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Mexico: Proposed initiative on the regulation of social networks, impacts and considerations for companies.

On February 8, 2021, Ricardo Monreal Ávila, a senator from the party MORENA announced that he would present a legislative proposal to regulate social media in Mexico (the "proposal"). Even if the project has not been formally presented to the Mexican Congress, its content has already been made public.

One of its remarks is that it pretends to reform Article 3 of the Federal Law on Telecommunications and Broadcasting, more specifically, fractions LXI and LXII in order to add the concepts of Social Media Services and Relevant Social Media, which are defined in the proposal as the following:

"LXI. Social Media Service: service offered on the internet whose main functionality is to diffuse across the platform information generated by its own users, such as text, data, voice, images, videos, music, sounds or a combination of these with the purpose of informing, entertaining or educating.

LXII. Relevant Social Media: Those that count with a million or more subscribers or users, which makes it capable of generating a greater impact in the processes of social communication and in the legal sphere of the citizens."

Also, it pretends to reform fraction LXII of article 15 of the same law, searching to give the Federal Institute of Telecommunications (**FIT**)[1] the faculty to resolve about the authorizations of Title Six by adding Chapter Two, from article 175 Bis to article 175 Nonies, about the authorizations for social media services. Finally, it seeks to add content to Chapter Five's fifteenth title, as well as article 311 Bis, which covers the sanctions that come from violating freedom of speech in social media.

What does the initiative seek?

Just like the proposal mentions, it seeks to reform the Federal Law on Telecommunications and Broadcasting with the purpose of establishing general foundations and principles about freedom of speech protection in social media, as well as providing the necessary

[1] The FIT is an autonomous constitutional organ. Its main object is the efficient development of broadcasting and Telecommunications in Mexico by sticking to what is established in the Constitution. In order to achieve this, it will have to regulate, promote and supervise the use and exploitation of (i) the radioelectric spectrum, (ii) the telecommunications networks, and (iii) the lending of broadcasting and telecommunications public services. It must contemplate the inclusion of the interests, rights and behavior of the users and the audiences in the emission of regulatory policies, such as the development and the efficient competition in the sector of telecommunications and broadcasting. Also, it must do the corresponding labors in order to grant the equitable access to ITC's, including the internet, in order to collaborate in the development and growth of the society of information and knowledge.

faculties to the FIT in order to guarantee the access to this human right in the field of the cyberspace, and establishing clear limits to the owners of social media regarding the suspension and elimination of accounts, guaranteeing the legal certainty of its users and service providers.

Why the initiative should be modified?

Regulating social media is now a global trend. Nowadays, there are several attempts and incoming projects. However, it is worth mentioning that even if the legislation proposal that is being prompted in Mexico is included in these attempts, this one contains several issues that might represent severe obstacles for the operation of social media. Even worse, they could contradict the current Mexican legal framework, which is why discussing it and analyzing it thoroughly is very well needed.

What should concern us about the initiative?

Consequently, there are two concerning remarks, first of all, the wide definition that could allow to understand other elements of ITCs as social media, when they might not be it necessarily, and the second one, the law attributes faculties to the FTI to authorize Relevant Social Media to provide their services based on the use of the radio electrical specter.

Regarding the definition of social media, in article 3, fraction LXII of the law, there is a guideline that allows a social media to be considered as "relevant" if it has over a million users, justifying it on the social impact that its activity could imply.

With regards to it, it must be said that the mentioned number of users is extremely reduced, taking as a reference the European Union's *Digital Services Act*[2], which needs 45 million users or the equivalent to the 10% of the European population to consider a social media as relevant. Setting the standard in one million could be harmful to rising social media, which would be forced to fulfill the same requirements as other much larger ones.

The second matter that concern us, is the Title Six, Chapter II "About the authorizations for social media services", in respect thereof, it is important to warn about the unconstitutionality of these faculties, given that article 28 of the Mexican Constitution indicates that the faculties of the FTI are limited to the following four aspects: (i) the regulation and supervision of the radio electrical specter, (ii) the regulation of broadcasting services and telecommunication networks, (iii) the access to active and passive infrastructure and other essential inputs, and (iv) the regulation and supervision of economic competition in the fields of broadcasting and telecommunications.

[2] Available in the following link: https://ec.europa.eu/digital-single-market/en/digital-services-act-package

This means that they are the authorized concessionaires that provide internet access to those who are subject to the control and vigilance of the FIT, not the social media platforms who operate only through the internet which is a concessional service provided by others. In consequence, it can be affirmed that there are several omissions in the present section because in many cases, the user does not access social media through a connection linked to the radio electrical specter, not to mention that social media do not provide internet services by themselves.

The better option: A proposal between self-regulation and State accountability.

Consequently, a mixed proposal that presents the autoregulation of companies accompanied by a supervising power of the State in this matter would be one of the most viable options, since if we analyze the vast majority of regulations that are currently in force or are in the process of discussion have opted for similar models. From the most prohibitive as in China or Hungary, to the most advanced or liberal as in the United States and Germany.

This model of self-regulation, sanctioned by the authority, is for now the most accepted and viable at international level, since it effectively links the networks or platforms with social claims, makes the operation of these companies more efficient, and guarantees respect for the human rights of users by making available to them complaint mechanisms in the event of possible violations of their rights.

Another element that the draft bill does not address is the impact of social networks on national and citizen security. In this regard, according to Internet Statistics 2020, every 24 hours more than 400 million messages are sent through Twitter, more than 3,500 million posts are created on Facebook with more than 500,000 Gb of information linked to these posts, around 30 million photographs are uploaded to the network, and just over three hundred thousand million e-mails are sent daily[3]. So much information is shared on the networks that it is difficult to control whether its content is illegal or constitutes a risk to society, such as espionage, so the proposed initiative should contemplate efficient criteria in terms of national and citizen security.

Finally, the proposal should consider incorporating regulations on corporate governance, such as the remarkable efforts undertaken by Facebook with the creation of the Content Advisory Board[4], a body made up of 20 professionals specialized in human rights and freedom of speech, responsible for settling disputes arising from content reported in the regions where the social network operates; as well as the Twitter initiative called

[3] Global report on digital statistics, elaborated by *Hootsuite* and *We Are Social*, Digital Report. October 2020, Internet Statistics 2020.

[4] The Content Advisory Board was created in June 2019, to help Facebook answer some of the toughest questions about freedom of expression on the internet: what content to remove, what to keep and why, you can read about its integration and operation in the following link: https://oversightboard.com/

"Birdwatch[5]", which involves users in reporting content that is presumed false or generates disinformation, thus being a democratic and collaborative tool.

Other countries regulations.

In the European Union, in terms of personal data protection a good reference is the Digital Services Act as well as the General Data Protection Regulation (or General Data Protection, known by its acronym as GDPR in English or RGDP in Spanish), the latter going into effect on May 24, 2016, with compliance being mandatory as of May 25, 2018.[6].

Both regulations indicate that all companies must request the unequivocal consent of the users of the platforms to use their data, regardless of their country of origin or activity and must comply with it if they collect, store, process, use or manage any type of data of European Union citizens, meaning that any digital platform is obliged to comply with it.

The jurisprudence of the European Court of Human Rights has also addressed the issue. In the case of Cengiz and others vs. Turkey of December 01, 2015, the Court referred to the "collateral" effects of certain general blocking measures on the internet; specifically, the deprivation of the right to receive information as a result of the impossibility imposed by a court decision to access YouTube, which, in the case, was defined as "a video hosting website where users can post, view and share videos, and which undoubtedly constitutes an important means of exercising the freedom to receive and disseminate information and ideas", making it clear that social networks are vehicles or mechanisms of freedom of speech.

In the United States, there is the FOSTA (Fight Online Sex Trafficking Act) and the SESTA (Stop Enabling Sex Traffickers Act)[7]. These two laws of April 2018 aim to prevent human trafficking through social networks and websites. It should be noted that this law has not been free from controversy, as it does not differentiate human trafficking from sex work, restricting the freedom of sex workers to offer their services online. However, it is useful for the present given that it addresses the issue of government intervention to the specific, casuistic content that circulates through social networks and websites.

Likewise, SCOTUS set another precedent in Packingham v. North Carolina in June 19, 2017, when it addressed for the first time the constitutionality of legal limitations on access to networks such as Facebook and Twitter. In the ruling, it was stated that a fundamental principle of the First Amendment is that all people are guaranteed access to sites where they can "speak and listen, and then, upon reflection, speak and listen again." second, it

[5] It was created in October 2020 by Twitter in order to be able to make it easier to moderate disinformation that could be given in the platform. To know about its structure and how it works, click the following link: https://oversightboard.com/
[6] Official text of the GDPR / RGDP available for consultation in the following link: https://gdpr-info.eu/
[7] Available in the following link: https://www.govtrack.us/congress/bills/116/s3165/text

was argued that, by prohibiting sex offenders from using those websites, North Carolina "prevented them from accessing what for many people are the primary sources of news knowledge, of reading job postings, of sites where people talk and listen in the modern public square and those that allow exploration of the vast fields of human thought and knowledge," finding that it was the U.S. government that should bear the responsibility for the use of the networks, for their surveillance, but not arbitrarily and definitively prohibit that use.

In Germany[8], The Network Enforcement Law (better known as NetzDG) in one of the first precedents of social network content regulation. The law indicates the imposition of fines for failing to remove content considered as inciting of hate speech, fake news and defamatory messages or any other form of incitement to violence, with the social network itself being responsible for closely monitoring the uploaded content and removing it within 24 hours of being published, in order to avoid fines.[9].

The Spanish Constitutional Court in STC 27/2020[10], of February 24, 2020, recalled that "the increase in popularity of social networks has run parallel to the increase in the levels of content exchange through the network". Thus, users have gone from a stage in which they were considered mere consumers of content created by third parties, to one in which the contents are produced by themselves, becoming collaborative subjects, citizens who interact and put in common, in networks of trust, what they have, what they know or what they do; and who share, with a more or less numerous group of recipients, all kinds of images, information, data and opinions, whether their own or others, thus valuing the margins of freedom of social networks.

In Mexico.

There are also precedents on the matter in the resolutions of the Judiciary. The Supreme Court of Justice of the Nation, resolved in the amparo in review 1005/2018[11], that the contents shared in the accounts of public officials on social networks have public relevance and constitute information of general interest. In this regard, the Second Chamber of the Court ordered the attorney general of Veracruz to unblock the account of a journalist on the social network Twitter whom he had blocked for questioning him, since it considered that the blocking constituted an act of authority that implied an undue restriction to the communicator's right of access to information.

[8] Available in the following link: https://germanlawarchive.iuscomp.org/?p=1245
[9] Méndez López, Adalberto. "*Ombudsman Corporativo: Reflexiones sobre Derechos Humanos y Empresas*". Flores Editores. México, 2019. Pages 79-80.
[10] https://hj.tribunalconstitucional.es/es/Resolucion/Show/26246
[11] Amparo trial in review 1005/2018, Second Chamber of the Supreme Court of Justice of the Nation, available in the following link: https://www.scjn.gob.mx/sites/default/files/casos_relevantes/2019-11/Twitter.pdf

Takeaways.

The regulation of social networks, but especially of digital platforms is an inevitable regulatory trend worldwide which already exists in several countries and tends to accelerate considering that, at the same time, the need to regulate the impact of entrepreneurial activities that may produce human rights violations is being strongly promoted.

A mixed model that incorporates self-regulation system that are sanctioned and supervised by the State in the event of non-compliance or irresponsible use is the most acceptable model so far. However, it is worth mentioning that the discussion continues at the international level and new normative developments or regulatory schemes may appear in future years.

The foregoing leads to reflect that another great omission of the initiative is that of a proposed law on cybersecurity, which seeks, for example, to incorporate international instruments that are a reference in the matter, such as the Convention on Cybercrime or Budapest Convention and the Ibero-American Convention on Cooperation on Investigation and Securing of Evidence in Cybercrime Matters of the Member States of the Conference of Ministers of Justice of the Ibero-American Countries, instruments to which, although Mexico has joined, none of these has been ratified by the Mexican State.[12].

It is worth mentioning that the regulation of digital platforms is broader than that of social networks, however, they have a shared origin: the need to mitigate the adverse effects of their development in the sphere of human rights, such as freedom of speech, labor rights, privacy, among others.

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[12] ECIJA, "*Por qué el FBI está investigando a ZOOM? Anotaciones sobre privacidad y ciberseguridad en el contexto de las plataformas digitales de videoconferencias*"; 24 de abril de 2020. Available in the following link: https://ecija.com/sala-de-prensa/mexico-por-que-el-fbi-esta-investigando-a-zoom-anotaciones-sobre-privacidad-y-ciberseguridad-en-el-contexto-de-las-plataformas-digitales-de-videoconferencia/#_ftnref5