

Management Summary

1. Public and private communication

A sharp distinction between private and public communication need not be made for the purposes of the present study. Rather, those influences of private individuals on electronically conveyed individual communication which are appropriate to change their communication behaviour in such a way that public communication can be influenced by them must be taken into consideration. Owing to the manifold uncertainties concerning causalities or correlations, however, restraint is required when considering such influences. Accordingly, consideration of the possible impact on public communication of measures which relate to private communication is also essential.

2. Structures of the fundamental communication rights

Freedom of expression is intended to protect democratic discourse and to enable the development of individual personality. Expressions of social interest are at the centre of this protection. In the public debate about such questions, it must be possible to express the greatest possible variety of views and opinions. In addition, every individual should have the possibility of being able to participate in public discourse; however, there is no individual claim to equal opportunity or to be heard. The media are of particular importance in enabling public discourse and conveying a diversity of opinions. This also applies in particular to certain internet intermediaries. To be able to perform this function, a degree of internal pluralism is necessary where public discourse is shaped by a few media or internet intermediaries.

3. Dangers for fundamental communication rights on online platforms

Public communication is initially endangered by types of behaviour which *excessively limit expression*. Control over statements which are conveyed via intermediaries is usually the responsibility of these private participants themselves. Restrictions based on this possibility of control regularly go further than would be possible and permissible according to legal standards. This creates the danger of obstructing or even making impossible discussion of certain subjects or selected arguments or aspects of a society.

Risks to public opinion-forming also result from structures or procedures which could reduce the *diversity* of available opinions or at least entail a corresponding danger. In particular, a corresponding measure is the use of algorithms in the filtering and sorting of statements and information. Similar risks arise from the powerful position of internet intermediaries in the market. However, in this context it must be taken into account that it is not so much the lack of diversity of opinions which is a problem but rather the very limited receptiveness and attention of people in relation to the extremely broad multiplicity of opinions and content.

Public opinion forming can then be endangered by measures and structures which prevent or at least do not allow *equal access* to communication infrastructure. Thus structural inequalities between intermediaries and users, in combination with the often present market power of these providers, can create the danger that they treat their users unequally without objective criteria

or even make content available to users with discriminatory intent. Consequently there is considerable *potential* both for restricting equal access to public communication and for content-based control of the public debate.

Dangers to the formation of public opinion may also arise if information is made unilaterally available to the public through algorithmic *sorting*, possibly without this being easily detectable. As a minimum there is the possibility that with increasingly personalised and thus more diversified and possibly one-sided information transfer there is a risk that society as a whole could lack a common basis for discussion. The risk is increased if the algorithms which sort and link content are founded on personality-based characteristics.

Public opinion forming may then be put at risk by the *use of bots*. This is particularly the case if bot statements are not recognisable as such, if they are used to create the appearance of broad agreement with a statement or if bots send out a large number of statements in order to paralyse certain communication forums.

Public opinion forming may also be jeopardised by measures which deter individuals from discussing specific content or exchanging views with specific persons. Such a risk may be created in particular by the *storage and evaluation of a communication using keywords or marginal data from the communication*.

State measures should be considered if the above-mentioned behaviours, phenomena or structures reveal specific dangers for free communication.

4. The *sui generis* position of the internet intermediaries

The position and role of powerful internet intermediaries in public communication differ substantially with reference to their regulation, according to the view presented here, from both the traditional printed media and from radio and television. For their regulation, it is important to start from the threat they pose to public communication, not from the existing models of regulation of the printed media or radio and television. Because of the elementary importance of the intermediaries for social opinion forming and the quasi-monopolistic position of many intermediaries, it is to be assumed that they are selectively subject to basic legal requirements.

5. Communicative guarantee obligations

a) General requirements

The existence of a guarantee obligation in the context of fundamental communication rights is dependent on the presence of the following factors in particular:

Guarantee obligations are recognised if *elementary preconditions* for exercising fundamental communication rights are brought into question. Such elementary preconditions include, for instance, minimal equality of opportunity for all to participate in public discourse; this also includes questions of access to communication infrastructures.

Recognised guarantee obligations in the context of fundamental communication rights are intended to secure or to guarantee the *communication structures* necessary for public opinion forming, including in particular protection of diversity of opinion. Guarantees are acknowledged in areas in which the *overall social communication process* is impaired. However, state guarantees extend only in as far as the measures required by them are *compatible with conflicting fundamental rights positions*.

b) Specific guarantee obligations

Specifically, the following obligations of the state in relation to the regulation of internet intermediaries flow from the fundamental communication rights:

On the internet, legislation must in principle be enforced by the state itself, under the legal process available for this purpose. This applies in particular to the deletion of online contributions, which takes place after the civil, criminal or administrative procedures have been applied. Also, the state should refrain from instructing internet intermediaries to delete contributions outside the legal procedures. This does not stand in the way of any obligations of internet intermediaries to cooperate in the procedures for enforcement of the law.

A guarantee obligation on the part of the state may also be assumed to mean that it must oblige intermediaries *to guarantee minimal basic and procedural rules* in order to guarantee equal access at an elementary level by all users to the communication forums which are relevant to social opinion formation. Such guarantees must take effect both in the preparation of community guidelines and in their application. Similar requirements must be imposed on the design of sorting and filtering processes by internet intermediaries. From a practical point of view, it must be ensured that internet intermediaries occupying powerful positions in the market *define precisely the limits of permissible contributions in their community guidelines* and ensure a *minimum of content neutrality*. From a formal point of view, it must be a requirement that a deletion will be accompanied by a *minimal justification* and that the person concerned is *informed* in an easily traceable, clear and understandable way about procedural and complaint options.

Fundamental legal guarantee obligations also exist with reference to *access to the communication infrastructure*. In view of the legislative anchoring of such rules in Art. 12e TCA, there is no need to go into this in greater detail.

It can therefore be assumed that there is an obligation on the state to formulate certain basic conditions for minimal *equal opportunity* with reference to access to communication forums. Intermediaries which are powerful in the market must be required, in the design of their service offerings, to grant equal access where denial of users would seriously impair their fundamental communication rights and in particular their personality.

The consultants consider it an indispensable condition for an effective guarantee of freedom of expression that the state guarantees minimal transparency concerning the use and design of *algorithms* for individual control of non-material content. This obligation does not extend to the disclosure of programming code.

An analogous obligation to ensure transparency is to be assumed in the case of *the use of bots* which influence public communication. Here, internet intermediaries must be obliged to identify automated bot statements on their platforms as such. One possibly effective means, but not a fundamental legal obligation, of protection from *flooding* and *trolling* might be the definition of a numerical upper limit of communications per unit of time; however, it would be essential to ensure that the fundamental rights of third parties continue to be protected.

Marginal data storage and evaluation of communication may have a *chilling effect* on freedom of expression. Effective protection of informational self-determination according to Art. 13 para. 2 of the Federal Constitution is indispensable in order to limit such a *chilling effect*.

Special guarantee obligations result from the freedom of choice and freedom of vote according to Art. 34 of the Federal constitution. These would have to be specifically identified.