

Comments on the Draft for an Act improving Law Enforcement on Social Networks (NetzDG)

1. General Remarks

The draft act addresses pressing issues with great importance for society.

There are now several versions of the draft (a version that has been sent to stakeholders to comment on, the notification version and the version that has been approved by the cabinet of the Federal Government). The following remarks refer to the last version unless otherwise stated. General remarks:

- Both „Fake News“ and „Hate Speech“ are complex issues of their own that are hard to define precisely and - additionally - do not have much in common. Therefore, it is wise that the draft does not try to define the terms but refers to existing criminal offences. However, in doing so the draft combines offences of various intensity causing problems regarding the assessment of the act's necessity when it comes to examining possible freedom of speech violations.
- With regard to effects of content (like false news) it is worth noticing that research has for a long time moved away from assuming causal links between specific media content and a change of attitude and, in consequence, of human behaviour. It is not plausible to assume that exposition to fake news regularly changes the voting behaviour of a citizen, to take an example, even though that might happen in some cases. People have a specific repertoire of information sources, the interplay of which has to be taken into account.
- In case of information with relevance for public opinion the media will most likely fulfill their task of checking and correcting it or add missing perspectives to the public debate.
- There are many effective ways of addressing fake news or hateful speech next to legal options (cf. <http://dangerousspeech.org/>). They should be taken into account to minimise potential negative effects on freedom of speech.
- Linking regulation to platforms seems to be an easy and effective way of dealing with the issue when legal action is considered. An assessment of the incentive structures of platforms reveals that the current legal basis already induces providers to remove content that might or might not be illegal on request. The reason for this is that there might be legal action against the provider if he does not comply with a takedown request. As regards the opposing interest at least as a rule, no user can claim that his or her content must remain on the platform. This draft strengthens this

incentive structure further at the expense of freedom of speech.

The Council of Europe has set up a *Committee of Experts on Internet Intermediaries (MSI-NET)* to develop a recommendation of the Committee of Ministers to member states on internet intermediaries. It is advisable to consider that recommendation when drafting a law to deal with Notice-and-Take-Down on social media platforms.

2. Aim of the Act and Legislative Power

As for the criminal offences the focus should be on the criminal prosecution of the *offender*. The draft law, however, does not help in achieving that, but rather creates duties and provisions for administrative offences for platform providers. The only provision that focusses on the offender is the suggested amendment of § 14 Telemediengesetz (TMG). This amendment might create chilling effects though and should be restricted to particularly grave infringements upon rights only.

Since the focus does not lie on the criminal prosecution but whether content should be made publicly available, there are doubts as regards the legislative power of the federal state. Content-related issues concerning broadcasting (in a broad, constitutional sense including telemedia) are not covered by any legislative power under the Grundgesetz. Thus the general rule applies and the competence of regulation lies with the states, "Länder", (Art. 70 sec. 1 GG). Drawing the line in this field is not an easy task in practice. However, the fact that the similar norm in § 4 Jugendmedienschutz-Staatsvertrag is state law at least gives an indication.

3. Scope

As for the scope the draft act is not clear-cut enough.

Firstly, it remains open what the draft refers to when it notes that editorial content that is not offered under the responsibility of the provider is excluded from the scope. The construction of the „provider“ is already challenging in the German Telemedia Act. Adding a new form of responsibility does not help in making the governance structure clearer.

Secondly, the draft does not specify what counts as a "user" when defining the threshold level for the applicability of the act.

Furthermore, there is no sufficient reason given by the government for the exemptions especially for business networks. There is at least the risk that this clause results in favouring domestic companies.

As for the criteria for assessing that content is illegal the draft refers to existing criminal offences. The official explanatory memorandum of the draft states that only the objective elements of the crime matter. In consequence whether there is intent or not or whether there are justifications does not matter. On the level of justifications you have, as a rule, to consider basic rights like freedom of speech (cf. para 193 of the penal code, "Strafgesetzbuch"). The concept of the draft does not allow for that.

4. Reporting obligations

The reporting obligations seem to be a potentially helpful and effective instrument. Given the possible relevance of platforms for the public opinion process the lack of information about content management by the providers is striking. According to

<https://rankingdigitalrights.org>, the information policy has improved in recent years, however there is still room for improvement. Reports could serve as a basis for a public debate on the communicative practices and power of platforms. It is noteworthy, however, that Member States are even less transparent as regards their take-down requests.

In obliging the platform providers to report about their take-down performance the draft suggests a modern form of governance making use of the public image of the provider as a regulatory resource. However, this creates even more incentives for the provider to perform a take-down on request without checking to avoid any self-blaming and -shaming in the report.

5. Dealing with Notices

There is a limited number of types of content where publication is illegal under any circumstances. Child pornography can serve as an undisputed example. In any other case, the protection of freedom of speech requires a context sensitive determination of the meaning of the act of speech. If a state law is likely to make a provider remove content that is legal, this law interferes with the freedom of speech (Art 5 sec. 1 GG, Art 10 sec. 1 ECHR, Art 11 sec. 1 CFR). Furthermore, fundamental rights of the provider are hampered.

This applies to draft NetzDG:

- First of all, the deadline of 24h for removing content that is “obviously illegal” triggers freedom of speech concerns. First, there is doubt whether obviously illegal content can be identified easily, given that the context has to be taken into account. Second, each piece of content that has been flagged has to be assessed to identify the “obviously illegal” parts. According to Facebook, defamation and hate speech alone account for 100.000 take-downs per month in Germany. Given that figure it seems rational for a provider to take down any flagged content if in doubt, just to save costs.
- The seven-day deadline for (not-obviously) illegal content also causes doubts. The assessment whether a speech is a statement of fact or a proclamation of an opinion is essential for an assessment under German law. This is a complex issue, and it might be that even different courts disagree on the result. The same is true for the question whether a statement of fact is proven true or not. To conduct such assessments within the given time-frame puts pressure on a provider and might again push it to the simple but human rights adverse solution to take down the content in almost any case.
- Early versions of the draft stated the obligation to make sure that the same content is not uploaded again. This triggered fears of over-blocking since this is best done by using upload filters, which – at the current state of development – fail to detect irony or critical reference to content. This part of the draft has been removed, but the draft still requires that the same content on the platform should be detected and removed, which again is best done by automated systems which are not context-sensitive.

It is not clear why the draft obliges the providers to save copies of the removed content locally. In any case, there has to be a specific basis for this in case personal data are involved. Furthermore, the legal problems caused by data retention law might occur here as well.

The official explanatory memorandum of the draft states that the obligations put on

providers just specify the Notice-and-Take-Down procedure under Art. 14 of the E-Commerce-Directive (2000/31/EG). If that is the case Germany is implementing EU law with the NetzDG and according to Art. 51 sec. 1 CFR bound by Art. 11 CFR, the relevance of which has to be considered by the EU Commission after notification.

It is plausible to assume that the obligations in the NetzDG will affect providers outside of Germany but based in the EU, so that the obligations at least in part fall within the field coordinated by the E-Commerce-Directive. In that case, measures by the state can only be justified by Art. 3 sec. 4 of the E-Commerce-Directive. Those measures are, however, only possible for addressing *specific cases*. Art. 3 sec. 4 does not allow Member States to introduce a governance system of sub-categories of services that are covered by the directive in a general way.

It has to be noted that the actual draft of a revised Audiovisual Media Services Directive will cover hate speech for some types of platforms which – if enacted – might limit the scope of activities of Member States accordingly.

6. Administrative offences

Part of the draft is a list of administrative offences with deterring fines. Even though they are only to be issued in case of systemic failure (obviously a reaction to critics of the first draft) it still seems likely that the fines will lead providers to implement systems that trigger the risk of over-compliance as stated above.

That the Federal Office of Justice (Bundesamt für Justiz) is foreseen as the responsible body to issue fines raises concerns too: The system of administrative offences is governed by the so-called principle of opportunity. There is a broad margin of appreciation whether to issue a fine or not. There is only limited control by courts. Especially in case the department does not act – possibly because the hate speech problem is caused by a political group the Minister of Justice, to whom the office directly reports, sympathizes with – there will be no oversight. Even if under the protection of freedom of speech an independent authority is only required for editorial media there have to be sufficient safeguards to prevent political influence. The court procedure that is established by the NetzDG does not hinder this since it only comes into effect when there is an act by the department.

The above mentioned court procedure does not give the user whose content is taken down a voice. This again neglects the interest of the speaker and therefore freedom of speech. Even the person the content refers to is not part of the procedure which matters in cases where the person that issued the notice is not the person affected by the respective act of speech.

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