

Newsletter

BRAZIL DESK

Social Media Regulation

A GLOBAL DEBATE INSPIRED BY
EUROPEAN REGULATION.



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The use of social media as a rallying point for an attack on Brazilian institutions - an escalation of acts in Brasília that began with the invasion of the Federal Police headquarters, followed by the placing of a bomb in a tanker truck near the airport, and culminated with the invasion of the three palaces of the Branches of Power of the Republic in anticipation of a coup d'état - has rekindled in the Brazilian government the urgency to tighten regulation of this activity.

Haste is never a good adviser, but it is worth reassuring those who fear that regulation may interfere with freedom of expression and opinion: not only does the Constitution expressly forbids prior censorship (art. 220, § 1 and 2, as well as art. 5, IX), but the aim of regulation is not to silence anyone's voice, but to create accountability mechanisms for crimes committed in the digital environment.

As a matter of fact, it should be remembered that freedom of speech and opinion are not absolute rights in any legal system, since they have their limits, which derive directly or indirectly from the Constitutions that institute them, since there are other fundamental rights, including the ones with collective repercussions, that deserve to be equally protected.

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In this regard, it is worth remembering that almost 20 years ago the Supreme Federal Court prohibited the publication of Nazi books, in a memorable decision by Justice Celso de Mello emphasizing that "the right to free expression of thought (..) is not absolute, as it is subject to ethical and legal limitations" and that "publications that abusively and criminally exceed the limits of scientific investigation and historical research, degrading themselves to the primary level of insult, offense and, above all, stimulus to intolerance and public hatred (...) do not deserve the dignity of the constitutional protection that ensures the freedom to manifest one's thoughts"[1].

After two decades, disinformation (or fake news, as it is commonly called) is the protagonist. It is true that disinformation, in and of itself, is nothing new. What is new is that in the digital age we are all subjected to such a great load of information that makes it more complex to understand the world we live in, a phenomenon that is aggravated by the flood of futile or inaccurate information superimposed over more relevant data. It is in this somewhat chaotic scenario that we form our opinions and our worldview with which we make decisions of great transcendence, which, as highlighted by Prof. Pedro López López[2] , can cause a democratic deficit.

Add to this the deliberate and malicious use of disinformation as a planned and structured tool as a concrete strategy with very precise political goals. Lee McIntyre [3] emphasizes that fake news is not simply fake news: it is deliberately false and created for a purpose, which can range from a not-so-offensive desire to leverage online audience to an act of powerful political sabotage.

[1] Habeas Corpus 82.424-2

[2] Derechos de información, medios de comunicación y democracia. Revista General de Información y Documentación, 11

[3] (2018). Post-truth. Massachusetts: Massachusetts Institute of Technology

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Certainly, Brazil is not isolated in facing the phenomenon of disinformation and other relevant issues arising from the digital environment. Therefore, as the country prepares to debate the issue with parliament and society, it is possible to reproduce good experiences consolidated in the European Community's Digital Services Act (Regulation EU 2022/2065), issued on October 19, 2022, which will come into force in February 2024.

From the very beginning, it is necessary to remember that the regulation of digital services is not limited to political and ideological aspects, since, recognizing that the population makes daily and intense use of online services, it is necessary to build a digital environment that is safe, predictable, and reliable for citizens. The following diagram illustrates the goals of regulation categorized by its addressees:

- **Citizens**: protection of fundamental rights/More choice, lower prices/Less exposure to illegal content
- **Service providers**: Legal certainty, harmonization of rules/Easier to start-up and scale-up in Europe
- **Business users**: More choice, lower prices/Access to EU-wide markets through platforms/Level-playing field against providers of illegal content
- **Society at large**: Greater democratic control and oversight over systemic platforms/Mitigation of systemic risks, such as manipulation or disinformation

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As we can see, there are many issues beyond the political arena that claim for an efficient regulation. However, given the urgency of the Brazilian issue and the evident vulnerability of our legal and institutional framework to deal with the torrent of malicious disinformation of which we have recently been victims, it is convenient to start addressing this challenge by taking the European example as a starting point.

The European Parliament's rule is a document of more than 100 pages, which obviously demands a much deeper and more detailed study than this introductory article, but even without attention to so many details it is already possible to highlight some relevant elements of the regulation that may inspire the Brazilian debate.

The first thing that draws attention is the division of digital service providers into 5 tiers, so that the obligations of the different online providers correspond to their role, size, and impact in the digital ecosystem:

- **Intermediary Services**, such as access providers, domain providers, etc;
- **Hosting Services**, such as cloud and webhosting services;
- **Online Platforms**, bringing together sellers and consumers such as online marketplaces, app stores, collaborative economy platforms and social media platforms;
- **Very Large Online Platforms**, which are those used by at least 45 million users and which therefore increase the risk of damage to society through the dissemination of illegal content.
- **Micro and Small Companies**, which while not exempt from liability, have a regulation proportional to their capacity and size.

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By segregating the obligations according to the size of each digital provider, the European legislation seeks to be stricter with providers with the potential to cause great damage. Thus, Very Large Online Platforms (Google, Facebook, Instagram, Twitter, Whatsapp, for example) and which are, to a large extent, the priority target of the Brazilian debate, are now required to:

- Have mechanisms for **risk management** and **crisis response**;
- Introduce a **compliance department** which, among other duties, must monitor **risks of dissemination of illegal content** or **speech with negative effects on civic issues or electoral processes**, so that **reasonable and effective measures** are employed to **mitigate these risks**;
- **Share data with authorities and investigators** when necessary to monitor and evaluate compliance with the regulation, respecting the protection of personal data and confidential information, especially trade secrets;
- Adopt an **internal complaint-handling system**, so that users, free of charge and electronically, can file complaints about illegal content or content incompatible with the terms and conditions of use, with a view to **suppressing the information, blocking access to it, or restricting its visibility**;
- Give priority to complaints addressed by **Trusted Flaggers**, which are entities certified by digital authorities as having specialized knowledge and specific skills for the purpose of **detecting, identifying and notifying** illegal content, which will submit their notifications diligently, accurately and objectively.

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As stated, the concerns of the European Regulation go far beyond the institutional issue. After all, the information society is now an essential part of citizens' daily lives, bringing new risks and new challenges for businesses, society, and states, all aggravated by the exponential growth of digital services. However, it is clear that a system aimed at crime prevention in general is effective for both state and private matters.

Just as European legislators have understood that regulation is the only effective way to ensure the creation and expansion of innovative digital services, creating requirements that allow for legal certainty, neutrality and a level playing field for business competition, there is renewed hope that Brazil will realize the relevance of establishing a regulation that allows for the flourishing of a digital ecosystem that is socially beneficial, induces innovation, refractory to crimes committed in the virtual environment and, above all, harmonious with constitutionally protected fundamental rights.

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