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NEW REGULATORY FORCE OF CYBERSPACE: THE CASE OF META'S OVERSIGHT BOARD *

by

JÁN MAZÚR † BARBORA GRAMBLIČKOVÁ ‡

It's been a few years since Facebook (Meta) instituted its Oversight Board as a new quasi-judicial and regulatory body of one of the most important contemporary cyberspaces. It's long established that social media platforms, such as Facebook, pose certain challenges to democracies as they, among other issues, allow for spread of fake news and hate speech, shift our perception of reality, or create echo chambers. In reaction to talks of regulating similar platforms, Meta's self-regulatory attempt of instituting the Oversight Board appears to tackle the issue of content moderation by the platform itself. As the content moderation is one of the main sources of Meta's problematic reputation (taking down posts, pages of various more or less known persons), the board is potentially significant. The paper analyses the board's mandate, governance structure and procedures. We look at standard elements of independence of decision-making bodies (such as courts) to establish whether the Oversight Board is structured in a way conducive to independent decision making. We conclude that that structure of the Oversight Board fulfils some of the elements of the de jure judicial independence, however there is a room for improvement. Independence of the Oversight Board from Meta is a vital element of the institution, however we detect connections and dependencies on Meta (Meta needs to agree on changes of the Charter as well as the Bylaws, Meta was profoundly involved in the initial selection of the members, etc.). The whole structure of Oversight Board is heavily impacted by the private law institutes – trust, company, contracts – which might not be able to fully facilitate all the needs of an independent quasi-judicial body. The private structure, lacking necessary participatory mechanisms, does not permit

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† Mgr. Ján Mazúr, PhD., EMPA, jan.mazur@uniba.sk, assistant professor, Department of Financial Law, Faculty of Law, Comenius University in Bratislava, Slovakia

‡ JUDr. Barbora Grambličková, PhD., LL.M. (née Czókolyová), barbora.czokolyova@uniba.sk, assistant professor, Department of Commercial Law, Faculty of Law, Comenius University in Bratislava, Slovakia

the Oversight Board to gain necessary legitimacy. We also review the Oversight Board's setup in light of the EU's 2022 Digital Services Act (DSA), which represents one of the most comprehensive regulations of the social media platforms, including content moderation issues. We conclude that the Oversight Board would also not be compliant with requirements set forth in the DSA. After the adoption of the DSA, a question of compatibility of the Oversight Board with the out-of-court dispute settlement bodies opened.

KEY WORDS

Social media platforms; regulation of cyberspace; Digital Services Act; Oversight Board; Meta; disinformation; fake news; purpose of the company; quasi-judicial power

1. CONTEXT

It appears to be superfluous to provide excessive evidence of Facebook's or other massively used social media platforms' (SMP) shortcomings and malfunctions in 2022.¹ A lot has been written about platforms in the popular media and academia.² Most recently, media has focused on new revelations by whistleblower Frances Haugen, related to the (in)ability of Meta to stop the platform abuse during highly problematic actions, such as 6/1 insurrection in USA or the Stop the Steal groups and conspiracies, but also to Meta's reluctance to act on inadequacies that even Meta itself recognized.³ It has been revealed that Meta had done very little to prepare for these kinds of crises; in fact, as Meta's own analysis stated: *"We were not able to act on simple objects like posts and comments because they individually tended not to violate, even if they were surrounded by hate, violence, and misinformation."*⁴

¹ We use the term „Facebook“ to refer to the social media platform and the term “Meta” to refer to the parent company of both social media platforms Facebook and Instagram. We use the term “Meta” to address the Facebook company even before its renaming to Meta. The Meta's policies related to the Oversight Board do not make any relevant distinction between Facebook and Instagram.

² For reference on media and academic writings since 2019 see for instance our previous take on the subject: Mazúr, J. and Patakyová, M. T. (2019) Regulatory Approaches to Facebook and Other Social Media Platforms: Towards Platforms Design Accountability. *Masaryk University Journal of Law and Technology* 13(2), pp. 219–42. Available from: <https://doi.org/10.5817/MUJLT2019-2-4>.

³ Redacted version of the disclosure is available at: Whistleblower Aid. (2021) Anonymous Whistleblower Disclosure: Re: Supplemental Disclosure of Securities Law Violations by Facebook, Inc. (NASDAQ: FB), SEC TCR #. Available from: <https://drive.google.com/file/d/1WPOaPE6MyWMdMV9f218nsSjGGrMSjnkW/view>.

⁴ O'Sullivan, D., Subramaniam, T. and Duffy, C. (2021) Not Stopping “Stop the Steal:” Facebook Papers Paint Damning Picture of Company's Role in Insurrection. CNN. Available from: <https://edition.cnn.com/2021/10/22/business/january-6-insurrection-facebook-papers/index.html>.

Meta is probably well aware of the fact that it is the very nature of Meta's product mechanics, such as recommendations, optimizing for engagement, which are the root cause of why massive spreading of hate speech and misinformation takes place. According to the leaked documents, Meta has misled the public about the negative effects its platforms have on children and youth.⁵ Content moderation budget is not spread evenly or proportionately among individual countries where Facebook's present – 87% of the content moderation budget is spent in USA.⁶ As the documents reveal, the platform has been used as a human trafficking tool. Many of these issues pose a serious problem for Meta under the SEC's rules for publicly traded companies.⁷ Meta presents itself as a beacon of freedom of expression, yet it willingly chooses growth over safety, by adopting censorship after government's requests.⁸

In reaction to these shortcomings, there have been numerous calls and proposals for regulation and regulatory actions, including by Mark Zuckerberg himself.⁹ Some of these proposals include actions and policies in the field of anti-trust, such as the anti-trust lawsuits and policies in order to break up social media¹⁰, proposals to treat parts of Facebook as a network monopoly¹¹, or general strengthening of competition law framework.¹² There were also proposals to improve the platforms' content moderation¹³,

⁵ Subramaniam, T. (2021) Four Takeaways from Facebook Whistleblower's Complaints. CNN. Available from: <https://edition.cnn.com/2021/10/06/tech/fb-whistleblower-doc-takeaways/index.html>.

⁶ Subramaniam, T. (2021) the Big Takeaways from the Facebook Papers. CNN. Available from: <https://edition.cnn.com/2021/10/26/tech/facebook-papers-takeaways/index.html>.

⁷ Duffy, C. (2021) Facebook Has Known It Has a Human Trafficking Problem for Years. It Still Hasn't Fully Fixed It. CNN. Available from: <https://edition.cnn.com/2021/10/25/tech/facebook-instagram-app-store-ban-human-trafficking/index.html>.

⁸ Dwoskin, E., Newmyer, T. and Mahtani, S. (2021) the Case against Mark Zuckerberg: Insiders Say Facebook's CEO Chose Growth over Safety. *The Washington Post*. Available from: <https://www.washingtonpost.com/technology/2021/10/25/mark-zuckerberg-facebook-whistleblower/>.

⁹ Zuckerberg, M. (2019) Opinion: Mark Zuckerberg: the Internet Needs New Rules. Let's Start in These Four Areas. *The Washington Post*. Available from: https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html.

¹⁰ Kang, C. (2021) the F.T.C. Asks for an Extension to Refile Its Facebook Antitrust Suit. *The New York Times*. Available from: <https://www.nytimes.com/2021/07/23/technology/ftc-facebook-antitrust-lawsuit.html>.

¹¹ Zingales, L. (2021) Don't Break Up Social Media, Bifurcate It. *Project Syndicate*. Available from: <https://www.project-syndicate.org/commentary/social-media-separate-network-infrastructure-from-editorial-role-by-luigi-zingales-2021-08>.

¹² This is the case of the recent EU's Digital Services Act package.

¹³ Electronic Frontier Foundation. (2021) *The Santa Clara Principles on Transparency*

of proposals to open Facebook's and other SMPs' data to researchers.¹⁴ Even more ambitious proposals called for creation of a new regulatory agency with overarching mandate.¹⁵ Perhaps the most prominent and overarching was the long-discussed European Commission's proposal for the Digital Services Act, which became the law in October 2022.¹⁶

Through the political and academic debates, one proposal related to content moderation issues was actually adopted by Meta itself: the creation of an ultimate content moderator for Facebook and Instagram – the Oversight Board. The Oversight Board is tasked with no lesser purpose but “to promote free expression by making principled, independent decisions regarding content on Facebook and Instagram and by issuing recommendations on the relevant Facebook Company Content Policy.”¹⁷ Through this purpose the Oversight Board should effectively serve as the “Supreme Court” of Facebook and Instagram, two of the most important and widely used social media platforms (owned by the parent company Meta).¹⁸ As such, the Oversight Board should provide impartial judgements in some of the wickedest content moderation decisions issued by the platforms.¹⁹ Taking into consideration the number of users of Facebook and Instagram and the fact that the board's jurisdiction is territorially not restricted, it represents seemingly the ultimate quasi-judicial body of the cyberspace, certainly the ultimate content moderator of the largest global public space.

This paper provides an analysis of the jurisdiction of the Oversight Board, its governance structure, including its corporate composition and inner quasi-judicial structure. We undertake a corporate law analysis to discuss

and Accountability in Content Moderation. Available from: <https://santaclaraprinciples.org>.

¹⁴ Hegelich, S. (2020) Facebook Needs to Share More with Researchers. *Nature* 579(7800), pp. 473–473. Available from: <https://doi.org/10.1038/d41586-020-00828-5>.

¹⁵ Wheeler, T., Verveer, P. and Kimmelman, G. (2020) New Digital Realities; New Oversight Solutions in the U.S. The Case for a Digital Platform Agency and a New Approach to Regulatory Oversight. *The Shorenstein Center on Media, Politics and Public Policy*. Available from: https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities_August-2020.pdf.

¹⁶ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act). *Official Journal of the European Union* (L277) 19 October. Available from: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32022R2065> (hereinafter the “DSA”).

¹⁷ Oversight Board. (2022) *The Charter*. Available from: <https://oversightboard.com/governance/>.

¹⁸ For an in-depth look into the board's origins, see: Klonick, K. (2020) the Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression. *Yale Law Journal* 129, pp. 2418–2499.

¹⁹ Unless stated otherwise in the text, the obligations of the Oversight Board relate to Facebook as well as Instagram, even though we explicitly mention only Facebook.

strengths and vulnerabilities of the structure and compare the structure with typical features of well-functioning judiciary.

The paper is structured as follows. Section 1 deals with the Oversight Board's mission, jurisdiction and powers, wherein we find that the current jurisdiction and capacities remain very limited, following a setup favoring niche decision making (of potentially significant cases). Section 2 provides an overview of the board's governance structure, including its creation and membership. The structure, although clearly setup to minimize Meta's influence on the board's functioning and primarily on its decision making, shows some vulnerabilities, which are discussed in detail. Section 3 deals with the board's decision making and the Meta's undertaking to implement the board's decisions. In the final section 4, we review the interaction of the board's mandate and governance structure with the presumed expectations from similar reviewing bodies as laid out in the DSA.

2. MISSION, JURISDICTION AND POWERS

When discussing the Oversight Board's mission, jurisdiction and powers, it is useful to clearly delineate what the Oversight Board claims to be, what it is and what it does not even have an ambition to be. As the board's charter states the board's overall mission includes promotion of free expression through the means of making decisions regarding content on Facebook and issuing recommendations on the company's content policy. As the board's mandate implies Meta's giving away some of its power over content policing, we may naturally ask what motivates Meta. Several explanations emerge.

First, from idealistic perspective, Meta may seek greater legitimacy of its content policies and reassuring its users that a third (semi-)independent body examines its decisions. Meta may also be interested in enforcing more stringent human rights standards. Second, by establishing a way of self-regulation, Meta may be attempting to stave off potential government regulation. Third, in a more cynical fashion, Meta may also attempt to use the board as a cheap way to achieve public relations points, feeding on the legitimacy of the board members' CVs.²⁰ Fourth, Meta outsources controversial decisions out of the company, which is not only beneficial from the legitimacy perspective, but also safeguards the company as it may always use the board as a scapegoat.²¹

²⁰ Applying Max Weber's conceptualization of legitimacy, one could conclude that the Oversight Board's legitimacy is based on the charismatic authority of its members in contrast to legal authority of an institution. See: Weber, M. (2004) *The Vocation Lectures*. Indianapolis: Hackett Publishing Company. p. 34.

²¹ Douek, E. (2019) Facebook's "Oversight Board:" Move Fast with Stable Infrastructure

The board is free to choose cases from those submitted to the board by Meta's platforms' users, but it also hears cases submitted by Meta. Once it reaches a decision Meta's bound to implement it. The board is also tasked to provide recommendations to Meta on its content policy, either upon Meta's request or on its own initiative.

This mandate closely resembles a mandate of judicial body conducting judicial review of administrative decisions in typical functioning democracies.²² The board's jurisdiction includes Meta's leading cyberspace platforms, Facebook, and Instagram, leaving out private messaging platforms, such as WhatsApp, Messenger, and Instagram Direct.²³ As for geographic outreach, the board's jurisdiction is global, not restricted to any specific region or country.²⁴

The board has discretion to choose from requests for review, yet the board is mandated to consider emblematic cases that have the greatest potential to guide future decisions and policies of Meta.²⁵ The board's discretion is shaped by substantial criteria for selection, a priori set and publicly issued by the board itself.²⁶

These criteria include the following: (i) cases that raise important issues pertaining to respect for freedom of expression and other human rights and/or the implementation of Facebook's (platform specific) Community Standards;²⁷ (ii) cases of critical importance to public discourse, directly or indirectly affecting a substantial number of individuals, and/or raising questions about Meta's policies; (iii) cases reflecting the platforms' user base, ensuring regional and linguistic diversity.²⁸ (iv) There are also negative eligibility criteria; the board does not review content posted through

and Humility. *North Carolina Journal of Law & Technology* 21(1), p. 17; Klonick, K. (2020) *op. cit.*, p. 2426.

²² Jaffe, L. L. (1958) the Right to Judicial Review. *Harvard Law Review* 71(3), p. 401.

²³ Also, less known service Oculus is left out of review.

²⁴ As is shown further, this does not mean the board decides cases according to local laws.

²⁵ Oversight Board. (2022) *Op. cit.* The Oversight Board met with exceptionally high demand for appeals from Facebook's users within the first period of the Oversight Board's existence (from October 2020 until December 2021) – over a million requests for review were received by the Oversight Board during this period. See Oversight Board. (2021) *Annual Report*, p. 5.

²⁶ Most recently, the Oversight Board issued its Overarching Criteria for Case Selection in October 2022. The board's priorities include: (i) elections and civic space; (ii) crisis and conflict situations; (iii) gender; (iv) hate speech against marginalized groups; (v) government use of Meta's platforms; (vi) treating users fairly; (vii) automated enforcement of policies and curation of content. See: <https://www.oversightboard.com/governance/>.

²⁷ Meta. *Facebook Community Standards*. Available from: <https://transparency.fb.com/en-gb/policies/community-standards/>.

²⁸ Oversight Board. (2022) *op. cit.*

marketplace, fundraisers, Facebook dating, messages, and spam, nor does it review content on platforms other than aforementioned.

There are also formal (eligibility) criteria set by more detailed Bylaws of the Oversight Board, resembling classic eligibility criteria of typical judicial proceedings:²⁹ (i) appeals must come from an active account holder, whether from the original poster of content or person who submitted content for review; (ii) Meta must have already reviewed its initial decision; (iii) appeals must be submitted within 15 days from the time Meta sends an update about its final content policy decision.³⁰

Furthermore, the review must not be in contradiction with country-specific laws (i. e. country of residence of particular user, or country from which the content was posted) and/or must not potentially trigger a criminal liability or regulatory sanctions of Meta, the board, or its individual members.³¹ The same restriction applies when keeping the content could lead to criminal liability or adverse governmental action against Meta, Meta employees, administration or board's members. The review is also not available when the content has been blocked by a valid report of illegality, or where the content is criminally unlawful in a jurisdiction with a connection to the content. The case selection is done by a majority vote of the board's case selection committee.³²

When critically reviewed, these restrictions do not hold. Douek has argued that Meta follows local rules in content moderation as they may result from legitimate legislative processes within any country.³³ Yet, there have been several instances where Meta yielded to local norms to the detriment of freedom of speech³⁴ and other instances where Meta overruled local norms by its own moral norms, also to the detriment of freedom of speech.³⁵ In these cases, Meta prioritized continuation

²⁹ See also: <https://oversightboard.com/appeals-process/>.

³⁰ Art. 3, Sec. 1.1 of the Oversight Board's Bylaws.

³¹ Art. 3, Sec. 1.2.2 of the Oversight Board's Bylaws.

³² In November 2020, the board issued its first rulebook, which is a non-binding, but practical guidance to the board members and administrative staff to facilitate selection of cases for review and make the process more accessible, transparent and predictable. This Rulebook was revised in October 2022. Oversight Board. (2020) *Rulebook for Case Review and Policy Guidance*. Available from: <https://oversightboard.com/sr/rulebook-for-case-review-and-policy-guidance>.

³³ Douek, E. (2020) *op. cit.*, p. 38.

³⁴ Pearson, J. (2020) Exclusive: Facebook Agreed to Censor Posts after Vietnam Slowed Traffic - Sources. *Reuters*. Available from: <https://www.reuters.com/article/us-vietnam-facebook-exclusive/exclusive-facebook-agreed-to-censor-posts-after-vietnam-slowed-traffic-sources-idUSKCN2232JX>.

³⁵ Jacobs, J. (2019) Will Instagram Ever "Free the Nipple"? *The New York Times*. Available from: <https://www.nytimes.com/2019/11/22/arts/design/instagram-free-the-nipple.html>.

of its service although it meant censoring political or cultural speech – Meta’s commitments to business are reliable, while clearly its commitments to freedom of political or cultural speech are not when they endanger the business interests. Without substantive review of local norms and their alignment with international legal norms following local rules becomes highly problematic and appears to be business-motivated decision to avoid legal problems.³⁶

The board is tasked to interpret Meta’s Community Standards and other relevant content policies to review the cases and “*determine if decisions were made [by Facebook] in accordance with Facebook’s stated values and policies.*”³⁷ It is clear from the board’s founding documents that the venture point of the board’s mission is promotion of freedom of expression (on social media). It may at times come at odds with other values, such as authenticity, safety, privacy and dignity. The board is tasked to balance them out, in light of human rights norms protecting free expression.

In its first Annual Report, the Oversight Board stipulated a new challenge in applying international human rights standards to content moderation.³⁸ The Oversight Board identified that among the sources of authority guiding the Oversight Board’s decisions, the Article 19 of the International Covenant on Civil and Political Rights (ICCPR) was the most cited. The ICCPR is a global human rights treaty that Meta voluntarily pledged to respect in its Corporate Human Rights Policy.³⁹ Thus, the Oversight Board states that the basis of its decisions are not only Meta’s rules but international human rights norms as well. Moreover, the Oversight Board already dealt with the case of conflict between Meta’s content policies and Meta’s human rights responsibilities. The Oversight Board overturned Meta’s decision based on its human rights responsibilities, even though the removal of the content in question was in line with the Meta’s rules. In the Annual Report, the Oversight Board pledges to prioritize human rights if a conflict emerges between Meta’s content policies and its human rights responsibilities.⁴⁰

Moreover, with the adoption of the DSA, the link between the Meta’s content policies (incl. Community Standards) and the core EU human rights document – the Charter of Fundamental Rights of the EU – becomes

³⁶ Facebook’s own Community Standards refer to international human rights standards when making judgements regarding moderation of free speech. See: <https://transparency.fb.com/en-gb/policies/community-standards/>.

³⁷ Oversight Board. (2022) *op. cit.*, Art. 2, p. 4.

³⁸ Oversight Board. (2021) *op. cit.*, p. 43.

³⁹ *Op. cit.*, p. 44.

⁴⁰ *Op. cit.*, p. 46.

even stronger.⁴¹ The DSA requires in the article 14(4) that the platforms act diligently, objectively and proportionately in applying and enforcing any restrictions in relation to policies, procedures, measures and tools used for content moderation, with due regard to the applicable fundamental rights stipulated by the Charter of Fundamental Rights. In practice, this would require the board to assess content moderation cases in light of the EU human rights law. Similarly, the DSA also provides additional room to draw up relevant codes of conduct in accordance with the Union law, especially in relation to illegal content, but also in other contexts (systemic risks).⁴²

Based on the above-mentioned, both the Oversight Board's commitments to apply international human rights norms to content moderation as well as the perspective requirements of the EU to assess content moderation cases in light of the EU human rights laws, put international human rights norms in the center of the decision-making processes of the Oversight Board.

The board decides whether Meta should keep or remove specific content ("*instruction to allow or remove content*"). The board may also instruct Meta to "*uphold or reverse a designation that led to an enforcement outcome.*"⁴³ The board issues decisions that are binding upon Meta unless their implementing could violate law.⁴⁴ It may moreover issue specific recommendations on the Meta's content policies, whether from its own initiative or upon Meta's request.⁴⁵ Meta may also ask further questions and seek advice from the board. The charter is very explicit about limiting powers of the board to decision making and recommendations.⁴⁶ In course

⁴¹ The DSA makes multiple direct references to the Charter (further as the Charter of Fundamental Rights): recitals 3, 9, 32, 34, 36, 39-41, 47, 51-52, 59, 63, 81, 109, 115, 127, 153, 155, art. 9 (orders to act against illegal content), art. 14 (alignment of platform's terms and conditions with the charter) art. 34 (risk assessment especially in relation to negative effects on fundamental rights in the charter), art. 35 (mitigation of risks on very large online platforms), or art. 36 and 48 (use of crisis protocols must be in line the charter).

⁴² Art. 45 of the DSA. This follows up on the previous soft regulations of codes of conduct, such as the 2018 Code of Practice on Disinformation and most recently the 2022 Strengthened Code of Practice on Disinformation. Even though the DSA understands the codes as voluntary self-regulation, the regular monitoring and review of the achievements of the codes' objectives should trigger potential reviews of policies (art. 45(4) of the DSA).

⁴³ Oversight Board. (2022) *op. cit.*

⁴⁴ Based on the Oversight Board's first Annual Report, in 2021, the Oversight Board published 20 decisions, from which 14 decisions of Meta were overturned and 6 upheld. Moreover, from these 20 cases 16 were submitted by the users and 4 by Meta. Oversight Board. (2021) *op. cit.*, p. 22.

⁴⁵ Based on the Oversight Board's first Annual Report, in 2021, the Oversight Board made 86 recommendations to Meta and for 2/3 of these recommendations Meta either demonstrated implementation or reported progress. While Meta committed to implement most of the recommendations, the Oversight Board stipulated a new challenge to ensure that Meta turns these commitments into actions. *Op. cit.*, p. 5, p. 54.

⁴⁶ Oversight Board. (2022) Art. 1 Sec. 4: „The board will have no authority or powers beyond those expressly defined by this charter.”

of reaching decisions, the board may also reasonably request additional information from Meta.

The board is explicitly asked to review Meta's decisions and policies for consistency. The charter provides for precedential value of previous decisions of the board when there are factual similarities of cases and applicability of policies is similar. Although the board has the power to set precedents in reviewing content decisions, the board has no power or direct mandate to *change policies a priori*. It may merely advise, and recommend Meta to change its policies, but the board itself cannot change the law, nor is it allowed to *choose the law*, which would not be in comfort with the Meta's policies. The corporate policy governs the content moderation.

We argue that the board's mandate and jurisdiction are insufficient to deal with complexity of the platforms. Correcting content moderation alone cannot serve as a panacea for the platforms' ills. Even internal documents of Meta recognized that dealing with isolated issues such as individual posts or comments helps little in solving massive spreading of fake news or hoaxes on the platforms and other types of abuses, as they individually do not violate content policies.⁴⁷

Including content policies advisory and recommendations is a nice gesture but does not compare to the real necessity of controlling or at least reviewing the true corporate golden egg: algorithms and overall architecture of the platform. Only by allowing a (semi-)independent body to review the platform's algorithms and architecture, based on independently reviewed data on the platform's use, can there be a proper discussion on how to balance corporate interests in high-traffic of low quality content without alignment to truth, and values of democracy, such as dignity. Clearly, the board has no mandate to deal with these topics, which is its main shortcoming.⁴⁸

3. GOVERNANCE STRUCTURE

This section deals with governance structure of the Oversight Board. We recognize that one of the most important factors of the board's institutional setup is its independence (on Meta, and third parties). Independence of court-like structure is important to achieve legitimacy of its decision-making authority. If two parties wish to have their dispute or conflict resolved, a third party – a judge or arbiter – must be neutral, impartial, and independent on the parties but also on other, external interests. Factual *and* perceived impartiality and independence may lead to legitimacy

⁴⁷ O'Sullivan, D., Subramaniam, T. and Duffy, C. (2021) *op. cit.*

⁴⁸ Douek, E. (2019) *op. cit.*, p. 74; Klonick, K. (2020) *op. cit.*, p. 2475.

of the whole resolution framework, be it private (arbitration courts) or public (traditional state-administered courts).⁴⁹ Consequently, legitimacy is necessary for sustainable existence of the courts and the acceptance of their resolutions by the parties and perspective parties.⁵⁰

We therefore consider internationally recognized structural elements of *de jure* judicial independence to establish whether the governance structure of the Oversight Board favors its independence.⁵¹

The elements include primarily the following: (i) Institutional stability, stability of the court's powers, allocation of competences and procedures to change them (who decides what powers courts have; how easy it is to change these rules). The more complicated the procedure to change the institutional setup of a court, the more stable the institutional setup of the court is. Such institutional stability leads to independence. (ii) Procedures to appoint judges (who appoints judges; how diverse or monolithic are persons selecting the judges etc.). The more diverse (in numbers, in representation), the more independent judges may be. (iii) Term of the judges (tenure, term, renewable terms etc.) – longer terms or tenures may be better for independence of judges as it makes them less dependent on other branches for re-election for next term. (iv) Remuneration of judges (who sets the remuneration; how comparable to market standard it is; how easy it is to cut the salary) – decent salary is a basic protection against outside influence (e. g. corruption). (v) Inference of other branches into decision making power of courts should be minimized. (vi) Distribution of cases should be based preferably on random draws. (vii) Requirements of transparency – publishing decisions – are conducive for public debate, which may decrease pressures of other branches on judiciary. We consider these elements individually.

The governance structure of the Oversight Board was designed to facilitate its independence from Meta and to enable a mechanism through which content may be brought for independent review. The Oversight Board's Charter was considered to become a constitution-like document⁵², which

⁴⁹ Shapiro, M. (1981) *Courts. A Comparative and Political Analysis*. Chicago: the University of Chicago Press.

⁵⁰ Similarly, higher levels of legitimacy are typically awarded to arbitration courts setup by rather neutral entities, such as attorneys (bar association) or organizations with wider groups of constituents (interest organizations). It is difficult to forego the elements of neutrality and participation.

⁵¹ We draw mainly from: Voigt, S., Gutmann, J. and Feld, L. P. (2015) Economic Growth and Judicial Independence, a Dozen Years on: Cross-Country Evidence Using an Updated Set of Indicators. *European Journal of Political Economy* 38, p. 197–211. Available from: <https://doi.org/10.1016/j.ejpoléco.2015.01.004>.

⁵² Klonick, K. (2020) *op. cit.*, pp. 2457-2458.

would establish the framework for creating this *institution* and lay out the relationship between Meta, the Oversight Board and the Trust.⁵³ The Charter may be amended only if approved by the simple majority of individual trustees of the Trust, the simple majority of the Oversight Board and once approved by Meta. The most recent update to the Charter added to this rule, that any amendment increasing the obligations or duties of any individual trustee, corporate trustee, or manager of the LLC, shall not be effective without the approval of said party (individual trustee, corporate trustee or manager of the LLC).⁵⁴ The requirement for Meta's approval to any changes to the Charter is logical for Meta, which safeguards its "investment" in the board, yet it is problematic from the perspective of independence of Meta, as it gives Meta – the 'controlled' – the power to block any meaningful changes to the Charter, which governs the controlling process.⁵⁵

The Charter makes a direct reference to the Bylaws, which outline the Oversight Board's operational procedures.⁵⁶ Moreover, the Charter makes a reference to other documents, such as LLC Agreement, Trust Agreement, Member contracts, Code of Conduct, and Service Provider Contract. To further assess respective elements of judicial independence, we explore the Oversight Board's governance and its main elements (the Trust, the Company and the Oversight Board and its members) through the analysis of the main documents (the Charter, the Bylaws, the LLC Agreement and the Trust Agreement).⁵⁷ We follow the structure of the Oversight Board, which consists of a Delaware limited liability company – Oversight Board LLC (the Company) and a non-charitable purpose trust – Oversight Board Trust (the Trust).

⁵³ The final version of the Charter was released on September 17, 2019. It is a nine-page documents divided into seven articles covering the matters of: members, authority to review, procedures of review, implementation, governance, amendments and bylaws and compliance with the law. The most recent version of the Charter was released on February 2023, which is referred to in this paper unless stated otherwise.

⁵⁴ Oversight Board. (2022) *op. cit.*, Art. 6 Sec. 1.

⁵⁵ Amendment of the Charter thus relies on the approval from Meta, which was criticized in the past. See: Klonick, K. (2020) *op. cit.*, pp. 2457-2466.

⁵⁶ The Bylaws were most recently revised in February 2023 and this revision introduced new rules for their amendment in Art. 5 Sec. 5 of the Bylaws. Each area of the Bylaws has a specific procedure for its amendment, with designated entities and stipulated quorums required for the consent on the amendment.

⁵⁷ In the process of writing this paper, the core documents of the Oversight Board were revised. In the paper, we refer to the core documents from the following dates: February 2023 Charter, February 2023 Bylaws October 2022 Rulebook. If necessary, we address the changes from the previous versions of documents directly in the paper.

3.1. THE TRUST

*Independence from Meta as a key element of the Oversight Board's governance structure cannot be enabled without financial independence. The Trust Agreement was signed between Meta as settlor and Brown Brothers Harriman Trust Company of Delaware as corporate trustee in October 2019 in order to create Delaware non-charitable purpose trust with a name: Oversight Board Trust. The purpose of the Trust is specified in Section 2 of the Trust Agreement: "The purpose of the Trust is to facilitate the creation, funding, management, and oversight of a structure that will permit and protect the operation of an Oversight Board, the purpose of which is to protect free expression by making principled, independent decisions about important pieces of content and by issuing policy advisory opinions on Facebook's content policies."*⁵⁸ Additionally, the vital role of the Trust is to protect the independent judgment of the Oversight Board and their ability to fulfil their purpose especially via proper administration and structure.⁵⁹

Moreover, the Trust Agreement states, that in order to assist to fulfil the Trust's purpose, the trustees shall form and fund a limited liability company of which the Trust will be the sole member through its trustees. The purpose of the limited liability company shall be to establish, administer, and attend to the ongoing operation of the group of individuals who make up the Oversight Board members. The trustees shall serve as managers of the limited liability company and the corporate trustee shall either serve as corporate manager of the limited liability company or appoint the corporate manager.⁶⁰

The main aim of the Trust is to ensure governance and accountability of the Board and at the same time to control the Oversight Board's adherence to the stated purpose of its existence.⁶¹ The responsibility of the trustees is to confirm the future board members and ensure that the Board operates in line with its purpose and governing documents.⁶² Moreover, one of the main duties of the trustees is to remove the members of the Oversight Board if they breach the Code of Conduct. The purpose of the Trust is to maintain the administration and to provide oversight, thus, the trustees are responsible for the safeguarding of the assets in the Trust. In concrete, the trustees oversee the annual review and approval

⁵⁸ Oversight Board Trust Agreement, Sec. 2 Subsec. 2.1.

⁵⁹ *Op. cit.*, Sec. 2 Subsec. 2.2.

⁶⁰ *Op. cit.*, Sec. 2 Subsec. 2.1 and 2.3.

⁶¹ Art. 5 Sec. 2 Oversight Board. (2022) *op. cit.*, Art. 5 Sec. 2. and *Oversight Board Bylaws*. Meta Oversight Board. Available from: <https://transparency.fb.com/sr/oversight-board-charter-2023>, Art. 4 Sec. 1.

⁶² Oversight Board Bylaws, Art. 4 Sec. 1 Subsec. 1.2.

of the Oversight Board's budget, including member compensation.⁶³ The trustees do not have any competence in reviewing cases and independent judgment of the Oversight Board members.⁶⁴

Moreover, it is necessary to address the relation of the Trust and Meta as settlor. The Meta is funding the Trust and is appointing independent trustees, who shall act in line with their fiduciary duties.⁶⁵ In order to enable the independence of the Trust and in order to avoid frustrating the independent judgement of the Oversight Board, Meta as settlor has relinquished its authority over the Trust except for exceptional provisions and circumstances stated in the Trust Agreement.⁶⁶

Three alternatives were discussed how to provide financial independence of Oversight Board. The first alternative was a model of an annual funding provided from Meta, which will create unwanted financial dependence, the second alternative was to make the Oversight Board self-sufficient in funding, this alternative was considered to be risky if the project fails, the last alternative was a creation of irrevocable fund in an amount that will be enough to fund the operations of the Oversight Board for six years (two terms).⁶⁷ The last alternative was agreed upon and an initial trust estate in an amount of \$130 million was transferred to the Trust by Meta.

The Trust is composed of at least three and maximum of eleven individual trustees and one corporate trustee selected by Meta as settlor. Individual trustees serve a five-year term⁶⁸ with an annual compensation of \$200.000.⁶⁹

⁶³ *Op. cit.*, Art. 4 Sec. 2.

⁶⁴ *Op. cit.*, Art. 4 Sec. 1 Subsec. 1.2.

⁶⁵ Oversight Board. (2022) *op. cit.*, Art. 5 Sec. 2.

⁶⁶ Oversight Board. (2021) *op. cit.*, Sec. 2 Subsec. 2.2.

⁶⁷ Klonick, K. (2020) *op. cit.* p. 2469.

⁶⁸ Oversight Board. (2021) *op. cit.* subsec. 6.2.2 (b).

⁶⁹ *Op. cit.*, subsec. 6.7. As of March 15, 2022, there are five individual trustees. See also: <https://oversightboard.com/governance/>.

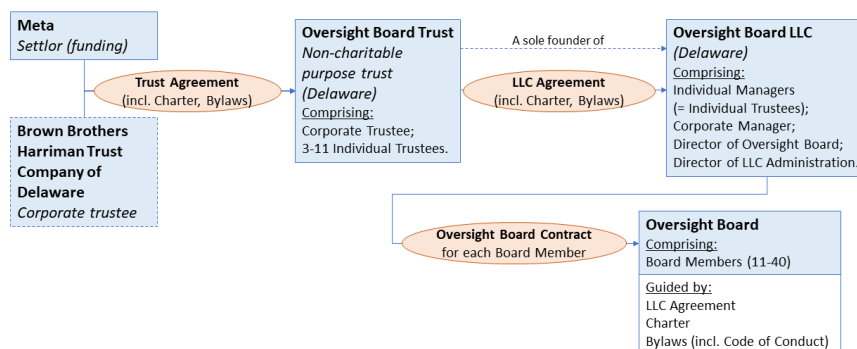


Figure 1: Governance Structure of the Oversight Board*

* Source: Meta published corporate documents, authors' design

3.2. THE COMPANY

The limited liability company, Oversight Board LLC (Company), was formed and funded by the Trust, thus, the Trust is the sole-member of this Company. The Company is a Delaware limited liability company, which was made effective as of October 17, 2019. The Company facilitates the functioning of the Board and its administration. The purpose of the Trust as a sole-member of the Company is defined in Article 2, Section 2.2 of the LLC Agreement and repeats the purpose already defined in the Trust Agreement. The Company facilitates the contractual relationships with the Oversight Board members as well as with the full-time administration staff. As mentioned above, the individual trustees of the Trust shall serve as individual managers of the Company and the corporate trustee of the Trust shall either serve as corporate manager or appoint the corporate manager of the Company.⁷⁰ Based on the LLC Agreement, business and affairs of the Company are managed in sole and absolute discretion by individual managers (individual trustees) and one or more of their powers may be delegated to director of Oversight Board (Director of Oversight Board).⁷¹ Director of Oversight Board shall be appointed by individual managers in order to assist in carrying out duties of managers as (for example)

⁷⁰ Oversight Board. (2019) *Oversight Board LLC Agreement*. Subsec. 2.2. Available from: <https://about.fb.com/wp-content/uploads/2019/12/LLC-Agreement.pdf>.

⁷¹ *Op. cit.*, Subsec. 5.1 (a).

entering into board member contracts, service and employment contracts, dealing with expenses and compensations.⁷² Moreover, Director of LLC Administration may be appointed by the corporate manager to assist in carrying out its duties⁷³ (managing finances, paying service providers, etc.).⁷⁴ It can be summed up that the Company is a tool which formally incorporated the Oversight Board.⁷⁵

3.3. THE OVERSIGHT BOARD AND ITS MEMBERS

The Oversight Board is composed of a diverse set of members. The minimum number of members is eleven and if fully staffed it may have up to forty members. As to the board composition and member qualification the Charter states: *“Members must not have actual or perceived conflicts of interest that could compromise their independent judgment 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.”*⁷⁶

The term of the members is a three-year term and one member can serve up to three terms. The renewability of terms is prone to problems with independence. The compensation of the members is based on the fulfilment of their duties but will not be conditioned or withheld based on the outcome of the decisions of the Oversight Board.⁷⁷ Responsibilities and duties of the members are stipulated in their contracts (with the Company) and in the Code of Conduct.

The Code of Conduct, which represents an annex to the Bylaws, includes typical elements of professional codes of conduct (ethical codes), such as requirements on independence and impartiality, professionalism and integrity, or confidentiality. It regulates the board members' conduct when selecting and deciding cases. The structure and governance of the Oversight Board determine institutional aspects and the extent of institutional independence of the board, while the rules in the Code of Conduct determine personal independence safeguards, impartiality of individual board members and their integrity. The Code of Conduct is thus

⁷² *Op. cit.*, Subsec. 5.3 (a).

⁷³ *Op. cit.*, Subsec. 5.2 (a).

⁷⁴ *Op. cit.*, Subsec. 5.3 (b).

⁷⁵ Klonick, K. (2020) *op. cit.* p. 2469.

⁷⁶ Oversight Board. (2022) *Op. cit.*, Art. 1 Sec. 2.

⁷⁷ *Op. cit.*, Art. 1 Sec. 5.

necessary to set standards of behavior of respective members, which must also be enforced through disciplining and/or removal from office.

The Oversight Board's operation is supported by administration; however, administration cannot interfere with the board's independent judgment on substantive content issues⁷⁸, the same applies to the trustees. Some of the members of the Oversight Board will serve as co-chairs, who will operate as liaisons to the administration, lead committees. Moreover, co-chairs will carry out management responsibilities as well especially in connection with membership and case selection.⁷⁹

It is stated in the Charter, that Meta undertakes commitments to (i) provide information reasonably required for the Oversight Board to make its decisions, (ii) request the Oversight Board's review of content, (iii) seek policy advisory opinions from the Oversight Board and commit to taking action on the board's decisions and recommendations, (iv) support the Oversight Board to the extent that requests are technically and operationally feasible and consistent with a reasonable allocation of Meta's resources.⁸⁰

Crucial element of Oversight Board's independence is the selection and removal of its members. It is stated in the Charter, that the initial formation of the Oversight Board will be supported by Meta, as well as selection of co-chairs. Indeed, this initial procedure was increasingly held by Meta and as Klonick states: "*It is unclear if this precedent of Facebook's initial involvement will forever taint the process and put in place long-term mechanisms that compromise members' ability to fairly adjudicate.*"⁸¹

After the initial formation, the Charter's mechanism stipulates, that co-chairs and Meta will jointly select candidates for the remainder of the board seats based on a review of the candidates' qualifications and a screen for disqualifications.⁸² Following the selection, the trustees will formally appoint those members to the Oversight Board. Meta and the public may propose candidates to serve as members of the Oversight Board.

Herein lies a major deficit of the board's governance, specifically of the composition of the board. Although the public may propose candidates, it does not participate on the selection procedures anymore (at least in a structured and predictable manner). Coming back to the concept of legitimacy, an important part of legitimacy is participation, as noted

⁷⁸ Oversight Board Bylaws, Art. 4 Sec. 1 Subsec. 1.2.

⁷⁹ Oversight Board. (2022) *Op. cit.*, Art. 1 Sec. 7.

⁸⁰ *Op. cit.*, Art. 5 Sec. 3.

⁸¹ Klonick, K. (2020) *Op. cit.* p. 2465.

⁸² Oversight Board. (2022) *Op. cit.*, Art. 1 Sec. 8.

in the past.⁸³ It would be advisable for Meta and the Oversight Board to introduce mechanisms to include various organized public interest groups or organizations (watchdogs, anti-conspiracy organizations, consumer protection organizations etc.) into the selection procedure in a structured way, especially with voting or nomination rights for certain board's members.

As mentioned previously, the trustees may remove a member of the Oversight Board before the expiration of their term for violations of the Code of Conduct, however, a member of the Oversight Board shall not be removed due to content decisions they have made.⁸⁴ The Bylaws stipulate that, at all times the Oversight Board must include a globally diverse set of members, in order to facilitate the needs of panel composition and in particular, this means that members of the Oversight Board should encompass the following regions: United States and Canada; Latin America and the Caribbean; Europe; Sub-Saharan Africa; Middle East and North Africa; Central and South Asia; and Asia Pacific and Oceania.⁸⁵ Although representation of various regions on the board is necessary, these regions naturally include thousands of respective cultures and societies with specific contexts to assess content moderation cases in – none of which is feasible with even a few dozens of board members.

4. DECISION MAKING AND IMPLEMENTATION

The third section deals with decision making and implementation of the board's decisions by Meta. It is useful to discuss who makes decisions, what process takes place to reach decisions, but also what basis is used to inform decision making.

The board reaches decisions in panels, which are composed of five board members with at least one member from the region of the content's origin. The panels are supposed to be gender diverse. The panels are established by random choice and their composition may remain anonymous to maintain safety and independence of the members of the panels.⁸⁶

Decision making process is based on the information and statements provided by Meta, and the posting or reporting person. The board's charter claims high levels of accessibility and promises that "*posting person or the reporting person will have the opportunity to submit relevant and informed written statements to the board.*"⁸⁷ The board may also gather or request

⁸³ Smith, R. W. (1970) the Concept of Legitimacy. *A Journal of Social and Political Theory* 35. p. 26.

⁸⁴ Oversight Board. (2022) *Op. cit.*, Art. 1 Sec. 8.

⁸⁵ Oversight Board Bylaws. Art. 1 Sec. 1.4 Subsec. 1.4.1.

⁸⁶ Meta's proprietary software, Case management Tool, is used for these random draws. See: Oversight Board Bylaws, Sec. 3.1.

⁸⁷ Oversight Board. (2022) *Op. cit.*, Art. 3 Sec. 3.

additional information, translations, or expert opinions to facilitate decision making. So far there has not been any tangible report on the use of expert opinions, yet they provide a potentially useful tool to mitigate the lack of fully contextualized decision making. As mentioned above, it may be difficult for individual board members to properly understand true meanings of messages in specific cultural contexts, opinions of recognized experts from countries or cultures of the origin of disputed message. Reliance on local, yet independent experts, sensitive to cultural nuances, may improve legitimacy of decisions. Additionally, the board is now allowed to accept additional written submissions by individuals and groups regardless of their direct relationship to the case.⁸⁸

To offset this lack of knowledge of local contexts, individuals and organizations can submit comments to the Oversight Board during the decisions process. The Oversight Board stated that these public comments were key element for their understanding of the language, culture, politics and human rights specificities. As stated in its Annual Report, the Oversight Board received almost 10.000 public comments from individuals and organizations around the world, which helped shape the board's decisions and recommendations – in any case though, 97% of these public comments related to the decision on the former President Trump's suspension.⁸⁹ The Oversight Board pledges its commitment to build a global network of regional consultants to encourage people to submit appeals and public comments in their respective regions and language of the content in question.⁹⁰

The Oversight Board's Bylaws require that the panels seek consensual decisions if possible. Yet if it is not possible, majority of the panelists resolve the case. Similar to dissenting opinions in court rulings, panelists are free to provide any reasons for divergence from the panel's decision, reservations or concerns.

Each decision should include a determination on the content, i. e. a resolution to allow or remove the content from Facebook or Instagram. The board can thus either uphold Meta's decision or reverse its decision. The board may also uphold or reverse any specific messaging (designation) that Meta may have decided to require prior to allowing the content (e. g. displaying a warning screen). The decision should also include

⁸⁸ *Ibid.*, Compare with the previous version of the Charter where the individuals or groups submitting their statements had to qualify as being "immediately depicted or impacted by the content in question".

⁸⁹ Oversight Board. (2021) *Annual Report*, p. 51.

⁹⁰ *Op. cit.*, p. 67.

explanation of the argumentation behind the decision, and, alternatively, also recommendations formulated by the board.

Transparency appears to be one of the guiding principles of the board's decision making.⁹¹ The board is required to publish not only procedures on submission and the board's requirements for review⁹², decisions and rationale behind decisions are also made publicly available, including within a publicly available database.⁹³ The board further publishes annual report (which is first approved by majority vote), including certain data on the volumes of cases submitted, considered and decided, broken down into regions, sources of referral and platform, as well as the analysis of the impact on the human rights standards.⁹⁴ The board should also include a report on the timeliness of Meta's implementation and response to board decisions and recommendations. The names of the board members are public, including their brief CVs.⁹⁵ The principle of transparency extends beyond board to Meta, which must disclose the actions it takes in response to the board's decisions.

There are four specific types of process the board may consider: (i) standard appeals process, which is the most common process dealing with overruling or upholding Meta's decisions; (ii) board re-review, which is a special procedure under which a decision is sent to all board members who may decide by a majority vote to submit the decision for a re-review by a new panel of the board (re-review must be decided before the decision is published); (iii) expedited review, which is undertaken under specific time-constrained circumstances as it may have imminent real-world consequences; under the most recent update of the Charter in February 2023, the expedited review is not automatic anymore and the co-chairs will decide whether to accept Meta's referral⁹⁶; (iv) request for policy advisory opinions by Meta – Meta may specifically request clarification of a previous decision of the board or advisory and recommendation regarding possible changes to its content policies.⁹⁷

Standard appeals process starts with a submission by user (original

⁹¹ Oversight Board Bylaws. *Op. cit.*, Art. 1 Sec. 4.

⁹² Note that the art. 3 Sec. 1.2.1 of the Oversight Board Bylaws requires the that users who submit a request for review can track the process online and get notifications about the request procedures and milestones.

⁹³ See: <https://oversightboard.com/decision/>.

⁹⁴ The first Annual Report was published in June 2022.

⁹⁵ See: <https://oversightboard.com/meet-the-board/>.

⁹⁶ Oversight Board. (2022) *Op. cit.*, Art. 3 Sec. 7 Subsec. 7.2. Additionally, also the co-chairs have the right to initiate an expedited review of a selected case, albeit with the consent of Meta (see Subsec. 2.1.2 of the Bylaws).

⁹⁷ *Op. cit.*, Art. 3 Sec. 7 Subsec. 7.3.

poster or reporting person, i. e. petitioner) or by Meta. Users are required to provide reasoning as to why the board should deal with the case and why the original Meta's decision was wrong. At first, the board's staff prepares a longlist of eligible cases for in-depth review. This first selection is done by the administrative staff of the board, i. e. The Case Selection Team. The longlist is then presented to the Case Selection Committee, composed of 5+ board members (on a rotating basis), and a sub-committee of the board, which prepares a shortlist of cases. This shortlist gets reviewed by the Meta's legal team to check for legality of review (legally risky cases are not considered).⁹⁸ The Case Selection Committee votes on the remaining cases to make a list of cases for review (simple majority vote suffices if there is no consensus reached). Once the panels are randomly formed and panelists familiarize with cases, panelists must declare conflicts of interest. Afterwards, the panel privately deliberates the case and prepare draft decision, which is reviewed by the whole board. Moreover, panelists may, by a majority vote, decide that a case requires plenary board deliberation. Next, the decision is published and implemented by Meta.

At times the board may decide to issue supplementary policy advisory opinions to Meta (previously policy guidance)⁹⁹. In such cases, once the request for policy advisory opinion is approved by majority of board members, a panel is formed, typically constituted of five members, based on regional diversity, gender representation, expertise, availability, and interest. Following, the panel will have a preliminary meeting to agree on the following matters: (i) the lead drafter of the policy advisory opinion; (ii) questions to Meta and written requests for additional information; (iii) research tasks for the Oversight Board administration to undertake and/or commission from external experts.¹⁰⁰ Under the new Rulebook for Case Review and Policy Guidance 2022, public comments, research findings

⁹⁸ Based on the Annual Report, the 278 cases considered by the Case Selection Committee through December 2021 covered more than 70 countries, ranging from Fiji to Chad, and Trinidad & Tobago. 130 cases were shortlisted by the Oversight Board up until December 2021 and from among these cases Meta identified 51 occasions where its original decision on the content was incorrect. As stipulated by the Oversight Board, "this high error rate raises wider questions both about the accuracy of Meta's content moderation and the appeals process Meta applies before cases reach the Board." Oversight Board. (2021) *Annual Report*, p. 21.

⁹⁹ The most recent update of the Charter in February 2023 records the change of policy guidance into seemingly softer "policy advisory opinions". Similarly, policy advisory opinions were referred to in Rulebook for Case Review and Policy Guidance 2020 as "policy guidance" under much simpler procedure of adaption as the policy advisory opinions under Rulebook for Case Review and Policy Guidance 2022.

¹⁰⁰ Oversight Board. (2022) *Rulebook for Case Review and Policy Guidance*. Step 5. Available from: <https://oversightboard.com/sr/rulebook-for-case-review-and-policy-guidance>.

and stakeholder inputs are taken into account in the process of deliberation on the policy advisory opinion.¹⁰¹ First the panel and next the board provide feedback on the draft policy advisory opinion prepared by the lead drafter. The draft policy advisory opinion may be approved by a single majority of both the panel and the board.¹⁰² If the policy advisory opinion is approved by the panel and the board, it is sent to Meta for privacy legal review and then follows its publication and translation.¹⁰³

The decisions of the board are binding upon Meta, which must implement them promptly, in a matter of days after the release of the decision (except for policy advisory opinions and recommendations).¹⁰⁴ Meta is also required to respond to all board decisions and provide information regarding the implementation of each decision. It also has 60 days to provide response to any policy advisory provided by the board.

5. THE OVERSIGHT BOARD IN LIGHT OF THE DSA

The DSA features several regulatory elements similar to the Oversight Board and its functions. It may be therefore useful to review the compatibility of the board's mission and setup with these elements in the DSA.¹⁰⁵

The regulation requires the platforms to provide their users with an easy and effective way to contest decisions of platforms that negatively affect them.¹⁰⁶ In specific, the platforms should be required to provide for easily accessible, user-friendly *internal* complaint-handling systems delivering outcomes in a non-discriminatory and non-arbitrary manner, and out-of-court dispute settlement framework by *external independent* certified bodies.¹⁰⁷ While the former option is envisioned as an internal and therefore dependent review system, the latter should rely on external independent and impartial arbiter, almost akin to arbitration court. None of these options should limit the possibility to contest platform decisions in a regular court – the last resort for the users or petitioners, yet from the regulatory point of view the least preferred option as it is expensive, lengthy and out-of-reach for many.

The internal complaint-handling system, as laid out in the art. 20 of the DSA, represents the first go-to option for the users (petitioners), typically after the platform limits or removes their content or profile,

¹⁰¹ *Op. cit.*, Step 6.

¹⁰² *Op. cit.*, Step 7.

¹⁰³ *Ibid.*

¹⁰⁴ Oversight Board. (2022) *Op. cit.*, Art. 4.

¹⁰⁵ We do not attempt to review or assess other elements of the regulation included within the DSA.

¹⁰⁶ Art. 16(1) of the DSA.

¹⁰⁷ See *op. cit.* art. 20 and 21.

or after they unsuccessfully attempted to limit someone else's content or profile. Specifically, reviewable are decisions taken by the platforms on the grounds that a user provided information on the platform that is illegal or incompatible with the platforms' terms and conditions. Petitioners have 6 months to lodge a complaint against decisions, electronically and free of charge. Anyone should be able to lodge a complaint and have their complaint reviewed in a timely and diligent manner.

This review system is internal; therefore, the review cannot be "independent" or "impartial" – the reviews are supposed to be made by the platform itself (e. g. by the employees, or contractor(s)). Nonetheless the complaints are supposed to be handled objectively, resulting in either upholding the decision or reversing it. Automated means of reviewing are permissible as well, but only if the review is not based solely upon them. The review output should provide petitioners with information on the options of additional out-of-court dispute settlement and other redress options.

Under the out-of-court dispute settlement system, users should have the right to select any out-of-court dispute settlement body certified by the EU Members States to settle disputes relating to decisions issued by the platforms (incl. those not resolved by the internal complaint-handling system).¹⁰⁸ The out-of-court settlement system is therefore based on external reviewer of the platforms' decisions, who must fulfill specific criteria to get certified. The logic of the system is similar to online dispute resolution systems – an independent and impartial, yet sufficiently knowledgeable neutral reviews disputes and issues decisions. The platforms and their users (petitioners) should be treated equally.¹⁰⁹ The decisions taken by the out-of-court settlement system are not binding on the parties though, which leaves the parties with the option to seek judicial redress.¹¹⁰

The certification requirements include further requirements indicating the structure of the dispute settlement system: (i) the settlement body must be impartial and independent of online platforms and users; (ii) the settlement body must possess necessary expertise to review the platform decisions; (iii) the remuneration of the settlement body's members is not linked to the outcome of the procedure; (iv) the system must be accessible electronically, and must be produce swift, efficient, and cost-effective

¹⁰⁸ *Op. cit.*, Art. 21.

¹⁰⁹ A minor deviation from this principle is in the distribution of fees under art. 21(5) of the DSA, under which if the platform loses it reimburses reasonable expenses of the petitioner, whereas if the platform wins the dispute, there is no reimbursement of the platform's costs.

¹¹⁰ *Op. cit.*, Art. 21(2); see also recital 59 of the DSA.

reviews; (iv) the resolution system must be based on clear and fair rules of procedure.¹¹¹

Considering the mission and the setup of the Oversight Board, it stands somewhere in the middle of these two review systems, presumably closer to the out-of-court dispute settlement. First, the Oversight Board it is not an internal body of Meta, and although not ideal, its dependence on Meta has been structurally weakened. Thus, it differs widely from the internal complaint-handling system, yet as the analysis provided in this paper shows, it cannot be considered completely independent as well. It remains to be seen how the digital services coordinators will interpret the requirement of independence under the art. 21(3) of the DSA (and whether detailed delegated legislation would be required to further specify these requirements).

Second, the board does not review all the platform's decisions, but only a fraction, as mentioned above.¹¹² Although anyone can submit a request for review to the board, the board has a broad discretion to select *emblematic* cases. It is not structured as a regularly approached entity (as both the internal complaint-handling and out-of-court dispute settlement systems are), but rather a last resort, selective reviewer, whose decisions are meant to have wider impact.

Third, the board's review process is currently fully covered by Meta's bulk payment to the trust, whereas the out-of-court dispute settlement is paid for by the losing side and/or online platforms. As such, these fees, although supposed to be reasonable, would deter a proportion of users, yet unlikely those with strong case against the platform. An interesting part of the DSA consists of requirement that the fees charged by the dispute settlement body should not exceed the costs of the dispute settlement, indicating its limited commercial potential. The internal complaint-handling system should be free of charge.

Fourth, the Oversight Board, but also the internal complaint-handling system, have clearly a global scope, whereas the out-of-court settlement system has a localization aspect to it. As the certification of settlement bodies is done at the level of Member States, there is some expectation these bodies will have a knowledge of local circumstances. In fact, a distributed network of certified local settlement bodies may be able to offset the lack of knowledge of local contexts when reviewing cases by the board.

Fifth, the DSA imposes strong transparency requirements on the platforms,

¹¹¹ *Op. cit.*, Art. 21(3).

¹¹² See Section 1: mission, jurisdiction and powers. See also note 75.

which is also one of the guiding principles of the board's mission.¹¹³ The DSA requires that platforms publish regular, accessible, and easily comprehensible reports on content moderation platforms engaged in during previous reporting period. The reports should include categorized statistics on content moderation by the platform, including orders issued by the Member States' authorities (under the art. 9 and 10 of the DSA), categorized by the type of illegal content concerned, time frames it took to act, also detailed and categorized information on the number of disputes the platform engaged in at its own initiative, handled through the internal complaint-handling systems or submitted to the out-of-court dispute settlement bodies, the outcomes and the average time needed for completing the dispute. Very large online platforms, i. e. platforms with over 45 million users¹¹⁴, would be in addition obliged to undertake and publish among other issues audit report and audit implementation report (based on the art. 37(4) of the DSA).¹¹⁵ The reporting obligations under the DSA are wider than the reports provided by the Oversight Board, which deal primarily with the cases submitted to it for review. Nonetheless, the board's reports may be potentially deeper as they have ambition to provide human rights impact assessments (in relation to content moderation).¹¹⁶

Sixth, the obligation to undertake an independent audit relates marginally to the policy-oriented recommendations the Oversight Board may provide Meta. There are no specific requirements on the audits and recommendations provided by the Oversight Board in its governing documents, the board enjoys and sometimes uses a wide discretion to comment on Meta's policies and actions. On the other hand, the DSA requires that very large online platforms procure an independent audit from an auditor with proven expertise in the area of risk management, technical competence and capabilities.¹¹⁷ Such auditor must be independent and objective and governed by professional ethics. The audit concerns the obligations set out in chapter III of the DSA (Chapter III Due diligence obligations for a transparent and safe online environment). The audit also reviews the platforms' performance when it comes to their commitments pursuant to the codes of conduct (under the art. 45-46 of the DSA) and the crisis protocols (under the art. 48 of the DSA). The audits must include

¹¹³ See Art. 15, 24, 39 and 42 of the DSA.

¹¹⁴ *Op. cit.*, Art. 33.

¹¹⁵ *Op. cit.*, Art. 42.

¹¹⁶ See Section 3: decision making and implementation. Additionally, the Oversight Board itself highlighted the Meta's transparency as one of their significant concerns. Oversight Board. (2021) Annual Report, p. 8.

¹¹⁷ Art. 37(3) of the DSA.

enumeration of the elements audited, methodology, findings, auditors' opinion on compliance and operational recommendations on measures to achieve compliance, but also a declaration of conflicts of interest.

In summary, the Oversight Board's present setup will not be compliant with the DSA, even though it resembles out-of-court dispute settlement system. It differs in several key aspects, primarily its semi-independent position, the breadth of its scope, yet the limitations of its capacity to hear cases, or global approach in contrast to requirement to consider local contexts.

The Oversight Board's mission is clearly different to the mission envisioned for the out-of-court dispute settlement bodies – the question of reconciliation of these missions is now open as the DSA was adopted in October 2022. Meta is not bound by the decisions taken by the out-of-court dispute settlement bodies, which provides the Oversight Board some attractivity. The Oversight Board may become an alternative for in-depth reviews of the out-of-court dispute settlements. The board would have to change its mission and structure (and comply with the requirements under the DSA). Another approach could involve a possible transformation of the Oversight Board into an out-of-court dispute settlement body, becoming additional redress venue, competing with certified out-of-court dispute settlement bodies. A major problem with the out-of-court dispute settlement bodies' mandate under the DSA relates to their non-binding nature of decision making; if Meta continues to make a credible promise to abide by the board's decisions, the board may have niche here. Therefore, there seems to be certain additional value in transforming the Oversight Board into a settlement body. Although the board's decisions are mandatory on Meta (with certain caveats)¹¹⁸, there may come into play other qualitative parameters in competition of these two systems, such as admission rate for review, fees, quality of decisions, reputation etc.

6. CONCLUSION

The Oversight Board's mandate is purposefully limited to reviewing content decisions by Meta. This limited mandate does not include more problematic issues for review, such as the overall architecture and design of the platforms, including algorithms used to spread information on the social media. Arguing that regulating specific instances of problematic speech on the platform would suffice is like arguing that regulating *merely* individual banks is sufficient to prevent the next financial crisis. As the previous financial crises revealed, it is essential to understand

¹¹⁸ The enforceability of the board's decisions is questionable should Meta decide to ignore them; such enforcement appears to rest only on potential reputation losses of Meta.

underlying connections between individual banks and other financial institutions, that lead to systemic risks – the same applies to algorithmically spreading fake information wildfires, as even the DSA accepts.

Although it is surely appealing for corporate PR to outsource some of the difficult content decisions on a semi-independent quasi-judicial body, the Oversight Board, it is way more important for the quality of democracies to independently review the channels, algorithms, and platform design than individual decisions. Still, the problem may lie in the contradiction of the corporate profit-maximizing purpose with protection of democratic values. Moreover, even though the board's governance is structured to account for majority of typical judicial independence elements, there are some structural weaknesses, such as short terms of the board members, or reliance on trustees to execute important decisions (yet the trustees also play an important role of enforcing accountability). Even the Oversight Board itself admits certain limitations to its scope for decision-making and independent institutional setup in its recent Annual Report.

As our paper suggests, the board suffers from legitimacy deficit, which comes from lack of participation on its composition, governing rules but also from lack of pure legal legitimacy. This deficit may be mitigated by legislative action – by outlining legal requirements (e. g. by the EU in case of the DSA) for the out-of-court dispute settlement systems, similar to the Oversight Board. Yet, the Oversight Board in its current form is a different animal as stipulated by the DSA. The Oversight Board may be a useful part of the overall platforms' regulatory framework, once it enhances the participation, strengthens its legitimacy towards the platforms' users and improves its systematic appreciation of local contexts.

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