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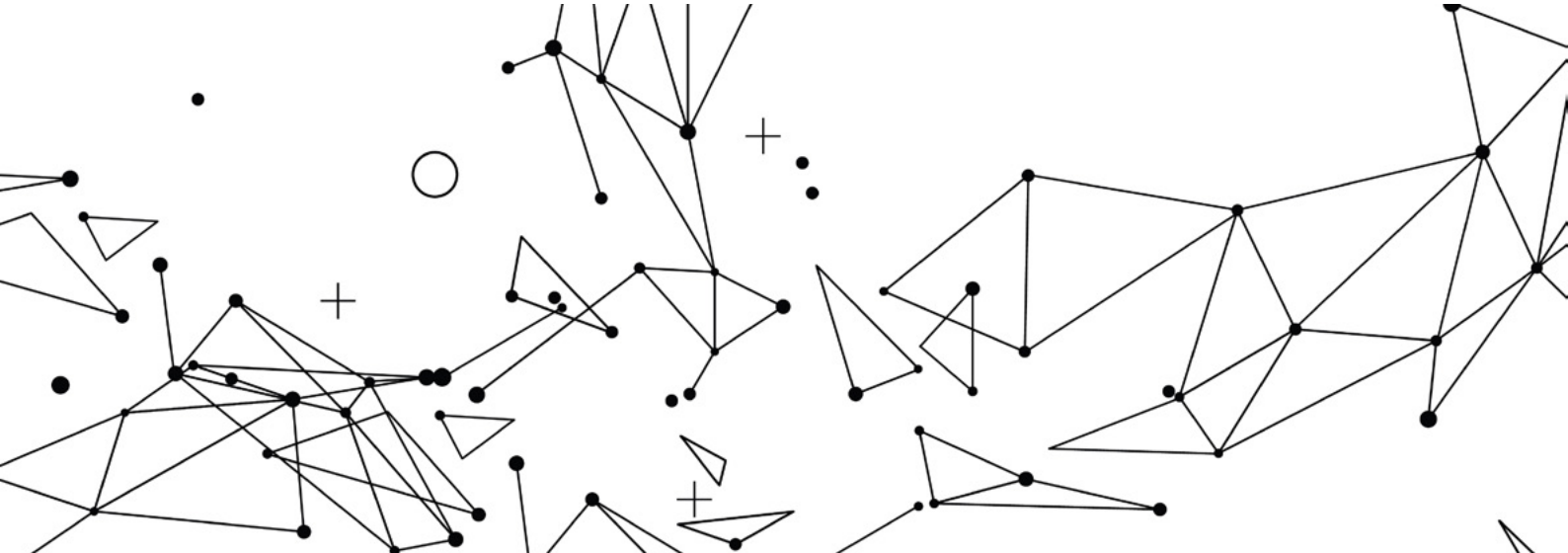
# DIALOGUES ON THE LIABILITY OF INTERNET INTERMEDIARIES: BRAZILIAN AND GERMAN SCENARIOS

Nathalia Sautchuk Patrício

## SUMÁRIO






# DIALOGUES ON THE LIABILITY OF INTERNET INTERMEDIARIES: BRAZILIAN AND GERMAN SCENARIOS

Nathalia Sautchuk Patrício[1]

**RESUMO**

Atualmente, um dos tópicos de política mais prementes no mundo é a responsabilidade de intermediários na Internet, especialmente, no que concerne às grandes plataformas de redes sociais. Em que medida esses intermediários devem ser responsáveis pelos conteúdos disponibilizados por terceiros ou atuarem na retirada de conteúdos tidos como ilícitos é uma discussão que deve levar em consideração aspectos que vão desde a liberdade de expressão, passando por segurança da informação, chegando até em segurança nacional. Por exemplo, a legislação brasileira adota um regime especial onde os intermediários da Internet, em geral, podem ser responsabilizados por danos decorrentes de conteúdo gerado por terceiros se, após ordem judicial específica, não tomarem as medidas cabíveis para indisponibilizar o conteúdo. Já a União Européia, através da *E-commerce Directive*, define algumas exceções na responsabilização de intermediários. Atualmente, a União Europeia está propondo rever esse regime de responsabilidades através do *Digital Service Act*. Já a Alemanha aprovou uma lei para lidar com discurso de ódio e desinformação, que trouxe algumas consequências na responsabilidade de intermediários. Além da *E-commerce Directive* e da NetzDG, o parlamento europeu aprovou recentemente a *Copyright Directive* e a Alemanha aprovou uma nova lei para lidar com a responsabilidade dos intermediários prevista nesta nova diretiva. O artigo propõe um diálogo entre Alemanha e Brasil, refletindo, a partir do debate sobre o atual cenário do regime de responsabilidade de intermediários nos dois países, as possíveis lições que podem ser aprendidas entre eles. O objetivo é fazer um mapeamento das tendências relacionadas à aplicação da responsabilidade de intermediários, por meio da análise desses dois países, além de ajudar a antecipar potenciais problemas a serem enfrentados em um futuro próximo.

**PALAVRAS-CHAVE**

Responsabilidade de intermediários; Moderação de conteúdo; *Copyright*; Bloqueio no DNS.

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**ABSTRACT**
Currently, one of the most pressing policy topics in the world is the liability of Internet intermediaries, especially with regard to large social media platforms. To what extent these intermediaries should be responsible for content made available by third parties or act to remove content deemed illegal is a discussion that should consider aspects ranging from freedom of expression, through information security, to national security. For example, the Brazilian legislation adopts a special regime where, as a general rule, Internet intermediaries can be liable for damages resulting from content generated by third parties if, after a specific court order, it does not take appropriate actions to make content unavailable. The European Union, through the E-commerce Directive, defines some exemptions in the liability of intermediaries. Nowadays, the European Union is proposing to review this liability regime through the Digital Service Act. Germany, in turn, has passed a law to deal with hate speech and disinformation, which had some consequences for the liability of intermediaries. In addition to the E-Commerce Directive and the NetzDG, the European parliament recently passed the Copyright Directive and Germany approved a new law to deal with the liability of intermediaries provided for in this new directive. The article proposes a dialogue between Germany and Brazil, reflecting, from the debate on the current scenario of the liability of intermediary's regime in both countries, the possible lessons that can be learned between them. The goal is to make a mapping of the tendencies related to the liability of Internet intermediaries, through the analysis of these two countries, as well as helping to anticipate potential problems to be faced in the near future.

**KEY WORDS**
Liability of network intermediaries; Content moderation; Copyright

## INTRODUCTION

Currently, one of the most pressing policy topics in the world is the liability of Internet intermediaries, especially with regard to large social media platforms. As Kurbalija (2016) says the intermediaries are increasingly called on to assist in the enforcement of legal rules, since they have a role in facilitating the transmission and availability of online content. Because of that, there are big debates, in which extension, intermediaries can be or not liable for the online content from third parties, and also what are their role in the containment of the dissemination of content considered to be disinformation and hate speech.

Organisation for Economic Co-operation and Development (OECD) defines Internet intermediaries as responsible for bringing "together or facilitate transactions between third parties on the Internet" (OECD, 2011, p.20). Another important point is that the intermediaries "give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties" (OECD, 2011, p.20).

The European Union was one of the first regions to be concerned with rules for digital spaces and published the E-commerce Directive as early as 2000. One of the effects of this regulation was the definition of three cases of exemptions for intermediaries: mere conduit, caching and hosting (Directive 2000/31/EC, 2000). In 2017, Germany has passed the NetzDG law that deals with hate speech and disinformation, but also brought consequences for the liability of intermediaries. More recently, NetzDG has undergone changes, with a view to giving bigger transparency to content moderation and access to right-wing extremism and hate crime content to investigative bodies. In addition to the E-Commerce Directive and the NetzDG, the European parliament recently passed the Copyright Directive and Germany approved a new law to deal with the liability of intermediaries provided for in this new directive. Finally, the European Union is proposing to review the liability regime set by the E-commerce Directive through the Digital Service Act, with obligations for different online players depending on their role, size and impact in the online ecosystem (Digital Service Act, 2020).

On the other hand, in Brazil, the Marco Civil Law of the Internet adopts a special regime where, as a general rule, Internet intermediaries can only be liable for damages resulting from content generated by third parties if, after a specific court order, it does not take appropriate actions to make content unavailable (LEMOS, 2017). In addition, a bill, already approved in the Senate, is being debated to combat disinformation. If it is approved, new responsibilities must be in force for large social networks and private messaging applications.

The paper aims to open a dialogue between Germany and Brazil, reflecting, from the debate on the liability of Internet intermediaries in both countries, the possible lessons that can be learned between them. The research questions which guide this reflection are: What are the main regulations that treat this subject in Brazil and Germany? What are the similarities and differences among them? Could Brazil and Germany learn with each other regarding the liability of Internet intermediaries? What risks can be anticipated through the debates that are taking place in Germany, and more generally in Europe, in a way that Brazil does not fall into the same traps when it comes to enforcing the liability of intermediaries from a regulatory point of view? Are there cases in which the regulations or their enforcement are a challenge to human rights? The goal is to make a mapping of the tendencies related to the liability of intermediaries, through the analysis of these two countries, as well as helping to anticipate potential problems to be faced in the near future.

The methods used are mostly comprised of literature review, document analysis and interviews. The collected data range from several documents, such as Directives, Laws, guidelines and reports from different bodies, to scientific and policy papers and interviews with different stakeholders from Brazil and Germany, including scholars, national telecommunication regulatory agencies, ccTLDs and gTLDs operators, Internet Service Providers and representatives from the civil society. The interviews helped to understand the scenario and also as a guide to which aspects are being debated most recurrently, as well as helping to identify the most important documents to focus on.

The paper will comprise three main sections. The first one will present fundamental concepts of the liability of Internet intermediaries as well as both Brazilian and German scenarios. The second section will reflect upon some highlights and risks that can be raised from the current German and Brazilian debates when it comes to the Internet intermediaries. Debates involving blocking at the DNS level, the fight against copyright infringement, hate speech and disinformation, and other points will be presented in this section. The last part will highlight what other countries could learn from the analysis of these two countries in this matter, and also discuss the challenges involved in these tracks, underscoring some possible scenarios for a near future.

## LIABILITY OF INTERNET INTERMEDIARIES

Most liability regimes were defined by OECD countries in the late 1990s and the early 2000s, especially for Internet Service Providers and hosts and, generally, they follow two main principles. First, intermediaries are not considered responsible for content produced or shared on the Internet by third parties and they do not have a general monitoring and surveillance obligation in order to prevent illegal activity. Second, intermediaries have specific obligations that differ among countries, which could include identifying users, preserving traffic data in response to qualified requests, removing content upon receipt of a valid notice, among others (OECD, 2011).

In order to regulate the liability of Internet intermediaries, many countries use some criteria to consider a type of intermediary as in some degree responsible for content from third parties. First, it is considering the level of passivity, which means that the more an intermediary act as a mere conduit, the less likely it will be considered responsible for actions of third parties. A second point is the nature of the relationship between generator of the content and the Internet intermediary, if a contractual relation-

ship exists or not. Another important characteristic is if any modification of the transmitted information is made by the intermediary. The knowledge of the illicit online content or activity is another criterion that will be considered. Finally, the last one is related to the speed with the intermediary acted when notified about illegal content (OECD, 2011).

Next, the scenarios of Germany and Brazil will be presented, which are countries that exercise a certain leadership in this theme within their respective regions.

*German scenario*

The European Union was one of the first regions to have some regulation with the publication of the E-commerce Directive as early as 2000. One of the effects of this regulation was the definition of three cases of exemptions for intermediaries. First, the mere conduit service consists in the information transmission in a network provided by a recipient of the service, or the provision of access to a network. In this scenario, the provider does not initiate the transmission, does not select the receiver of the transmission, as well as, does not select or modify the information contained in the transmission. Other exemption constitutes the automatic, intermediate and temporary information storage, with the purpose of a more efficient information's transmission to other recipients of the service upon their request, known as caching. In this case, the provider does not modify the information, complying with rules regarding the information update, specified in a manner widely recognised and used by industry. Moreover, it does not interfere with the use of technology, recognised and used by industry, to obtain data, and acts expeditiously to remove or to disable access to the stored information after discovering that the information at the initial transmission source has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal. Finally, hosting consists of the storage of information provided by a recipient of the service. It means that the provider is not liable for the content from third parties if it does not have actual knowledge of illegal activity or information and is not aware of facts or circumstances from which the illegal activity or information is apparent; or, after obtaining such knowledge, acts expeditiously to remove or to disable access to the information. In those three cases, there is not a general obligation to seek actively facts or circumstances indicating illegal activity (Directive 2000/31/EC, 2000).

Since the E-commerce Directive does not provide for a number of issues that emerged after its entry into force, many EU member states made their own national regulations to address specific issues and this has led to a scenario of regulatory fragmentation in the EU, inclusively increasing compliance costs for intermediaries operating cross-border. In this direction, the European Union is proposing a new regulation called Digital Service Act (DSA), which will, among other things, review the liability regime set by the E-commerce Directive, with obligations for different online players depending on their role, size and impact in the online ecosystem. Basically, in this regulation proposal the intermediaries will be divided into four groups, such as the ones that offers network infrastructure (Internet access providers and domain name registrars), hosting services (cloud and webhosting services), online platforms that bring together sellers and consumers (online marketplaces, app stores, collaborative economy platforms and social media platforms) and very large online platforms. DSA provides for different measures for different intermediaries, being these four applied for all of them: transparency reporting, requirements on terms of service due account of fundamental rights, cooperation with national authorities following orders and points of contact and, where necessary, legal representative. In addition to these obligations, very large online platforms also will have to comply with several others, among which it is worth mentioning: complaint and redress mechanism and out of court dispute settlement; trusted flaggers; reporting criminal offences; risk management obligations and compliance officer; external risk auditing and public accountability; transparency of recommender systems and user choice for access to information; and data sharing with authorities and researchers (Digital Service Act, 2020).

Another European regulation that brings new obligations to the Internet intermediaries is the Directive on copyright approved in 2019. This directive changes the liability regime of online content-sharing service providers[2]. The Directive (EU) 2019/790 on its article 17 says that providers need an authorisation from the rightsholders in order to make available to the public copyright-protected content. In case of an authorisation

[2] According to the Directive (EU) 2019/790 online content-sharing service providers are the ones that give public access to copyright-protected content which is uploaded by their users. There are some exemptions that are not considered as online content-sharing service providers: not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services.

is not granted, providers will be liable for unauthorised sharing of copyright-protected works even if they have been published by a third party. The providers can be exempted from the liability if they demonstrate that made best efforts to obtain an authorisation and to ensure the unavailability of specific works for which the rightsholders have provided the service providers with the relevant and necessary information; and in any event acted expeditiously, after receiving a sufficiently substantiated notice from the rightsholders, to disable access to the notified works (DIRECTIVE (EU) 2019/790).

Talking specifically about the German scenario, the most important legal development regarding this topic was the approval and the entry into force of the Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act, known as NetzDG). According to Kettemann (2019), the law incentives profit-making social networks, with at least two million registered users in Germany, to increasingly introduce measures of blocking, filtering and take-down of illegal content. The law says that "manifestly unlawful" content must be removed or blocked by the provider within 24 hours of receiving the complaint and 'simply' unlawful content within 7 days. "Unlawful" content is defined by law and encompasses several offenses under the German Criminal Code[3]. For this purpose, the law provides the obligation to maintain an effective and transparent procedure for handling complaints, as well as includes a reporting obligation for social networks that receive more than 100 complaints per calendar year, being published twice a year and including information on procedures for handling complaints, the number of complaints, the number of complaints that resulted in the deletion or blocking of the content, and the time between complaints being received and unlawful content being deleted or blocked, among other information (KETTEMANN, 2019).

[3] According to Kettemann (2019), this is the full list of illegal content ('section' refers to the Germany's criminal code): Section 86 (Dissemination of propaganda material of unconstitutional organisations), Section 86a (Using symbols of unconstitutional organisations), Section 89a (Preparation of a serious violent offence endangering the state), Section 91 (Encouraging the commission of a serious violent offence endangering the state), Section 100a (Treasonous forgery), Section 111 (Public incitement to crime), Section 126 (Breach of the public peace by threatening to commit offences), Section 129 (Forming criminal organisations), Section 129a (Forming terrorist organisations), Section 129b (Criminal and terrorist organisations abroad), Section 130 (Incitement to hatred), Section 131 (Dissemination of depictions of violence), Section 140 (Rewarding and approving of offences), Section 166 (Defamation of religions, religious and ideological associations), Section 184b (Distribution, acquisition and possession of child pornography) in conjunction with section 184d (Distribution of pornographic performances by broadcasting, media services or telecommunications services), Sections 185 to 187 (Insult, malicious gossip, defamation), Section 201a (Violation of intimate privacy by taking photographs), Section 241 (Threatening the commission of a felony), and Section 269 (Forgery of data intended to provide proof).

Since it came into force, the NetzDG was the subject of two legislative procedures. First, the Law to Combat Right-Wing Extremism and Hate Crime expanded the NetzDG to include a reporting obligation to combat right-wing extremism and hate crime, which came into force on April 3, 2021. In this scenario, social networks are obliged to report serious crimes to a central office at the Federal Criminal Police Office (BKA), transferring the content and the available data of the content author (including the last login IP) to the BKA. Second, the law amending the Network Enforcement Act (NetzDGÄndG), which came into force on June 28, 2021, has strengthened the rights of users in social networks, making the right of contesting content moderation decisions possible (GERMANY, 2021b).

A very recent development related to liability of intermediaries in Germany has to with obligation under the Copyright directive, which forced countries to pass or reform their national legislation within two years, implementing its provisions. The country decided to implement the provisions related to the article 17 into a new separate act from its national copyright act, the "Act on the Copyright Liability of Online Sharing Content Service Providers" (GERMANY, 2021), that started to be applied on August 1, 2021. This act relies on the concept of "uses presumably authorised by law" and the content has to fulfill the following cumulative criteria to be consider in this way: (1) the use must consist of less than 50% of the original protected work (except for images, which can be used in full); (2) the use must combine the parts of the protected work with other content, and (3) the use must be either minor (less than 15 seconds of audio or video, 160 characters of text or 125 kB of graphics that don't generate significant revenues) or has been flagged by the user as falling under a copyright exception. In this case, the content cannot be automatically blocked in the platform.

*Brazilian scenario*

Reflecting on the Brazilian scenario, one of the first developments in this matter was the publication of the 'Principles for the governance and use of the Internet' by the Brazilian Internet Steering Committee (CGI.br) in 2009, which mentions the non-liability of network intermediaries as one of the ten principles. CGI.br Decalogue says that:

> all action taken against illicit activity on the network must be aimed at those directly responsible for such activities, and not at the means of access and transport, always upholding the fundamental principles of freedom, privacy and the respect for human rights (Brazilian Internet Steering Committee, 2009).

CGI.br's principles brought a set of values for the Internet in Brazil and they ended up influencing the regulation, with several of them being adopted within the law approved in 2014, the Marco Civil Law of the Internet in Brazil. Regarding liability of Internet intermediaries, the legislation deals with two different actors: Internet Service Providers (ISPs) and application providers. According to Santos (2020), ISPs are absolutely exempted from liability for content of third parties.

On the other hand, Marco Civil adopts a special regime where, as a general rule, application providers can only be liable for damages resulting from content generated by third parties if, after a specific court order, it does not take appropriate actions to make content unavailable by the stipulated deadline. This general rule has two exemptions. The first one is related to copyright infringements. As Souza (2017) points out, Marco Civil did not change the established practice of sending out notifications for the removal of copyrighted material made available in the platforms without authorization, as set by the Brazilian Copyright Act. Santos (2020) adds also that if an application provider makes certain content unavailable to its users by a copyright issue, it must notify the user who published it, in order to allow them to appeal to the Court in case of disagreement with the removal of the content. The other exemption has to do with a practice called revenge porn, that happens when content (images, videos, and other materials containing nudity or sexual acts of a private nature) is published without the participants' authorization, representing violation of privacy resulting from the disclosure. In this case, application providers will be considered liable, if after receiving notice from the participant or their legal representative, they fail to expeditiously remove the content from its service, taking into consideration their technical limitations (LEMOS, 2017).

The Marco Civil Law of the Internet does not mention content moderation based on terms of use of the services. As Souza (2017) says the law does not prevent application providers from determining their own requirements for content removal once notified by the alleged victims for damages arising out of content made available through their platforms. He also reinforces that providers are not obliged to do any removal without judicial request, in order to avoid creating incentives for private censorship (SOUZA, 2017). However, regarding their own acts, such as the individual and autonomous decision, even if based on terms of use, to suppress certain online content, application

providers are subject to the general liability regime provided for in the Brazilian Civil Code[4] (SANTOS, 2020).

Currently in Brazil, a new legislation is being discussed that focuses on combating disinformation through social networks and private messaging applications. The bill, called Brazilian Law of Freedom, Responsibility and Transparency on the Internet, commonly referred as "the Disinformation Bill", which has already been approved in the Federal Senate and is currently in debate in the Chamber of Deputies, provides for new responsibilities for Internet intermediaries in the application layer. Some of the new obligations for social networks will be the identification of automated accounts, which will not be prohibited per se, but it must be clear that these are not personal or institutional accounts. In the case of private messaging providers, they will also have new obligations. Upon request of the judicial authority, they must store and make the user's interaction, for a period of up to 15 days, available to the criminal investigation bodies. Another point is that these types of providers will have to design their platforms in a way to prevent the massive distribution of content and media, including the need for the previous consent of the user for inclusion in message groups, broadcast lists, or equivalent mechanisms for grouping users and the prohibition of the sale of software, plugins and any other technologies that allow massive message forwarding in the services of instant messaging (BRASIL, 2020).

## HIGHLIGHTS AND RISKS IN BRAZIL AND GERMANY

Analyzing the main discussions regarding Internet intermediaries, it is possible to identify some highlights and points of attention both in Brazil and Germany. In this section, it would be discussed some of them.

*Blocking content at the DNS level in Germany*

From the current German debate, one point that draws attention is the fight against copyright infringements. As Kurtz, Do Carmo e Vieira (2021) says, Germany is

[4] In the Brazilian Civil Code, the following articles are applied in this case:
Art. 186. Anyone who, by voluntary action or omission, negligence or recklessness, violates law and causes harm to others, even if exclusively moral, commits an illicit act.
Art. 187. The holder of a right that, when exercising it, manifestly exceeds the limits for its economic or social purpose, for good faith or for social mores, also commits an illicit act.
Art. 188. Do not constitute illicit acts:
I - those practiced in self-defense or in the regular exercise of a recognized right;
II - deterioration or destruction of someone else's thing, or injury to a person, in order to remove imminent danger. (BRASIL, 2002)

internationally known for its national legislation emphasis to the defense of copyright, being notoriously rigid and one of the most extensive on the subject.

In order to combat the sharing of copyrighted materials on the Internet without the proper recognized rights, especially through illegal streaming platforms, the blocking directly at the DNS level, without an express court order, is being used in the country. Early this year, an initiative called Online Copyright Clearance System (CUII) was released by the copyright industry. This initiative is voluntary and has as participants associations representing the music, cinema, games and scientific publications sectors, as well as all major ISPs in Germany. Basically, the goal is to implement DNS blocking more effectively and quickly to make it more difficult to access websites that infringe copyright. The foundation behind this is a recent German jurisprudence, according to which rightsholders can, in certain circumstances, ask ISPs to block access to websites that illegally make their copyrighted works available (CUII, s.d.).

According to CUII (s.d.), DNS blocking requests must first be examined by a three-person committee based on the criteria established by the jurisprudence, which means it will be examined if it is clear that a lawsuit against the provider of the illegal content has no chance of success. If the decision is unanimous by blocking the DNS, the recommendation of this committee should then be forwarded to the Bundesnetzagentur (Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway). The agency will analyze whether the recommendation can be implemented in compliance with the net neutrality aspect and express its opinion in an informal statement. If the Bundesnetzagentur does not express any concern, ISPs will block the respective domains in the DNS. Obviously, DNS blocking is implemented voluntarily by ISPs in this case.

This measure raises concerns on the human rights as well as on the free market. Beckedahl (2021) says that DNS blocking is one of the most popular means of building a censorship infrastructure and its use in democratic states normalizes this instrument. As happened in the case of the NetzDG, authoritarian governments can use Germany as a role model to pass real censorship laws in their countries. In addition, once control instruments are introduced, they usually no longer withdrawn, but expanded (BECKEDAHL, 2021; REDA, 2021). One example is the child protection in Germany. Child protection associations have been looking for ways to ‘motivate’ uncooperative porn platform operators to adhere to youth protection rules by threatening to block the

network. In this sense, CUII can be used as inspiration for the establishment of a new clearing house for this purpose (BECKEDAHL, 2021). Reda (2021) adds also that is important to think whether the agreement between ISPs and entertainment industry associations for the purpose of network blocking is compatible with the rules for fair competition and antitrust. In this context, CUII can be seen as a privatized legal enforcement body, not being an independent court or authority that decides which websites is classified as illegal. Ultimately, CUII is occupied by competitors from these streaming portals, that alleged sharing illegal copyrighted content, which is a clear conflict of interest (REDA, 2021).

An interesting point to add is that, despite being used to prevent access to illegal content, the blocking in the DNS level is not very effective for this purpose. In this direction, ISOC (2017) alert around some drawbacks related to blocking content in the infrastructure level, such as that the measures are easily circumvented and do not solve the problem, causing potential collateral damage (like blocking legal materials); they can put users at-risk (when users try to use alternative and non-standard approaches to reach the content); they encourage lack of transparency; they can lead the establishment of "underground" services (when the content is moved to the Dark Web or users access the content through VPNs); they intrude on privacy (since many measures for content blocking require the examination of the user´s traffic); and they raise human rights and due process concerns (like necessity, proportionality and freedom of expression concerns).

*Fight against Copyright infringement in the platforms*

The new Copyright directive approved in the European Union brought many debates, especially in relation to article 17. From the point of view of many experts, basically, this article implements an obligation to monitor what users are posting on the online platform. Since this duty aims specially to target large commercial platforms which make the sharing a huge amount of third-party content possible, this practically leads to the use of automated tools for filtering content to be posted on platforms, known popularly as upload filters, such as the Content ID tool used by YouTube[5]. Reda, Selinger and Serviatus

[5] According to its website, Content ID is YouTube's software system built to help content owners to find copies of their work on the platform. First, content owners send audio or visual reference files that identify their works. Then, the Content ID creates a 'fingerprint' from these files and keep in a database. The Content ID scans videos on YouTube against these fingerprints, recognizing audio, video

(2020) warn that article 17 “fails to strike a fair balance between the right to intellectual property of rightsholders and the freedom of expression and information of users, their right to privacy and the freedom to conduct a business of platform operators”.

Regarding the solution adopted by Germany to implement the obligations of article 17 locally, the “Act on the Copyright Liability of Online Sharing Content Service Providers” (GERMANY, 2021a), the idea was to assure that the use of upload filters does not result in automatic blocking of legal content, relying on the concept of “uses presumably authorised by law”. When the content fulfills in the criteria adopted in the legislation, it can stay online. Rightsholders can ask for review of the legality of such uses but platforms have to keep the uploads online until those complaints have been passed through a human review (Communia Association, 2021; EDRi, s.d.).

*Fight against hate speech and disinformation*

The NetzDG legislation has also sparked discussions about its implementation. According to Kettemann (2019), the main points of critique are related to the imposed timeframes and the internal procedures for removing content. Since a list of offenses are provided and according to which content must be removed or blocked, “the German authorities are de facto demanding that intermediaries restrict access to content but do not provide for the necessary time for a legal challenge or appeal procedure” (KETTEMANN, 2019). These provisions oppose the 2018 Council of Europe Recommendation on roles and responsibilities of internet intermediaries, which encourages states to obtain “an order by a judicial authority or other independent administrative authority, whose decisions are subject to judicial review, when demanding intermediaries to restrict access to content”. As Kurtz, Do Carmo e Vieira (2021) point out, the volume of published content that are reported on the platforms would make the use of automatized filters the only viable way to comply with these rules. This scenario can lead to a content overblocking by platforms, being a serious threat to the freedom of expression online.

Regarding the expansions in the scope of the NetzDG, they raise new concerns. Kurtz, Do Carmo e Vieira (2021) says that they amplify the responsibilities of these digital platforms, which are, ultimately, private companies, rather than a government oversight

and even melodies, to find possible matches. When the system finds a match, the content owner can block the content, can monetize the video or can track viewer data to get detailed analytics (YouTube Help, s.d).

structure. Regarding the political extremism and hate crime, the law provides fines for platforms that fail to report criminal activities to law enforcement authorities, but there are no repercussions for platforms that mistakenly report legal content (KURTZ; DO CARMO; VIEIRA, 2021). In this context, Google is currently challenging the expanded version of NetzDG in a German court, arguing that the platforms are being forced to transfer user data in mass without a court order, based only on suspicion of committing a crime. The company also argues that data of innocent people could end up in a crime database without their knowledge (BUSVINE, 2021). Another point that Polido (2020) brings is that, in many countries with authoritarian and anti-democratic regimes, the NetzDG is used to legitimize statements and shape laws passed to control the internet and user behavior, as well as monitor and persecute citizens and political opponents.

Speaking of the use of NetzDG to legitimize laws in other countries, the “Disinformation Bill” from Brazil is said to be inspired by the German law. Among the points clearly inspired by NetzDG is the application of the Brazilian bill only to platforms with more than 2 million users in the country, exempting journalistic companies. Another similar point has to do with the possibility of fines for companies (up to 10% of sales in Brazil) in case of non-compliance with the law and also by forcing them to produce quarterly transparency reports. The new legislation also brings the principle called “regulated self-regulation”, that is inspired by German law (SCHREIBER, 2020).

Reflecting on the advances that NetzDG brings and the Brazilian bill can bring, it is possible to say that both have a focus on transparency, with very detailed provisions. For example, in the Brazilian case, the Disinformation Bill asks for platforms to publish quarterly reports with data, such as the total number of moderation measures adopted due to the compliance with their own terms of use, the Law and court order, specifying the motivation and methodology used in detecting the irregularity and the type of measure adopted, as well as the total number of automated accounts, artificial distribution networks detected by the provider, with the corresponding measures adopted and their motivations and methodology for detecting the irregularity, among other. The law also provides for advertising and sponsored content to be indicated in a transparent manner, with additional data when it comes to electoral propaganda (BRASIL, 2020).

Another interesting point in both countries is the differentiation between small and large platforms, bringing heavier obligations to the larger ones. The Marco Civil Law of the Internet does not mention this parameter when it comes to liability of inter-

mediaries, being consider only in a concrete case law. However, the bill under discussion brings this distinction, being applied only to large platforms.

In the Brazilian case, the Disinformation bill has an interesting point that is the institution of a multistakeholder chamber under the auspices of CGI.br, which has among its responsibilities to draw up guidelines for the formulation of code of conduct for social networks and private messaging services, certify the codes of conduct of the platforms, evaluate the data contained in the transparency reports, evaluate the moderation procedures adopted by the social network providers, among many other duties (BRASIL, 2020). In Germany, such kind of multistakeholder structure does not exist.

*Other points*

A point to be raised in relation to the liability of Internet intermediaries is that both European regulation and Brazilian legislation have gaps in relation to some activities within the Internet ecosystem. In the Brazilian case, there is a breach regarding the liability of Top-Level Domains (TLDs) registries[6], the Brazilian Network Information Center (NIC.br)[7], transit providers[8] and Content Delivery Networks (CDNs)[9]. In the European context, transit providers can be classified as a mere conduit and CDNs as caching, being exempt from liability for third-party content. However, TLDs and the RIPE NCC[10] are in a loophole in the legislation. There is a current debate with the Digital Service Act

[6] A Top-Level Domain (TLD) registry provides domain name resolution services by running and maintaining the name server infrastructure needed to answer queries for its part of the hierarchy. It also provides registration services to registrars (and sometimes registrants). These services include operations on the records in that registry's database, such create or cancel a domain name, update of a name server, etc. A TLD registry also manages the zone file, a subset of its database, which holds the domain names and their associated name server information. Information about the registrant and contacts for technical and administrative issues related to a domain name can be queried via WHOIS, a directory service maintained by the registry (CENTR, s.d.). There are two types of TLDs: ccTLDs (Country Code Top-Level Domain) and gTLDs (Generic Top-Level Domains).

[7] Network Information Centers are responsible for making the allocation of IPv4 and IPv6 addresses (Internet Protocol, in versions 4 and 6) and distribution of Autonomous Systems Numbers (ASN) to the networks. NIC.br is the Brazilian one that makes this function in the country.

[8] A transit provider is an ISP that provides transit to customers (normally other ISPs or customer networks) as a paid transport service, offering access to every publicly reachable destination on the Internet (Thousand Eyes, s.d).

[9] According to Cloudflare (s.d.), a CDN "refers to a geographically distributed group of servers which work together to provide fast delivery of Internet content".

[10] The Réseaux IP Européens Network Coordination Centre (RIPE NCC) is one of five Regional Internet Registries (RIRs) providing Internet resource allocations (such as of IPv4 and IPv6 addresses and ASNs), registration services and coordination activities for Europe, the Middle East and parts of Central Asia. (RIPE NCC, 2018).

for an explicit liability exemption for the technical auxiliary function performed by DNS service providers (CENTR, 2021).

## CONCLUSIONS

As Germany is the largest market in the European Union and Brazil the largest one in Latin America, the two countries have a certain regional leadership in Internet Policy debates, although there is a fundamental difference in the fact that Germany needs also to comply with the European regulations. In recent years, it is possible to note that, in both countries, there has been an increase in debates related to the liability of Internet intermediaries, especially focused on large social media platforms.

Despite the two countries are trying to implement the principle called “regulated self-regulation”, a point of concern in both is the increase of intermediary’s responsibilities, which would eventually lead to a scenario in which the judgment of illicit content and practices would be excessively in the hands of platforms, which are ultimately private companies. Brazil has more safeguards in this regard, by providing for the need for a court order in many cases, while Germany adopts the notice and take down provision with a predetermined response time. In addition, a Clearing System was implemented in Germany, which provides for a completely private mechanism for judging and removing domains directly from the DNS system.

Despite some similarities, it is possible to see that, while in Germany there is a focus on trying to combat especially hate speech on social media, Brazil is more concerned about disinformation, especially thinking about attacks on democracy institutions in the country and health issues (that increases during the COVID pandemic). In addition, Germany has very clear and strict provisions regarding copyright infringements in the online environment, an issue that Brazil has not yet faced.

Another point of difference has to do with the excessive focus that the Brazilian debate is giving to private messaging applications, especially WhatsApp, including specific provisions in the discussed bill for this type of platform and generating debates regarding the user privacy. In Germany, the legislation is agnostic regarding the application, being more flexible.

Finally, a highlighting point in both countries is the attempt to expand the obligations regarding the transparency of the content moderation measures taken by the big platforms, with very detailed reports, including justifications for the actions. In Brazil,

the idea of creating a multistakeholder chamber under the auspices of CGI.br stands out, based on the successful experience of the committee along many years, to debate issues related to content moderation. These transparency measures seem to be a trend not only in Germany and Brazil, but also in other countries as a way to alleviate the negative effects currently observed in the use and regulation of social network platforms, also being seen in the Digital Service Act.


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