DE-PLATFORMING TRUMP

Twitter's decision to suspend the account of outgoing US President Donald Trump has thrust internet governance into the mainstream. **ERIC BARENDT** contemplates the future of freedom of speech on social media platforms

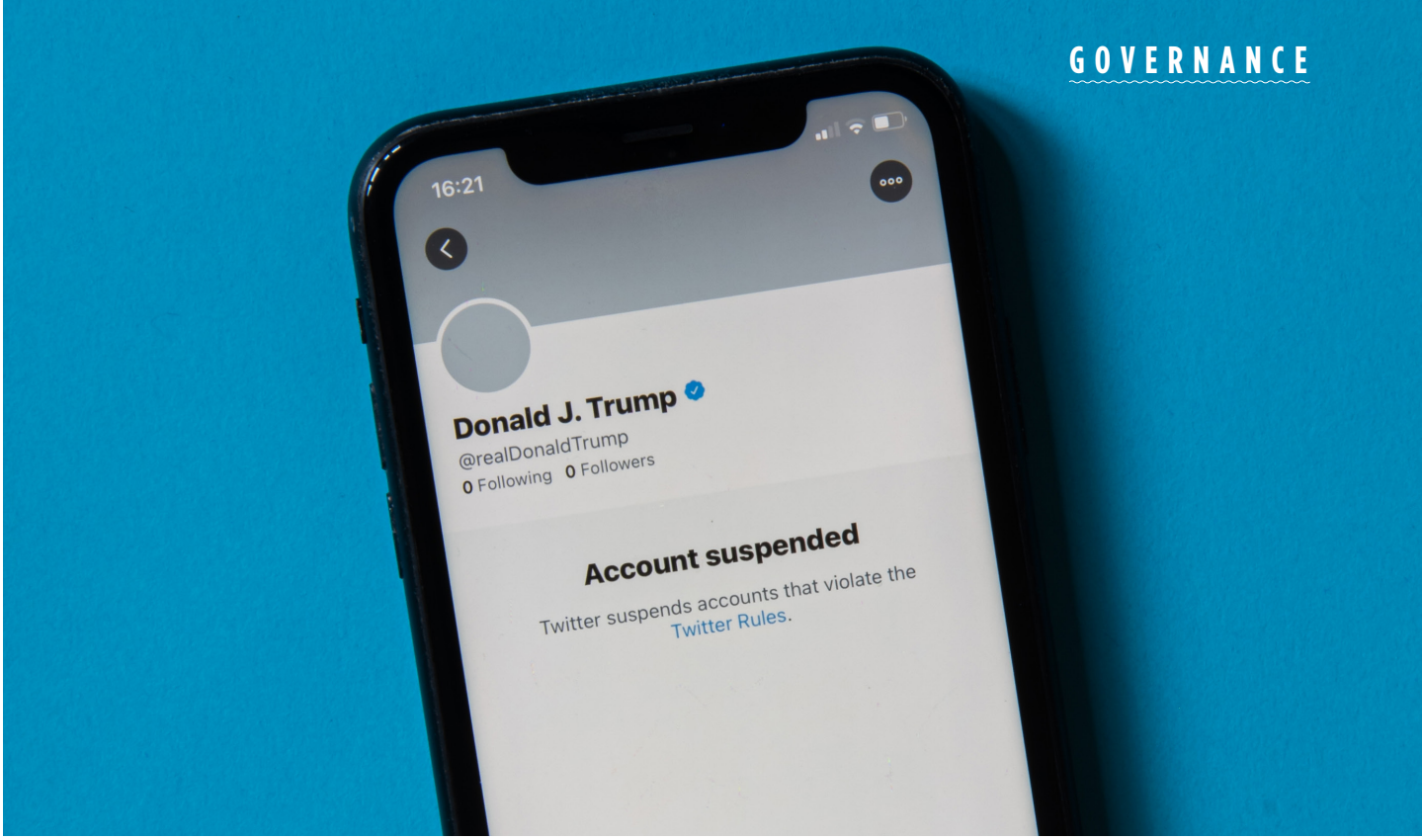
President Trump will leave many toxic legacies: a bitterly divided country, a declining belief in the democratic process, and the weakened authority of the USA in the free world, but one fortunate consequence might be the opportunity he has given to reconsider the position of social media platforms and their apparent ability to switch off the capacity of politicians (and others) to communicate their messages to the public. Following the invasion of the Capitol on 6 January 2021 by Trump supporters, social media companies denied Trump use of their platforms; he could no longer call on his followers to protest the fairness of the election, whether by disrupting Congress or in other ways. In short, he could not use these platforms any longer; he was, to adopt a neologism, simply de-platformed.

Many commentators see this as an interference with Trump's freedom of speech. Chancellor Angela Merkel, not known for her sympathy for Donald Trump, said Twitter's decision to suspend Trump's use of its platform was "problematic" and the same view has been taken by the French government and by the Russian dissident, Alexei Navalny. In the last year or two social media have become increasingly active in controlling what they consider damaging expression on their platforms, for example, banning Holocaust denial and anti-vaccination ads (see the article "Social media and free speech" in *The Economist*, 24 October 2020). They often act in response to complaints as well as at their own initiative. So Twitter's decision does not raise a new issue; but its reaction to Trump's inflammatory speech in Washington on January 6, has highlighted it, raising questions about the ability of social media platforms to limit their use for political, or indeed other types of, speech.

FREEDOM OF SPEECH ON SOCIAL MEDIA PLATFORMS

It might be thought axiomatic that we all have a free speech right to use social media to communicate any message we like, subject only to the limits imposed by the general laws prohibiting the dissemination of, say, criminal incitement, obscenity, and in many jurisdictions (though not the USA) hate speech. But the position is not nearly as clear as that. If a social media platform decides to withdraw its services, perhaps because we disseminate what it considers "fake news" or use it regularly to harass other users or invade their privacy, can we take it to court for infringing a right to freedom of speech – which in many liberal countries is guaranteed by the constitution or by statute such as the United Kingdom Human Rights Act 1998? The legal answer to this question depends, of course, on the state's constitution and other laws. As far as I know, no country has really grappled with this question at the highest level.

I will consider the position in the United States, largely because there is more relevant jurisprudence there than in other jurisdictions, and it provides the context for Twitter's decision about Trump. In its first decision on free speech on the internet, the Supreme Court, like the lower courts involved in the case, stressed the role of the internet in providing a forum for mass democratic participation; it should not be equated with the traditional broadcasting media and subject, as that has been, to any special regulation. So a federal legislative ban on sending indecent or patently offensive messages to young persons under 18 could not be upheld as it would infringe constitutionally protected speech (*Reno v American Civil Liberties Union*, 1997). But it does not follow from the decision in *Reno* that freedom of speech would equally be upheld if an internet service provider, rather than Congress or state law, imposed a similar ban. The point is that the First Amendment guarantee of freedom of speech and the press – Congress shall make no law abridging the freedom of speech or of the press – applies only to *state action* and does not limit the freedom of private persons, including media corporations. Freedom of speech is regarded in the USA (with only a handful of exceptions) as a negative liberty, with which government must not interfere. The free speech guarantee would only apply if a positive First Amendment right of access to use the



internet and social media were recognised. Maybe such a right should be upheld, but hitherto it has not been in the United States, or for that matter in other liberal democracies such as the United Kingdom.

Indeed, in the United States positive free speech access rights have been denied in other media contexts. In *Miami Herald v Tornillo* (1974) the Supreme Court unanimously struck down a Florida law which provided a right of reply to election candidates whose conduct had been criticised in a newspaper. The First Amendment could not be invoked to limit the freedom of press editors to determine the contents of their paper. So Trump could not have complained if he had written daily articles for, say, the *New York Post*, and its editor then decided to put a stop to this practice. And the First Amendment does not apply to private broadcasters either, so a network could not be compelled to carry an important political message by Democrats in protest against the war in Vietnam (*Columbia Broadcasting System v Democratic National Committee*, 1973). Newspaper owners, editors and broadcasting channels have free speech rights, but not the individuals who claim access to them.

The principles in these cases concerning the traditional mass media might not be applied to the internet, in particular to the social media. An argument could be made that given their importance for free speech – consider the rapidly increasing role of citizen journalists – access rights should be upheld in this context, so that Twitter and Facebook could not simply deny anyone the use of their platforms without pressing justification. Social media should not be treated in the same way as newspaper companies and broadcasting channels. It would probably be open for constitutional courts or legislatures to formulate appropriate access rights, recognising the role of social media in the current political and cultural landscape. Access rights have been recognised to use the streets, parks and other public spaces for speech and meetings in the United States as well as in other countries, and they could be similarly upheld in the context of the social media.

THE RESPONSIBILITY OF SOCIAL MEDIA PLATFORMS

In the absence of legal recognition of access rights to use their services, social media platforms are therefore free to deny users a platform. As noted earlier, Facebook, Twitter have done this increasingly frequently in the last two or three years. Sometimes they ban speech – notably, Holocaust denial – which would almost certainly be ruled protected by the First Amendment, if Congress, or, say, the state legislature in New York, were to outlaw it. Indeed, it is not absolutely clear that President Trump's speech to his supporters in Washington, DC on January 6 amounted to a criminal incitement to violence which would not be covered by the generous protection of political speech and advocacy afforded by the Supreme Court's interpretation of the First Amendment (*Brandenburg v Ohio*, 1969). Much would depend on the interpretation of the language he used and whether it was probable that a violent invasion of the Capitol was a likely and imminent consequence of his speech – the test in *Brandenburg*. So if Twitter were bound to respect

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the constitutional guarantee of free speech, its suspension of Trump's use of its platform might have infringed his First Amendment right; it would have acted where the courts might have held Trump's address to his supporters was protected by the First Amendment guarantee. Moreover, the suspension was indefinite; it denied Trump freedom to tweet in the future, and so amounted to what would have been a plainly unconstitutional prior restraint on his First Amendment right if that were guaranteed against social media platforms.

It is these difficulties which rightly cause unease about the power of social media platforms to determine who has access to them and who might be de-platformed. They act largely unregulated by law, though of course their users can be criminally prosecuted or may be civilly liable, say, for defamation if their messages infringe the law. Indeed, in the USA the providers of computer services enjoy immunity from proceedings for their dissemination of information provided by others; they are not treated as publishers of such information under section 230 of the Communications Decency Act of 1996, a measure enacted when it was generally considered right to encourage the provision of internet services. It is now realised that social media companies and search engines – Facebook, Twitter and Google – are media giants, oligopolies which may constrain the free speech interests of individuals (as well as enable damage to their reputation and privacy rights) just as they have promoted the freedom for millions.

Rather than leaving the responsibilities of social media platforms (and the providers of other services on the internet) unregulated, they should surely be governed by laws put forward by governments after public consultation and debated by Parliament, Congress, or other legislative body. One model is the German Federal Network Enforcement Act, enacted in July 2017, which requires the quick removal by social networks – within 24 hours for manifestly unlawful content – of hate speech and other communications which infringe the Criminal Code. Massive fines are imposed for a failure to comply with this requirement. There are of course difficulties with legislation of this type; platforms may act too summarily on receipt of a complaint, removing material which does not amount to an offence. On the other hand, the French legislation introduced in 2018 to limit the spread of disinformation or "fake news" during an election period requires a court order to compel its removal; that might be too late to deal with the damage created by a false story disseminated by a political candidate or one of his supporters.

Above: Twitter CEO Jack Dorsey ponders the decision to suspend outgoing US President Donald Trump's Twitter account @realDonaldTrump which had 88.7 million followers at the time

CONCLUSIONS

There are real problems in framing legislation to regulate the power of social media platforms. They may act too quickly to remove controversial messages, for they may fear the imposition of a heavy fine by a regulatory authority and, unlike newspaper publishers, they have no real interest in defending freedom of speech and the media. Equally, to wait for the intervention of a court or independent authority will leave the message – cyber-bullying, threats of violence and sexual assault, including rape, or harassment – online to damage its victim. The regulation of "fake news", or disinformation, is particularly difficult. On the one hand, false stories about the alleged harm of a vaccine may undermine the ability of governments to deal with the pandemic and endanger public health, and deliberate lies about politicians – such as the Pope supporting the candidacy of Donald Trump in 2016 – make nonsense of a fair electoral process. On the other, should the determination of truth and falsity be left to government, or even an independent public authority, or should we trust the public to make the right judgment about competing political and social claims?

My view is that an independent court or public authority should have authority to direct social media platforms to remove clearly false tweets and posts, at least if it is obvious that they have been deliberately manufactured, as well as those which threaten violence, encourage terrorism, or harm children. This conclusion will not be universally, or even widely shared. What should be agreed is that the de-platforming of Trump has raised important free speech questions, and it would be irresponsible to leave all these issues to be determined by a handful of social media platforms.

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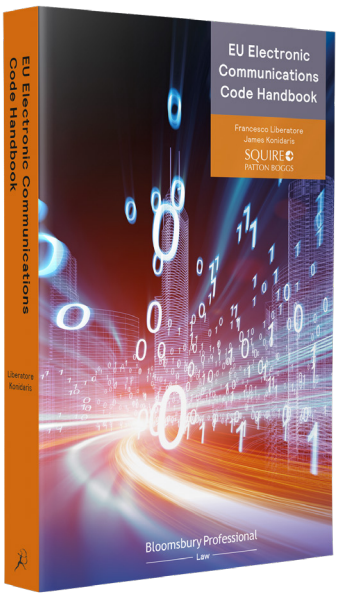
EECC HANDBOOK



The EU Electronic Communications Code Handbook, by Francesco Liberatore and James Konidaris of global law firm and IIC member Squire Patton Boggs, is a new reference guide and research tool for those involved in the application of regulation in the electronic communications sector in the European Economic Area (EEA) and, in particular, of the EU Electronic Communications Code (EECC).

THE EECC

The EECC is an ambitious recast of the previous EU regulatory framework. It is aimed at promoting competition and consumer protection in electronic communications, while expanding the scope of telecom-style economic regulation to new internet-based communications services. As Liberatore puts it, "the EECC is unique in contents and ambitions but is also a complex piece of legislation of epic length and some of its provisions are the result of highly debated compromise amendments between the EU legislative institutions".

THE HANDBOOK

The handbook helps resolve this complexity. Konidaris says "Our aim is to help interpret each of the provisions of the EECC by correlating it with its corresponding recitals, the previous legislative provisions which it recasts, and other legislative provisions to which it refers. We cite all of the relevant case law of the Court of Justice of the EU to date in which the court has not only interpreted the regulatory framework but has, at times, expanded it as a driving force for harmonisation. We also cite under each provision of the EECC the relevant guidance published by the European Commission, the Body of European Regulators for Electronic Communications (BEREC) and/or the Communications Committee (COCOM) which assists the Commission in carrying out its executive powers with regard to the Digital Single Market."

In most cases, this guidance is non-binding; in other instances, it is either binding or the national regulatory authorities must take "utmost account" of it. In all instances, however, this guidance works like "soft law" which can only be departed from in justified and exceptional circumstances. The importance of the work of BEREC in providing guidance on the application of the EECC is also reflected in the handbook's foreword, which is provided by the new chairman of BEREC, Michel Van Bellinghen.

"Leveraging our experience", Konidaris continues, "the handbook consolidates the key European legislation and other instruments pertinent to the interpretation of the EECC, and provides annotations and commentaries on each of the provisions of the EECC, to enable companies to navigate the new regulatory environment successfully."

The handbook also contains other useful tools, such as correlation tables and a list of all national measures transposing the EECC into national law.

EXPERIENCE IN CHANGE

Liberatore says "Our firm is a global leader in communications regulation. For over 40 years, we have been at the centre of major regulatory changes shaping this industry, from the early days of liberalisation and privatisation of former state telecommunications monopolies to the rise of new digital services over the internet, which have been so important in keeping us connected throughout the ongoing pandemic. The communications regulatory landscape is now about to change significantly again. This time, Europe is set to take the lead with the EECC and our firm is, once again, excellently positioned to assist our clients in preparing for this change."

Ann LaFrance, co-chair for Squire Patton Boggs' Data Privacy & Cybersecurity Practice Group, said, "Given the significant changes on the horizon in the EU and UK regulatory frameworks affecting tech and telecoms companies, and the potential implications of Brexit that are affecting the broader ICT sector, this handbook could not be coming at a more opportune time."

Brian Hartnett, managing partner of the Squire Patton Boggs Brussels office and co-chair of the firm's Competition – Antitrust Practice Group, added "This handbook is a shining example of our collaborative and interdisciplinary experience in the electronic communications sector, ranging from competition law and consumer protection to data privacy."

Certain jurisdictions outside the EEA take the EECC as a key benchmark for the reform and application of their national regulatory frameworks (for example, the UK). Therefore, this handbook will also be useful to non-EU practitioners, in-house teams, regulators and courts.

The book is due to be published in April 2021 by Bloomsbury Professional and is ready for pre-order online.