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Federal Council finds no Need for Specific Social Media Legislation

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1 Introduction

In response to a postulate raised by a Member of Parliament, the Federal Council recently published a thorough report on social media. The aim of the report was to assess, whether specific regulations for social media should be introduced, similar to the regulations on broadcasting. The Federal Council also considered adapting existing legislation where necessary.

1.1 The Risks analyzed in the Report

The reports starts with analyzing the benefits and the risks associated with social media and then reviewed how these risks have been addressed abroad and in domestic legislation. This overview makes the report a valuable tool for any practitioner.

The report first focuses on the risks potentially caused by the social media platform operators, then reviews the risks that can be caused by the users and finishes with a reflection on persons requiring particular protection.

1.1.1 Discriminatory Administration by Social Media Platform Operator

Discriminatory administration by social media platform operators can consist in problematic access conditions, discriminatory denial of access or censorship. Reviewing these risks, the Federal Council came to the conclusion that the current legislation could only prevent abuse in certain specific circumstances, such as the abuse of a dominant market position or the discrimination based on race, ethnicity or religion. However, the Federal Council found that the competition between social media platform operators was currently sufficient to prevent such abuses and thus refrained from proposing an amendment to current legislation. It also came to the conclusion that domestic regulations would most likely not be enforceable, as most social media platform operators are located abroad.

1.1.2 Threat to Personal Interests by Social Media Platform Operators

The major threat to personal interests from social media platform operators lies in data processing issues. The list is rather long and stretches from the lack of control of the user and of third parties over their own data, to the right to be forgotten, data mining, searchability of user profiles in search engines, image recognition and geolocation. Not surprisingly, the Federal Council found that the protection of the user's data was a key issue, but refrained from a closer review due to the pending revision of the Data Protection Act. The conclusions of the data protection task force are expected by the end of 2014. The outcome is open and a lengthy legislative process will ensue. Thus, we do not expect any amendments to the Data Protection Act before three or four years.

Although the Federal Council identified a certain "lock-in effect" with regard to data posted on social media platforms or used to operate platform functionalities since they cannot be easily migrated, the Federal Council found that a specific regulation was not necessary for the time being. However, it suggested monitoring the developments in this field and introducing a regulation if necessary. Such regulation would probably be similar to the regulation on portability of telephone numbers in the field telecommunications.

1.1.3 Impairment of Individual Interests by Users

As broadly discussed in the media recently, social media can be used for slander and libel, infringing personality rights as well as cyberbullying and cyberstalking. Although this social phenomenon is rather new, the Federal Council found that the legislation in place, in particular the Criminal Code and the Unfair Competition Act to sufficiently address these issues.



Misuse relating to identity theft and creation of fantasy identity is addressed in several acts, such as the Civil Code, Data Protection Act and Unfair Competition Act. Although the application of several acts leads to complication, the Federal Council found the disadvantages of introducing new regulations as opposed to keeping a complicated system to prevail and thus abstained therefrom.

1.1.4 Impairment of Common Interests by Users

Social media may not only display illegal contents, such as racist and other discriminatory statements, pornography, illegal advertising for certain products and services, but may also contain statements that threaten the public order, public health or manipulate the formation of political opinions or the formation of opinions for commercial reasons, etc. Again, the Federal Council came to the conclusion that these risks were already adequately addressed by numerous laws and found no benefit in introducing new legislation.

1.1.5 Persons Requiring Particular Protection

Children and young people, employees, persons with disabilities need particular protection. The Federal Council finds the existing legal instruments insufficient. However, it recommends raising awareness, especially with regard to children and young people rather than introducing new legislation. Programs raising awareness were already launched back in 2010. These programs are supervised by federal government, which will determine whether there is a need for specific regulation. However, since education is no federal but cantonal task, introducing a federal law is likely to require an amendment of the Constitution.

1.2 Enforcement

1.2.1 In general

Not surprisingly, the Federal Council found that the major issue relate to enforcement. Particularly, anonymity and/or cross-boarders matters jeopardize and hinder prosecution and enforcement. Thus, rather than focusing on domestic law, international efforts should be promoted.

1.2.2 Allocation of Liability

In order to be able to enforce its rights, the allocation of liability is of prime importance. It is undisputed that the author of an infringing content is liable. However, the liability of the other players in the communication chain is disputed.

Unlike the EU with the E-Commerce-Directive, Swiss law does not have a set of regulations concerning the criminal or civil liability of hosting or access providers for the content hosted or transmitted. As there is no recent precedent by the Federal Supreme Court concerning liability, a certain degree of uncertainty remains. In particular, it is unclear whether, to prevent liability, monitoring or filtering measures have to be implemented and whether illegal content has to be removed or blocked in case of notification by private persons. However, a recent court decision held that a claim could be introduced against a newspaper hosting an infringing blog, requiring the newspaper to remove the infringing content. However, the court left the question open, whether the newspaper was liable for the content. In this court decision, the Federal Supreme Court indicated that it deems the general rules on civil liability inadequate under these circumstances. This leads the Federal Council to review its position and to now find a need for specific regulation. However, due to the complexity of the matter and length of the legislative process in Switzerland, we do not expect any regulations to be enacted before several years.

1.2.3 Deletion or Blocking Orders

The Federal Council also analyzed the possibility for content deletion or blocking orders. Although the legal basis is rather flimsy, it could not see a need for further regulation due to the self-regulation in the industry and due to the good cooperation between internet service and access providers and the authorities.



1.3 Telecommunications Law

Since the most recent revision of the Telecommunications Act, the technical environment has changed radically. In particular, the telecommunications services are no longer necessarily linked to the underlying transmission infrastructure and there is a wide range of different transmission services, which can be offered all over the world. With the convergence of the various services, the separation between telecommunications and other electronic communication and media services becomes more and more difficult. The legal classification of the services is a complex one. This complexity also applies to the various transmission services and paths which can be used on social media platforms.

Thus, the Federal Council mandated OFCOM to draft a consultation paper on the revision of the Telecommunications Act. Such draft is expected at the earliest by the end of 2014.

1.4 Summary

The Federal Council concluded its report by saying that it does not see a need for a specific social media regulation, comparable to the one in the broadcasting sector. It also found the existing legislation adequate, with the exception of issues regarding data protection and liability of service providers, including social media platform operators. Further, it also found a need to revise the Telecommunications Act with regard to its scope, application and the definition of the various services in scope.

The cross-border contexts suggest that Swiss legislation has limited influence and that international efforts must be fostered.

2 Comment

The report is a valuable review on legal issues linked to social media platforms. However, it is far from being visionary. In particular, all hot topics are excluded from the report to be addressed at a later stage, such as data protection issues (including the section relating to young people), liability of social media platform operators and telecommunications regulations.

Although the Swiss legislative process based on careful assessment and consensus proved to foster stability of the Swiss economy in the past, it is questionable if this will not turn out to be a disadvantage in the fast moving field of electronic communication and services.

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