Assessment of Existing Regulatory Standards and Regulatory Options Regarding Intermediaries in Switzerland

Legal study commissioned by OFCOM and carried out by

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Executive Summary

This legal study is part of the research carried out by OFCOM on the topic of “Intermediaries and the public sphere” and will be incorporated in the governance report to be submitted by OFCOM to the Federal Chancellery. It examines how intermediaries are regulated under Swiss law in areas relevant to the public sphere (2), assesses these regulatory standards and any loopholes or problems in their application and makes proposals for improving them (3).

In general, the study’s evaluation of current legislation shows that many binding standards apply to intermediaries, including in areas that concern the public sphere (understood in this context to mean the social sphere in which citizens communicate with each other about issues of common concern). Intermediaries do not, therefore, operate in a lawless zone, and there are no systematic loopholes. There is fairly good protection of the individual as such, whether this regards infringements of personality rights, damage to reputation or exposure to undesirable content. Conversely, protection of society and the collective interest is much less well regulated. Democratic society’s interest in having a well-functioning public sphere where debate can take place freely is poorly protected.

One reason for this is that the public sphere in the above sense is neither a property protected by criminal law nor a clearly defined legal concept. The second reason is that respect for freedom of expression, which the state must guarantee and protect, makes any control measure a sensitive issue. A democratic society needs open debate to take place in the public arena, i.e. in a space where everyone can express themselves, including saying things that might displease the state. But failing to take any measures would not encourage healthy democratic debate either.

The issue of the civil and criminal liability of social media, internet service providers and other providers has been comprehensively studied and discussed in Swiss law in recent decades. It is gratifying that this has also included intermediaries. The current regime provides sufficient measures in terms of criminal law, especially through regulations on complicity.

The situation with regard to civil liability is slightly more complicated, as the perpetrator needs to be identified for legal action to be taken. However, the infringement of personality rights is a notable exception, as an injunction can be brought against any participant. Conversely, the civil law measures that preliminary injunctions contain to protect the public sphere do not go far enough and need to be supplemented.

Another recommendation is to introduce a duty to provide information about the intermediary’s identity, a specific obligation to be transparent about how content is selected and distributed, and a more general obligation to publish a regular report on content that has been promoted, deleted or otherwise used and the criteria applied. At the same time, users must be guaranteed extensive control rights, particularly so that they can opt out of personalised recommendations.

Lastly, the study stresses the importance of the press subsidies and raising awareness of the risks of manipulation and misinformation.