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# A FACEBOOK COURT IS BORN: TOWARDS THE 'JURISDICTION' OF THE FUTURE?

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**Abstract:**

The paper, starting from the news of the appointment of the first 20 Members of Facebook's Oversight Board, offers first brief reflections about the entry into force of a Facebook Court, enlightening true or presumed independence from the company, as well as similarities or differences with Google Advisory Council. Last but not least, the paper poses a question that already seems crucial: a model of justice with an own Court for each 'Big Tech' is going to be the 'jurisdiction' of the future?

**Key-words**: Social networks, Private jurisdiction, Right to erasure and right be forgotten, Data Protection Law, Technology, Internet.

**Summary:** 1. Facebook's Oversight Board after the appointment of the first 20 Members. – 2. How independent the Oversight Board really is from Facebook? A deeper look through the Charter of the Board. – 3. A comparison between Facebook's Oversight Board and Google Advisory Council. – 4. An own Court for each "Big Tech": towards the "jurisdiction" of the future?

## 1. Facebook's Oversight Board after the appointment of the first 20 Members

On May 6th 2020 Facebook appointed the first 20 Members of its Oversight Board [1], an own 'Court' which is supposed to review content and issue reasoned

[1] *See* the official website of the Oversight Board for the complete and continuously updated list of members and other relevant information on the newborn 'Facebook Court': https://www.oversightboard.com.

and binding decisions, strongly desired by Facebook itself to clean up its image partially compromised by the controversies occurred to the company in the past years [2]. The Court is scheduled to become operational this year.

The recent news of the appointment of the first 20 Members allows us to carry out the first reflections on the 'Facebook Court' now about to start operating.

First of all, a brief analysis of the profiles identified and the selection procedure allows to understand what kind of 'Court' this Board is going to be. Once this is done, it is crucial to analyze the functions in more detail, trying to understand the real impact the Oversight Board is going to have.

It seems not secondary to start with the recently appointed 20 Members of the Board: all of them are high profile professionals, coming from all over the world, to ensure a global perspective. We could easily call them 'a dream team'. A brief analysis of their *curricula* suggests the leading role that the Board will take in Facebook's intentions.

Each member will serve for a three-year term, for a maximum of three terms, pursuant to the Charter of the Board [3], Article 1, para. 3.

Among the 20 Members, 4 Co-Chairs were appointed: Catalina Botero-Marino, from Colombia, Dean of the Universidad de los Andes, Faculty of Law, Special Rapporteur for freedom of expression at the Organization of American States, alternate Judge of the Colombian Constitutional Court; Jamal Greene, from the United States, Professor at Columbia Law School; Michael McConnel, from the United States, Professor and Director of the Constitutional Law Center at Stanford Law School, former Judge of U.S. Court of Appeals and U.S. Supreme Court advocate; Helle Thorning-Schmidt, from Denmark, former Prime Minister of Denmark, former CEO of Save the Children.

The Co-Chairs, according to the Charter, Article 1, para. 7, who will serve as liaisons to the board administration, lead committees and carry out management responsibilities, such as membership selection and case selection.

Members also include several other Professors from primary Universities from all over the world and Tawakkol Karman, a Nobel Peace Prize laureate.

In fact, in order to be selected, the Members must have specific characteristics, defined in the Board's Charter, Article 1, para. 2: 'For the board to serve its purpose effectively, members must possess and exhibit a broad range

[2] *See* JC Wong, 'Will Facebook's new oversight board be a radical shift or a reputational shield?' (2020) *The Guardian*, 7 May 2020, which poses the following question: 'will Facebook's oversight board live up to its lofty promises and reshape how Facebook shapes the world? Or will it just be a reputational shield for a company whose pathologies run deeper than the question of whether individual pieces of content should be allowed or taken down?'.

[3] For the Charter *see* https://www.oversightboard.com/governance/.

of knowledge, competencies, diversity and expertise. Members must not have actual or perceived conflicts of interest that could compromise their independent judgement and decision-making. Members must have demonstrated experience at deliberating thoughtfully and as an open-minded contributor on a team; be skilled at making and explaining decisions based on a set of policies or standards; and have familiarity with matters relating to digital content and governance, including free expression, civic discourse, safety, privacy and technology'.

Furthermore, according to Article 1, para. 4, of the Charter, the Board will have the following expressly defined powers. First of all, the Board may request that Facebook provide information reasonably required for board deliberations in a timely and transparent manner. The Board will take the decision interpreting Facebook's Community Standards and other relevant policies (collectively referred to as "content policies") in light of Facebook's articulated values. In order to execute the decision, the Board may instruct Facebook to allow or remove content and also instruct Facebook to uphold or reverse a designation that led to an enforcement outcome. Each decision should be motivated by written explanations and, under Article 6 of the Charter, will be made publicly available and archived in a database of case decisions on the Board's website, subject to data and privacy restrictions.

People using Facebook's services and Facebook itself may bring forward content for board review. Furthermore, pursuant to Article 2, para. 1, 'in instances where people disagree with the outcome of Facebook's decision and have exhausted appeals, a request for review can be submitted to the board by either the original poster of the content or a person who previously submitted the content to Facebook for review': in this sense, the Oversight Board seems to be a Facebook's Court of Appeal.

The Board will have no authority or powers beyond those expressly defined by the Charter.

## 2. How independent the Oversight Board really is from Facebook? A deeper look through the Charter of the Board

Facebook claims that the Oversight Board should be independent from the company. Mark Zuckerberg, Founder and CEO of Facebook, stated: 'We are responsible for enforcing our policies every day and we make millions of content decisions every week. But ultimately I don't believe private companies like ours should be making so many important decisions about speech on our own. That's why I've called for governments to set clearer standards

around harmful content. It's also why we're now giving people a way to appeal our content decisions by establishing the independent Oversight Board'. [4]

In essence, in Zuckerberg's words, the birth of the Board would have followed the call to governments to intervene on the matter, which failed, but Zuckerberg himself seems to be aware of the necessity that the Board should be independent from the company he rules.

The same recently appointed 20 Members of the Board, in the aforementioned intervention on The New York Times, made it clear: 'We are all independent of Facebook. And we are all committed to freedom of expression within the framework of international norms of human rights. We will make decisions based on those principles and on the effects on Facebook users and society, without regard to the economic, political or reputational interests of the company'. [5]

To verify how true this assumption is and how much aspirations correspond to reality it seems necessary to examine in detail the Charter of the Board, as well as By-laws and Code of Conduct.

According to the aforementioned Article 1, para. 2, of the Charter, in order to guarantee the independence of the judgement, the specification, among the requirements, of the absence of any actual or perceived conflict of interest seems to be very important.

It is legitimate to doubt, however, that the conflict of interest may derive from the same selection procedure, envisaged by Facebook, and from the regulation of the remuneration provided for the assignment.

As for the selection procedure, provided by the Charter, Article 1, para. 8, all roads seem to lead to Facebook, since it is Facebook to select the group of Co-Chairs.

Once Facebook has selected the Co-Chairs, Facebook and the Co-Chairs will then jointly select candidates for the remainder of the Board seats, formally appointed by trustees. Facebook and the public may always propose candidates to the Board.

As regards remuneration, the speech is perhaps more complex, since Facebook has taken precautions to prevent criticism from this point of view.

In the aforementioned intervention on The New York Times, the four Co-Chairs ensure that 'independent judgment is guaranteed by our structure. The

[4] M Zuckerberg (2019) at https://www.facebook.com/zuck/posts/one-of-the-most-important-projects-ive-worked-on-over-the-past-couple-of-years-i/.

[5] C Botero-Marino, J Greene, MW McConnel, H Thorning-Schmidt, 'We Are a New Board Overseeing Facebook. Here's What We'll Decide' (2020) *The New York Times*, 6 May 2020.

oversight board's operations are funded by a $130 million trust fund that is completely independent of Facebook and cannot be revoked'.

This is confirmed by reading the Charter: according to Article 5, para. 1, 'the board will be funded by the trust to support its operations and expenses' and, under the para. 2, 'the trustees will maintain and approve the board's operating budget, including member compensation, administration and other needs. The trustees will formally appoint and, if necessary, remove members for violations of the board's code of conduct'.

However, as for the relationship between the trust and Facebook, according to Article 5, para. 2, 'the trust will receive funding from Facebook, and the trustees will act in line with their fiduciary duties. Facebook will appoint independent trustees'.

Therefore, it is still legitimate to doubt that the mechanism devised, also in this respect (and not only for the selection procedure), can guarantee effective independence.

## 3. A comparison between Facebook's Oversight Board and Google Advisory Council

Before the birth of the Board, a comparable experience was perhaps that of the Google Advisory Council whose establishment indicates, however, a totally different approach from Google. The Council, indeed, seems to have some similitudes with the Oversight Board but also big differences

After the groundbreaking 2014 decision of the Court of Justice of the European Union in the Google Spain case (C-131/12) [6], Google was supposed to take a binding decision in the matter of right to be forgotten. [7]

A first difference with the Facebook Board is here: if the Oversight Board is a Facebook initiative, in the case of Google it was the same pronunciation of the Court of Justice that assigned to Google a function that should not be proper to it and that the same Google has unwillingly accepted: that of 'judge' on requests regarding the right to be forgotten, in the sense of de-referencing made by the Court.

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[6] CJEU, Grand Chamber, May 13th 2014, C-131/12 (Google Spain).

[7] *See* G Cintra Guimarães, *Global technology and legal theory. Transnational constitutionalism, Google and the European Union* (2019) New York, 156, which observes: 'private companies such as Google will act as a sort of "court of first instance" in the implementation of the right, filtering the requests that will eventually end up being analyzed by data protection authorities and official tribunals'. About the right to be forgotten *see* above all TE Frosini, *Liberté Egalité Internet* (2015) Napoli, 117 ff.

About this new and perhaps undesired function, Google itself stated 'these are difficult judgements and as a private organization, we may not be in a good position to decide on your case'. [8]

At this purpose, Google enforced Google Advisory Council: the Council wasn't really a 'Google Court', like Facebook's one, since Google intended to take 'directly' decisions in the field of right to be forgotten, without worrying about providing a semblance of independence, being expressly allowed by the Court of Justice.

If Google was supposed to take binding decision in matter of right to be forgotten [9], the Council was supposed to help Google to make the right balance between right to be forgotten and other rights and the public's right to information above all. [10]

That's why, in order to make this balance right, Google established a Council of experts from all around the world to require them to weigh, on a case-by-case basis, an individual's right to be forgotten with the public's right to information. The Council of experts, composed of subjects with proven experience and well-known Professors such as in the case of the Oversight Board, but directly nominated by Google, was supposed to review input from dozens of other experts in meetings across Europe, as well as from thousands of submissions through the web. [11]

Another difference is in the scope. Google Advisory Council's scope, at evidence, was limited to advice Google for requests related to right to be forgotten, while the Oversight Board's judgment potentially extends to the removal and maintenance of all content published on Facebook, also for different reasons.

What the Oversight Board and the Google Advisory Council really have in common is that the occasion of their birth is due to the substantial abdication by Nations and the European Union by a web regulation and the consequent jurisdiction.

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[8] Google's FAQ about right to be forgotten, available at: https://policies.google.com/faq?hl=en.

[9] *See* G Cintra Guimarães, *Global technology,* 158, according to which 'Google increasingly assumes the role of a "court of first instance" for the whole of Europe'.

[10] *See* also G Cintra Guimarães, *Global technology,* 157, which observes that the Advisory Council was a way for Google to make its decision-making more transparent and predictable, since Google would have followed the 'specific advice on the implantation of the judgement' given by the Council.

[11] Google (2015) *The Advisory Council to Google on the Right to be Forgotten*, 7, available at https://static.googleusercontent.com/media/archive.google.com/it//advisorycouncil/advisement/advisory-report.pdf, identified four primary criteria on which the Council advised Google to evaluate delisting requests from individual data subjects: 1. data subject's role in public life; 2. nature of the information; 3. the specific source; 4. time elapsed.

The new model represented by the 'Facebook Court', also because of the spaces left by lawmakers, will be the 'jurisdiction' of the future?

## 4. An own Court for each 'Big Tech': towards the 'jurisdiction' of the future?

The digital revolution is giving one of the greatest transformations to the world since the era of the industrial revolution. In this framework, the birth of a Facebook Court suggests a first reflection about the evolution of the jurisdiction in the digital era [12], also considering the risks carried out by this evolution. Although Facebook announces the Board as independent of its organization, it is still Facebook to dictate the rules.

Is the justice slowly (or not so slowly) moving towards a 'Big Tech justice'? With virtual life becoming more and more important, do these para-jurisdictional Boards, as Facebook's Oversight Board, not risk becoming more and more central in the global legal experience in the future? If so, will this para-jurisdictional 'drift' be able to equally guarantee effective protection of rights?

In the aforementioned intervention, Mark Zuckerberg, Founder and CEO of Facebook, stated that the birth of the Board followed a call to Governments to intervene in the matter, which failed.

Undoubtedly the spaces for regulatory intervention first and jurisdictional then are those left by national legislators, as well as by the European Union, which have not yet provided for a precise discipline of the matter.

Just think of the case of the right to be forgotten. Despite the huge impact of the Google Spain ruling, which prompted Google to set up the Advisory Council, the GDPR seems to have failed in its task of regulating the right to be forgotten. In fact, GDPR, Article 17, para. 1, only establish the principle according to which the interested party, under certain conditions, has the right to request the cancellation of personal data concerning him (therefore not de-referencing personal data from the search engine as the Court of Justice claimed in the Google Spain decision). [13] Referring only to the cancellation it is not clear if the

[12] *See* B De La Chappelle, P Fehlinger, 'Jurisdiction on the Internet: from legal arms race to transitional cooperation', available at: https://www.internetjurisdiction.net/uploads/pdfs/Papers/IJ-Paper-Jurisdiction-on-the-Internet.pdf. The paper underlines that 'the theme of "digital sovereignty" gains traction in many jurisdictions in a context of rising tensions and a sense of powerlessness by public authorities to impose respect for their national laws on foreign-based Internet platforms and technical operators'.

[13] *See* S Zanini, 'Il diritto all'oblio nel Regolamento europeo 679/2016: quid novi?' (2018) 15 Federalismi.it; D Barbierato, 'Osservazioni sul diritto all'oblio e la (mancata) novità del Regolamento UE 2016/679 sulla protezione dei dati personali' (2017) 6 Resp. civ. e previd., 2100 ff.

GDPR intends to refer this duty to proceed with the cancellation also to the search engines or not. Furthermore, as said, the same Court of Justice of the European Union forced Google to become a judge in the matter of right to be forgotten and the result is the abovementioned Google Advisory Council.

More generally, the gaps regarding several aspects of the web, not only in European legislation, leave huge spaces for the intervention of private subjects and especially of 'Big Tech', as stated by Mark Zuckerberg himself.

If the regulation of the web is theoretically possible, the task seems to be difficult indeed, even for the European Union, given the universalistic and tendentially free nature of the web. [14]

Perhaps, the easier way to regulate the web is by more flexible soft law sources, instead of the traditional hard law. [15] The regulation of the Internet, therefore, risks being mostly entrusted to the "owners" of the house: the law of the future should be Google Law or Facebook Law?

In fact, the giants of the web appear, at present, the only subjects capable of dictating truly large-scale rules on the most varied aspects of the web and also capable of enforcing them, despite their soft law nature.

The rules that germinate within the giants of the web, therefore, still constitute 'law', despite the undoubtedly undemocratic origin and the submission to business logic rather than fundamental rights.

To the crisis of hard law and, more generally, of the state monopoly on the sources of law corresponds the crisis of the state monopoly on jurisdiction. As has been observed, these are two aspects of the same phenomenon: the erosion of state sovereignty in the global space. [16]

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[14] About the challenge of regulating the web protecting fundamental rights *see* A Iannotti della Valle, 'L'età digitale come "età dei diritti": un'utopia ancora possibile?' (2019) 16 Federalismi.it.; also *see* S. Sassi, *Diritto transnazionale e legittimazione democratica* (2018) Milano, 56 ff., about the need for a transnational law for the regulation of sectoral areas which, by their transnational nature, neither the State nor the international legal system are able to regulate.

[15] *See* MC Gaeta, 'Hard law and soft law on data protection: what a DPO should know to better perform his or her tasks in compliance with the GDPR' (2019) 1 EJPLT. Also *see* E Mostacci, *La soft law nel sistema delle fonti: uno studio comparato* (2008) Milano, 2008; A Somma, 'Soft law sed law: diritto morbido e neocorporativismo nella costruzione dell'Europa dei mercati e nella distruzione dell'Europa dei diritti' (2008) 3 Rivista critica del diritto privato, 437 ff.

[16] About the growing role of the private justice in the globalized world, with particular regard to arbitration, *see* F Marone, *Giustizia arbitrale e Costituzione* (2018) Napoli, 241, according to which: 'Una giustizia "privata", dei privati e per i privati, infatti, meglio si presta ad un contesto costituito da sempre più regole private e meno regole statuali. L'arbitrato, per certi versi, costituisce – sul piano processuale – l'altra faccia della stessa medaglia: da un lato la regolamentazione giuridica dei privati (soft law) erode lo spazio della normazione statale (hard law), dall'altro l'arbitrato (giurisdizione dei privati) erode lo spazio della giurisdizione statale. La riduzione dello spazio della sovranità dello Stato, in definitiva, passa per entrambi i momenti: alla crisi del mono-

In the specific case of the Oversight Board, the institution seems to have been conceived by Facebook to effectively protect fundamental rights and freedom of expression, while not referring to any of the constitutional experiences resulting from centuries of legal civilization in Europe and America.

The Oversight Board's Charter itself, Article 2, para. 2, states that 'the board will review content enforcement decisions and determine whether they were consistent with Facebook's content policies and values': that said, it is clear that Facebook's content policies and values are going to act as a Constitution for the Board's judgements. In fact, the statement, at the bottom of the same Article, according to which 'the board will pay particular attention to the impact of removing content in light of human rights norms protecting free expression', without other specifications, seems to be a style clause, while Facebook's content policies and values are clearly at the first place.

It is also important to outline that, according to the Charter, Article 2, para. 1, 'the board has the discretion to choose which requests it will review and decide upon. In its selection, the board will seek to consider cases that have the greatest potential to guide future decisions and policies'. Therefore, not all requests will enjoy effective protection, which leaves us perplexed. How can the protection of fundamental rights be *à la carte?*

But the real question is the following: can we allow the protection of fundamental rights to be left to the good intentions of the CEOs of Facebook and Google?

It would then perhaps be better if the legislators around the world take back what is up to them and that is recognized by the 'Big Tech' themselves, taking the courage to regulate the most controversial aspects of the web. In fact, a progressive evolution of jurisdiction towards a jurisdiction managed by 'Big Tech', capable of issuing binding decisions in delicate matters, without fully ensuring the rights of defense and the contradictory, would not be acceptable.

The prospect of an increasingly central role of the private justice in the field of rights on the web, however, may be acceptable or even desirable if the legislators, at the highest possible level [17], will be able to impose minimum guarantees that allow defining a judgment actually 'justice': just think of the possibility of technical defense and the effectiveness of the contradictory as well as guarantees on the appointment of truly independent and impartial 'judges'.

Indeed, it was appropriately stated that 'even in the most informal of pro-

polio statale sulle fonti del diritto, quindi, corrisponde la crisi del monopolio statale della giurisdizione'.

[17] It is worth remembering the definition of contemporary constitutionalism as 'multilevel constitutionalism' provided by I Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 Common Market Law Review, 703 ff.

ceedings certain minimum requirements of 'due process' must be met if the award is to be legally binding'. [18]

In presence of such guarantees, forms of private justice can offer undoubted advantages: first of all, as already happens in many countries with administered arbitrations [19] in matters such as banking and financial law [20], public procurement [21] and sport [22], technical bodies appear more suitable to resolve disputes in subjects requiring specific knowledge. In the present case, a knowledge of the technology behind the law [23] as well as a knowledge of the fundamental rights involved, obviously.

[18] E Brunet, 'Arbitration and Constitutional Rights' (1992) 71, 1 NC Law Review, 1992, 81 ff.

[19] About the advantages of the private justice and the arbitration, with particular regard to administrated arbitrations, *see* F Marone, *Giustizia arbitrale*, 188 ff.

[20] *See* L Albanese, 'Banking and financial litigation: between alternative dispute resolution systems and so-called "vessatorietà" of the arbitration clauses' (2017) 6 Resp. civ. e previd., 1873 ff.

[21] *See* I Lombardini, 'Il nuovo arbitrato nei contratti pubblici, obbligatoriamente amministrato dalla Camera arbitrale: rivoluzione copernicana o restaurazione?' (2016) 4 Riv. Arb., 715 ff.

[22] *See* TE Frosini, 'La giustizia sportiva italiana e comparata' (2017) 15 Federalismi.it.

[23] *See* L Gatt, R Montanari, IA Caggiano, 'Consenso al trattamento dei dati personali e analisi giuridico-comportamentale. Spunti di riflessione sull'effettività della tutela dei dati personali' (2017) 2 Pol. Dir., 339, where the Authors opportunely suggest to look at the law from a technological point of view.