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THE EVOLUTION OF SOCIAL MEDIA TERMS OF USE AND THEIR IMPACT ON HUMAN RIGHTS

Executive summary

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Exploratory study 2022-2023

'Governance and regulation of social media' research project

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CONTRIBUTORS

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LAB-LEX

Lab-LEX is a joint legal research laboratory of the Université de Bretagne Occidentale (Brest) and the Université Bretagne Sud (France). Lab-LEX's main objective is fundamental and applied research in private law, criminal science and public law. The team is made up of some fifty lecturers and forty doctoral students. It is based in Brest, Quimper, Vannes and Lorient (France).

REPORT PRESENTATION

The [full report](#) (in French) has been written by legal researchers at the University of Brest (Lab-LEX laboratory), and highlights changes in the terms of use of social media that have an impact on human rights. The analysis was carried out from a legal angle, using data from the Open Terms Archive program, a database that "*publicly records every version of the terms of use of online services to enable democratic control*" : <https://opentermsarchive.org/fr>

This experimental and exploratory study covers the period from January 2023 to June 2023. It concerns a selection of sites that have undergone numerous governance changes and controversies over the past few years, and bring together a large volume of users: **YouTube, Facebook, Instagram, TikTok, Twitter** (now X).¹

The decision to limit ourselves to a **sample of platforms** reflects the need to match the resources available to the research program at this stage with the large volume of data available. The project's ambitions may be revised upwards at the end of this exploratory phase, with regard to the platforms studied, should the monitoring work be renewed.

In addition, only changes with an **impact on human rights** have been monitored. In particular, the civil, political, social and cultural aspects of human rights were monitored, as were standards relating to personal data, hate speech, disinformation and terrorist and extremist content. The aim of this exploratory study is to determine whether it would be appropriate to continue the annual assessment of modifications to general terms and terms of use.

The study attempts to address frequently debated issues concerning social media:

Lack of transparency on the part of platforms

Determining whether companies publish notices when substantial changes are made to the terms of use. "Substantial" changes are those which alter the nature of the rights and obligations imposed on users, or which affect the ability of public authorities to assess their suitability.

Recourse to informal or arbitrary practices

Identify informal self-regulatory practices, i.e. decisions that are taken by platforms but do not appear to be expressly based on a provision in the terms of use. These informal practices are generally characterized by a lack of predictability concerning the rules applicable to users, or by a reliance on the "values" that permeate corporate governance.

Impermeability of instruments to positive law

Identify cases where terms of use have not been substantially modified despite the introduction of regulations or the adoption of sanctions against the companies in question. The absence of amendments to terms of use over a long period (several years) may reflect a failure to incorporate or take into account the current legislative framework.

Frequent amendments

Highlight marginal but frequent changes to terms of use, including cosmetic changes. This approach generally reveals the existence of sustained legal monitoring (e.g. punctuation,

¹ Twitter was renamed X at the end of July 2023, after the end of this study. The name Twitter is retained in the report in view of the period during which the observation was carried out.

numbering, replacement of one notion by another in a text without modifying the nature of the right or obligation).

Problems of intelligibility, clarity or predictability

Determine whether amendments to terms of use relating to the moderation of illicit content resolve or aggravate problems of intelligibility of the "standard" enacted. The presence of an explicit reference to state legislation and regulations generally facilitates the interpretation of TOS and standards.

Concomitant governance changes and amendments

Determine whether amendments to the terms of use may reflect structural changes within the companies administering the social media, or result directly from them. This may include changes in management, the abolition of departments, downsizing, etc.

KEY FINDINGS FROM A HUMAN RIGHTS PERSPECTIVE

- Platforms' terms of use **have an undeniable impact on users' rights** to privacy, freedom of expression and the right to life. The U.S. Supreme Court's reconsideration of *Roe v. Wade* on June 24, 2022² demonstrated that social media can be used to collect data from users who plan to travel to another state for an abortion³. French and international practice show that the rights recognized to individuals by a variety of legal instruments also apply online. A closer look at the evolution of terms of use shows that the content of these rights is affected by **the addition, deletion or modification of rules specifying authorized or prohibited behavior** online.
- Some social media **have made efforts to** make their terms of use **more transparent**, with features that allow users to compare different versions of the texts (e.g. Meta's "changelog"). Users are sometimes notified of updated terms of use when they open the social media application. This does not mean, however, that users consult them, are encouraged to do so or are able to understand the changes made.
- The terms used to describe the rights and duties of users do **not always have a concrete meaning or scope in legal terms**, which makes it difficult to assess them in the light of the relevant legal instruments, unless they are re-characterized. Conversely, some legal terms are used by social media in a different sense to those used in state law. In order to understand the real scope of the terms of use, it is better to focus on the content of the text and the way in which it is implemented, rather than on the terms used.
- Except in specific cases (e.g. TikTok), social media tend to **apply their terms of use globally, according to legal standards inspired by common law**, for example in terms of freedom of expression or the identification of protected categories of persons. Given the divergence between European and US standards, social media alternate between two approaches: either they adapt their standards to the regions in which they operate, or they extend the standards derived from American legislation on a global scale. In the first case, moderation standards will be adapted to comply with local legislation, but the result will probably be a fragmented approach. In the second case, social media face the risk of being fined by local authorities for non-compliance. In any case, this transplantation of concepts and notions into the French and EU systems raises the risk of inconsistency.
- The analysis of Open Terms Archive databases and their comparison with practice demonstrates **the existence of arbitrary content moderation practices**, i.e. not based on specific provisions in the terms of use, or not preceded by amendments to the latter. Twitter, in particular, repeatedly deviated from its own standards after its acquisition by Elon Musk, giving rise to a significant lack of legal predictability from the user's point of view.
- Some **moderation policies are not translated into French**, or are only translated belatedly, which prevents non-English-speaking users from easily accessing essential information about what is and isn't allowed.
- The occasional references to human rights or international law, for example with regard to the definition of terrorist or hateful content, often disappear from the terms of use in favor of criteria defined internally by social media companies. There is only a very limited correspondence between social media' human rights commitments and their implementation in terms and terms of use.

² Dobbs v. Jackson Women's Health Organization.

³ <https://www.theguardian.com/us-news/2022/aug/10/facebook-user-data-abortion-nebraska-police>;
<https://mashable.com/article/police-using-facebook-google-user-data>.

RECOMMENDATIONS

- Public authorities, civil society organizations and researchers from various fields need to pursue and systematize their **efforts to monitor changes in terms of use**. The sheer volume of terms of use justifies parallel monitoring of specific issues, such as privacy protection, freedom of expression, consumer rights and the fight against misinformation.
- The exploratory study raised a number of **linguistic issues**, including the unavailability of terms of use in certain target languages or disparities between versions. Social media should provide terms of use in the target language, in line with the obligations set out in the relevant instruments, notably article 14 of the EU Digital Services Regulation.
- **Listing prohibited behaviors** is certainly useful in terms of helping service users to understand them. From a legal point of view, however, it has the disadvantage of entailing the **risk of frequent updates**, which are not always notified to users. It also creates the risk of overlapping or, on the contrary, contradictions between different qualifications under positive law. It should be expected that the lists provided be considered as clues intended to enlighten the various stakeholders (e.g.: for the identification of so-called hate speech or behavior considered extremist or terrorist) and not to undermine **categories derived from positive law**.
- The use of **blog posts or other press releases** as stand-alone channels for amending the terms of use is problematic. Users are not necessarily aware of their existence, so they do not have all the information they need to understand the rules. What's more, these communications are not systematically translated from English.
- Given the adoption of policies in which they undertake to comply with human rights, social media companies should as far as possible bring the content of their terms of use into line with the requirements of the relevant international instruments. The opposite is true of some social media, which **delete references to international law and the practice of international organizations**.
- Many aspects of the terms of use have not been addressed in the study, as certain policies were not amended during the monitoring period. Nevertheless, terms of use deserve to be scrutinized in their entirety, by researchers, authorities and civil society.

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<https://grsomediamedia.wordpress.com>

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<https://geode.science>

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