Recommendations on modern intermediary governance

Information intermediaries are amongst the few genuinely structural changes in public communication that have been brought about by the expansion of the internet. Reversing this structural change through regulation is not in the interests of the freedom of communication nor is it feasible to attempt this, even if some political debate appears to suggest otherwise. Properly functioning public spheres are theoretically possible even under the current conditions.

One of the key decisions in the regulatory response to changes is whether regulatory concepts are being updated or newly developed. The updating of traditional media regulation would only appear effective to a limited extent as it is based on editorial control and aims to achieve diversified regulation of media content. However, diversified regulation of all content accessible via intermediaries would appear neither possible nor desirable. Here the legislator can nevertheless continue to attempt to confine the media sphere through regulation as it is of major importance to social dialogue.

As far as the control methods in relation to individual content are concerned, the currently prevailing differentiation – liability for editorial control and extensive privileged liability treatment where this does not exist – will no longer be adequate to deal with the complexity of the situation. Courts worldwide are already adopting differentiated solutions. A typology of content moderation and associated, graduated and differentiated preventative and liability regulations may be the solution which should be governed by law and ideally harmonised internationally to establish legal clarity for all parties concerned. In contrast, simply making intermediaries subject to media-type liability regulations would inevitably result in them relinquishing their special functions promoting public communication.

With regard to obligations for providers to intervene in their content moderation – for example, through take-down and put-up regulations – knowledge gaps must be taken into account in determining the scope of the regulations: where the provider is unaware of the context or is incentivised to use technology that cannot adequately determine the meaning of the communication, there is a risk of lawful content being removed. Such systemic effects should be excluded in the drafting as far as possible. The orientation of public communication towards truthfulness is first and foremost the duty of a strong civil society and not the regulatory state. The independence of decision-making should therefore be considered in provisions on organisational measures. This mainly concerns establishing procedures for safeguarding fundamental rights.

The question of what the need for regulation depends on arises in relation to control methods for decision-making logics at intermediary level and the related risks. Here the debate often implicitly focuses on the heavily used platforms. The reliance of relevant sections of the population on the intermediary service for communicative requirements may be the key indicator of whether there is a risk to properly functioning public spheres.

Where regulation refers to entire-service-related selection and sorting logics and procedures, the involvement of intermediaries in structuring the procedure must focus on ensuring the supporting potential of intermediary functions is maximised and that the detrimental potential is minimised. This can be achieved through organisational, procedural approaches and transparency-creating disclosure and reporting obligations that enable critical dialogue. Generally, differentiation between three elements is recommended in relation to control methods for decision-making logics at intermediary level:

- Anti-discrimination regulations firstly require the definition of what is deemed unjustified unequal treatment. However, providing such a definition for various intermediary functions is anything but a trivial matter. The distinction from antitrust legislation would also have to be taken into account.
- Transparency regulations are not a universal remedy – instead the question of who must understand what to achieve a regulatory objective should be asked. On this basis, transparency can contribute to quality of discourse and checks on power.
- With the intermediaries a private system of public communication has emerged which is becoming increasingly important. Continually monitoring it, better understanding it and, if necessary, shaping it through regulation is a media policy task. In this respect, legal provisions may help to stabilise user expectations of intermediary service provision.

The question of whether the vulnerability of the respective economic markets is a factor also arises. As intermediary and some telecommunications markets clearly do not appear to be moving towards competition long-term, lessons can also be learned from telecommunications legislation here and regulatory structures can be adopted where applicable.

Publicly financed alternatives seem unrealistic in view of network effects and the pace of innovation. Supporting approaches which tie sorting and selection logics to social interests and ultimately make intermediaries hybrid, private/public-oriented institutions seems more expedient.

In view of the difficulties of international law enforcement, it may be beneficial to provide for cooperative forms – in addition to ‘hard’ regulations – which also enable alignment with regulatory objectives where they cannot be legally enforced.