely. This does not need to be the case. It is not irreversible.

In practice, regulators should mandate platforms with a certain degree of market power to separate their hosting and content-curation functions, and to allow third parties to access their platform to provide content curation to users and allow users to freely decide, at any point in time, which content-curation service they want to use or switch to.[45]

For users, the unbundling of services would mean that, when they create or have a profile on a large platform (e.g. Facebook), they would be asked whether they want Facebook itself or other players (to be freely selected) to provide the content-curation service. In this way, users would be able to select content-curation services that address their concerns or preferences. The option to stay with the same platform should be presented as opt-in, rather than opt-out. We believe that opt-in default is more pro-competitive, overtakes users' bias towards the status quo, and reduces switching costs (and, therefore, it also avoids platforms undermining the effects of the unbundling by making it hard for users to switch and nudging them towards a locked-in situation).

The benefits of the unbundling of services

Our proposal of the unbundling of services on large platforms would be beneficial for the markets and companies, as well as for users:

- **For the markets**, the unbundling of services is a highly pro-competition remedy. It opens the market for content curation and relies on competition among players to deliver more choices and better-quality services to users, where the concept of quality includes the protection of privacy and other users' rights. The unbundling of services is also capable of addressing the current market failures. Importantly, this regulatory solution is not a novelty in the history of economic

regulation. On the contrary: it has often been used in network industries, and especially in the telecommunication sector, to enhance competition and stimulate market entry.

- **For the companies**, the imposition of the unbundling of services could diminish the excessive power of large social media platforms on social media markets and open the doors to new players providing competing services. It is less invasive or paternalistic than other instruments to address challenges related to content curation (these might include imposing specific curation policies or establishing 'must carry' obligations). It interferes with digital platforms' freedom of economic activities in only a limited way, as it is a form of functional separation only. It supports long-term, market-driven, sustainable outcomes for content curation, rather than involving a regulator's top-down requirements, which is often problematic when it comes to freedom of expression and media-diversity objectives.

- **For users**, the unbundling of services would provide more options and better services. Users would be able to pick the service that better fits their needs and desires, and to switch to another one if they are unsatisfied, or if a better service arrives to the market.

Key aspects of the proposal

The unbundling of services and human rights-based content curation

ARTICLE 19 recognises that diminishing the market power of large social media platforms, and decentralising and diversifying the landscape of content-curation services, is the first necessary step to protect free expression and media diversity on social media markets. However, all content-curation providers will have to be guided by international human rights standards while providing their services.

Therefore, the unbundling of services must be coupled with rules that set human rights- compliant standards for the provision of content curation that all players, not only large platforms, should implement. We envision the unbundling of services and human rights-based content-curation rules as cumulative solutions.

Importantly, the unbundling of services leaves liability rules, with regards to the moderation of illegal content, untouched. The liability would thus remain with the provider that matches the requirements to trigger it.

The unbundling of services and the protection of users' data and privacy

The unbundling of services has to be designed in a way that is compliant with data-protection and privacy rules. In practice, interoperability between the hosting provider and the content-curation provider will lead to additional processing and disclosure of data to additional entities (the content curators). An adequate system should be put in place to guarantee that consumers' data is collected, processed, stored, and used according to comprehensive data-protection rules and principles by all parties involved. The processing of personal data by third-party content curators should be strictly limited to what is needed to support interoperability. Additionally, the respective roles, relationships, and responsibilities of the joint data controllers (i.e. the hosting provider and the content-curation provider) regarding the data subject (i.e. the user) will have to be defined, and this information should then be made available to the user.

Finally, the unbundling of services should be designed in a way that empowers users and gives them back control of their data.

The unbundling of services and the need for interoperability

We are aware that there will be a number of technical aspects related to functional separation of hosting and content curation. To provide content curation on large social media platforms, third parties will need their service to interoperate with the platform.

A variety of technical options could be used to achieve the needed degree of interoperability.[46] For example, content curators could have access to these platforms' application programming interfaces (APIs), or be able to integrate their own API on the platforms. At present, all major social media platforms have their own APIs and provide app developers with access to them according to different conditions.

However, other options could be explored. We suggest inserting a reference to interoperability obligations in primary legislation, while the details can be worked out through an open and inclusive regulatory dialogue, including with civil society organisations. Industry standards could be relied on, provided that certain safeguards are guaranteed to avoid incumbents capturing the standardisation process, and that the need to respect human rights is duly considered in the process.

The unbundling of services and alternative platforms

Our suggestion for the unbundling of services is neutral with regards to the possibility of alternative platforms appearing. If a new player wants to set up its own platform (which would provide both hosting and content-curation activities), they would be free to do so. The unbundling of services would not create any additional obstacle. On the contrary, it might support the new platform to enter the market, to the extent that it makes users accustomed to choices, and thus more open to the possibility of switching providers.

The unbundling regime would not be an alternative to the support of community content creators and moderators. The two measures can – and should – coexist, and they complement each other in trying to guarantee more diversity in social media markets.

The unbundling of services and sustainability of alternative players

The way content is currently curated on large social media platforms is shaped by the advertising-driven business model,

based on massive data collection, profiling, and personalisation. Ideally, new players on the market should adopt alternative business models to present better choices for users. The key question, then, is how economically sustainable other business models may be, and whether there are incentives to stimulate their adoption.

We recognise that such business models might prove to be, at least in the short term, less competitive. However, we do not believe the extractive business model that large social media platforms use is the model we should maintain and replicate.

Evidence suggests that, in the sector, several alternative players are already emerging whose business model is not profit-oriented and whose services are significantly more in line with data-protection standards.[47] These players currently operate under many restraints, due to the market conditions and gatekeepers' behaviours highlighted in this policy brief, and would strongly benefit from the unbundling of services on large platforms. Other players could also be able to develop content-curation systems that respect users' rights and are able to contribute to public objectives like exposure diversity.

This is why we suggest that policy makers consider supporting alternative business models that not only aim to *extract* massive value but also *create* value, and could help to achieve public objectives like exposure diversity. The forms of support can vary, both in terms of the legal instrument used and the time frame (short- vs. long-term support). For instance, one way to promote alternative business models could be through public-funding support for a temporary period.

ARTICLE 19's recommendations

ARTICLE 19's recommendations

ARTICLE 19 proposes the unbundling of hosting and content curation on large platforms as a sound and efficient instrument to solve the challenges posed to human rights by the concentration and market power of certain platforms. This pro-competitive solution should encompass, at minimum, the following criteria.

Recommendation 1

States should introduce asymmetric regulation that imposes the unbundling between hosting and content curation on large platforms

ARTICLE 19 believes that regulation is needed because large platforms do not have sufficient incentives to implement the unbundling of services via self-regulation. On the contrary, they have plenty of incentives not to: the bundle has a strategic economic value; it contributes to locking in users, who will not look for content-curation services outside of the platform; and it raises barriers to entry to the market for potential competitors. Large platforms will not implement the unbundling of services unless they are mandated to.

Therefore, we propose that States adopt rules that would oblige social media platforms with significant market power to unbundle hosting and content-curation activities and allow third parties fair and non-discriminatory access to offer content curation to the platforms' users.

The option for users to stay with the same platform should be presented as opt-in, rather than opt-out. Opt-in default is more pro-competitive, overtakes users' bias towards the status quo, and reduces switching costs (and, therefore, it also avoids

platforms undermining the effects of the unbundling of services by making it hard for users to switch and nudging them towards a locked-in situation).

Recommendation 2

Independent regulatory authorities should enforce asymmetric regulation that imposes the unbundling of services

The unbundling of services obligations should be enforced by independent and accountable regulatory authorities, both in law and in practice. The rules should contain a definition of the degree of market power that triggers the asymmetric obligations, together with the thresholds to identify such market power.

The independent regulator should be tasked with performing this case-by-case assessment, based on the information provided by the platforms and collected on the market. However, the thresholds should be described with sufficient legal certainty that platforms are capable of making a self-assessment.

Recommendation 3

The unbundling of services should be shaped as a form of functional separation

We recommend a form of functional separation, not a structural one. The unbundling rules should oblige large platforms to separate the provision of the hosting service from the provision of the content-curation service. They should not oblige large platforms to separate the platform's assets that are used to provide one from those that are used to provide the other; for example, by obliging platforms to sell one of them. In other words, they do not imply a change in the platform's physical structure or assets.

In addition, we suggest the platform that provides the hosting should remain free to offer content curation, too. What would change is that it would keep the two services separate; allow competitors to offer their curation services on its platform; and allow users to freely choose, at any time, from a variety of content-curation providers.

Recommendation 4

Independent regulatory authorities should ensure that the unbundling rules are implemented in an effective way

The unbundling rules should be designed and implemented in a way that makes the remedy effective. There might be various ways to do so.

To help regulators in their tasks, we offer some preliminary recommendations:

- We suggest that platforms provide access to competitors based on fair, reasonable, transparent, and non-discriminatory grounds. We also suggest platforms should not be allowed to change the access conditions unilaterally in a way that nullifies competitors' efforts and investments.

- For the technical layer, the efficacy of the unbundling remedy is based on the adoption of interoperability solutions, whose details should be defined by the regulator and guided by independent experts with the relevant knowledge, and in cooperation with the platform, to deal with the substantial information asymmetries in the market. As mentioned, various types of interoperability already exist, and each of them could best fit different situations and needs.

Recommendation 5

Complementary human rights-based content- curation rules should be introduced

The unbundling of services should be coupled with rules that set human rights-compliant standards for the provision of content curation that all players, not only large platforms, would have to implement.

Importantly, these will have to be accompanied by transparency obligations and improved systems to resolve disputes over content curation.

To this extent, a better knowledge of how algorithms for content recommendation work would certainly be beneficial for making more informed decisions. There is still scope for additional research, the main obstacle to which appears to be lack of access to the information needed to perform it. Regulators could play a role here, too; for example, by obliging platforms and content curators to be more transparent about the automated systems they use and the business model that shapes their design, and obliging them to provide access to information and data for independent research.

Endnotes

Endnotes

(Click on the endnote number to read in context)

1 For 'hate speech', see e.g. NetzDG Law in Germany (Federal Law Gazette I, p.3352ff, version of 1 September 2017, valid from 1 October 2017) or the now-defunct French Draft Bill on Countering Online Hatred, (so-called Loi Avia, or Avia Bill, the Bill 388), initially adopted by the National Assembly on 2 January 2020 before being struck down by France's Constitutional Court (*Conseil d'État*); for 'disinformation', see e.g. ARTICLE 19, Malaysia: 'Anti-Fake News Act', April 2018.

2 For example, in April 2020 the Australian Government instructed the Australian Competition and Consumer Commission (ACCC) to develop a mandatory code to address commercial arrangements between digital platforms and news media businesses. The code will cover, inter alia, the sharing of data, ranking and display of news content, and the monetisation and the sharing of revenue generated from news. The mandatory code will also establish appropriate enforcement, penalty, and a binding dispute-resolution mechanism; see Joint media release with The Hon Paul Fletcher MP, Minister for Communications, Cyber Safety and the Arts, 20 April 2020.

3 For example, the European Commission's proposal for a Digital Services Act uses the concept of 'very large online platforms'; see European Commission, 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 COM (2020) 825 final, 2020/0361 (COD), Article 25. The European Commission's proposal for a Digital Markets Act refers to the concept of 'gatekeepers'; see the European Commission, Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) COM (2020) 842 final, 2020/0374 (COD), Article 3.

4 See e.g. the European Commission, Digital Markets Act, *op. cit.*; ACCC, Digital Platforms Inquiry, Final Report, June 2019; UK Competition and Markets Authority (CMA), Online platforms and digital advertising, Market Study Final report, 1 July 2020; Stigler Committee on Digital Platforms, Final Report, 2019.

5 ARTICLE 19 has repeatedly raised this point; see, inter alia, ARTICLE 19 submission to DG COMP call for contributions about 'Shaping Competition Policy in the Digital Area', September 2018; ARTICLE 19, EU: Joint statement on DG CNECT and DG COMP inception impact assessments, 30 June 2020.

6 See ARTICLE 19, US: A Capitol riot and Big Tech takes a stand: But it is the one we want?, 12 January 2021.

7 See ARTICLE 19, internet Intermediaries: Dilemma of Liability, 2013 and ARTICLE 19, Sidestepping Rights: Regulating Speech by Contract, 2018.

8 ARTICLE 19, Watching the watchmen: Content moderation, governance, and freedom of expression, 2021.

9 UN General Assembly, Universal Declaration of Human Rights, 1948 (217 [III] A).

10 UN General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, UN Treaty Series, vol. 999, p.171.

11 Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 September 1950; Article 9 of the African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981; Article 13 of the American Convention on Human Rights, 22 November 1969.

12 UN Human Rights Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, paras 12, 17, and 39.

13 UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on FoE), the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on freedom of expression, and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on freedom of expression and access to information, Joint Declaration on Freedom of Expression and the internet, June 2011.

14 *Ibid*.

15 *C.f.* Article 2 of the ICCPR.

16 See e.g. Council of Europe, Freedom of expression and information in the media in Europe, Report of the Committee on Culture, Science and Education, Doc. 9000, 19 March 2001; UN Special Rapporteur on FoE, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, and ACHPR Specia Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Media Independence and Diversity in the Digital Age, 2 May 2018.

17 See e.g. ARTICLE 19, Background paper 4 on freedom of expression and commercial issues, December 2007.

18 *Ibid*.

19 *Ibid*.

20 UN Commission on Human Rights, Resolution 2003/42, Section 6(a).

21 UN Special Rapporteur on FoE, OSCE Representative on Freedom of the Media, and OAS Special Rapporteur on Freedom of Expression, Joint Declaration on International Mechanisms for Promoting Freedom of Expression, 10 December 2002.

22 Declaration of Principles on Freedom of Expression and Access to Information in Africa, adopted by the African Commission on Human and Peoples' Rights at its 65th Ordinary Session, 21 October–10 November 2019, Banjul, the Gambia.

23 See e.g. Council of Europe Conference of Ministers Responsible for Media and Information Society, Artificial intelligence – intelligent politics: Challenges and opportunities for media and democracy, Final Declaration, 10–11 June 2021; M. Moore and D. Tambini (eds), *Regulating Big Tech: Policy Responses to Digital Dominance*, OUP, 2022.

24 Council of Europe, Recommendation CM/Rec(2018)1 of the Committee of Ministers to Member States on media pluralism and transparency of media ownership, adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies.

25 *Ibid.*, para 3.1.

26 Special Rapporteur on FoE, Report on artificial intelligence technologies and implications for freedom of expression and the information environment, A/73/348, 29 August 2018, para 10.

27 *Ibid*.

28 Council of Europe, CM/Rec (2018) 1, *op. cit*.

29 For a definition of content curation, see e.g. E. Mazzoni and D. Tambini, Prioritisation Uncovered: The Discoverability of Public Interest Content Online, Council of Europe Study, DGI(2020)19.

30 See e.g. D. Tambini and M. Moore (eds), *Digital Dominance: The Power of Google, Amazon, Facebook and Apple*, OUP, 2018; Pew Research Center, Most Americans say social media companies have too much power, influence in politics, 22 June 2020; N. Helberger, The political power of platforms: how current attempts to regulate misinformation amplify opinion power, *Digital Journalism*, 2020, vol. 8, no. 6, 842–854.

31 See Section 2 of the US Sherman Act and Article 102 of the Treaty of Functioning of the European Union. The EU electronic communications rules refer to the concept of 'significant market power'. A company is deemed to have this power if, either individually or jointly with others, it enjoys a position equivalent to dominance, namely a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers; see Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) Text with EEA relevance, Article 63.

32 M. Eli Noam, Online Video: Content Models, Emerging Market Structure, and Regulatory Policy Solutions, *TPRC47: The 47th Research Conference on Communication, Information and internet Policy 2019*, 26 July 2019.

33 European Commission, Digital Services Act, *op. cit*.

34 European Commission, Digital Markets Act, *op. cit*. The Proposal also provides the possibility for the European Commission to define a gatekeeper based on a case-by-case qualitative assessment if needed; see Article 3.

35 See e.g. Unlocking digital competition, Report of the Digital Competition Expert Panel, United Kingdom, March 2019; or CMA, Online platforms and digital advertising, *op. cit*.

36 See Competition Authority of France (*Autorité de la concurrence*), Contribution to the debate on competition policy and digital challenges, 19 February 2020.

37 ARTICLE 19, EU: Recommendations for the EU Digital Services Act, 21 April 2020, Recommendation 7.

38 The high level of concentration in digital platforms markets has been identified, among others, by the CMA in Online platforms and digital advertising, *op. cit.*, and Unlocking digital competition, *op. cit*.

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41 Studies demonstrate that the most engaging content is typically what Mark Zuckerberg called 'borderline'; that is, content that is sensationalist and provocative, including stories that appeal to our baser instincts and trigger outrage and fear. See M. Zuckerberg, A Blueprint for Content Governance and Enforcement, 2018; S. Vosoughi, D. Roy, and S. Aral, The spread of true and false news online, 2018, *Science*, vol. 359, issue 6380, pp. 1146-1151; Z. Tufecki, The Rial Bias Built in at Facebook, *The New York Times*, 16 May 2016. See also revelations of Frances Haugen in 2021 at e.g. Facebook Files, *Wall Street Journal* investigation, October 2021.

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44 For example, in Mexico the hashtags #PrensaSicaria, #PrensaCorrupta, and #PrensaProstituida have been used to build a narrative against journalists that includes a certain level of not only manipulation but also human interaction. See e.g. Signa_Lab, 'Ustedes cumplen con su trabajo': Andrés Manuel López Obrador, 4 December 2019. Another example concerns CLS strategies in Mexico, Bolivia, and Venezuela; see e.g. Facebook, August 2020 Coordinated inauthentic behaviour report, 1 September 2020. A third example is the use of bots on Twitter to try to hush Mexican activities; see e.g. Klint Finley, Pro-government Twitter bots try to hush Mexican activists, *Wired*, 23 August 2015.

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47 See, for example, YouChoose.AI.

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