Platform Procedure and the EU's Digital Service Act – Taking Procedure Serious in Internet Governance

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At the IGF 2020 one topic will be of special importance: Platform Governance. One major – albeit underestimated – aspect of platform regulation is the procedures applied by platforms when moderating content (adjudication). The EU's central platform governance legislation, the E-Commerce Directive, contains no requirements for Platform Procedure. The EU Commission's envisaged Digital Service Act, which will overhaul the E-Commerce Directive and mark the future cornerstone of European – and potentially worldwide – Internet Governance, does not seem to change this. To protect internet users, the EU however should focus on Platform Procedure.

The Importance of Platform Procedure

Platform Procedure comes into play every time a platform takes a decision that directly affects its users' rights and obligations. This happens in two ways: decisions regarding *illegal* (law-violating) and otherwise *harmful* (i.e. especially violating platform terms and conditions) content. In all these instances, Platform Procedure serves – as does offline procedure – significant functions. It protects individual rights, most importantly guaranteeing a right to be heard. It also impacts the outcomes of a process in a material sense. Not only, but also speaking with *Luhmann*, procedure gives legitimacy to the results. In terms of a more economic assessment, procedure can set incentives and costs – thus de facto impacting users' and platforms' actions.

Supranational and private institutions have been discussing Platform Procedure extensively. Interest groups like EFF raised the issue based on the so-called Santa Clara Principles. The *UN Special Rapporteur David Kaye* recommends basic

procedural obligations, such as “Notice and Appeal” and a remedy. To the same extent, the *Council of Europe* advocates for procedural obligations. As an important idea giver, the *IGF Dynamic Coalition on Platform Responsibility (DCPR)* has worked on establishing procedural guarantees. Its “Best Practices on Due Process Safeguards” call for users’ rights to prior notification and contest, counter-notice, human review, appeal, a (voluntary) independent and impartial alternative dispute resolution mechanism, and expedite procedure.

EU E-Commerce Directive’s Blind Eye Towards Online Procedure

When enacting the E-Commerce Directive, the European legislator has overlooked the value of procedure with regard to Platform Governance. Regarding *illegal content*, the ECD establishes a so-called notice-and-take down approach. However, it entails no further restrictions on how platforms ought to handle notices and takedowns. Looking at platforms’ *harmful content*-adjudication the E-Commerce Directive does not establish any procedural system or procedural obligations. Rather, the ECD sets platforms free to follow any procedure they want – an approach of unrestricted self-regulation, subject only to market forces (and courts’ interventions).

When the implications of notice-and-take down became the topic of political and academic discussion, commentators seemed to have missed the point of Platform Procedure’s intrinsic values. They stopped at recognizing the incentives the E-Commerce Directive’s liability regime creates for over-blocking (“collateral censorship”; see *Heldt* in this symposium). The establishment of procedural safeguards, such as a right to counter-notice, that could also cut back on over-blocking did not make it into the headlines. In the void left by EU (and U.S., see sec. 230 CDA) regulation, internet platforms have developed different, though still unsatisfactory, approaches towards Platform Procedure (see *de Gregorio* in this symposium). *Facebook* for example is in the process of developing a rather sophisticated adjudication process. It allows appeals for content decisions. Currently, it creates an Oversight Board (also called Facebook’s Supreme Court), that shall oversee important content moderation decisions. Twitter, to the contrary allows for appeals only since mid-2019 and seems far from establishing an institution such as Facebook’s oversight board.

EU’s New Approach: Some (Commercial) Platform Procedure

Recent European legislation seems to have understood, that self-regulation does not produce a level of Platform Procedure matching platforms’ unique role. It silently walked away from the E-Commerce Directive’s blind eye on Platform Procedure – at least in some parts. The Copyright-Directive, in essence, sticks with a notice-and-take down system (leaving aside the discussions about upload filters) for the *adjudication of illegal content* (i.e. copyright violations). It merely adds two tweaks to the E-Commerce Directive’s almost inexistent procedural obligations. First, the Copyright-Directive demands a “sufficiently substantiated notice”. Second, it establishes a rudimentary appeal-procedure. The directive demands an “effective and expeditious complaint and redress mechanism”. The

appeal “should be processed without undue delay” and “be subject to human review”.

More importantly, the Platform to Business (P2B)-Regulation – unnoticed by public and academic attention – mandates comprehensive procedural rules regarding the a*djudication of harmful content*. Platforms must provide a “statement of reasons” before or when taking action against their business users. In addition, they must establish an “Internal complaint-handling system”, allowing for appeals. The system must be “easily accessible and free of charge” while being based “on the principles of transparency and equal treatment”. Platforms are obliged to “duly consider” and “adequately address” appeals (“complaints”), processing them “swiftly and effectively”. The outcome is to be “communicated … in an individualised manner”. For “complaints that could not be resolved”, the platform must provide for an independent mediation process – which can be read as a second appeal (before going to state court).

In sum, the European legislator seems to have departed from its original E-Commerce Directive approach. Particularly the P2B-Regulation’s sophisticated procedural obligations give ample due process guarantees to commercial platform users. They seem to constitute from an international perspective the first time Platform Procedure has been regulated so extensively.

The EU Digital Service Act: A Chance for Global Platform Procedure

With its plan for a Digital Services Act, the EU Commission is taking its next big step towards regulating the internet. It is about to execute an extensive overhaul of the E-Commerce Directive that would apply to all sorts of platforms, including such that are central to free speech online. As it would “expand its scope to services established in third countries”, the Digital Services Act potentially sets global standards for platform governance.

From a procedural perspective, these plans are little promising. A leaked policy paper suggests that the Digital Services Act shall “update the liability provisions of the ECD [E-Commerce Directive]” while putting “especial emphasis … to updated rules for online platforms”. It insofar would apply to *illegal* as well as *harmful content*. Regarding *illegal content*, the policy paper depicts “Uniform rules for the removal” in the form of “notice-and action rules” [sic!]. As far as the Digital Services Act shall “cover *harmful content* (which is not necessarily illegal)”, it is however not aiming for a “strict notice and action type obligations”. Rather, regulation shall be achieved via “codes of conduct and user empowerment”, while strengthening “the role of the regulator”. Thus, the Commission does not seem willing to move away from an ample self-regulatory scheme. In the field of harmful content adjudication, the paper does not indicate any procedural obligations for platforms.

The first sketches for a Digital Services Act reveal a troubling misbalance of platform users’ commercial and free speech interests. While the EU offers vast procedural protections to business users under the P2B-Regulation, non-commercial customers

could be left with little to no procedural rights. Insofar, also the Copyright-Directive offers a fraction of the P2B-Regulation's protections. Yet, especially where human rights are at stake, procedural rights are needed. In fact, human rights issues online deserve to be given more importance than commercial issues. Thus, the Commission should change course when drafting the Digital Services Act and its "Future Internet Governance Strategy". The EU must take international advice such as the IGF DGPR's seriously and establish strong Platform Procedure.

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