

Internet Impact Brief – Proposals to Regulate Content Moderation on Social Media Platforms in Brazil

Pedro de Perdigão Lana, Internet Society Brazil Chapter
Flavio Rech Wagner, Internet Society Brazil Chapter
Paulo Rena da Silva Santarém, Internet Society Brazil Chapter

Version 1.0, 13 March 2022

Abstract

The Brazilian National Congress is discussing a bill (*Projeto de Lei* - PL) that aims to regulate the moderation of content by social networks through a text that reproduces a Provisional Measure rejected by both the Federal Supreme Court and the Federal Senate. It is based on an extensive list of content categories. The main risks of the proposed law reside in two topics: (i) for social media companies to exclude any categories of content left out of the mentioned list they would need a court order, which is an implicit prohibition of self-regulation regarding the moderation, for example, of disinformation and hate speech; and (ii) attributing to the Executive Branch a highly discretionary control over what may or may not be subject to moderation in social networks, including the ability to apply severe punishments to companies based on a distortion of copyright law institutes.

This report uses the Internet Impact Assessment Toolkit (IIAT)¹ to examine how Bill 3227/2021² (as initially drafted) may affect the Internet by impacting what it needs to thrive as an open, globally connected, secure, and trusted resource for all people involved. The enablers "Collaborative development, management and governance" and "Accountability" have been found to be undermined.

Methodology

The Internet owes its strength and success to a foundation of critical properties that, when combined, represent the Internet Way of Networking (IWN). This includes: an accessible Infrastructure with a common protocol, a layered architecture of interoperable building blocks, decentralized management and distributed routing, a common global identifier system, and a technology neutral, general-purpose network.

To assess whether the present proposal has an impact on the Internet, this report will examine its impact on the IWN foundation the Internet needs to exist, and what it needs to thrive as an open, globally connected, secure and trustworthy resource.

1 <https://www.internetsociety.org/issues/internet-way-of-networking/internet-impact-assessment-toolkit/>

2 Amends Law No. 12,965 of April 23, 2014, and Law No. 9,610 of February 19, 1998, to address the use of social networks. House of Representatives Portal. Legislative proposals. Available at <https://www.camara.leg.br/propostas-legislativas/2299490>.

Context and Assumptions

Context

The Brazilian federal government's proposal to regulate online content moderation, the subject of this brief, was initially reported as a proposed decree regulating the Brazilian Civil Rights Framework (“Marco Civil”) for the Internet³.

This proposal intended to prohibit platforms from performing internal content moderation in some categories, creating a limited list of situations where this would be possible. Almost all the points listed were already provided for in most of the Terms of Use of the major social media platforms, but certain usual motivations for excluding content or accounts in these Terms were left out, notably misinformation.

This Decree was characterized by a questionable legislative technique and a vast potential for unintended effects that would make several Internet businesses models other than social networks unviable, including payment platforms⁴. There was, for example, a loophole that allowed for the infringement of online trademark rights⁵. Most notably, the Decree clearly went beyond its regulatory character and brought in legal innovations, which are forbidden under Brazilian law.

The motivation for the proposed Decree exposed allegations that digital platforms were inhibiting or even censoring conservative political opinions, a category of argument repeated in several other countries with some adaptations. The inclusion of payment platforms seemed to be motivated by the success of the #SleepingGiants movement in Brazil⁶.

After intense criticism from various sectors of society about the illegality of choosing a decree as the normative alternative for regulation (because it cannot produce innovations in the legal system)⁷, the government published a similar text in the form of Provisional Measure (“*Medida Provisória*” - MP) n. 1.068/2021⁸ correcting some of the most glaring problems of the Decree. This legislative institute is provided for in art. 62 of the Constitution of the Republic and is an exceptional act of the Federal Executive Branch with law-like capacities, which can only be invoked in cases of relevance and urgency. It must be approved by Congress and turned into law in order not to lose effectiveness in 60 days, extendable for an equal period.

MP 1.068/2021 amended the Brazilian Civil Rights Framework for the Internet and the Copyright Law (“*Lei de Direitos Autorais*”, Law n. 9.610/98) to establish an administrative mechanism under the control of the Executive Branch to judge violations of its provisions, with fewer guarantees than the system then in place under the tutelage of the Judiciary Branch. This change was supported by an innovative twisted institute of copyright law provided in art. 2 of the Provisional Measure,

3 See <https://jornaldebrasil.com.br/noticias/politica-e-poder/bolsonaro-mira-2022-e-suas-bases-com-decreto-visto-como-ilegal-para-limitar-retirada-de-posts-de-redes-sociais/>; and, for the official text, Circular Letter No. 88/2021/GM, of May 13, 2021 <https://static.poder360.com.br/2021/06/minuta-decreto-mudanca-marco-civil-internet.pdf>

4 See <https://www.conjur.com.br/2021-mai-23/especialistas-criticam-tentativa-bolsonaro-controlar-redes-sociais>

5 See <https://www.conjur.com.br/2021-ago-23/opinio-decreto-remocao-conteudo-redes-sociais>

6 See <https://valor.globo.com/legislacao/noticia/2021/05/21/decreto-sobre-redes-sociais-pode-impactar-meios-de-pagamento.ghtml> and <https://blogs.oglobo.globo.com/sonar-a-escuta-das-redes/post/em-um-ano-sleeping-giants-brasil-evitou-mais-de-r-14-milhoes-em-publicidade-sites-desinformativos-calculam-fundadores.html>

7 See <https://teletime.com.br/08/06/2021/isoc-brasil-defende-fim-da-tramitacao-de-decreto-do-governo-que-regula-redes-sociais/>

8 Official text in http://www.planalto.gov.br/ccivil_03/ Ato2019-2022/2021/Mpv/mpv1068.htm.

alleging that the removal of content posted in social media would be an infringement of these rights, and gave, in theory, another alternative to the Executive Branch to apply penalties. The established sanctions, which already existed for acts considered illicit by the Brazilian Civil Rights Framework for the Internet, were extended to these MP 1.068/2021's new cases, encompassing fines up to 10% of companies' annual revenues in Brazil and the prohibition of data treatment activities in the country.

On September 14, 2021, under solid pressure mainly from civil society and the opposition, MP 1.068 was simultaneously suspended by a preliminary injunction decision of Federal Supreme Court Justice Rosa Weber and returned by the President of the Federal Senate, Rodrigo Pacheco⁹. Both decisions were based on the legal insecurity generated and the abuse of the normative power of the Executive Branch when dealing with issues that could not be the object of a Provisional Measure, besides not having sufficiently demonstrated the urgency and relevance of the measure and the existence of conflicts with another Bill that was already in Congress.

However, less than a week later, on September 20, 2021, the Federal Government tried for the third time to advance its agenda, sending a Bill (PL 3227/2021¹⁰) to Congress with the same text as the rejected Provisional Measure.

This proposed legal text is currently being discussed at the House of Representatives and may be analyzed independently or joined with another Bill, such as Bill 2630/2020 ("Brazilian Law of Freedom, Responsibility, and Transparency on the Internet", known as "Fake News Law")¹¹, which has been under construction for several months in constant debate with various sectors of Brazilian society. The risk of a last-minute incorporation into the final text of the Bill that is already in an advanced legislative stage is a red flag to entities concerned about preserving an open and trustworthy Internet.

Assumptions

The assumptions can be categorized into strong assumptions, which are factual interpretations made by the authors of this report of a given fact or legal article; and weak assumptions, which are dominant interpretations (in Brazil or internationally) about normative aspects of the proposals.

As strong assumptions, we highlight:

- By invoking copyright protection to effectively restrict content moderation by social media, article 2 of PL 3227/2021 provides that the decision on penalties resulting from copyright infringement in those cases would be made by "the responsible organ, to be defined in regulation". It is assumed that this body would be linked to the Federal Executive Branch¹², since the legal document explicitly talks about "administrative sanction".

9 See <https://images.jota.info/wp-content/uploads/2021/09/adi-6991-mc.pdf> and <https://www12.senado.leg.br/noticias/materias/2021/09/14/pacheco-devolve-mp-que-dificultava-retirada-de-conteudo-da-internet>.

10 <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2299490>

11 English translation: <https://docs.google.com/document/d/1MHMDHsVJBi45P1R5IAyoLmZvZk8eULHisYFqGy9X2s/edit>

12 Especially given point 8 of the motivations present in EMI no. 00072/2021 MTur MCTI MJSP <https://legis.senado.leg.br/sdleg-getter/documento?dm=9012623&ts=1632502217153&disposition=inline>

- There is an active interest from the Federal Executive Branch in avoiding greater control over disinformation networks, because several important political agents linked to the current government are being investigated for connections to these networks in various oversight bodies, such as the Federal Police¹³, the Superior Electoral Court¹⁴, and the National Congress¹⁵;
- There is a deliberate choice not to include some categories, often provided for in the Terms of Use of social media platforms¹⁶, such as misinformation and certain categories of hate speech or human rights offenses online, such as microaggressions.

As weak assumptions, we outline:

- The administrative penalty procedure would have fewer guarantees than a judicial proceeding, such as reduced time limits and less possibility of appeals, a pattern widely observed in Brazilian formal procedures. This is especially true when considering the judicial-order-and-takedown regime adopted by the Brazilian Civil Rights Framework for the Internet (art. 19), except for a notice-and-takedown regime for unauthorized nudity or sexual material (art. 21), arguably also applicable to traditional copyright infringement cases (art. 19, §2 and art. 31, although there is no consensus on the interpretation of these articles)¹⁷.
- Considering the data-intensive nature of social network services, not allowing the "collection, storage, safekeeping and processing of records, personal data or communications"—which is a possible sanction under art. 11 of the Brazilian Civil Rights Framework for the Internet—it would make it unfeasible for social network companies to operate, effectively forcing them out of the country. These sanctions were extended to the new articles inserted by the proposals of the Brazilian government.
- There are no provisions in the Brazilian Copyright legislation (Law n. 9.610/98) which would allow the judgment and application of penalties to be carried out in a privileged way by administrative agencies replacing the Judiciary.

Summary

The regulation proposals present a risk to the Internet mainly for three reasons: (i) a lack of inclusivity and transparency in elaborating these new rules, contrasting with past experiences of the law it intends to change (Brazilian Civil Rights Framework for the Internet); (ii) the implementation of an exhaustive legal list of cases allowing content moderation to be done in social networks, effectively prohibiting autoregulation by social media platforms and their communities in situations not specified there, such as disinformation; (iii) the creation of a new administrative mechanism under the Executive Branch to decide on matters related to content moderation on social media, lacking traditional safeguards of judicial procedures and risking

13 See <https://www.cnnbrasil.com.br/politica/pf-diz-que-bolsonaro-teve-atuacao-direta-em-fake-news-sobre-urnas-eletronicas/> and <https://www.poder360.com.br/justica/operacao-da-pf-contra-fake-news-mira-aliados-de-bolsonaro/>

14 See <https://www.bbc.com/portuguese/brasil-58070438> and <https://www.tse.jus.br/imprensa/noticias-tse/2021/Outubro/tse-julga-improcedentes-acoas-contra-jair-bolsonaro-e-hamilton-mourao>

15 See <https://www12.senado.leg.br/noticias/materias/2021/12/27/cpi-das-fake-news-buscar-parceria-com-policia-federal-tse-e-ministerio-publico> and <https://www.bbc.com/portuguese/brasil-51745900>

16 See <https://www.cnnbrasil.com.br/politica/ao-se-explicar-sobre-mp-bolsonaro-diz-que-nao-se-combate-fake-news-com-censura/>

17 For a detailed explanation on Marco Civil's intermediary liability framework in English, see <https://isoc.org.br/noticia/study-an-assessment-of-marco-civil-s-intermediary-liability-framework>.

interference by public authorities that are currently involved in investigations related to disinformation.

How Does the Attempt of the Regulation Impact What the Internet Needs to Exist?

Upon initial review of the materials to date, the proposals do not appear to pose any direct impact on the critical properties the Internet needs to exist.

How Does the Attempt of the Regulation Affect What the Internet Needs to Thrive?

While the critical properties are essential for the Internet to exist, they are not enough to help it reach its full potential. To assess how we can achieve an open, globally connected, secure, and trustworthy Internet, we need to analyze them through the Enablers that are essential for these goals to be achieved.

Collaborative Development, Management, and Governance

The Internet's technologies and standards are developed, managed, and governed in an open and collaborative way. This open collaboration extends to the building and operation of the Internet and services built on top of the Internet. The development and maintenance process is based on transparency and consensus, and has as its goal the optimization of infrastructure and services to the benefit of the users of these technologies.

Internet regulation in Brazil is marked by collaborative and (more than usual) transparent lawmaking processes. CGI.br, as the main locus of multistakeholder debate and best practice recommendations for the Internet in Brazil, is identified as a successful example of multistakeholder processes by several actors from the national and international Internet Governance ecosystems. The creation of the Brazilian Civil Rights Framework for the Internet, which is the object of the proposed legal amendment, was characterized by a high degree of participation from different stakeholders, in a long process that stimulated the debate in the country and that, despite its limitations, arrived at a final text that reflects these minimum consensuses in a balanced manner and with an appropriate legislative technique¹⁸. Also, the General Law of Data Protection was discussed in an open and transparent way, over several years.

These collaborative and open procedures were not only ignored, but actively avoided in the drafting of the proposed Bill by the Federal Government in 2021, born as a Decree and turned into a Provisional Measure. No attempt was made to promote discussions with other sectors to improve the normative text, excluding even other branches of the Brazilian public sphere, and in particular the Legislative Branch. One of the rare moments in which a minimally open debate was observed was in the convening of a Public Hearing by the Human and Minority Rights Commission

¹⁸ See https://bd.camara.leg.br/bd/bitstream/handle/bdcamara/26819/bazilian_framework_%20internet.pdf. For further details, see https://itsrio.org/wp-content/uploads/2018/02/v5_com-capas_mio_lo_Brazil-Internet-Bill-of-Rights-A-closer-Look.pdf

of the House of Representatives, after the intended Decree became known through the Press, with the intention of making the Executive Branch bodies aware of the need to treat the matter with care¹⁹. The manifestations other than the Executive Branch ones were largely contrary to the content of the Decree, apart from congressmen allied to the government.

Finally, the top-down imposition of an exhaustive list of types of content subjected to moderation also limits the most recent efforts of self-regulation by social network companies with support from government agencies and representatives of society. No study commissioned or conducted by the government was released to explain the choices made, ignoring the state-of-the-art discussion on the subject and the opinion of the community of experts who have been addressing the issue in recent years, including those in favor of some level of regulation²⁰.

The systematic disregard for a collaborative process result in rushed, low-quality regulatory proposals that ignores the harm they introduce and contains numerous inconsistencies, which considerably diminishes society's confidence in the Internet. An open Internet relies on collaboration, in which trust is dependent on consistent regulations that result from a search for some degree of social consensus.

Accountability

Accountability on the Internet gives users the assurance that organizations and institutions they interact with are directly or indirectly acting in a transparent and fair way. In an accountable Internet, entities, services, and information can be identified and the organizations involved will be held responsible for their actions.

The Government's proposal gives an administrative body an overly discretionary control over what may or may not be subject to moderation by social network application providers. Article 2 of the bill inserts into the Brazilian Copyright Law the provision that "the responsible body, to be defined in regulation" could apply sanctions to platforms that make online content unavailable "without being characterized as just cause". However, the cases that would be inserted into the Brazilian Civil Rights Framework for the Internet classified as "just cause" are listed in art. 8-C, § 1. This list is redundant and poorly systematized manner, reaffirming the enforcement of court orders (which is a mandatory content exclusion scenario because of Marco Civil's art. 19) and cases already foreseen by law as illicit, while also adding "at the request of the offended person (...) in the hypothesis of violation to intimacy, privacy, image, honor, protection of personal data or intellectual property".

This framework imposes a level of discretion in interpreting open-ended clauses that could easily be abused by the mentioned administrative body, possibly generating a "chilling effect" for social networks. In addition, the proposed law diminishes the possibility of efficient liability and accountability of Internet social network service providers for damages arising from their own

19 <https://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-permanentes/cdhm/noticias/alteracao-da-regulamentacao-do-marco-civil-da-internet-e-objeto-de-audiencia-publica-da-cdhm>

20 See <https://direitosnarede.org.br/2021/06/08/tentativa-de-bolsonaro-de-protoger-a-difusao-de-odio-e-desinformacao-pode-quebrar-a-internet/> and the meeting of the Interamerican Commission on Human Rights: <https://www.youtube.com/watch?v=7V6A-cx9Ic>

conduct, whether active or passive, in the broad context of content moderation and Brazil's current regime of liability of intermediaries, explained above.

The proposed legislation creates a mandatory standard of measures that must be adopted by social media companies, including requirements for transparency and user responsiveness with likely positive effects. However, regarding actual moderation practices, the proposal establishes as a rule that social media platforms are prohibited from deleting, canceling, or suspending content, except in the cases expressly enumerated as "just cause". As a result, it would be significantly more difficult to hold companies accountable if they fail to moderate harmful content that is not foreseen in the aforementioned exhaustive list, such as disinformation. Therefore, offenses to rights committed on social media, but not listed as "just cause", could occur relatively freely, so that providers would not only be discouraged, but prevented by law from making any efforts to mitigate these violations.

Social networks are intermingled with the very concept of the Internet by a significant part of the world population, including Brazil²¹, and take most of the time users spent online today. Distrust of the veracity and safety of information from this source, leading to the identification of cyberspace as a dangerous and violent environment, may profoundly weaken the possibility of defending the Internet against assaults that could harm the search for its aspirational state, especially in relation to its trustworthiness and accountability of Internet agents.

As the average citizen loses confidence in the global network of networks as a force for good, it becomes much easier to implement regulations or technological interference that negatively affects the core of the Internet as we know it today and the aspirational state we hope it will reach. Thus, the implied legal prohibition on moderating content related to misinformation, bullying, and other actions detrimental to digital human rights or the public interest is extremely troubling.

Summary

PL 3227/2021 has negative implications on at least two enablers that promote the development of the open, globally connected, secure and trustworthy Internet. The Bill was drafted by the government unilaterally, without any consultation with other sectors of society, which negatively impacts the "collaborative development, management and governance" of the Internet. The ban on content moderation by social networks in various situations related to human rights online negatively affects the "accountability" of Internet Governance ecosystem agents.

Summary and Recommendations

The Brazilian National Congress is discussing a Bill that aims to regulate, through an exhaustive and exclusive list of cases in which moderation could be exercised, the moderation of content carried out by social networks. The main risks of the proposed law reside in an implicit prohibition of moderation of situations not listed in the bill, such as disinformation and hate speech, and in an attribution to the Executive Branch of control, with a high level of discretion, over what may or may not be subject to moderation by social network application providers, including the ability to apply severe punishments to companies.

21 Cf. <https://olhardigital.com.br/2017/01/18/noticias/dos-brasileiros-acham-que-o-facebook-e-a-internet-diz-pesquisa/>

These risks bring strong threats to at least two enablers that promote the development of the open, globally connected, secure, and trusted Internet: "collaborative development, management, and governance," and "accountability".

ISOC Brazil, the Brazilian chapter of the Internet Society, hereby recommends through this Internet Impact Brief that the government and the National Congress of Brazil:

- suspend the procedures related to PL 3227/2021, due to the serious risks it brings to the development of the Internet in the country
- promote, in the country's Internet legal framework, respect for human rights online, fighting all behaviors that are harmful to the development and use of the Internet as an instrument of social inclusion and promotion for all
- promote a business environment with adequate legal security, based on the Brazilian model of intermediary liability already enshrined in the Brazilian Civil Rights Framework (Marco Civil) for the Internet; and
- discuss any future proposal for legislative improvement affecting the Internet with all sectors of society, including the private sector, civil society, the technical community, and academia, in an open, broad, and transparent manner, respecting the deadlines that are necessary in the search for appropriate social consensus.

As a contribution to the debate on this important subject, ISOC Brazil reminds the government and the National Congress of the "Decalogue of Recommendations on the Brazilian Model of Intermediary Liability"²². The 2021 document²³, produced from conversations with representatives of civil society, private sector, and academy organizations, establishes a set of ten principles to be followed in the discussion of any legislative or regulatory proposal on the matter.

22 https://isoc.org.br/files/Decálogo_de_Recomendações_sobre_o_Modelo_Brasileiro_de_Responsabilidade_de_Intermediários.pdf

23 <https://isoc.org.br/noticia/decalogo-de-recomendacoes-sobre-o-modelo-brasileiro-de-responsabilidade-de-intermediarios>