

**Harm reduction content limitation: Social media platforms' effect on
fundamental human rights.**

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LLM Capstone Thesis

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07.06.2020

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Introduction

With 90% of European households having Internet connection in 2019, the digitalization of the world has had a great influence on almost every aspect of our lives.¹ Consequently, it has a great effect on drug policy and people who use drugs. The European Monitoring Centre for Drugs and Drug Addiction in its 2019 EU Drug Markets report highlighted the importance of the Internet as a key contributor to globalization that has impacted the drug market in several ways.² The Internet provides new ways to access customers and suppliers, both on the so-called surface or clear web and the deep web, including dark web markets. The surface web, especially social media platforms, have become the main communication platform in Europe for people who use drugs.³ Responding to this trend, harm reduction actors have increased their presence on these platforms. They have however encountered obstacles in their activity, with their content being removed for purportedly violating the rules of social media platforms.

Each social media platform has their own terms of service which outline the rules for what kind of content is not allowed on each site. Such content is either age-restricted, blocked from being published using automation, or removed after being reviewed by content moderators when flagged for violating community guidelines. There is a legitimate effort by social media platforms to restrict drug trafficking and promotion of drug use. Most of the major social media platforms explicitly ban content that promotes drug usage or facilitates trade of unauthorized psychoactive substances, but some, like Facebook, go much further in terms of the scope of drug-related content they disallow. Such content moderation policies

¹ Dennis Schmid. "Household internet access in the European Union (EU28) 2007-2019." Statista, accessed June 5, 2020, <https://www.statista.com/statistics/377585/household-internet-access-in-eu28/>.

² European Monitoring Centre for Drugs and Drug Addiction and Europol, "EU Drug Markets Report 2019" (Luxembourg, Publications of the European Union, 2019).

³ Nasser F. Bindhim, Sundresan Naicker, Becky Freeman, Kevin Mcgeechn & Lyndal Trevena, "Apps Promoting Illicit Drugs—A Need for Tighter Regulation?" *Journal of Consumer Health on the Internet* 18, no 1 (2014) 31-43.

might seem reasonable on the surface, but in reality, may exclude a considerable amount of harm reduction material and consequently limit access to important health-related information.

Given the lack of literature analyzing the effect of content moderation on harm reduction content, this paper presents a general analysis of this issue. Starting from the significance of the Internet for harm reduction services this research describes the obstacles encountered when operating on social media platforms as a result of content moderation. Taking on the case studies of YouTube and Facebook, it will be therefore necessary to analyze their moderation policies in light of harm reduction content and the process of moderation itself. The research maps out the relevant international and regional human rights framework concentrating on freedom of expression and opinion, right to health and freedom of assembly and association which may be affected in the process of moderation. The concluding section presents three case studies, one from the United Kingdom and two from Poland, which will be analyzed to illustrate the limitation of harm reduction content, shortcomings of content moderation and its implications for fundamental human rights.

Chapter 1

Harm Reduction

Harm reduction doctrine builds on the principle that abstinence from drug use is not an essential condition for individual and public health positive goals.⁴ Therefore its objective is to minimize risks and harms associated with illegal drug use instead of following a drug-free world concept and making efforts to eliminate drug use per se.⁵ It pursues this goal by a model embedded in public health as contrary to the still predominant law and order policing of users. There are clear evidence-based examples that show the benefits of this approach. Needle and syringe programs which provide users with sterile injecting equipment greatly reduce the risk of acquiring HIV and HCV.⁶ Opioid agonist treatment⁷ has been proved to reduce the use of opioids, injection risks, including overdose, the incidence of HIV and hepatitis C and even have a correlation with reducing the contact of the users with the criminal justice system.⁸ A major part of harm reduction is drug education. This involves a broad range of activities often involving dissemination of knowledge about risks associated with drug use, social inoculation programs, information on how to safely use drugs or even creating safe non-judgmental spaces where users can share their experiences and freely talk about their drug use. Drug education has proven to be an adequate response and considered

⁴ Louisa Degenhardt, Daniel Wolfe, Wayne Hall, Matthew Hickman, Judy Chang, Julie Bruneau, Michael Farrell & Paul Griffiths, “Strategies to reduce drug-related harm: responding to the evidence base,” *Lancet* 394, no 10208 (26 October–1 November 2019): 1490-1493, 1491.

⁵ Adrian Farrugia, “Assembling the dominant accounts of youth drug use in Australian harm reduction drug education,” *International Journal of Drug Policy* 25, no 4 (2014): 663-672, 663.

⁶ Louisa Degenhardt, Daniel Wolfe, Wayne Hall, Matthew Hickman, Judy Chang, Julie Bruneau, Michael Farrell, Paul Griffiths “Strategies to reduce drug-related harm,” 1491.

⁷ It involves taking opioid agonist medications such as methadone, buprenorphine which are slowly released into the body preventing withdrawal symptoms.

⁸ Natasa Gisev, Chrianna Bharat, Sarah Larney, Timothy Dobbins, Don Weatherburn, Matthew Hickman, Michael Farrell & Louisa Degenhardt. “The effect of entry and retention in opioid agonist treatment on contact with the criminal justice system among opioid-dependent people: a retrospective cohort study.” *The Lancet Public Health* 4, no 7 (2019) 334-342, 335.

more effective than punitive approaches with the condition that it follows an educative, non-judgmental and peer led formula rather than a coercive one.⁹

1.1. Online Harm Reduction

The Internet has revolutionized the drug policy world and the health services sector. According to the Eurobarometer report on Young People and Drugs, the Internet is the most-mentioned source of information (59%) on illicit drugs and drug use that respondents would turn to.¹⁰ A number of authors and reports emphasize that the Internet is not only a source of threat: there is a significant but mostly unused potential of the Internet as a tool for research, drug prevention, harm reduction, treatment and recovery.¹¹ Both the surface web and the deep web hosts a range of social media platforms, forums, chatrooms in which drug users are able to exchange information about particular drugs, their risks and drug vendors. These online places provide a platform for demand and harm reduction services to reach out to their clients with online communication tools.

Although there is no broad assessment of harm reduction online services it is visible that almost every single organization has moved some of its actions to the Internet and provide some of their services online. An evaluation of drug-related YouTube videos showed that 12% of such content has been published by institutions working within the field of drug policy.¹² Different actors are working on mapping best practices and coming up with new

⁹ Farrugia, Adrian. "Assembling the dominant accounts of youth drug use in Australian harm reduction drug education." 663.

¹⁰ European Commission, Young People and Drugs, Flash Eurobarometer series No. 401 (2014).

¹¹ Julia Buxton & Tim Bingham, "The rise and challenge of dark net drug markets," Swansea: Global Drug Policy Observatory, Policy Brief 7 (2015). Monica J. Barratt, Simon Lenton & Matthew Allen, "Internet Content Regulation," Public Drug Websites and the Growth in Hidden Internet Services, *Drugs: Education, Prevention and Policy* 20, no. 3, (2013): 195–202. Jane Mounteney, Alberto Oteo, Paul Griffiths, "The internet and drug markets: shining a light on these complex and dynamic systems," *The internet and drug markets*, European Monitoring Centre for Drugs and Drug Addiction: Insights 21 (Luxembourg, Publications Office of the European Union, 2016).

¹² Paul Manning, "YouTube, 'drug videos' and drugs education." *Drugs: Education, Prevention and Policy* 20, no 2 (2013): 120-130, 123.

tools that will be best suitable for reaching out to people who use drugs online.¹³ This community has however experienced obstacles to its operation on online social platforms. Harm reduction actors have reported their content being blocked from publication, their posts and videos removed, and their accounts suspended or banned.¹⁴ This has a tremendous effect on their functioning because the consequences go far beyond a video or an article being taken down. If an account is banned the whole community and its forum that has been created around it is lost. Individuals lose a platform where they have received health-related information and where they could engage and express their views on the matters of drug policy. All these actions and restrictions are a result of content moderation mechanisms of online social platforms.

¹³ European Monitoring Centre for Drugs and Drug Addiction and Europol. “EU Drug Markets Report 2019.” Luxembourg, Publications of the European Union (2019).

¹⁴ Sessi Kuwabara Blanchard, “Social Media Giants’ Censorship of Harm Reduction Is Book Burning,” Filter, August 15, 2019. Accessed May 20, 2020. <https://filtermag.org/social-media-censorship-harm-reduction/>.

Chapter 2

Content Moderation

Moderation can be best described as “screening, evaluation, categorization, approval or removal/hiding of online content according to relevant communications and publishing policies. It seeks to support and enforce positive communications behavior online, and to minimize aggression and anti-social behavior. In this platform moderation parallels historic forms of negative media regulation designed to protect individuals, particularly vulnerable audiences such as children, from inappropriate, illegal, obscene or potentially harmful material, as well as enforcing aspects of conduct, such as respect for privacy. It also seeks to avoid the publication of illegal or harmful content.”¹⁵ The process may take place at two stages. Pre-moderation occurs before content becomes published and post-moderation which happens after the publication of the content.¹⁶ The “moderators” are either algorithms or human moderators, or a mechanism that engages both human and algorithms.

This process can be divided up in three parts: creation, enforcement and response.¹⁷ Creation relates to the development of rules that govern content moderation. Enforcement involves tagging certain content as problematic and evaluating whether it is in breach of the terms and conditions of the platform and following that evaluation taking action towards the content. Response is the final stage which is the internal appeal process where the users can question the actions taken by the moderators.¹⁸

The creation of content guidelines is an ongoing never-ending process with different factors influencing the final outcome. Needing to adhere to the national or regional legal

¹⁵ Terry Flew and others, “Internet Regulation as Media Policy: Re-thinking the Question of Digital Communication Platform Governance,” *Journal of Digital Media & Policy* 10, no 1 (2019): 33-50, 40.

¹⁶ Giovanni De Gregorio, “Democratising Online Content Moderation: A Constitutional Framework,” *Computer Law and Security Review* 36 (2020): 1-18, 2.

¹⁷ MacKenzie F. Common, “Fear the Reaper: how content moderation rules are enforced on social media,” *International Review of Law, Computers & Technology* 34, no 2 (2020): 126-152, 127.

¹⁸ *Ibid*, 127.

frameworks, social media platforms have to delete content that is illegal under respective legislations, such as terrorist content, incitement to violence, content protected by copyrights and content relating to illegal drugs. As a business enterprise, one of the decisive considerations is content which is creating a favorable environment for the users of the platforms and as a result increase in revenue.¹⁹ With the condition that they adhere to the laws imposed by regional and national frameworks, it is the online platforms themselves that establish content moderation guidelines that govern the conduct of their users around the globe.

2.1. Drug-related content provisions of Facebook and YouTube

When joining Facebook or YouTube the user has to sign the Terms of Service (ToS), a legal agreement with the social media platform service provider which govern their relationship, including user's rights and responsibilities. ToS also encompass specific provisions relating to content moderation, describing what content is prohibited, what may happen if the user violates these provisions and whether there is a remedy available.²⁰ At Facebook those provisions are codified in Facebook Community Standards (Standards), while in YouTube they are laid out in Community Guidelines (Guidelines). While both of the frameworks prohibit the sale of drugs, their approach to other drug-related content differs. The analysis of these frameworks is needed in order to determine what kind of content harm reduction content may be affected by them and for the evaluation of actual practices of social media platforms, basically whether the platforms adhere to their own rules.

¹⁹ Ibid, 131.

²⁰ Terry Flew and others, "Internet Regulation as Media Policy," 43.

Under Community Standards Violence and Criminal Behaviour section Regulated Goods provisions prohibit to purchase, sell, or trade non-medical drugs, pharmaceutical drugs, and marijuana. It is prohibited to publish content that:

- Attempts to buy, sell, trade, donate, gift, or solicit non-medical drugs
- Admits to buying or trading non-medical drugs by the poster of the content by themselves or through others
- Admits to personal use without acknowledgment of or reference to recovery, treatment, or other assistance to combat usage
- Promotes, encourages, coordinates or provides instructions for use or make of non-medical drugs
- Content that attempts to buy, sell, trade, donate, gift, or solicit marijuana or pharmaceutical drugs.²¹

On YouTube drugs are regulated under Violent or dangerous content under Harmful of dangerous content policy section of YouTube Community Guidelines, which prohibit:

- Displays of hard drug uses: Non-educational content that shows the injection of intravenous drugs like heroin or huffing/sniffing glue.
- Making hard drugs: Non-educational content that explains how to make drugs.
- Minors using alcohol or drugs: Showing minors drinking alcohol, using vaporizers, e-cigarettes, tobacco or marijuana, or misusing fireworks.
- Selling hard or soft drugs: Featuring drugs with the goal of selling them. If you're using links in your description to sell hard drugs, your channel will be terminated.

²¹ Facebook. "Regulated Goods." Facebook Community Standards, Accessed May 29, 2020. https://www.facebook.com/communitystandards/regulated_goods.

If this type of content is educational, documentary, scientific, or artistic, we may still age-restrict it. For example, a documentary about intravenous drug use that shows the injection of drugs may be allowed, but it won't be available to all audiences. If your content shows items used for taking drugs, it may also be age restricted.²²

Comparing these two set of rules, it is explicit that YouTube is much favorable environment for harm reduction content than Facebook which excludes a greater amount of these activities. Under Facebook Standards people who use drugs may not admit they buy or use substances, unless the statement was made in a specific context. This specific context rules out peer conversations where users could exchange information on their drug-related experiences. Similarly, the possibility of counselling online if the user does not want to end his drug habit is debatable. The provisions prohibiting instructions for use or make of non-medical drugs are quite broad therefore may definitely encompass content on safe drug use, including instructions how to minimize risks associated with the consumption of drugs but also how to act when a person has overdosed. A considerable amount of drug policy content such as documents on people who use drugs, people who sell drugs, or the process of production also fall under those rules. YouTube has a different approach to content moderation, and it puts a strong emphasis on the context of the content, leaving room for many exceptions if the content is of educational, documentary, scientific, or artistic nature. Consequently, the only interference that harm reduction content should be affected by is the eventual age restriction of access. This may have an effect on adolescences who use drugs or are thinking about experiencing with drugs but also touches upon the issue of privacy as to overcome the age restriction barrier one has to register an account and provide personal

²² YouTube. "Harmful or dangerous content policy." YouTube Community Guidelines, Accessed May 29, 2020. <https://www.youtube.com/about/policies/#community-guidelines>.

details.²³ Adults, after registration, have access to a broad range of channels which openly talk about drugs or even depict people consuming them and sharing their experiences.²⁴

In practice however, both companies delete harm reduction content, often in an inconsistent way, putting harm reduction actors in a situation of uncertainty on how to operate online. This is the result of vague and unclear policies but even more so the way these Guidelines and Standards are enforced. In its Community Standards Enforcement Report, where Facebook reports on content moderation, we find that during the period of January-March 2019 Facebook has acted upon 823,6 thousands of pieces of content related to drugs while in the same time in 2020 it has acted upon 7,9 millions of pieces of content, 10 times more as the previous year, most of it resulting in its removal.²⁵ YouTube, on the other hand, deleted 66 040 dangerous or harmful content, including drug content, in January-March 2019.²⁶ In over 90% of these cases in both companies' content was flagged by algorithms.

2.2. Enforcement and response

“Flagging” refers to a mechanism of reporting offensive content to the social media platform.²⁷ This mechanism is available on all major social media platforms and is the core of the content moderation mechanisms on Facebook and YouTube. They are a way for the users

²³ When creating such an account Google will have access to and will be using the following data: name, birthday, gender, phone number, contacts, calendar events, photos and videos saved by the user or comments made on YouTube. This data is only shared when one is creating an Google account that is needed to overcome the age-restriction barrier. During normal use of google services, including YouTube, the following information is being gathered and used by the platform: Things that you search for, Videos that you watch, Ads that you view or click, Your location, Websites that you visit, Apps, browsers and devices that you use to access Google services. Information from Data Transparency of Google, Accessed May 29, 2020. https://safety.google/intl/en_uk/privacy/data/

²⁴ An interesting development in this sphere is the DrugsLab channel, an initiative of the Ministry of Education, Culture and Science where young hosts try different drugs on camera, from marijuana to cocaine and Oxycontin. Drugslab, YouTube, Accessed May 15, 2020. <https://www.youtube.com/channel/UCvRQKXtIGcK1yEnQ4Te8hWQ/about>.

²⁵ Facebook, Community Standards Enforcement Report. Accessed May 26, 2020. <https://transparency.facebook.com/community-standards-enforcement>.

²⁶ YouTube, YouTube Transparency Report. Accessed May 26, 2020. <https://transparencyreport.google.com/youtube-policy/removals>.

²⁷ Kate Crawford and Tarleton Gillespie, “What is a Flag for? Social Media Reporting Tools and the Vocabulary of Complaint,” *New Media & Society* 18, no 3 (2016): 410–428, 411.

to express their view that certain content may violate the terms and conditions of the platform but also a vital tool for the platforms to deal with the enormous amount of content that is available and uploaded every day with YouTube having 500 hours of video being uploaded every minute.²⁸ With the development of artificial intelligence and creation of sophisticated algorithms allowing the analysis of a great amount of data in a short time, most of the content is nowadays being flagged by these instruments instead of users themselves.

After the content is flagged, it is the company's internal moderators that make the decision whether the content should be maintained or whether it should be acted upon. YouTube has a 3-strike policy. All these strikes involve removal of the contested video and gradual access to the platform. The user has the right to appeal every strike decision of the platform only once. The additional appeal procedure is available upon the termination of the whole channel of the user which may happen when the user gets three strikes or even based on a single case of severe abuse.²⁹ Facebook provides for three actions in regard to content that may be in breach of its Standards – removal of the content, disabling the account of the publisher, covering content with a warning which indicates disturbing content that does not explicitly violate policies. Accounts are disabled when a continuing violation of Standards occur. If the user disagrees with the decision, he may ask for a review by Facebook moderators.³⁰ Here it is important to note that decisions of the moderators and algorithms are based on internal guidelines which are more specific than the described Guidelines and Standards and are not accessible by the public.³¹ According to the platform's data out of 122

²⁸ Ibid, 412.

²⁹ YouTube, "Reporting and Enforcement," YouTube Community Guidelines.

³⁰ Facebook, "Introduction," Facebook Community Standards.

³¹ Giovanni De Gregorio. "Democratising Online Content Moderation", 7.

thousand appeals to Facebook decisions only 50 thousand were reversed, while on YouTube out of 108 779 appeals 78 % of appeals were rejected, with 23 471 videos being reinstated.³²

2.3. Systemic weaknesses

It is quite challenging to critically assess and analyze the work of moderators of Facebook and YouTube because all the moderators have to sign a non-disclosure act which prohibits them from sharing anything about their work.³³ There is very little transparency when it comes to content moderation and most of the data, excluding the few general statistics mentioned in this paper, has to come either from leaks, whistle-blowers or external data analysis. Some clear issues have been however identified. First of all, the main goal of moderators is high efficiency with companies striving to remove the possibly problematic content as fast as possible. With the moderators having very little time to make a decision, depending on the platform, 10-30 seconds for once piece of content, there is a need for simplification and categorization of issues.³⁴ This leads to omitting the context of the message and limitation of harm reduction content even if it is not against the Guidelines or Standards but it simply deals with the topics of drugs. Secondly, both moderators and algorithms hold biases that represent the primarily white and male environment of social media giants. Although it may seem that algorithms should be more objective, they are created by programmers and reflect their biases whether they are conscious or unconscious. This has resulted in discrimination of content moderation against certain groups such as women or people of color. Images involving violence and brutality are often upheld while those portraying menstrual blood are removed. Algorithms designed to tackle terrorism are greatly

³² Facebook, Community Standards Enforcement Report. YouTube, YouTube Transparency Report.

³³ MacKenzie F. Common, "Fear the Reaper," 128.

³⁴ Olivia Solon, "To Censor or Sanction Extreme Content? Either way, Facebook can't Win," The Guardian, London (23 May 2017). Accessed June 15, 2017. <https://www.theguardian.com/news/2017/may/24/facebook-struggles-with-mission-impossible-to-stop-online-extremism>.

influenced by Islamic jihadism and therefore may be not suitable to target white right-wing extremism.³⁵ The appeal process is also ineffective, with users mainly receiving generic answers from moderators, which are not indicating how were the Guidelines or Standards specifically violated. All those factors result in a strong inconsistency of enforcement of Guidelines and Standards. The consequences are extreme – harm reduction content is being removed from these platforms, while a great amount of illegal and dangerous content is left untouched. As highlighted in the recent whistle-blower’s complaint concerning Facebook, the company “did not seem to worry about drugs at all” allowing for an online drug trade to openly take place on the platform.³⁶ This, of course, raises concerns and the question what the standards of content moderation should be and whether there is a need for an external supervision over their enforcement.

³⁵ MacKenzie F. Common, “Fear the Reaper,” 133.

³⁶ Nitasha Tiku, Whistleblowers say Facebook has not warned investors about illegal activity, in new SEC complaint, *The Washington Post* (27 May 2020). Accessed June 5, 2020. <https://www.washingtonpost.com/technology/2020/05/27/facebook-sec-whistleblower/>.

Chapter 3

Corporate responsibility and international human rights

As already stated, platforms do have to conform to the national legislation rules of what content is legal and what is prohibited, but they have little legal obligations to the users themselves. In this sense, they are almost completely autonomous in governing the content published and have limited liability in that regard. Some authors indicate that such big influence of few companies over the majority of the transnational flow of information results in a move to a functional instead of a territorial sovereignty.³⁷ In the European Union, based on the E-Commerce Directive, they act as intermediaries and therefore they are exempt from accountability for third-party content if they remove it once they are informed of its unlawful nature.³⁸ Due to those obligations, it is the private corporations that have to make decisions which affect fundamental human rights. So, what kind of rights if any do users have when using social media platforms?

The main argument is that online platforms as private actors are not bound by international human rights which vertically bind only States, leaving platform regulation in the hands of the national and regional legal frameworks.³⁹ Users by agreeing to the ToS of the platforms, consent to their content being moderated in a certain way and the companies on the basis of freedom of contract are free to decide what kind of content is desirable and which is not in line with their business models. With Facebook having 2,6 billion active monthly users and 2 billion watching videos on YouTube every month and these two platforms controlling

³⁷ Frank Pasquale, 'From Territorial to Functional Sovereignty: The Case of Amazon' Law & Political Economy Blog (6 December 2017). Accessed 28 May 2020. <https://lpeblog.org/2017/12/06/from-territorial-to-functional-sovereignty-the-case-of-amazon>.

³⁸ Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 OJ L 178/1. Article 14.

³⁹ Jennifer Grygiel and Nina Brown, "Are Social Media Companies Motivated to Be Good Corporate Citizens? Examination of the Connection Between Corporate Social Responsibility and Social Media Safety," Telecommunications Policy 43, no 5 (2019): 445-460, 449.

70% of all web traffic we are experiencing enormous concentration of the online platform market and an oligopoly of these companies.⁴⁰ One can therefore see these ToS agreements as exploiting the dominant position in the market and creating “imbalances of power and unfair contract terms between the companies and individuals.”⁴¹

3.1. International human rights framework

Trying to fill this void many actors have called for the business community to follow the international human rights standards and a growing number of soft-regulation frameworks have been established. One of the main points of reference are the UN Guiding Principles on Business and Human Rights⁴² adopted by the Human Rights Council which call on the states to enact laws which require private businesses to respect human rights. Moreover, directly addressing the companies, they urge them to “respect human rights”⁴³, explicitly mentioning the rights protected by the International Bill of Human Rights and to “avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur.”⁴⁴ In the same spirit the Manila Principles on Intermediary Liability propose safeguards and best practices based on the international human rights frameworks.⁴⁵ They call for content restrictions based on clear and unambiguous rules, carried out in conformity with proportionality standards and affording users mechanisms that enable them to challenge the decision.⁴⁶

⁴⁰ Terry Flew and others, ‘Internet Regulation as Media Policy.’, 34.

⁴¹ Article 19. “Side-stepping rights: Regulating speech by contract.” (2018): 1-55, 15.

⁴² UN Human Rights Council, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31 (21 March 2011). United Nations, Guiding principles on business and human rights: implementing the United Nations “Protect, Respect and Remedy” framework (2011).

⁴³ Ibid, art. 12

⁴⁴ Ibid, art. 13.

⁴⁵ A Global Civil Society Initiative. “Manila Principles on Intermediary Liability” (2017). Accessed May 20, 2020. https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf.

⁴⁶ Ibid, principles no 3, 4, 5.

This issue has been widely addressed by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye. In his report on online content moderation, he has laid out the State obligations and companies' responsibilities in this respect.⁴⁷ It is the States that are primarily responsible for ensuring the effective realization of human rights. They are obliged to facilitate access to information, in this context promoting universal Internet access. It is also their duty to protect citizens freedom of opinion and expression from interference by third parties. Underlining the fact that companies function as regulatory bodies, exercising quasi-judicial decisions when moderating content, he advocates for the incorporation of international human rights law, as described in the UN Guiding Principles on Business and Human Rights, as the standard for their conduct.⁴⁸

3.2. European human rights framework

Similar documents have been adopted in Europe and within the European Union. The Committee of Ministers of the Council of Europe, the European Commission and the European Parliament have endorsed the UN Guiding Principles on Business and Human Rights and called upon States and private actors to follow human rights standards when imposing restrictions on content and providing their services.⁴⁹ However, with no actual binding force, ultimately it is up to private actors to what extent will they adhere to these standards.⁵⁰ Some authors, such as Aleksandra Kuczerawy, argue that under the doctrine of

⁴⁷ UN Human Rights Council. Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression on online content regulation, David Kaye, A/HRC/38/35 (6 April 2018).

⁴⁸ Ibid. Similar arguments have already been made by the Rapporteur in his previous report: UN Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression on the intersection of freedom of expression, private sector and the internet, David Kaye, A/73/348, (29 August 2018).

⁴⁹ Recommendation of Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, CM/Rec(2018)2, Council of Europe (7 March 2018). European Parliament resolution on the EU's input to a UN Binding Instrument on transnational corporations and other business enterprises with transnational characteristics with respect to human rights, 2018/2763(RSP) (4 October 2018). Commission Recommendation on measures to effectively tackle illegal content online, C(2018) 1177 (1 March 2018).

positive obligations of States in the ECHR framework and principles of proportionality and fair balancing under the CFEU, States have the duty protect certain freedoms such as the freedom of expression.⁵¹ The European Court of Human Rights (ECtHR) has quite a steady case law in this regard, obliging states to provide an favorable environment for public debate or stating that in special circumstances there may be limits to private ownership of the media and an obligation to publish a reply to a text.⁵² An answer to such calls may be the upcoming EU Digital Services Act which is planned to uniform the rules on the deletion of illegal content and providing the users with effective remedies against the decisions of moderators.⁵³ Time will tell what is the outcome and actual scope of the still negotiated framework and whether freedom of expression and other rights are sufficiently protected by it.

I will now turn to the specific rights and freedoms that may be affected by harm reduction content moderation. Firstly, it has to be emphasized that the International Bill of Human Rights, European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (Charter) protect rights and freedoms of individuals both offline and online.⁵⁴ This research concentrate on three rights – freedom of opinion and expression, right to health and freedom of assembly, noting that in this context they are all strongly interconnected.

⁵¹ Kuczerawy, Aleksandra. “The Power of Positive Thinking: Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression.” JIPITEC 226 para 1 (August 31, 2017).

⁵² *Dink v. Turkey*, nos. 2668/07 and 4 others, ECHR [2010]. *Melnychuk v. Ukraine*, no 28743/03, ECHR [2005].

⁵³ Digital Single Market Strategic Group, Leaked note concerning the discussion of the Digital Service Act. Accessed 27 May 2020. <https://cdn.netzpolitik.org/wp-upload/2019/07/Digital-Services-Act-note-DG-Connect-June-2019.pdf>.

⁵⁴ Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace, Join/2013/01 (2013). Recommendation of Committee of Ministers to member States on Internet freedom, CM/Rec(2016)5[1] (13 April 2016). UN Human Rights Council Resolution on the promotion, protection and enjoyment of human rights on the Internet, A/HRC/RES/20/8 (16 July 2012).

3.3. Freedom of expression and opinion

First of all, the restriction of legitimate harm reduction content may affect the freedom of opinion and expression of the individuals who use Facebook and YouTube. Article 19 of the Universal Declaration of Human Rights guarantees everyone the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.⁵⁵ The International Covenant on Civil and Political Rights (ICCPR) guarantees the same rights stating that the freedom applies to information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of a person's choice.⁵⁶ One of the essential rights protected under article 19 paragraph 2 is the right to access information. The same rights are protected under article 10 of the ECHR which guarantees the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".⁵⁷ Article 11 of the Charter additionally emphasizes the need to respect "freedom and pluralism of the media".⁵⁸

Limiting the possibility to impart harm reduction information greatly affects individuals or organizations who disseminate them in different ways. It may affect their performance and activity, their possibility to communicate with their audiences, including their clients. Consequently, it affects the people who may receive such information. In the light of the fact that there are different approaches to drug use, it affects the plurality and variety of available information and limits the possibility to express one's opinion and argue

⁵⁵ UN General Assembly, "Universal Declaration of Human Rights," 217 (III) A (Paris, 1948): art. 19.

⁵⁶ UN General Assembly, "International Covenant on Civil and Political Rights." Treaty Series 999 (December 1966): art. 16.

⁵⁷ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950): art.10.

⁵⁸ European Union: Council of the European Union, Charter of Fundamental Rights of the European Union, 2007/C 303/0 (14 December 2007): art. 11.

on how drug policy should be shaped. This is very important because the right to seek out and receive information is necessary for the development of opinions of the people and it allows them to meaningfully participate in public affairs, a right which is protected by Article 25 of the Covenant.⁵⁹ Freedom of expression plays a specific role in the human rights system as it is often the indispensable condition for the enjoyment and exercise of other rights and freedoms. As the ECtHR put it - “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress.”⁶⁰

3.4. Right to health information

The link between the right to receive information and the right to health has been long established. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁶¹ Access to health information is crucial to the realization of the right to health and the right to the highest attainable standard of health. Individuals must have access to accurate and reliable health information in order to take appropriate measures to protect themselves.⁶² This includes “the right to seek, receive and impart information and ideas concerning health issues.”⁶³ Access to such information allows people to effectively realize their rights, promoting their own health and participate valuably.⁶⁴

⁵⁹ David Kaye, “Speech Police: The Global Struggle to Govern the Internet,” (New York, Columbia Global Reports, 2019): 1-100, Conclusions.

⁶⁰ Hertel v. Switzerland, no. 25181/94, ECHR [1998], §46.

⁶¹ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series 993 (16 December 1966): art. 12.

⁶² Article 19. A Healthy Knowledge: Right to Information and the Right to Health (2012).

⁶³ Committee on Economic, Social and Cultural Rights. General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4 (11 August 2000), paragraph 12.

⁶⁴ UN Human Rights Council. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, A/HRC/7/11 (31 January 2008) paragraph 40.

Harm reduction content has a very specific role - to inform and therefore reduce the eventual harms caused by drug use. With 51% of European looking for health-related information online restriction on harm reduction content has serious implications on individuals and their possibility to access such information.⁶⁵ In this regard, it is important to note that there are many advantages in obtaining harm reduction information through internet. Certain barriers may discourage an individual from seeking such information offline through a regional service provider - they are often only available in larger cities, they may require financial resources to be accessed, due to the stigma related to drug use, individuals may not want to visit such institutions. The importance of the access to health-related information for individuals who are not “sufficiently resourceful or had not the necessary level of education to have access to alternative sources of information” has been emphasized by the ECtHR.⁶⁶ The significance of health-related information published on the internet has become even more explicit throughout the SARS-CoV-2 pandemic – with many harm reduction programs and medical institutions being closed, the internet became the only source of such information and possible way to communicate.

3.5. Freedom of assembly and association

Another right that can be affected by harm reduction content moderation is the freedom of assembly and association. These two separate rights which are often grouped together because of their close relationship are strongly protected by international and regional legal frameworks. Article 20 of the Universal Declaration of Human Rights guarantees everyone the right to freedom of peaceful assembly and association. Same rights are covered by articles 20 and 21 of the ICCPR, Article 11 of the ECHR and Article 12 of the

⁶⁵ OECD. “Realising the Potential of Primary Health Care.” OECD Health Policy Studies, Paris (2018), 1-205, 139.

⁶⁶ Open Door and Dublin Well Woman v. Ireland, no. 14235/88, ECHR [1992], §77.

Charter with the latter protecting these freedoms “at all levels.”⁶⁷ These freedoms are recognized as essential for the existence of democracies by ensuring that “people have a voice and are able to organize collectively around shared interests.”⁶⁸ Assemblies are characterized as “an intentional and temporary gathering in a private or public space for a specific purpose”⁶⁹ while an association “is an organized, independent, not-for-profit body based on the voluntary grouping of persons with a common interest, activity or purpose.”⁷⁰ The Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has emphasized the importance of social media platforms as new spaces for organizing assemblies and associations online as well as supporting these taking place or existing offline.⁷¹

Restricting harm reduction content may interfere with these freedoms on many levels. Organizations, as well as individuals, if their accounts are blocked or removed lose one of the most common, effective and simple way to facilitate assemblies and reach out to the community. Individuals may therefore encounter obstacles in obtaining information on protests or signing an online petition. Social media platforms have become a place where people interested in drug policy gather and exchange ideas with various forums being established which allow people to associate and have conversations which have been recognized as health promotion interventions.⁷²

The final risk associated with harm reduction content moderation is common to all the three described rights and that is the self-censorship of individuals. Because they have no

⁶⁷ Charter of Rights, art. 12.

⁶⁸ UN General Assembly. Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Clément Nyaletsossi Voule, A/73/279 (7 August 2018) paragraph 9.

⁶⁹ UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Kishore Singh, A/HRC/20/21 (21 May 2012) paragraph 24.

⁷⁰ OSCE. “Guidelines on Freedom of Association.” (Warsaw, Office for Democratic Institutions and Human Rights, 2015), paragraph 7.

⁷¹ UN Human Rights Council. Rights to Freedom of Peaceful Assembly and of Association: Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Clément Nyaletsossi Voule, A/HRC/41/41 (17 May 2019).

⁷² Jonathan Syred, Carla Naidoo, Sarah C Woodhall, Paula Baraitser. “Would you tell everyone this? Facebook conversations as health promotion interventions.” *Journal of Medical Internet Research*, 16(4):e108 (2014).

certainty whether the content they post will be found as violating the terms of service of the platform they may decide to refrain from doing so or publishing it with adjustments compromising some of its original message.⁷³ This chilling effect has a particular effect on harm reduction organizations and activists which operate mainly online and therefore may not afford the removal of their accounts as the basis for their existence. These will be clearly visible in the three cases of harm reduction content restrictions which I will describe in the next section of this paper.

Before, is it relevant to note that the freedom of expression and opinion as well as freedom of assembly and association are not absolute rights and may be restricted under special circumstances. Such restrictions must be provided by the law, protecting a legitimate aim specifically enumerated in the limitation clause and conform to the standards of necessity and proportionality, obliging the states to impose the least burdensome restrictions which are actually likely to protect the legitimate aim.⁷⁴ These standards should also apply to the restriction of online content.

⁷³ Ben Marder, Adam Joinson, Avi Shankar and David Houghton. “The extended ‘chilling effect’ of Facebook: the cold reality of ubiquitous social networking.” *Computers in Human Behavior*, 60 (July 2016), 582-592.

⁷⁴ Article 19 par 3, Article 21 and Article 22 of the ICCPR limitation clauses mention the following legitimate aims: interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. Article 10 of ECHR mentions: interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Article 11 of ECHR: interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

Chapter 4

Case studies of harm reduction content limitations

To better illustrate the issue three case studies will be briefly analyzed. All the three case studies involve actors that work in the harm reduction field, with great effort trying to minimize negative consequences that may result from use of psychoactive substances.

In 2019 Youtube has removed the channel *Wiem co Ćpiem* (I know my dope), the biggest drug policy video channel in Eastern Europe with more than 9,6 million views. The author, Damian Sobczyk, has uploaded many videos, mainly concentrating on specific substances, their history, possible risks associated with their consumption and advices on how to use drugs in the safest way possible. His channel had 137 000 subscribers, mostly young audience, with 90% of the viewers being between 18-35 years old. His problems started after he published a video on the request of the Polish Academy of Sciences concerning a mobile phone application dedicated to fighting addiction. This video has been found to be “harmful and dangerous” and shortly after its removal his whole channel has been banned. YouTube in its justification argued that in this video there were links available to drug-selling sites. The channel was removed immediately without the above described three-strike warning system. After he appealed the decision, he has received a generic response where the exact same reason was given without any further explanation.⁷⁵

Drug Users Bible is a platform which was created after the publication of a book with the same name by Dominic Milton Trott. The book provides insight in over 150 psychoactive substances and “it’s objective is to provide, without fear or compromise, core and critical information to support the health and welfare of the 250 million people in the world who use

⁷⁵ Adam Stasiak, “YouTube Removed My Channel for Promoting Harm Reduction – An Interview with Damian Sobczyk”, DrugReporter, accessed May 15, 2020. <https://drogriporter.hu/en/mestoslaw/>.

drugs.” Consequently, the author has expanded his activity and created accounts on Facebook and other social media platforms to share information on safe drug use. The piece of information that was widely shared and became the reason for content removals and account bans was the 10 Commandments of Safer Drug Use, a sort of a guidebook throughout information about drug use that any person that wants to experiment with psychoactive substances should know. In April 2019 his account on Facebook has been blocked for three months, disabling any content to be shared on his page and any users accessing the content that was published on it previously. In August Facebook has restored his account. Trott has been given zero notice explaining why his account has been frozen and why the decision was reversed afterwards.⁷⁶

Social Drug Policy Initiative (SIN) has very much concentrated on young people who use drugs. Most of their harm reduction programs involved party-working, drug testing and education taking place on social media platforms. SIN was the biggest online drug-related community in Poland with thousands of active users on its forum. In 2018 Facebook has removed a fan page and a group run by SIN without any warning or clear justification. SIN has asked for a review of the decision, but the moderator responded with a generic answer that the group has violated Facebook Community Standards. The removal took place the same day that an offline event concerning harm reduction organized by SIN took place. Because the event was facilitated by using Facebook people could not check information about it and very few, compared to the previously declared, people arrived.⁷⁷

As illustrated, all of the above actors have published only relevant harm reduction content. Their accounts were either frozen or banned, with their content being removed. No clear justification was given that would give them the opportunity to find out

⁷⁶ Sessi Kuwabara Blanchard, “Social Media Giants’ Censorship”.

⁷⁷ Panoptikon, „SIN vs FACEBOOK,” Panoptikon, accessed May 15, 2020. <https://panoptikon.org/sinvsfacebook/en>.

which part of content has violated specific rules. Consequently, their chance to use the appeal process effectively was diminished as they could not defend themselves in an appropriate way. Moreover, the appeal procedure was futile, with the exact same generic response being provided to their appeal request. The notion of context did not play any practical role in the decision. A video dedicated to fighting addiction was deleted from YouTube, which as described has much more favorable environment for harm reduction content, while was not acted upon on Facebook. In conclusion, it does not matter whether the author chooses to operate under more favorable YouTube framework or chooses Facebook, because his content may be targeted and removed even if it is in compliance with the rules of both platforms. This inconsistency implies that there is little certainty for harm reduction actors operating on social media platforms. With the content moderation process having a chilling effect on their performance and all three of the above being very cautious of their online presence, interferences with their content still occur. The social media platforms mechanisms are inadequate and do not provide suitable space for harm reduction actors to perform necessary health-related activities.

Conclusions

Facebook and YouTube have an enormous and still growing effect on the life of individuals. Due to their oligopoly in this sphere and the regulatory function which they realize through content moderation it is at their discretion to make decisions which affect fundamental human rights. The content moderation mechanism that are now in place are inadequate and inconsistent, often resulting in overbroad content limitation. Even though harm reduction actors adhere to the rules that govern these platforms, their content is constantly limited, while numerous illegal drug content persists. Although appeal mechanisms that are supposed to give redress to such situations exist, they are ineffective and do not provide any assistance in the process. This has a negative impact on harm reduction actors but also on people who use drugs. Deleting legitimate harm reduction content may result in interference with their freedom of expression and opinion, right to health information and freedom of assembly and association. The extent of such limitations is vast, as the three case studies demonstrated that thousands of people lost access to such online harm reduction content. Under current legal frameworks, these companies acting as private actors may not be obliged to keep harm reduction content on their platforms, yet it is very important that they adhere to international human rights standards and improve their content moderation mechanisms. Achievement in this domain, for Facebook users, may be the newly established Oversight Board, which consists of 20 independent experts who will have the task of ruling on complex and topical content moderation cases.⁷⁸ Time will show whether harm reduction cases will reach their authority. If this situation continues to persist and these companies do not improve their services on their own, a new legal framework which would oblige them to

⁷⁸ Catalina Botero-Marino, Jamal Greene, Michael W. McConnell and Helle Thorning-Schmidt, “We Are a New Board Overseeing Facebook. Here’s What We’ll Decide.” *The New York Times* (May 6, 2020). Accessed June 5, 2020. <https://www.nytimes.com/2020/05/06/opinion/facebook-oversight-board.html>.

could be considered. This has to be done with great caution, avoiding any unnecessary limitations on the freedom of expression of the users of these platforms.

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