Così fan tutte: Some Comments on Austria’s Draft Communications Platforms Act

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Abstract
Austria’s Communications Platforms Act (KoPl-G) provides for a multi-stage procedure for content moderation, put-back rights and a stronger cooperation between platforms and supervisory authority. It is in some respects better than Germany’s NetzDG. There remain, however, a number of flaws. In remedying them, Austria could extend its reporting obligations to include "soft" content moderation measures, algorithmic tools, and advertising rules.

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Keywords: platform governance, NetzDG, Communications Platforms Act, Austria, transparency

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1 Introduction

That’s how all (states) do it right now: they enact laws – with varying degrees of success and respect for the rule of law – that are meant to increase transparency and codify content governance obligations for platforms. France’s Loi Avia\(^1\) failed, the reform of Germany’s NetzDG\(^2\) is stuck at the Office of the Presidency, the Brazilian Congress is working on a new law, the Turkish authorities have just enacted one – and in September Austria published the draft of the Communications Platforms Act (KoPl-G), which was notified to the Commission at the beginning of September.\(^3\) It does not increase coherence of the European media order that (European) states chose not to wait for the Digital Services Act (DSA), which is expected within the next months, but this does not absolve us from taking a look at what the draft KoPl-G actually says. In the following, we will present the law (2.) and offer suggestions for changes (3.) of aspects of the KoPl-G, which will be subject to national review until mid-October 2020 and European review until the end of the year, before concluding with some recommendations (4).

2 La clemenza di platforms

Due to the transnational character of the regulation of communication platforms, the presentation of the KoPl-G draft has provoked criticism based on violations of the country of origin principle in E-Commerce-Directive.\(^4\) While this did not stop Germany’s NetzDG from passing Commission muster, the Austrian draft is at pains to take European developments into account.\(^5\) This becomes particularly obvious in § 9 (3), which firmly excludes a general

\(^1\) Law to combat hateful content on the Internet, 09.07.2019, notification procedure 2019/412/F (France), German translation.
\(^2\) Act to Improve Enforcement of the Law in Social Networks (Netzwerkdurchsetzungsgesetz – NetzDG) BGBl I S 2252.
\(^3\) 49/ME 27th GP - Ministerial draft of a federal law enacting a federal law on measures to protect users on communications platforms - Communications Platforms Act - KoPl-G.
\(^5\) S 49/ME 27. GP, explanation, 2ff; incl.: Decision of the French Constitutional Council of 18 June 2020, (Décision n° 2020-801 DC).
monitoring obligation for platforms. At the same time, following Delfi, platforms are obliged to delete immediately ‘clearly unlawful’ content, and under KoPl-G (and NetzDG) have only 24 hours to do so for clearly illegal content. A certain ‘general’ monitoring is hence inevitable and, of course, already takes place vis-à-vis content protected by copyright and content checked against databases with materials of sexual exploitation of children. Almost apologetically, the draft emphasizes the urgency of the regulations proposed in the KoPl-G and states that they are intended to provide a remedy "[until] the regulatory deficit at European level is eliminated".6 This seems like Austria’s legislative “Solange”.

The notification procedure of § 3 KoPl-G is textually similar to the German § 3 NetzDG. Both provisions provide for the introduction of an "effective and transparent procedure" and require that it be easy to find and permanently available. Furthermore, the KoPl-G requires "easily manageable functionalities". The evaluation of the NetzDG has shown that the reporting channels of some platforms are extremely difficult to find and are not user-friendly. This was especially apparent when the reporting channels of NetzDG were not integrated into other, already existing, reporting channels.7 It is questionable whether the phrase "functionalities […] that are […] easy to use" as can be found in the KoPl-G is sufficient to prevent such difficulties.8

The obligation to process notices within 24 hours or 7 days was also copied from the NetzDG. In the evaluation of the NetzDG, these deadlines proved to be practicable.9 With regard to the reporting obligations of platforms, the evaluation of the NetzDG indicates the need for more precise specifications.10 Fortunately, the KoPl-G already provides for more extensive reporting requirements in some cases. For example, platforms must clearly state the number of pieces of content removed due to violations of community standards in the transparency reports under the KoPl-G. This is significant because NetzDG reports of large platforms have shown that a two-stage review process is often carried out, with content being

6 49/ME 27. GP explanation, 1.
8 The KoPl-G does not provide for any further specifications for the procedures, nor does it provide for the supervisory authority to issue a decree in this respect. However, the appeal procedure pursuant to § 7 of the KoPl-G could provide more concrete details over a longer period of time.
reviewed in the first stage according to community standards and only in a second stage according to legal standards.\(^{11}\)

The idea of the "domestic authorized recipient" was also adopted by NetzDG in the KoPl-G through the introduction of the "responsible representative".

The aim of the KoPl-G is to "promote the responsible and transparent handling of user reports" on certain illegal (i.e. illicit) contents and "[their] expeditious handling".\(^{12}\) For this purpose, the law establishes a number of obligations for communication platforms, the disregard of which over a longer period of time can lead to the imposition of substantial fines. In other words, this procedure does not consider individual cases but is designed to enhance overall platform compliance.

The requirements of the KoPl-G apply exclusively to those platforms in accordance with §1 (2) which have more than 100,000 authorized users or an annual turnover of € 500,000 in Austria. Irrespective of this, non-profit online encyclopedias and platforms that serve to sell goods or services are excluded from the application of the law - the draft sees no need for action here.\(^{13}\) A further exception exists for platforms operated by media enterprises.\(^{14}\)

In the following, the KoPl-G specifies obligations to create effective notification and deletion procedures ("notice and take down", § 3 (1) and (2) leg cit), which result, among other things, from case law of the European Court of Human Rights (ECtHR).\(^{15}\) As minimum requirements for the notification procedure, the KoPl-G states that it must be easy to find, permanently available, easy to handle and located on the platform itself. At any rate, this increase in transparency is an improvement.

As a basis for decision making, platforms have to refer to the standards of Austrian criminal law mentioned in § 2 Z 6 KoPl-G.\(^{16}\) Thus, they can rely on the established practice of national courts when evaluating content. Platforms should not have any difficulty in removing content within 24 hours if the "illegality is already evident to a legal layperson without further investigation".\(^{17}\) This follows both, the obligation to process the majority of reports within 24

\(^{11}\) Ibid, p. 11.

\(^{12}\) § 1 (1) of the draft 49/ME 27. GP.

\(^{13}\) See Ministerial Draft - Explanation, 4f; encyclopedias and sales portals have therefore not been used in the past to distribute online hate speech.

\(^{14}\) After § 1 (1) (6) MedienG, see § 1 (1) KoPl-G.

\(^{15}\) Centrally, ECtHR 10 October 2013, 64669/09, Delfi AS/Estonia; ECtHR 2.2.2016, 22947/13, Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt/Hungary.

\(^{16}\) §§ 105, 107, § 107a, 107c, 113, 115, 120a, 144, 188, § 207a, 208a, 278b, 278f, 282a and 283 StGB, §§ 3d, 3g and 3h of the VerbotsG.

\(^{17}\) Mandatory according to § 3 (3) (1) lit a KoPl-G.
hours which nine major platforms have accepted in the framework of the Code of Conduct on Countering Illegal Hate Speech Online, and the German NetzDG.\textsuperscript{18} Other illegal content that causes more subsumption work must be removed within 7 days.

The OSCE recommends that insult and blasphemy should be removed from the list of illegal contents in § 2 Z 6 StGB as the international standards do not explicitly require these contents to be deleted. According to the OSCE, especially insults are hard to identify as "clearly illegal". Insult and blasphemy often have to be read within their context to make a decision on their illegality, which does not work well with AI or other automated tools used by platforms.\textsuperscript{19}

To prevent overblocking in the sense of a deterrent effect ("chilling effect"), there is the possibility of a review of the decisions in the notification procedure according to § 3 para. 4 of the law. This is possible in the case of deletion as well as non-deletion and is available to authors of posts and to persons who report content for two weeks after receipt of the decision in the notification procedure.

On the positive side, it should be emphasized that both, excessive deletion and the excessive leaving online of reported content, can ultimately lead to the platforms being liable to pay a fine in the supervisory procedure. This gives the platforms a real incentive to actually check the content of reported postings.

The internal platform procedures outlined above are embedded in further measures to promote transparency and accountability, which should be welcomed in principle. The complaints procedure under § 7 KoPl-G, in which RTR, Austria’s media regulator, acts as a complaints body, is intended to find a mutually acceptable solution to alleged deficiencies in reporting and review procedures in a mediation procedure. In principle, this procedure only covers the procedures of the platforms, not their decisions on content. In the case of substantial violations of obligations to delete or maintain content, however, it can be assumed that the reasons for decisions communicated to users are flawed as well and that a procedure which appears to have been carried out in a formal, legally compliant manner will not be able to cure the fundamental violations – and the complaint can therefore be considered justified.\textsuperscript{20}

\textsuperscript{18} European Commission, Code of Conduct on Countering Illegal Hate Speech Online, May 2016.

\textsuperscript{19} OSCE, Legal Review of the Austrian Federal Act on Measures to protect users on communication platforms, 15 October 2020.

\textsuperscript{20} This is therefore an "inadequacy of the reporting procedure " according to § 7 (1) KoPl-G.
Platforms must present their moderation practice in quarterly (for large platforms with more than 1,000,000 users) or annual reports to the regulatory authority.\footnote{\S 4 (1) and (2) KoPl-G.} It must also be explicitly stated whether deletions were carried out on the basis of the list of "illegal content" in \S 2 (6) KoPl-G or due to violations of the platform's community standards. This is a novelty and potentially allows insights into the currently still little or not at all transparent decisions of platforms based on community standards.\footnote{\S 4 (2) 2 KoPl-G stipulates a duty to report on how it is determined in the individual case, "whether there is any illegal content or [emphasis added] whether contractual provisions between service provider and user have been violated".}

In addition, platforms are required to report in general on their efforts to prevent illegal content, the extent to which the reporting procedure is user-friendly, and the personnel, know-how and technical infrastructure available to their responsible bodies.\footnote{\S 4 (2) KoPl-G.} Such openness is not to be expected from communication platforms without legal levers, which is both customary and understandable from a market logic point of view.

In the event of persistent implementation deficiencies, the supervisory authority must initiate a supervisory procedure for which the overall behaviour of the respective platform is the subject of the investigation. According to \S 9 (1) KoPl-G, this must be done on the one hand if more than five well-founded complaints (pursuant to \S 7 KoPl-G) are lodged with the complaints body during a month.\footnote{Pursuant to \S 7 (3) 2nd sentence, the Complaints Office shall submit a monthly report to the supervisory authority on the complaint proceedings pending before it. Pursuant to \S 7 (3) 1st sentence, these reports are to be published annually in the KommAustria report.} On the other hand, the supervisory authority can also take action according to \S 9 para 2 on the basis of reports from the complaints body or on the basis of its own preliminary assessment that KoPl-G obligations have been seriously violated. In the supervisory procedure, the authority can thus base its assessment on the number and type of complaints, previous supervisory procedures and assessments by the complaints body.\footnote{\S 9 (2) KoPl-G.} In the supervisory procedure, the authority must ensure that platforms are not obligated to prior checking of contents in violation of fundamental and human rights.

The supervisory procedure ends, in the first procedure concerning a specific platform, in an official order to comply with the KoPl-G. When a second misconduct is identified, the authority has to impose a fine of up to € 10,000,000. An appeal against such administrative decisions of
the supervisory authority is possible before the Federal Administrative Court (BVwG), thus
notices of the authority can be reviewed and challenged.26

There was plenty of criticism of the KoPl-G, as well as praise. In the debate on the draft, for
example, it was argued that private entities (i.e. platforms) should not decide which postings
are covered by freedom of expression and which are illegal or punishable by law.27 Others
sensed "censorship" in the involvement of platforms in the prevention of criminal law
violations.28 While states should indeed not overburden platforms with filtering and
monitoring duties, it is simply unavoidable that platforms make millions of micro-decisions
every second about which content stays online. Current developments make the
responsibilities for content governance shared by states and platforms increasingly complex.
The transnational character of the companies to be regulated makes a renaissance of the
strong state on the Internet either an illusory or even a totalitarian task (see China). In fact,
the democratic constitutional state would not be able to implement or enforce individual
content moderation decisions (not to mention the fight against spam and online fraud on
platforms) on its own. Instead, the Austrian state formally transfers to platforms a preliminary
role in content moderation which they in fact already exercise.

The transparency prescribed by the KoPl-G entails positive effects on proceedings
conducted before Austrian courts. The KoPl-G does not exclude other forms of legal
protection, as has been partly argued,29 but complements them. § 3 (3) KoPl-G, for example,
stipulates the obligation to store deleted contents and the data of authors for evidentiary
purposes, including for the purpose of criminal prosecution.

Conversely, civil law proceedings arising from the contract between user and platform,
such as in the German decision "III. Weg",30 will be possible in Austria in the future. Since the
decisions in notification, review and complaint procedures have to be sent to users and the

26 According to Art 132 (1) 1 B-VG.
27 Katharina Kucharowits/SPÖ-Parliamentary Club, „Kucharowits zu Hass im Netz: „Ein österreichisches
Netzwerkdurchsetzungsgesetz birgt Gefahren““, 3 September 2020,
https://www.ots.at/presseaussendung/OTS_20200903_OTSA078/kucharowits-zu-hass-im-netz-ein-
oesterreichisches-netzwerkdurchsetzungsgesetz-birgt-gefahren; Amnesty International, “KoPl-G: Maßnahmen
gegen Hass im Netz dürfen nicht zu Lasten der Meinungsausserungsfreiheit gehen“, 3 September 2020.
28 FPÖ, „Gesetz gegen „Hass im Netz“ soll in Wahrheit politische Mitbewerber mundtot machen!“, 3 September
mundtot-machen-1.
29 Thomas Lohninger/Epicenter.Works, “Auf die Großen geschossen, die kleinen getroffen! Erste Analyse des
NetzDG/KoPlG“, 2 September 2020, https://epicenter.works/content/auf-die-grossen-geschossen-die-kleinen-
getroffen-erste-analyse-des-netzdgkoplig.
30 Federal Constitutional Court 22.5.2019, 1 BvQ 42/19, marginal no. 1-25.
(quarterly) annual reports of the platform have to be published in accordance with § 4 (1) KoPl-G, individuals will have considerably more evidence at their disposal.

3  Le nozze di content moderation

While the KoPl-G will initiate some interesting to promising legal developments, especially in comparison to the NetzDG, some content governance-related points are worthy of criticism. We are ignoring the obvious violation of European Union law here, because the Commission did similarly in the German NetzDG case.

The evidence on reported cases of online hate speech presented in the KoPl-G materials is at best cursory. A more in-depth analysis would have had significant advantages, especially for the estimation of the workload for the complaints body and the supervisory authority. ZARA, an anti-racism and anti-hate speech NGO, reported 1,070 cases of racist attacks in 2019 – this serves as the draft's only numerical guideline. In contrast, the Anti-Discrimination Agency (ADS) Styria, operator of the reporting app "BanHate", argued that the KoPl-G draft underestimates the problem quantitatively: ADS Styria on average receives more than 2,000 reports annually, and 250 in the two weeks before the presentation of the KoPl-G. If the latter trend continues, this would mean 6,500 reports per year for the app "BanHate" alone.

Furthermore, it is to be criticized that media companies and their forums are to be excluded from the application of the KoPl-G. As experts emphasize, these forums are fertile ground for the dissemination of hate speech. The claim that the MedienG (Austria’s media law) already offers sufficient remedy, as stated in the explanations to the KoPl-G, is not convincing per se. The MedienG has a different ratio legis and by no means formulates the same standards as the KoPl-G. Practice shows that the forum rules of Austrian media companies do not always meet the required due diligence requirements. Also, the jurisdiction of the ECtHR, which

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32 Ibid. ADS Styria notes that in the last reporting period of the "BanHate" app about 15% of the reports received came from newspaper forums. The legal protection according to MedienR is therefore similarly (in)effective as the legal remedies available on large international platforms.
33 See 49/ME 27. GP, Explanation, 4. This relates to procedures according to §§ 6ff media law. The parallel reform of § 32 MedienG is to be seen as positive in itself: the limitation period of 3 years for media offences should no longer begin with publication, as was previously the case, but only after the incriminated posting has ceased to be retrievable. However, this in no way creates a level of legal protection comparable to the KoPl-G.
states that especially profit-oriented news portals have to delete obviously illegal content,\(^{35}\) makes an application of the KoPl-G to media companies appear desirable. From the perspective of constitutional law, doubts about the conformity of this regulation with the general principle of equal treatment arise: Regulations that apply to platforms that do not have an editorial infrastructure in the classical sense (e.g. Facebook) would have to apply all the more to those that maintain such facilities (e.g. newspapers and their online forums).

Likewise, the materials on the KoPl-G draft do not explain why the limits for the applicability, € 500,000 annual turnover or 100,000 users, were drawn precisely there.\(^{36}\) The explanations on the KoPl-G draft are entirely silent in this regard.\(^ {37}\) The current status of the KoPl-G also invites platform splitting, i.e. the distribution of platforms to several companies. As described above, this is only excluded for the contribution of claims, but not for the calculation of the requirements of § 1 para. 2 KoPl-G – which could easily be remedied with a reference to the group regulation of § 6 para. 5 in § 1 para. 2 KoPl-G.

One wish remains: While the reporting obligation of the KoPl-G is better conceptualized than in the NetzDG, it could further be enhanced by an obligation for companies to also disclosures regarding algorithmic content governance tools and the key logic used by recommender algorithms, which in practice often replace "hard" deletion or blocking.\(^{38}\) The OSCE made a similar recommendation, suggesting that reports should include information on content organizing algorithms, including (de-)prioritizing, aggregation or selection of content.\(^{39}\)

4  A magic flute?

The KoPl-G violates European Union law, but this has not stopped the NetzDG either. It is better than the NetzDG in some respect, but still has some flaws. A basic problem of content moderation, by no means only on Facebook, cannot be solved (immediately) by even the best

\(^{35}\) See ECHR 10 October 2013, 64669/09, Delfi AS/Estonia, but also ECHR 2.2.2016, 22947/13, Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt/Hungary.

\(^{36}\) The question of the applicability of regulations to platforms, differentiated according to size, is complex, so it is all the more important to give a precise explanation of the legislator's motives. See currently: Brown, Models of Governance of Online Hate Speech, Council of Europe, May 2020, 74ff.

\(^{37}\) See 49/ME 27. GP, Explanation, 2ff: The comments on § 1 KoPl-G are completely silent on the limit values introduced; the term “critical size” appears only once.

\(^{38}\) Gorwa/Binns/Katzenbach, Algorithmic content moderation: Technical and political challenges in the automation of platform governance, Big Data and Society, 2020, 1-15

\(^{39}\) OSCE, Legal Review of the Austrian Federal Act on Measures to protect users on communication platforms, 15 October 2020.
law. The actual main responsibility lies with the platforms themselves: They set the rules, they design the automated tools, they delete and flag. Currently, all major platforms follow the approach to leave as much content as possible online, to delete only the worst postings (e.g. death threats) and to provide problematic speech (e.g. disinformation, racism) with counter-arguments (e.g. warnings, fact checks). This platform behavior is based on an unacceptable maximization of freedom of expression at the expense of other, (also) important legal interests, such as the protection of the rights of others and social cohesion.\(^\text{40}\) The assumption implied by platforms that all forms of speech are in principle to be regarded as \textit{positive} contributions to the diversity of opinion is not true under today's communication conditions of the Internet. In the meantime, however, it has become clear on the part of platforms that many contributions can no longer even be seen as a profit-maximizing contribution to the overall platform content reflected back to the users by data-driven recommendation algorithms. This is not an insignificant reason for the fact that certain forms of content are now increasingly taken offline: disinformation about elections or about Covid-19; white nationalism in the US; conspiracy theories around QAnon; and most recently holocaust denial.

The NGO Access Now proposes several recommendations for state regulation that respects human rights. Following strict democratic principles, not imposing a general monitoring obligation, creating meaningful transparency and accountability obligations are just some of the best practice suggestions made.\(^\text{41}\) The draft KoPl-G complies with the recommendations in their essence, even though – as shown above – there is still room for improvement.

In order to ensure a certain level of platform transparency, and this is what the KoPl-G is all about, the reporting obligations should be extended to all measures that these platforms take to moderate, recommend or rank content. After all, not only deletions (or non-deletions) are influential for the content offered by social media. When Facebook and Twitter decide not to amplify or share a story by the New York Post on a laptop by then-US presidential candidate Biden’s son, they are behaving in powerful yet ‘soft’ ways that need to be comprehensively explored. What applies to content should also apply to advertising decisions. Indeed, this is a

\(^{40}\) See ECHR 10 October 2013, 64669/09, Delfi AS/Estonia; ECHR 2.2.2016, 22947/13, Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt/Hungary; ECHR 5.5. 2011, 33014/05, Editorial Board of Pravoye Delo and Shtekel/Ukraine, ECHR 16.07.2013, 33846/07 Wegrzynowski and Smolczewski/Poland; ECHR 19.3.2019, 43624/14 Høiness/Norway.

\(^{41}\) Access Now, 26 recommendations on content governance – a guide for lawmakers, regulators, and company policy makers, 2020.
moderation area that has been under-researched until now. If the new version of the KoPl-G draft takes into account the criticism expressed here, as well as the expected input from the European Commission on the EU-law-conformity, the KoPl-G can become a better NetzDG and bring platforms up to standard with regard to the normative order they have developed and the technical and regulatory "tools" they use for content moderation. This would, in turn, contribute to elevated levels of human and fundamental rights protection online.