



Task Force 05

**INCLUSIVE DIGITAL TRANSFORMATION**

## Tackling Human Rights gatekeeping in social media markets: the need for a pro-competitive solution to protect freedom of expression

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## Abstract

Nowadays, the right to freedom of expression and the exercise of human rights in digital spaces is centralized and controlled by a few companies with enormous economic power. In this policy brief, we address how these rights are being harmed by the excessive concentration on social media markets and present a solution for public regulators in the G20 discussion spaces to create better social media market conditions through economic regulation enforcement tools to harvest human-rights-compliant social media services.

Data-driven and attention-based business models applied on social media networks have the potential to enhance harmful practices, such as the dissemination of hate speech and disinformation. Since their business models are majorly based on the provision of services in bundles, this business strategy makes it almost impossible for other players with other business strategies to enter the market. As a result, the bundles shrink diversity in social media content, harm consumers, and entrench the market power of a few players. Since freedom of expression and other human rights can only be exercised through these companies, they act not only as economic gatekeepers but as human rights gatekeepers.

Based on previous G20 research and existing literature, we propose concrete regulatory solutions, such as the imposition of unbundling of hosting and curation services and open access obligations (supported by interoperability mandates) as a way to guarantee plural and diverse social media markets. We discuss how this remedy can achieve a few objectives at once: it sets the conditions for new players to enter the market; it supports the competitive dynamics among players, creating incentives for innovation and quality improvement (including concerning human rights' compliance); it empowers users, providing them with real choices.

**Keywords:** human rights; freedom of expression; competition; social media; interoperability; unbundling; economic power.

## Diagnosis of the Issue

The Internet is a necessary tool for the exercise of human rights and, principally, freedom of expression. Increasingly, it has become an integral part of people's lives: it affects their work, family, and social life, and aids in the construction of their own identity and societies<sup>1</sup>.

In that sense, Internet intermediaries as social media platforms exercise a crucial role in people's promotion of rights and freedoms: it helps us to reach pluralism and diversity by making it easier for users to, among others, express themselves, create communities, and search for information. However, these intermediaries can also be harmful: they might perpetuate the digital divide, violence, and censorship<sup>2</sup> when their actions and decisions on how they manage their spaces are based on business terms that are non-transparent and incompatible with human rights<sup>3</sup>.

These terms of service or community standards, policies, and alike of social media platforms, often built from a mainstream Western and Global perspective, privilege

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<sup>1</sup> Idec. Acesso à internet pelas classes C, D e E. Available at: <https://idec.org.br/pesquisas-acesso-internet>.

<sup>2</sup> Meta, for example, has been censoring Palestinian supportive content on its services. See more: Human Rights Watch. Meta's Broken Promises: Systemic Censorship of Palestine Content on Instagram and Facebook. Available at: <https://www.hrw.org/report/2023/12/21/metas-broken-promises/systemic-censorship-palestine-content-instagram-and>

<sup>3</sup> Incentives of virality and recommendation algorithms have been used as a commodity rather than a public good. This valuation of the information comes at the expense of quality journalism and directly affects the health of information environments. See more in OECD. Facts not Fakes: Tackling Disinformation, Strengthening Information Integrity. Available at: <https://www.oecd-ilibrary.org/sites/d909ff7a-en/#execsumm-d1e101-d197d98716>

visions or identities that blur or are apathetic to other contexts and realities and also determine which expressions are allowed or get more visibility in these spaces and by whom.

In that sense, the content moderation and removal decisions implemented by them - without adherence to international human rights standards - directly impact the right to equality, social mobilization, and the free circulation and access to information online. These actions are, above all, detrimental to local social demands and expressions since their effects are more abrupt and devastating when carried out against groups or populations who have been historically marginalized. Beyond that, it can be harmful to democracy, such as in the context of elections.

Also, because the business models of these companies rely on capturing the users' attention and selling it to advertisers, their content recommendation practices are designed to keep users engaged. Thus, they are not optimized to achieve diversity or plurality, but rather to push for content that maximizes engagement, including problematic or borderline content, and to remove or censor expressions based on profit-making considerations, too.

The situation is aggravated as decisions that affect millions of people are made by a handful of big intermediaries that hold concentrated economic and regulatory power. In this scenario, neither the self-regulation models applied by these powerful intermediaries nor some counter-productive restrictive legislations developed by states regarding digital platforms' are sufficient to effectively guarantee freedom of expression online.

First, counter-productive and intrusive regulations or free speech laws are not compliant with international standards on the right to freedom of expression and are particularly inclined to lead to censorship or propaganda (or both).

On an economic approach, one of the reasons for the lack of incumbents' incentives to improve the quality of their services, such in price terms or human rights protection terms, can be found in the absence of adequate self-regulation. There is no competitive pressure, and they are too big and powerful to be sensitive to public interest calls.

Nevertheless, the actions of these social media platforms have a profound impact on people's rights and society, thus it is necessary to establish mechanisms that mitigate risks and create guarantees for the exercise of human rights associated with their use. These measures also have the capability of leveraging digital innovations through inclusive and ethical considerations.

## Recommendations

The aim is to tame corporate power through economic regulation-related tools and pro-competitive solutions because of its negative impacts: high concentration, barriers for other providers to entry, and gatekeeping positions in social media markets. These are important reasons why a handful of powerful intermediaries can adopt content recommendation and moderation practices that are incompatible with human rights. Ultimately, users will be able to implement their agency on how they want to experience digital rights and freedoms.

The obligations we recommend have to be designed with a multistakeholder approach to discussion spaces as the G20 and not only by State actions but also with the private sector and civil society organizations.

We recommend the following:

### **1. Implementation of UN Guiding Principles on Business and Human Rights in Social Media Markets**

To respect international human rights law and standards, not only States but also every business actor, including in social media markets, should comply with the UN Guiding Principles on Business and Human Rights<sup>4</sup>.

To guarantee that these general principles are duly applied, some measures should be implemented. States should reinforce and protect freedom of expression in these digital

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<sup>4</sup> UN Office of the High Commissioner for Human Rights. 2011. “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.” [Digitallibrary.un.org](https://digitallibrary.un.org/record/720245?v=pdf). Available at: <https://digitallibrary.un.org/record/720245?v=pdf>.

spaces with their existing law obligations. Such rules should target both, how the services are provided on the market, and who holds power in the market. If the legal system is not sufficient to deal with the problem, a regulatory framework should be drawn up that both protects rights and stimulates competition and innovation in the markets.

Business actors should comply with international human rights standards on content curation and content moderation practices. All businesses, independent of their size, must adopt business models that present transparent human rights-compliant standards for the provision of content curation moderation. The business activities cannot be based on misleading information practices. Business actors should provide effective remedies in case of violation of user's rights. In addition, business actors should not exploit users nor exclude competitors from the market.

## **2. Implementation of adequate pro-competitive regulatory measures, such as unbundling services**

Preventing abuse of economic and political power by large digital companies through asymmetric regulation of digital platforms is essential to ensure competition in digital markets. The current regulatory framework has proved incapable of guaranteeing this outcome.

Asymmetric rules targeting the biggest companies that operate as gatekeepers should aim to lower barriers to entry and create conditions for new players to operate in the market. Interoperability mandates and mandatory unbundling and access obligations are the most effective remedies to do so.

With regards, in particular, to social media platforms, and to the challenges raised by content curation and moderation, we recommend imposing the unbundling of hosting and content curation services. Such unbundling should take the form of functional separation

so that the gatekeeper can continue to offer both services, but the latter should provide the possibility for other players to offer content curation services to users on their platforms.

For this to happen, we recommend putting in place interoperability mandates for the gatekeepers and obliging them to provide third-party players with open, fair, and non-discriminatory access to their platforms. To tackle users' tendency to stick to the *status quo*, we recommend that the option to use the content curation systems of the gatekeeper has to be presented as an opt-in, and not as a default. Finally, we remind that all players, including third-party ones, must provide their services in compliance with the UN Guiding Principles mentioned above.

Also, an autonomous and independent authority to monitor the effective implementation of the regulation is necessary to ensure that the competitive process is fair and promotes quality and innovation. The authority should have administrative, financial, and functional autonomy<sup>5</sup> and must be associated with a 'multi-sector council'<sup>6</sup>. This council could have the technicality with sufficient diversity to support the authorities' role.

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<sup>5</sup> Coalizao Direitos na Rede. Órgão independente de supervisão das plataformas é essencial, mas não pode ser Anatel. 28 abr. 2023. Available at: <https://direitosnarede.org.br/2023/04/28/orgao-independente-de-supervisao-das-plataformas-e-essencial-mas-nao-pode-ser-anatel/>.

<sup>6</sup> Conselho Gestor da Internet no Brasil. Sistematização das contribuições à consulta sobre regulação de plataformas digitais (2023). Available at: [https://cgi.br/media/docs/publicacoes/1/20240227162808/sistematizacao\\_consulta\\_regulacao\\_plataformas.pdf](https://cgi.br/media/docs/publicacoes/1/20240227162808/sistematizacao_consulta_regulacao_plataformas.pdf).



### **3. Adoption of a broader conception of harms and consumer welfare in antitrust analysis**

Antitrust traditionally focuses on economic harms and on the orthodox concept of “consumer welfare”, the interpretative paradigm of harms under antitrust law. This flexible paradigm is important to follow up with the dynamism of markets. Nevertheless, its pace can be insufficient to tackle significant issues in some markets, especially digital ones.

The consumer welfare orthodox paradigm focuses on two main elements: price and quality. That means the traditional analysis is that competition harms are economically measured by assessing price increases and/or degradation in terms of the quality of the products and services.

Nonetheless, when we are dealing with zero-price markets (such as social media on the consumer side of the platform) and with new variables, this analysis might be challenging. In digital markets, data (especially personal data) takes the central stage of the business models, but antitrust is not keeping up the pace of this analysis. Beyond that, the impact of concentrated economic power on consumers' rights, including human rights, must also be considered.

For this reason, in antitrust theories of harm, a broader spectrum of the conception of consumer harm has to be incorporated. It has to be not only related to price aspects but also data privacy-related aspects, or to the protection of human rights, as such parameters are part of the quality of the products and services. There is no space for applying the

consumer welfare standard based only on the traditional Chicago school theories when it comes to dealing with the economic concentration on digital markets<sup>7</sup>.

**4. The G20 must ensure that its countries apply the necessary changes for a pro-competitive solution to protect freedom of expression**

As we are dealing with global markets, these changes are most effective when applied on a large scale by different jurisdictions. Human Rights cannot have different standards to leave users less protected in different countries. Since information has no borders, international cooperation and coordination are necessary to fight against economic concentration and its negative effects on open markets and human rights.

G20 must use its mandate to develop appropriate standards for human rights and freedom of expression to be better protected in the digital environment, both through antitrust enforcement and regulation.

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<sup>7</sup> Hovenkamp, Herbert J. and Scott Morton, Fiona, "Framing the Chicago School of Antitrust Analysis" (2020). All Faculty Scholarship. 2113. [https://scholarship.law.upenn.edu/faculty\\_scholarship/2113](https://scholarship.law.upenn.edu/faculty_scholarship/2113).

## Scenario of outcomes



To put in place the recommendations above will, in the short and medium term, lead to the following scenario of outcomes:

### **1. The measures create a more diverse and decentralized market environment**

The imposition of pro-competitive measures reduces barriers to entry and opens the market for other agents in the content curation market. Those new agents can provide better services for the users in terms of offering different types of content curation that comply with the UN Guiding Principles on Business and Human Rights. The competition dynamics can be reinstalled and create many incentives such as:

- New players will be able to enter the market: with the segregation of the services, one market opportunity will arise from it. With openness, small entrepreneurs will be able to develop and design new forms of content curation according to the needs seen by them. And not only small players will be able to do it, but the other big ones too. They will have to improve their own services so they don't lose users. Also, other types of content curation models will be able to be developed by several types and sizes of businesses. This measure leverages digital innovations.
- Better quality services: with more actors on the market, more different types of business strategies will be able to urge and gain market power accordingly with their usage of their resources and efficiencies. Different actors bring different qualities to the service. With this plurality of players, users can use the ones that have better quality products, improving the competition environment with higher

levels of services than when it was monopolized by the gatekeepers. Also, the actors which

- Attract users to different models of service: due to network effects, the players who are more successful will attract more users. This condition creates more fairness in the competitive process because different agents will be able to succeed as well, not only the big ones.
- Lower the dependence of gatekeepers: with the arise of new competitors, the market power will be spread among other market actors. With more options on the market, the consumers don't depend only on the gatekeepers to access social media services and, consequently, exercising their freedom of expression and other rights.
- New business models: There will be the incentive to experiment new business models accordingly with the demand on social media services. This brings more possibilities for the users, who will benefit from variety of services instead of only one type.
- Human-rights compliant business models: As all players operating in the market will be called to respect the UN Guiding Principles, the quality improvements incentivized by competitive dynamics will include better protection of guarantee of users' human rights, such as privacy and the right to freedom of expression.

## 2. It will empower users, providing them with real choices

- With the unbundling and the opening of the market for content curation systems, users will be better off in a variety of ways:
- Rather than being locked in with the gatekeepers' services, they will be able to pick the services that better match their needs and preferences, and to change their choice easily and as often as they want.
- By having the possibility to easily switch between providers, users can abandon exploitative or abusive relationships imposed by the gatekeepers. The variety of choices provides users more choices for exercising their rights.
- The collectivity of users (demand side of the market) will regain some bargaining power towards providers of services (supply side of the market), so that supply will again be driven, at least in part, by demand. In other words, the direction of innovation and quality improvement will not only be decided by a gatekeeper but will again be part of a negotiation between users and providers.

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