LSE MEDIA POLICY PROJECT

The Regulation of New Online Media Services (NOMS)

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Considerable uncertainty still exists as to the definition and most appropriate form of regulation for New Online Media Services (NOMS) in most EU countries. As a result, there is a clear absence of a coherent regulatory policy for NOMS. At the EU level, neither the Audiovisual Media Services Directive (AVMSD) nor the eCommerce Directive offer plausible or sustainable solutions with respect to NOMS.

Several EU directives provide guidelines relating to self-regulation, particularly with regard to advertising, data protection (Directive 95/46), eCommerce (Directive 2000/31) and unfair trading practices (Directive 2005/29). However, although the EU's AVMSD (2010/13) includes a generic encouragement for self and coregulation, it offers no such guidelines and contains definitions of audiovisual media services and "on-demand" or "non-linear" services that do not adequately capture or clearly exclude a range of NOMS. This results in varying degrees of statutory and co-regulation taking hold with respect to NOMS, creating legal uncertainty for NOMS players and in many cases giving space for member states to apply statute designed for "old media".

Treating NOMS within the legislative vacuum

My study[1] has identified a number of trends — some highly concerning from a media freedom perspective — regarding how various NOMS are treated throughout the European Union.

- General civil and criminal legislation, as well as regulation and court precedents (at least implicitly, in the case of countries that apply continental legal system) relating to traditional audiovisual and/or printed media, are applied to NOMS in most countries though they are often not fit for purpose.
- Forms of co-regulation are only emerging in some countries, such as the hybrid forms in Denmark, and generally more restrictive statutory regulation continues to remain in force at the national level.
- An alternative form of regulation is developing in the form of network-level filtering, which means that some internet service providers (ISPs) limit content or filter it. This type of filtering and monitoring by ISPs is being required by certain governments, for example, the French and the British. Such requirements are essentially a less transparent form of co-regulation for NOMS, and the European Court of Justice (CJEU) ruled in 2011 that general internet filtering obligation for ISPs infringes European law.
- The regulation of NOMS often depends on the self-definition and self-categorisation of the providers and/or actors in question, and NOMS can be left out of protections afforded other media. This is despite the fact that the Council of Europe developed six criteria in 2011 designed to assist policy-makers in identifying whether a new communication service amounts to a media service or provides only intermediary or auxiliary activities for media services[2].
- National courts have been particularly affected by the current uncertainty surrounding the regulation of NOMS. Self-regulation is perceived to leave more autonomy to NOMS than statutory-regulation and self-regulation is therefore adopted by industry in an attempt to stave-off statutory regulation. Media owners, however, tend to be more conservative in regulating NOMS and may be overly keen to prevent potential legal disputes.

Basis for guidelines from European Courts?

The two European Courts, the CJEU and European Court of Human Rights (ECtHR), have been developing a regulatory framework for NOMS, informed by the right to freedom of expression and access to information. The CJEU has offered some pan-European guidance with respect to which court should hear cases regarding transnational libel and defamation, as well as clarifying the legal responsibility of a website owner/author and Internet access provider. The ECtHR has established some general guidelines, some of which were based on previous rulings with respect to traditional media. However, increasingly it has considered the new media environment, regarding the proper balance to be struck between freedom of speech and other rights and interests, most notably in relation to personality rights.

The initial approach of the CJEU seems to be more technologically neutral. The CJEU also clearly refers to national jurisdiction as a source of law in such cases. The more developed approach of the ECtHR, although also sensitive to local cultural-religious traditions and customs, considers that NOMS should have more freedom than traditional media. More importantly, since in the area of freedom of speech, as in others, it builds on precedent, and may follow the suggestion by the Council of Europe for a graduated approach to regulating NOMS, the ECtHR's rulings may ultimately enhance freedom of speech in culturally more conservative countries (such as Turkey).

Recommendations

There is clearly an urgent need to develop effective and accountable self- and co-regulatory approaches for NOMS at the national level. This, however, seems to have a future only in those countries where there is respect both for freedom of speech and formal and informal rules, as in Denmark. Also, the 2003 Institutional Agreement on Better Law Making[3] stipulates in Article 17 the conditions under which self- and co- regulatory measures can be taken instead of statutory regulation in the EU. It seems clear that it is impossible to meet these conditions in the case of NOMS, so there remains considerably more work to be done in clarifying those regulatory principles that apply to NOMS at the EU level, for example in the AVMSD, and at the national level. In the meantime, an important regulatory role remains with the ECtHR, CJEU and national courts as well as national legislators. Therefore, the European courts, ECtHR and CJEU, should find ways to coordinate their judgments. Otherwise, there will be even more confusion in our regulatory approaches to NOMS.

The courts are not responsible for establishing new regulations, and they do not act on their own initiative to regulating content and access to it on the Internet. However, ultimately, if nobody else acts to clarify the definitions and positions of NOMS with respect to regulation, the courts will end up enacting new rules as they are confronted with cases that require distinctions to be made and rights and responsibility to be determined.

Key Rulings on NOMS in Europe by the European Court of Justice (CJEU):

- In 2011, the Court issued an important judgment in joined Cases C-509/09 and C-161/10 that established the concept of the "centre of gravity of the dispute" in relation to transborder NOMS (in the specific case it was transborder libel).
- In 2012, the Court ruled in Case C-466/12 (referring to Cases C-136/09 and C-306/05) that the provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public'.

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[2] Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media. Retrieved April 27, 2014, from https://wcd.coe.int/ViewDoc.jsp?id=1835645.
[3] Institutional Agreement on Better Law Making. Retrieved April 27, 2014, from http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/c_321/c_32120031231en00010005.pdf