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Combating Disinformation and its Conflict with Human Rights – A Legal Perspective

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Public Policy Sessions 2024

Wednesday, 15 May 2024

Structure of the presentation

1. Governance of disinformation in Switzerland
2. European regulations and implications for Switzerland
3. Current legal framework in Switzerland
 - Human rights framework
 - Applicable legal norms on **unlawful** content
 - Applicable legal norms on **lawful** content
 - Compliance and enforcement
4. Regulation?
5. Conclusion

Governance of disinformation in Switzerland

- In Switzerland, there is no **specific** legislation dealing with disinformation
- However, there are legal provisions that cover situations that can be characterized as disinformation
 - Protection of the individual
 - Protection of the democratic decision-making, elections and voting, public health, public order etc.
- No co-regulation

- Key issues from a **legal** perspective
 - Digital disinformation and the problem of **compliance and enforcement** of legal rules
 - Distinction between **lawful** and **unlawful** content
 - Distinction between **creator, disseminator** and **recipient**

European regulations, in particular the Digital Services Act (DSA)

- European Union (EU): **Digital Services Act (DSA)**
 - Contains a number of regulations that are (also) aimed at combating disinformation
 - Primary aim: prevention of the dissemination of unlawful content on the internet
 - Procedural measures
 - Reporting procedure (Art. 16 DSA)
 - Complaints mechanism (Art. 20 DSA)
 - Transparency (Art. 26 DSA)
 - Implications for Switzerland
 - DSA only applies to EU Member States, not Switzerland
 - Impact of DSA on **users** in Switzerland?

Human rights framework (1/3)

- Swiss Constitution (SC) and European Convention on Human Rights (ECHR)
 - Freedom of expression, freedom of information, freedom of the press, economic freedom, political rights
- **Freedom of expression** (Art. 16 SC; Art. 10 ECHR)
 - Opinion-forming process should generally take place **without state interference**
 - In certain cases, however, state interference is necessary to protect public opinion of individuals and the society
 - Duty to protect and fulfil human rights by state authorities
 - Regulatory intervention by the state is particularly appropriate in cases where there is a power imbalance between private parties because protection of the weaker party is required
 - Problem: Individuals and private entities (e.g. platforms) are not bound by human rights obligations

Human rights framework (2/3)

- Disinformation from the perspective of the **disseminator**
 - Freedom of expression and information (Art. 16 SC)
 - Protected is 'opinion', a term that is understood broadly and encompasses the entirety of human thought and opinion (BGE 127 I 145, E. 4.b.)
 - Protection includes subjective opinions (one's own or those of others) and value judgements, but also factual claims
 - In terms of content, **provocative** or **shocking** statements (BGE 138 I 274, E. 2.2.1) and even **untrue factual claims** are also protected
 - Protected are not only content but also means and forms of the statement
 - Preventive interventions such as **bans** on publication are only permissible in exceptional circumstances

Human rights framework (3/3)

- Human rights of **third parties** affected by disinformation
 - Protection of privacy (Art. 7 SC, 10 Abs. 1 SC, 13 Abs. 2 SC)
 - E.g., in cases of systematic and persistent disinformation campaigns by the state
 - Election and voting
 - Art. 34 Abs. 2 SC: 'The guarantee of political rights protects the **free formation of opinion by the citizens and the unaltered expression** of their will in ballots.'
- The perspective of **special disseminators**
 - Foreign governments
 - Can invoke freedom of expression under certain circumstances
 - Social bots
 - Social media platforms (companies!)

Interim conclusion on the human rights framework

- Complex situation due to the protection of human rights of various actors involved in disinformation
- The protection of freedom of expression goes very far in Switzerland
 - Conflict with the right to privacy and economic freedom?
 - Does freedom of expression tolerate state interference?
 - Interference in opinion-forming processes?
 - Repercussions on democracy?
 - Protection of untrue factual claims?

Lawful and Unlawful Contents

- Key distinction for the applicability of legal provisions
- **Unlawful** content
 - Content that violates objective legal norms and subjective rights, e.g. personality rights
- **Lawful content**
 - Content that neither violates objective legal norms nor subjective rights

Legal norms on unlawful content (1/2)

- Balancing human rights
 - Freedom of expression vs. human dignity and personality rights
 - But: Freedom of expression has a very wide scope and also protects **untrue** factual statements
 - Freedom of expression can be restricted only to protect overriding public interests, e.g. public order or the rights of others
- **Certain content** and dissemination of disinformation is explicitly prohibited in **civil and criminal law**
 - Violation of personality or honour, defamation
 - Art. 28 et seq. Swiss Civil Code, Art. 173 et seqq. Swiss Criminal Law
 - Discrimination and incitement to hatred (Art. 261bis Swiss Criminal Law)
 - Disruption of the constitutional order by disinformation (Art. 275 Swiss Criminal Law)

Swiss Criminal Code: Discrimination and incitement to hatred (Art. 261 bis)

Art. 261bis Swiss Criminal Code

Any person who **publicly incites hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin, religion or sexual orientation,**

any person who publicly disseminates ideologies that have as their object the systematic denigration or defamation of that person or group of persons,

any person who with the same objective organises, encourages or participates in propaganda campaigns,

any person who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin, religion or sexual orientation in a manner that violates human dignity, whether verbally, in writing or pictorially, by using gestures, through acts of aggression or by other means, or any person who on any of these grounds denies, trivialises or seeks justification for genocide or other crimes against humanity,

any person who refuses to provide a service to another on the grounds of that person's race, ethnic origin, religion or sexual orientation when that service is intended to be provided to the general public,

shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

Legal norms on unlawful content (2/2)

- Disinformation might also violate
 - Swiss Federal Act on Unfair Competitions
 - Swiss Federal Act on Medicinal Products and Medical Devices
 - Swiss Federal Act on Foodstuffs and Utility Articles

Legal norms on lawful content

- ‘Lawful’ disinformation content can be harmful and manipulate public opinion and opinion-forming process as well
 - Protection of political decision-making
 - Political rights
 - Art. 34 para. 2 SC: ‘free formation of opinion and the unaltered expression of the will’
 - Protection under criminal law (Art. 279-286 Swiss Criminal Code)
 - Specific provisions for actors, such as the media

Compliance and enforcement of legal provisions

- Under what conditions can platforms be held responsible for unlawful content distributed by their users through their services?
 - Swiss legislator has not yet clarified this question
 - From a **civil law** perspective, it is assumed that at least negatory claims, e.g., the right to block or delete an unlawful post, can be asserted against the **providers of social media services**
 - This also applies to other platforms, but **not** to messenger services
 - Messenger services do not take note of the content disseminated via them and cannot delete individual content, they are therefore not involved in infringements of the law in a legally relevant way
 - From **criminal law** perspective, the focus is on the possible aiding and abetting (Art. 25 StGB) of social media platforms; but will be generally not be met due to lack of intent
 - Key issue
 - Shift from state to **private** law enforcement

Regulation? (1/2)

- State acts on disinformation are problematic because they infringe with human rights
- If regulatory measures by the state relate to content, the question also arises as to who can and should decide whether a particular content is correct or incorrect
 - Follow-up question: Is and should there be a duty on the part of the state to correct false information?
 - In elections and voting (Art. 34 para. 2 SC)
- Implications of the EU rules (DAS) on Switzerland
 - Adoption of the EU rules for legal harmonization?
 - Do we need a legal framework that is specific to Switzerland?
 - Different political opinion-forming process in Switzerland than in the EU member states
- Legal Regulation?
 - Addressing the *mass* dissemination of disinformation?

Regulation (2/2)?

- Transparency rules
- Institutional measures in Switzerland
 - Disinformation protection officer or Ombudsman?
 - Disinformation monitoring institution?
 - Digital council?
- Procedural measures
 - State dispute resolution mechanisms (against private law enforcement)
 - Specific procedural requirements for platforms (see DSA of the EU)
- Further measures...

Conclusion

- The existing legal framework in Switzerland for protection against disinformation appears to be **sufficient** from a substantive legal perspective
- Problems exist at the level of **compliance** and **enforcement**
- Switzerland can partially benefit from the new EU regulation
 - However, there are some gaps in the law, which is why consideration could be given to issuing supplementary regulations

Thank you for your attention

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