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Visions of a Coherent EU Information and Media Order

Policy Paper



1. Fundamental changes in Europe's communication structures

1.1 Access to information about the world has never been as easy as it is today for the citizens in Europe. The internet and its services therefore have a positive effect on the exercise of the freedom of communication and a diverse information ecosystem. However, the direct access to information and lack of editorial control means that also illegal content finds it easier to spread.

1.2. Member States are increasingly aware that easy access to information alone does not provide for all the basic functions for democracy and for individuals, which a free and open communication system is designed to safeguard. Therefore, guaranteeing a diverse communication system – important as it is and remains – does not suffice as the main goal for media policy any more. The Member States have – to take an important example – to address challenges for social cohesion and the role of communication in this context in general as they cannot rely on traditional media regulation to guarantee that cohesion. Other relevant functions are the integrity of the formation of public opinion especially during elections, which also needs further inspection. In general, the scope of media policy broadens.

1.3. While information gathering via social media and other intermediaries grows in importance that does not mean that journalistic-editorial media content becomes less important. On the contrary, this type of content retains its special role as trusted source of public information especially in view of the spread of “fake information”, as demonstrated during the corona crisis.

1.4. There is a shift of user attention and therefore a change of distribution chains for content that has drastic effects on the advertising markets. That is one – even though not the only – factor that leads to achieving financial stability for the media a core issue for current media policy. Furthermore, the profits often flow out of Europe and thus generate little added value here.

1.5. Intermediaries contribute to the creation of public spheres in their own way. However, even in the academic discourse the various specific functions of intermediaries for communication and the effect of phenomena like detachment of the content from its context are not fully understood so far. The hybrid nature of those services (e.g. serving private and public communication needs at the same time) is an obstacle for finding adequate policy solutions that address the risks without hampering the constructive functions of those intermediaries, as well as communication freedoms in general.

1.6. Personalisation, content selection and content sorting supported by algorithms (automated decision-making; ADM systems) play an increasingly important role not only in the findability, but also in the creation of communicative content even in the newsroom.





1.7. The corona crisis has exemplified how important the selection and ranking of voices – and therefore constructing diversity – is for a society but also how difficult and momentous it is for media and social media platforms in their respective roles to take those decisions e.g. about conflicting strategies in a crisis.

1.8. Deep Mediatization, i.e. the fact that all areas of private and social life are affected by the use of media, makes it harder to separate the field of media and media regulation from other fields. How we “do” family, education or business depends to a high degree on media and is affected by its change.

1.9. The communication spaces in Europe still largely follow the language boundaries. The “European Public Sphere” is rather limited. During the Corona crisis, the focus shifted even more to the national public spheres.

1.10. The video on demand platform markets are still largely dominated by US American players. However, they start to integrate themselves into the European networks and, furthermore, European services have been successful in finding niches.

2. Challenges for the European regulatory framework

2.1. The Freedom of Communication and Information enshrined in Art. 11 ECFR – including the respect for diversity – and the constitutional guarantees of the Member States as well as the division of regulatory competencies within the EU remain the foundation of the European communication regime. It continues to be the sole responsibility of the Member States to guarantee a functioning public sphere, including ensuring diversity. Given the above-mentioned structural changes, it does not seem to be a feasible strategy to separate the governance of “traditional media” from those of platforms/intermediaries with respect to those policy goals that aim at guaranteeing a functioning public sphere.

2.2. While freedom from state interference and diversity in the media is among the central values of the EU (Art. 2 TEU) we witness that these requirements are not only under pressure in foreign countries but also from time to time in the middle of Europe. Issues are the independence of media companies as well as media regulators. Protection against the erosion of those values needs to be robust. Furthermore, for freedom of expression to be truly realised, an independent and effective judicial system is vital.

2.3. There seems to be a tendency among policy makers to see control of communication as a means to combat problems created by extremism, populist movements and declining social cohesion in general. While the threats triggered by those developments have to be taken very seriously, policy makers sometimes neglect to keep in mind that freedom of communication is also granted for minority opinions and ideas that shock, offend or disturb the State or any sector of the population, and that counter measures need to be based in law and have to stand the proportionality test. Self- and co-regulatory concepts bear great potential, but can trigger the risks of circumventing requirements set





by human rights and the rule of law if not carefully drafted to meet those requirements. Fighting extremism is primarily the role of a strong civil society.

2.4. Member States as well as various stakeholders have noticed that general European regulation as well as regulation in other sectors increasingly affect communication services, the communication system in general as well as its functions for societies and individual citizens. The GDPR (EU 2016/679) and the ePrivacy Directive (2002/58/EC), the Copyright Directive (EU 2019/790), the E-Commerce Directive (2000/31/EC) and the State Aid Regulation can serve as examples. Lack of consistency of regulation and side effects on freedom of communication are an issue.

2.5. Private ordering, i.e. the rules set by companies that own platforms/ intermediaries, have growing influence on public communication. Especially the rules based on which content is removed or demoted play a key role. The public perception is, however, sometimes contradictory since on the one hand stakeholders demand action by the companies to get rid of hate, to take an example, on the other hand the same actors blame the companies for “private censorship” in case they actually do act. There is, however, rough consensus that companies as well as states have room for improvement in terms of transparency with regard to takedowns and demotions (or respectively requests for such takedowns). The growing use of advanced algorithmic systems for content moderation – especially during the crisis – aggravates the problem.

2.6. The fundamental changes in communication structures in Europe require both the EU and the Member States to apply a broader view and assess the coherence of the regulatory structures that affect the communication system across the board. The framework on the European level is – as might be expected – characterised by path dependencies and reactions to phenomena of the day. Tensions and even frictions in the multi-level-system of governance seem to be inevitable and are already to be seen. The pressure put on the country of origin principle in some fields bears witness to the increasing problem of coordination in Europe.

2.7. The changes described under 1. also lead to blurring boundaries of established concepts. The core concept of “diversity” is affected, too. Regulation of diversity that rests on representation models. The diversity within a society should be represented in the media. On the basis for those models, traditional broadcasting regulation issued and issues licences and regulated means of transmission. This, however, cannot function in an open communication environment where, to take an example, recommender systems have the whole content available in the internet as a basis (not just a limited number of broadcasting channels) and where citizens can use the recommender system for various completely different information needs. We lack a diversity model that includes all types of content – and maybe designing something like that is neither possible nor desirable – and there are limits for regulating the reception diversity since that would mean to overrule the users’ choices in many cases.





2.8. Member States struggle with the task of promoting the production and distribution of journalistic content and to stabilize the financing of the media system in general under the current legal framework. Concepts how to fund journalism without endangering the independence of the media and without infringing state aid rules are urgently needed.

2.9. The tension between traditional media and their respective supporters in the political arena on the one hand and the tech companies and their camp on the other has reached an extent that renders rational policy making nearly impossible. In the interest of the values of the Member States and the Union this situation should be overcome. A prerequisite for this is the recognition of each other's role and significance for communication in the digital society. Media companies as well as intermediaries should refrain from misusing their influence on public opinion making for lobbying for their own interests since that erodes their trustworthiness.

3. Suggestions for the way forward

3.1. To make the protection of the values under Art. 2 TEU more robust it would be helpful to flesh out the notions of “rule of law” and “respect for human rights, including the rights of persons belonging to minorities”, “pluralism” and “non-discrimination” in more detail and with respect to characteristics of a free and democratic media system. The work of the Council of Europe can serve as an inspiration in this respect. Regular country reports that assess essential criteria could serve a “soft” approach for implementation.

3.2. To reach more coherence in the regulatory framework there is the option to take procedural measures:

- 1) Map the existing regulation and assess overlappings and conflicting values (basis: HBI studies);
- 2) Create a taxonomy of regulatory aims and instruments and try to link regulation rather to these objectives than to types of services; provide gradual approaches to different services depending on their societal and individual functions;
- 3) Agree on overarching principles to solve future regulatory conflicts; those principles should also include good practices for governance like regulation being technically neutral wherever possible, choosing the right level of regulation for a task (EU laws, national law, bylaw set by regulator...);
- 4) Improve the impact assessment of new regulation to avoid regulatory conflicts from the beginning, i.e. by implementing a mandatory test of a proposed European law to assess the impact on the freedom of communication – in important cases by independent experts;

This could be done by adding an annex to the Impact Assessment Guidelines of the EU Commission. To be practical, this could consist of two steps (outlined in those guidelines)





- i) Assessment of the probability and intensity of an impairment of the freedom of communication by a planned measure and, based on this, a classification into three categories;
 - ii) Assessment of the impact depending on the category (A- Compact in-house assessment, B- In-depth in-house assessment, C- External evaluation).
- 5) Apply systematic balancing procedures in cases of conflicting rights and values – in important cases by independent experts.
- 6) Agree on a set of compatibility clauses, e.g. exemptions or freedom-respecting graduated measures for media, journalists or intermediaries that can be uniformly used in new rules, and to improve the coordination among regulatory authorities.

3.3. Given the importance of ADM systems also in the field of communications, these principles and procedures (3.2.) should already be applied to the current process leading to a Digital Services Act and to a potential cross-sectional AI-regulation at EU level.

3.4. Considering the role of private ordering, there is need for a systematic review of private rules, their changes and implementation with respect to possible impacts on freedom of communication and a functioning public sphere. The EU should encourage and incentivize civil society and the academic community to focus on the issues revolving around private ordering of public communication.

3.5. While the competence to ensure the functioning of the public sphere rests with the Member States alone and the EU does not have the authority to harmonise or co-ordinate regulation in this field, a helpful role of the EU could be to support the mutual learning process of the Member States. In this fast changing and complex environment, this learning process is crucial. The extension of the media pluralism regulation beyond traditional media can be an example where exchange of knowledge is needed. The media pluralism monitor could be a starting point and a blueprint for this role of the EU.

Measures that could be provided to support the Member States' efforts could be, inter alia:

- Regular horizon scanning (change of media use, new technologies, new players, associated risks etc.),
- Knowledge sharing about new regulatory concepts – especially on ensuring diversity in the current information eco-system – and approaches within Europe and beyond,
- Networks of experts,
- Funding for research on regulatory concepts and instruments and methodologies for impact assessments

3.6. European coordination rests on the concept that just one Member State takes the responsibility to guarantee compliance with the European standards; generally, that is the country of origin. All actors need to agree on the importance of that principle in those fields where European coordination is called for.





3.7. A broader European public sphere cannot be mandated, however, Public Service media could be encouraged – and their remit adjusted accordingly if necessary – to try out new strategic concepts for European cooperation.

3.8. The Commission is encouraged to draft a communication on the principles under which state aid can be used to overcome the crisis of media financing in times of digital transmission. Member states need solid legal ground to build respective programs. Funding schemes need to make sure that journalistic services are supported, not media companies as such.

3.9. That within Europe taxation of revenues generated online is not always linked to where the “eyeballs” are giving the companies the opportunity to use tax havens, is made possible by EU Tax Law; it is up to the EU to assess the fairness of those regulations.

3.10. Media Literacy is not just nice-to-have and should not be used for shifting responsibility to the users, but it is essential for achieving most of the goals of communication policy. Given the fact that media policy cannot regulate the diversity of the actual information diet of citizens the shift to more user choice means that democracies increasingly depend on the users’ interest in and ability to find and contextualize content that is of relevance for the society at large. Media literacy – including data and information technology literacy – is a prerequisite for that and should be supported by both, the EU and the Member States.

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