



UNIVERSITY OF
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LUDOVIKA

The regulation of social media platforms

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THREE MAIN FREE SPEECH ISSUES

- A. Moderation of users' infringing content as a legal duty (notice & takedown)
- B. Private regulation: rules & policies for user content
- C. Prioritising between user content (curation → "editing")

ISSUE A-B → USER FREEDOM & DSA

- The EU's Digital Services Act aims...
 - ❖ to create a safer digital space where the fundamental rights of users are protected
 - ❖ to establish a level playing field for businesses
- The DSA retains the essence of the notice and takedown procedure & platforms still cannot be obliged to monitor user content (Arts 6 & 8)
- The DSA seeks to protect users' freedom of expression
 - ❖ providing procedural guarantees (transparency, the obligation to give reasons for a deletion of a content or suspension of an account)
 - ❖ rights to redress: DSA gives users the possibility to have recourse to dispute resolution mechanisms, as well as to the competent authorities or courts
- The amount of available speech is massive; much time & effort needed from the users → the legal guarantees' questionable effectiveness
- Drafting the rules of the private speech codes remains the platforms' competence

ISSUE A-B → USER FREEDOM & DSA (2)

- The DSA states that the restrictions in the contractual clauses must take into account freedom of expression and media pluralism (Art 14)
 - ❖ Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions (...) with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in [CFR]

ISSUE A-B → USER FREEDOM & DSA (3)

- VLOPs and VLOSEs must identify and analyse the potential negative effects of their operations (in particular their algorithms and recommendation systems) on freedom of expression and on “civil discourse and electoral processes”
- They must take appropriate and effective measures to mitigate these risks
- The DSA’s rules on codes of conduct encourage the management of such risks and promote the enforcement of codes (e.g., the Code of Practice on Disinformation)

ISSUE C → RULES THAT BALANCE OUT THE PRIORITISING POWERS OF THE PLATFORMS

- The DSA only partially addresses the issue
- The recommender systems of platforms must be transparent to users and must explain 'why certain information is suggested to the recipient of the service'
- Shadow banning as a type of moderation decision (procedural guarantees)
- The alternative to opt out of content recommendation based on individual profiling

WHAT'S NOT IN THE DSA?

- It does not explicitly take action against legal, but “dangerous” speech
- No direct regulation of disinformation

(These omissions are not undesirable from a free speech perspective)

- Lack of a truly effective process to protect users' freedom of expression
- Lack of effective action against filter bubbles/echo chambers to protect diversity and reduce the effects of manipulation [*Users become separated from information that disagrees with their viewpoints, effectively isolating them in their own cultural or ideological bubbles, resulting in a limited view of the world → polarisation*]
- Ensuring the availability of public interest content

THE POSSIBLE WAYS FORWARD FOR PLATFORM REGULATION

Ideas from the US legal system

- Common carrier doctrine
- Public forum doctrine

Ideas from Europe

- Horizontal effect of fundamental rights
- Media (broadcasting) regulation

COMMON CARRIER DOCTRINE – TEXAS LAW (HB 20 [2021])

- The law prohibits social media platforms from "censoring" the "expressions" of users in the state of Texas on the basis of their "viewpoints"
- This includes removal, moderation, or labeling posts with warnings or disclaimers
- Social media platforms may only "censor" content if it is unlawful, they are "specifically authorized" to do so by federal law, based on requests from "an organization with the purpose of preventing the sexual exploitation of children or protecting survivors of sexual abuse from ongoing harassment", or "directly incites" criminal activity or contains threats of violence against persons based on protected categories

NETCHOICE, LLC V. PAXTON, 5TH CIR. (2022)

- Common carrier doctrine limiting discrimination when providing the service → a “duty to serve”. E.g. courts, education, electricity, telephone, post – publicly/privately owned
- If social media was common carrier → no private regulation of speech
- “We reject the idea that corporations have a freewheeling First Amendment right to censor what people say.”
- “The Platforms are not newspapers. Their censorship is not speech.” (so, platforms are not editors, either)
- Certain platforms have effective monopoly
- “Social media platforms with the largest number of users are common carriers by virtue of their market dominance.” → whereas the platforms engage in viewpoint-based discrimination
- A similar law was struck down by another Court (NetChoice v AG Florida, 11th Cir.)

THE POSSIBLE APPLICATION OF THE PUBLIC FORUM DOCTRINE

- If large social media platforms were considered to be public forums, it would open the gates to wider restrictions on their operation
 - ❖ *Packingham v. North Carolina* [2017] (law barring sex offenders from using social media)
 - Justice Kennedy described the Internet as the “modern public square”, where members of the public exchange opinions
 - ❖ *Knight First Amendment Institute v. Trump* [2020] (plaintiffs banned from Trump’s Twitter account because of their tweets that disputed the content of the presidential tweets)
 - The Court ruled that the President’s account was a designated or limited forum from which a person whose speech did not cross the limits of the freedom of speech could not be banned

THE INDIRECT HORIZONTAL EFFECT OF FUNDAMENTAL RIGHTS

- The application of public law rules to directly affect legal relations between private individuals in their relations with other private law persons (the German *Drittwirkung* doctrine)
- Applying the constitutional free speech doctrines (BGB) to contractual relationships
 - ❖ BGB s. 307(1) unreasonable disadvantage by unclear and incomprehensible contractual provisions
 - ❖ BGB s. 241(2) '[a contractual] obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party'
- Recent German cases:
 - ❖ Facebook's ToS do not fulfil the procedural requirements;
 - ❖ a platform may not remove content that is otherwise permissible (GG)
- ECtHR case law of free speech: states' positive obligations may require measures of protection even in the sphere of relations between individuals
- DSA Article 14 (contracts shall give due regard to the rights of the parties)

PLATFORM REGULATION IN THE INTEREST OF THE PUBLIC?

- The problem of curation is the danger to content diversity (media pluralism being the main objective of media regulation in Europe)
- The media regulation toolbox:
 - ❖ Limiting ownership concentration (anti-trust)
 - ❖ Right of reply
 - ❖ Impartial news coverage
 - ❖ Must carry rules (distributors should carry certain broadcasters)
 - ❖ Obligation to cover local news & broadcast public service content
- No direct restriction of media speech
- The aim is to keep the public sphere diverse and plural

CONCLUSIONS

- The notice-and-takedown system remains the basis for the liability of the platforms
- The DSA aim to strengthen users' free speech, mainly through the introduction of appropriate procedural guarantees and the creation of independent forums for redress
- The amount of speech available on platforms makes it practically impossible to effectively apply any legal regulation
- Private regulation by the platforms can make constitutional freedom of expression irrelevant
- The media regulation provisions widely known in Europe may inspire the future regulation of platforms