

Faculté de droit et de criminologie

The German NetzDG: A Model for Future Online Speech Regulation in the European Union?

Auteur : QUENTIN FONTAINE

Promoteur(s) : ALAIN STROWEL

Année académique 2019-2020

Master en droit à finalité spécialisée : Droit européen

Plagiat et erreur méthodologique grave

Le plagiat, fût-il de texte non soumis à droit d'auteur, entraîne l'application de la section 7 des articles 87 à 90 du règlement général des études et des examens.

Le plagiat consiste à utiliser des idées, un texte ou une œuvre, même partiellement, sans en mentionner précisément le nom de l'auteur et la source au moment et à l'endroit exact de chaque utilisation*.

En outre, la reproduction littérale de passages d'une œuvre sans les placer entre guillemets, quand bien même l'auteur et la source de cette œuvre seraient mentionnés, constitue une erreur méthodologique grave pouvant entraîner l'échec.

** A ce sujet, voy. notamment <http://www.uclouvain.be/plagiat>.*

Remerciements

La liste des gens auxquels je dois reconnaissance pour leur soutien, intellectuel ou moral, ne pourra être exhaustive. Aussi me contenterai-je de remercier mes parents pour n'avoir reculé devant aucune maltraitance infantile afin de me faire parler Anglais; de m'excuser auprès des nombreux amis auxquels j'ai imposé de lire des chapitres à leurs yeux soporifiques; et bien entendu d'exprimer ma gratitude envers le Professeur Alain Strowel pour m'avoir guidé vers puis à travers ce sujet d'un intérêt tel à mes yeux, que la rédaction de ce mémoire n'a su l'épuiser totalement.

TABLE OF CONTENTS

INTRODUCTION.....	1
Chapter 1. Description of the Act.....	5
Section 1. A Brief History.....	5
Section 2. Scope of Application.....	6
Section 3. Reporting Obligation.....	7
Section 4. Complaints	8
Section 5. Fines	8
Chapter 2. Criticisms.....	9
Section 1. Privatized Enforcement	9
Section 2. Over-removal	10
Section 3. Precedent to Repress Online Speech.....	11
Section 4. Outdated German Criminal Code.....	12
Section 5. Harm to Competition and the Single Market	13
Section 6. Streisand Effect	14
Chapter 3. Freedom of Expression Legal Standards	15
Section 1. Freedom of Expression in International Law	15
Section 2. Freedom of Expression in European Law	16
Section 3. Fake News	17
Section 4. Hate Speech.....	19
Chapter 4. Conformity with Standards of Human Rights Law	21
Section 1. Principle of Legality.....	22
Section 2. Legitimate Aim	26
Section 3. Necessity Test	26
Section 4. Blasphemy Law.....	28
Chapter 5. E-commerce Directive	29
Section 1. Service Provider Liability	30
Section 2. Article 3: Country of Origin Principle	31
Section 3. Article 14: Hosting Providers.....	34
Section 4. Article 15: General Obligation to Monitor.....	36
Section 5. Conclusion.....	38
Chapter 6. The NetzDG in Practice.....	39
Section 1. Complaint Procedures	40
Section 2. Transparency Reports Figures.....	42
Section 3. NetzDG Case Law.....	46

Section 4. Evaluation and Suggestions	48
Chapter 7. Impact on European Law and Future Developments	51
Section 1. Avia Law	52
Section 2. Digital Services Act	53
Section 3. NetzDG Amendments and Future Reform.....	54
ASSESSMENT AND CONCLUSION	57
Freedom of Expression.....	57
Intermediary Liability	58
Practical Effects.....	59
Soft Law or Hard Law?	59
Final Assessment.....	61
BIBLIOGRAPHY	63
Legislation	63
International Law	63
European Law	63
German Law	63
French Law.....	63
Belgian Law	63
United States Law	64
Case Law	64
Court of Justice of the European Union	64
European Court of Human Rights.....	64
German National Courts.....	65
Doctrine	65
Reports, Opinions and Assessments.....	67
Press Articles and Miscellaneous	70

INTRODUCTION

The internet was once idealized to become a place of total free expression, exempt of any form of governmental power. A place where the collective knowledge and intelligence of humanity would form a whole greater than the sum of its parts, capable of solving its toughest challenges. Social networks were designed to become modern versions of the Greek *agora*¹, marketplaces for debate and the sharing of ideas that would enrich all those taking part in discourse.

This utopia has materialized to some degree. Anyone who uses the internet today will acknowledge that it hosts the very best humanity has to offer. But it turns out that global communication and total free expression bring out not only the best, but also the absolute worst in human nature. Numerous characteristics inherent to internet speech, and social networks in particular, tend to increase the prevalence of harmful expression. Anonymity and distance from interlocutors lead to estrangement, loss of empathy and disinhibition, and render users more likely to give in to hate speech. The growing involvement of algorithms in determining the content that users enjoy being exposed to is responsible for the phenomenon of “digital echo chambers”², which by segregating and polarizing discourse inevitably radicalizes it.

The potential effects of expression are also exacerbated online. The size of the audience reached by a piece of content is potentially virtually unlimited and subject to the unpredictable nature of online virality; this matters given that the likelihood of unlawful speech resulting in real-world harm is highly correlated with the volume of the public exposed to it³. While oral speech is ephemeral and localized, it becomes durable and ubiquitous once published on the internet, which increases the chances of it being taken out of context. All these factors

¹ M. MAZZARA and others, “Social Networks and Collective Intelligence: A Return to the Agora”, *Newcastle University*, June 2012, available at https://www.researchgate.net/publication/258374381_Social_Networks_and_Collective_Intelligence_A_Return_to_the_Agora.

² K O'HARA, D STEVENS, “Echo Chambers and Online Radicalism: Assessing the Internet's Complicity in Violent Extremism”, *Policy & Internet*, April 2015, available at https://www.researchgate.net/publication/275281614_Echo_Chambers_and_Online_Radicalism_Assessing_the_Internet%27s_Complicity_in_Violent_Extremism_The_Internet%27s_Complicity_in_Violent_Extremism.

³ L. BARNETT, “Incendiary speech and social media”, *Texas tech law review*, 1 January 2012, available at <https://scholarship.law.ufl.edu/facultypub/154/>, p. 148.

contribute to what may be called the incendiary nature of internet speech⁴.

It is a self-evident truth that individuals ought to be held accountable for their speech, regardless of the means of communication used. In Belgium for example, freedom of expression is supervised by a series of laws that condemn certain forms of discrimination or negationism⁵. Similarly, in Germany, those responsible for unlawful speech may be prosecuted on the basis of provisions of the German Criminal Code⁶. These legislations apply to both offline and online speech.

However, given the aforementioned characteristics of internet speech and its so-called incendiary nature, is individual accountability sufficient to effectively thwart large-scale online unlawful content, and prevent the harm it may cause? Much of this internet speech is made available through platforms provided by private companies: social networks are the best example. Excluding any liability from such platforms in favor of an exclusive focus on individual accountability would give rise to problematic situations. For example, pieces of content published online could remain globally accessible, no matter how potentially harmful, until declared unlawful by a judgment and ordered to be taken down months later. Consequently, should these platforms ever be held liable for content shared using their services? And if so, under which conditions? These questions largely shaped the development of internet regulation. The US attempted an answer in 1996, through the famous Communications Decency Act⁷, while EU harmonization happened with the E-commerce Directive⁸ in 2000. These legislations established conditions under which intermediaries would - or would not - be shielded from liability. By regulating intermediary liability, they offered internet platforms the legal certainty required for them to grow. And they grew. In less than two decades of existence, their userbases expanded and their market valuations increased exponentially, to a point where they became some of the world's largest companies.

⁴ *Ibid.*, p. 147.

⁵ Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, *M.B.*, 8 août 1981 ; Loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale, *M.B.*, 30 mars 1995.

⁶ Strafgesetzbuch (StGB), 15 May 1871.

⁷ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-commerce Directive), 8 June 2000.

⁸ Communication Decency Act (CDA), 8 February 1996.

In the meantime, the need to moderate online expression intensified. Social networks provided ideal outlets for extremist groups to broaden and galvanize their audience, intentional disinformation began to threaten the integrity of the democratic process, and instances of hate speech multiplied in the context of a resurgence of nationalism. Social networks are no longer just tools with which to share holiday selfies with friends and family; they have morphed into major political battlegrounds.

Some of the first entities to acknowledge the problems of online hate speech and fake news, and attempt regulatory solutions, were the platforms themselves. They committed to a form of supervision based on internal community guidelines, designed to filter out the most egregious types of content. But self-regulation, though necessary, proved insufficient. The stakes were too high to leave them entirely in the hands of private companies. In Europe, the European Union appeared best positioned to tackle these issues effectively. Maintaining harmonization of the regulation of digital services seemed desirable, considering the web's indifference to borders. Under former Justice Commissioner Vera Jourova in 2016, the European Commission opted for a soft-law approach, by creating a Code of Conduct⁹ hand in hand with the platforms themselves. The outcomes were deemed successful by the commissioner, who reaffirmed her preference for the avoidance of hard EU legislative action, though she did not exclude it entirely in a 2018 interview¹⁰.

Germany, particularly hit by issues of hate speech, conducted its own assessments, and deemed such an approach insufficient. In 2017, a law was finally drafted to clamp down on hate speech and fake news on the internet. The *Netzwerkdurchsetzungsgesetz* (Network Enforcement Law), was born. Commonly referred to as the NetzDG, it has been rightfully described as the most ambitious attempt by a western country to regulate online speech¹¹. Legislators in Europe and around the world have already drawn inspiration from it, and they are likely to continue.

This thesis will assess the NetzDG's compliance with higher legal norms. Then, more

⁹ European Commission, "Code of conduct on countering illegal hate speech online", 30 June 2016, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

¹⁰ C. STUPP, "Jourova: Never Say Never to EU Hate Speech Law", *Euractiv*, 19 January 2018, available at <https://www.euractiv.com/section/data-protection/interview/jourova-never-say-never-to-eu-hate-speech-law/>.

¹¹ H. TWOREK, "An analysis of Germany's NetzDG Law", *Transatlantic Working Group*, 15 April 2019, p.1, available at https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf.

ambitiously, it will attempt to determine whether its archetype constitutes a suitable model for future online speech regulation in European Union law. To that end, the following topics will be covered:

- **Chapter 1** will begin with a brief historical description of the context and of the motivations behind the act's adoption, and proceed with a description of its components.
- The adoption of the NetzDG created unexpected controversy¹². Free speech advocates spoke out against what they believed would lead to disproportionate censorship of ideas, while prominent political figures defended it as a solution to finally clamp down on criminal speech on social media. The legitimacy of the criticisms and the validity of their responses will be examined in **Chapter 2**.
- Numerous legal experts, from Germany and elsewhere, expressed their doubts about the Act's compliance with international and European law. The assessment of the NetzDG's compliance with higher legal norms will be split between two aspects: fundamental rights, and intermediary liability. **Chapter 3** will be dedicated to a presentation of the relevant legal frameworks related to freedom of expression, and be followed by an assessment of the NetzDG's compliance to these standards in **Chapter 4**.
- **Chapter 5** will focus on the existing provisions on intermediary liability and determine whether the NetzDG complies with the relevant articles of the E-commerce Directive.
- An outlook on the practical effects of the NetzDG in **Chapter 6** will allow us to gauge how effective the law has proved, with the hindsight provided by almost 3 years of enforcement.
- Finally, **Chapter 7** will present some of the latest developments of the German law, of the comparable French Avia Law, and of the highly relevant upcoming Digital Services Act, then describe the disruptive effect that the NetzDG has had on European law.

¹² T. URBAND, "Germany start enforcing new "Hate Speech" Law: initial reactions to the Network Enforcement Act", *Media Writes*, 19 January 2018, available at <https://mediawrites.law/germany-starts-enforcing-controversial-hate-speech-law-initial-reactions-to-the-network-enforcement-act/>.

Chapter 1. Description of the Act

An overview of the context in which the NetzDG came into existence will be followed by a material description of the act. This will cover its scope of application, the obligations it creates, and the ensuing sanctions, should these obligations not be complied with.

Section 1. A Brief History

The German efforts to promote self-control of online content started as early as 2015¹³. Germany had at this point welcomed more than one million refugees from middle eastern countries, which sparked significant backlash, mostly from right-wing activists. Social media platforms provided ideal outlets for all kinds of opinions; instances of hate speech directed against both migrants themselves and political figures deemed responsible for their presence proliferated¹⁴.

As a response, Heiko Maas, the Minister of Justice, assembled a task force to cooperate with the most relevant social networks and Non-Governmental Organizations (NGO's) with the aim of examining all content within 24hrs of it being flagged by users. After several meetings which included representatives from Facebook, Google, Twitter, and NGO members, a code of conduct was established¹⁵. Maas then assigned a reviewing body to assess the results of its application. Out of 200 instances of flagged content on each platform, 90% had been removed by YouTube, 39% by Facebook and only 1% by Twitter¹⁶. Though the initiative had resulted in improvements, they were deemed insufficient¹⁷.

¹³ W. ECHIKSON, O. KNOTT, "Germany's NetzDG, a Key Test for Combatting Online Hate", *CEPS*, No. 2018/09, November 2018, available at http://wp.ceps.eu/wp-content/uploads/2018/11/RR%20No2018-09_Germany's%20NetzDG.pdf, p. 4.

¹⁴ *Ibid.*, p. 3.

¹⁵ German Ministry of Justice and Consumer Protection, "Results paper of the task force "Umgang mit rechtswidrigen Hassbotschaften im Internet": proposed ways to combat internet hate speech", 15 December 2015, available at https://www.bmjbv.de/SharedDocs/Downloads/DE/News/Artikel/12152015_TaskForceErgebnispapier.pdf?__blob=publicationFile&v=2.

¹⁶ Jugendschutz.net, Assessment: "Löschung Rechtswidriger Hassbeiträge Bei Facebook, YouTube Und Twitter: Ergebnisse Des Monitorings von Beschwerdemechanismen Jugendaffiner Dienste", 14 March 2017, available at https://www.bmjbv.de/SharedDocs/Downloads/DE/News/Artikel/03142017_Monitoring_jugendschutz.net.pdf.

¹⁷ German Ministry of Justice and Consumer Protection, "Deletion of illegal hate posts on Facebook, YouTube and Twitter: results of monitoring complaints mechanisms for youth-related services", 26 September 2016, available at https://www.bmjbv.de/SharedDocs/Downloads/DE/News/Artikel/09262016_Testergebnisse_jugendschutz_net_Hasskriminalitaet.pdf?__blob=publicationFile&v=1.

Maas used these findings to justify the need for hard legislative action, as he judged that the “soft law” approach had proved inadequate. Despite protests by critics disputing the study’s sample size and methodology¹⁸, the German Federal Department of Justice presented a draft legislation for the NetzDG in April 2017¹⁹. After some amendments, the Law was passed easily despite opposition from left-wing parliamentarians and abstention from the Greens. It entered into force on 1 October 2017, however targeted social networks had until 1 January 2018 to comply.

The premise of the Law is that social media platforms, once they reach a certain size, should not be considered mere platforms but have increased responsibility over the published content. The act compels them to adopt specific complaint procedures directed against content that violates provisions of the German Criminal Code. They then have a duty to delete or at least block access to illegal content, and submit periodical reports on the complaints to administrative authorities. Heavy fines may be imposed upon social networks should they fail to comply, and much heavier fines yet should their failure be considered systemic rather than an isolated event. The aspects of the act will now be reviewed one by one.

Section 2. Scope of Application

The NetzDG applies to social networks with more than two million registered users in Germany²⁰. It defines social networks as “*service providers which, for profit-making purposes, operate internet platforms which are designed to enable users to share any content with other users or to make such content available to the public*”. That definition is presently applicable to only seven service providers, the best known of which are Google, Facebook, and Twitter. It excludes online games and commercial services, as well as email or messaging services.

The act does not create new categories of illegal speech and refers to the German

¹⁸ Jugendschutz.net, “Monitoring Des Beschwerdemanagements von Social-Media-Plattformen Bei Hassbotschaften”, June 2017, available at https://www.jugendschutz.net/fileadmin/download/pdf/17-06_Monitoring_Beschwerdemanagement_Social-Media-Plattformen_Hintergruende.pdf.

¹⁹ German Ministry of Justice and Consumer Protection, “Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken”, 5 April 2017, available at https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_NetzDG.pdf?__blob=publicationFile&v=2.

²⁰ Law on Improving Law Enforcement in Social Networks (Network Enforcement Law - NetzDG), 1 September 2017, Section 1.2.

Criminal Code²¹ for the interpretation of its definition of unlawful content. It targets two categories of illegal speech: hate speech, and offences that resemble the spreading of fake news. Hate speech includes public incitement of crimes (§111 StGB), threats to commit offences (§126), incitement to hatred (§130) and defamation of religions (§166) or people (§186). Offences related to fake news include intentional defamation (§187), treasonous forgery (§100a) and forgery of data (§269).

Section 1 of the act also requires that every social media network designates a domestic agent to answer requests from law enforcement authorities²².

Section 3. Reporting Obligation

According to Section 2 of the act, providers of social media networks which receive more than one hundred annual complaints about unlawful content must produce a biannual report. That report must disclose several elements, including most notably:

- General observations on the handling of criminal activity on the network.
- A description of the complaint mechanism and the criteria used, to decide whether to delete the reported content.
- The exact number and origin of the complaints (users or dedicated complaint bodies), as well as the number resulting in the deletion of the content.
- The composition and inner workings of the personnel resources responsible for the processing of the complaints.
- The time elapsed between the filing of the complaint and the decision of either removing or maintaining the complaint.
- The measures taken to inform the user or body who filed the complaint.

²¹ Strafgesetzbuch (StGB), 15 May 1871.

²² NetzDG, Section 1.5.

These requirements are justified by the legislator on grounds of accountability and transparency of social media networks' providers, as well as to allow for an evaluation of the efficiency of the legislation²³.

Section 4. Complaints

Section 3 of the NetzDG describes requirements for the handling of complaints about unlawful content. It imposes the adoption of an effective and transparent procedure, that should be “*easily recognizable, directly accessible and permanently available to users*”²⁴. Whenever a user submits a NetzDG complaint, the social network must immediately take note and respect strict time frames to act upon that complaint. If the content is “manifestly unlawful”, it must be deleted or have access to it blocked within 24hrs, unless the competent law enforcement authority has agreed to allow for a longer period. If the unlawfulness of the content is not manifest, the social network must decide whether to remove or block it within 7 days. This period is also subject to exceptions.

Section 5. Fines

Section 4 of the act establishes sanctions for regulatory offences, i.e. non-conformity by a social network to any of the previously described obligations. Such offences are punishable with fines of up to 5 million euros according to Section 4.2 of the NetzDG for offences that include failure to publish a report in time or publishing it incompletely. However, this section also refers to specific guidelines²⁵ which provide more detail on regulatory fines within the scope of the act. According to these guidelines, several of the more serious breaches to the obligations under the NetzDG will be sanctioned by a fine of 50 million euros rather than 5 million euros, should the offence be symptomatic of a systemic failure to comply with the NetzDG.

²³ German Federal Government, “Draft law to improve law enforcement in social networks” (NetzDG draft), available at https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_NetzDG.pdf?__blob=publicationFile&v=2, p. 20.

²⁴ NetzDG, Section 3.1.

²⁵ Network Enforcement Act Regulatory Fining Guidelines (Guidelines on setting regulatory fines within the scope of NetzDG), 22 March 2018.

Chapter 2. Criticisms

As soon as the development of the NetzDG began, it was surrounded by heated debates about its implications for freedom of speech. Justice Minister Heiko Maas (now Minister of Foreign Affairs) championed it vigorously: “Freedom of expression also protects offensive and hateful statements. But it is not an excuse to commit crimes”²⁶. According to a 2018 poll, this was effective at convincing the public. The Law was approved by a whopping 87% of German voters²⁷, reflecting strong popular support for minority protection.

Most criticisms came from the other side of the fence: not the average voter, but Human Rights activists, academics, and the tech industry. Although less numerous, the critics were significantly more vocal than the supporters. Multiple open letters and joint statements were signed, warning that the law “jeopardizes the core principles of freedom of expression”²⁸ and “poses a threat to open democratic discourse”²⁹. The signatories included the German Journalists Association (it is worth noting that their concern was selfless since the act specifically excludes journalism from its scope of application), various academics, and tech associations. Their warnings were ignored, and the Law was voted in shortly before the German elections of October 2017. This chapter will focus on the criticisms arising from civil society, while the legal aspect of compliance with higher legal standards will be assessed in further chapters.

Section 1. Privatized Enforcement

The first and perhaps most important criticism addressed to the NetzDG is that it essentially entrusts private entities with the power to assess legality of content. It has been described as an example of privatized enforcement³⁰. Social Networks are, under the act,

²⁶ “Maas Defends Law Against Hate on the Internet”, *Der Spiegel*, 4 January 2018, available at <https://www.spiegel.de/netzwelt/netzpolitik/netzdg-heiko-maas-verteidigt-netzwerkdurchsetzungsgesetz-gegen-kritik-a-1186118.html>.

²⁷ A. LAM, “87% of Germans Approve of Social Media Regulation Law”, *Dalia Research*, 17 April 2018, available at <https://daliaresearch.com/blog/blog-germans-approve-of-social-media-regulation-law/>.

²⁸ U. BUERMEYER and others, “Declaration on Freedom of expression”, available at <http://deklaration-fuer-meinungsfreiheit.de/en/>.

²⁹ K. CUMMINS and others, “Proposed German Legislation Threatens Free Expression Around the World”, *Global Network Initiative*, 20 April 2017, available at <http://globalnetworkinitiative.org/proposed-german-legislation-threatens-free-expression-around-the-world/>.

³⁰ Declaration on Freedom of expression, *op. cit.*

entitled to interpret provisions of the German Criminal Code and impose a sanction (the removal of content) without the need for a court order. The law should, critics argue, be interpreted and enforced only by institutions with democratic legitimacy. The soft law approach was exempt from this defect, since the categories of speech to be deleted were agreed upon, rather than established by reference to criminal law³¹.

This concern appears legitimate in principle, but it is worth pointing out that the NetzDG has not fundamentally changed the situation in that respect. Social networks all have Community Guidelines that allow them to delete content they deem clearly inappropriate. They have always held some form of discretionary power over the content published. What the NetzDG has changed is that social networks are now legally mandated to exercise that power, and it is entrusted to them by the State. It is mostly a difference of principle, but it matters, nonetheless. One way to account for that criticism - at least partially - would be for the act to provide the user whose content is under fire with an appeal mechanism that includes the possibility of involving National Courts in the most critical and ambiguous cases.

Section 2. Over-removal

A second flaw was unanimously pointed out by the detractors of the act³². If a social network is afforded little time to review content and has limited manpower to do so, it will not have the ability to assess complaints accurately. Some cases are likely to require in-depth knowledge of German Law, jurisprudence, and investigation of context on a case-by-case basis. The social networks targeted by the act are for-profit organizations and are faced with fines of up to €50 million in case of non-removal of unlawful content. The logical attitude for them would be to remove any content susceptible of engaging their responsibility, especially in the absence of an appeals procedure. Social Networks would have little or nothing to lose by removing lawful content, and plenty to lose should they fail to remove unlawful content. This would likely lead to over-removal regardless of the merits of the content.

³¹ European Commission, “Code of conduct on countering illegal hate speech online”, 30 June 2016, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

³² For example, Article 19, “Germany: The Act to Improve Enforcement of the Law in Social Networks”, August 2017, available at <https://www.article19.org/wp-content/uploads/2017/09/170901-Legal-Analysis-German-NetzDG-Act.pdf>.

Once again, this criticism makes much sense on paper but practical tests outvalue theoretical risks. In Chapter 6, an analysis of the periodic reports released by social networks after the entry into force of the NetzDG will show that over-removal fears proved excessive.

Section 3. Precedent to Repress Online Speech

The NetzDG has provided a source of inspiration for numerous States in Europe and elsewhere. The almost identical “Avia” Law³³, in France, was approved in July 2019 by the French National Assembly but its adoption was delayed due to freedom of speech concerns, and ultimately declared unconstitutional by the French Constitutional Council³⁴.

But such legislative proposals have not only emanated from countries with a democratic foundation as solid as France or Germany. According to the American news publication “Foreign Policy”, in 2019, thirteen countries had already proposed or in some cases adopted models of intermediary liability directly inspired from the NetzDG³⁵. Among these countries, five are ranked as “not free” (Venezuela, Vietnam, Russia, Belarus, and Honduras) by Freedom House, an American NGO dedicated to researching democracy, human rights, and political freedoms³⁶. Five are ranked as partly free (Kenya, India, Singapore, Malaysia, and the Philippines), the remaining three being France, the United Kingdom and Australia. It is clear that the NetzDG has set what could be described as a worldwide legislative trend, which does not consistently serve the interests of democracy. Many of these NetzDG-inspired laws go further than the original, imposing on intermediaries the removal of vague categories of content that include “anti-government propaganda” and “Hate Speech” without providing a definition for this polysemic term³⁷.

The bill signed by Vladimir Putin in March 2019 serves as a prime example. It condemns a very broad definition of “false information” as well as “blatant disrespect for the

³³ Loi du 24 juin 2020 visant à lutter contre les contenus haineux sur internet (loi Avia).

³⁴ C. BERTHÉLÉMY, “French Avia law declared unconstitutional: what does this teach us at EU level?” *EDRi*, 24 June 2020, available at <https://edri.org/tag/avia-law/>.

³⁵ J. MCHANGAMA, J. FISS, “Germany’s online crackdowns inspires world’s dictators”, *Foreign Policy*, 6 November 2019, available at <https://foreignpolicy.com/2019/11/06/germany-online-crackdowns-inspired-the-worlds-dictators-russia-venezuela-india/>.

³⁶ Freedom House, “2019 Report on Freedom on the Internet”, 2019, available at <https://freedomhouse.org/report/freedom-net/2019/crisis-social-media>.

³⁷ J. MCHANGAMA, J. FISS, “Germany’s online crackdowns inspires world’s dictators”, *op. cit.*

government”³⁸ and has received public accusations in Russia that this amounts to disguised censorship. Kremlin representatives silenced critics by comparing it to the NetzDG, arguing that online speech is strictly regulated in Europe as well. The German act is also frequently mentioned in the preparatory works of the Russian bill.

The German culture and constitution offer reliable guarantees to its citizens concerning their freedom of speech, regardless of the existence of the NetzDG. This is much less true for many countries inspired by it, as poetically expressed in the title of a publication by the Danish judicial think tank Justitia: “*The Digital Berlin Wall: How Germany (Accidentally) Created a Prototype for Global Online Censorship*”³⁹.

Section 4. Outdated German Criminal Code

The act does not create any new categories of illegal speech, but it defines unlawful content in reference to the German Criminal Code. Some of the categories in the list should, according to NGO’s⁴⁰, either be defined more restrictively or not be considered illegal in the first place. Two criminal offenses originally included in the act were later excluded: criminal defamation of the President of the Federation⁴¹ and criminal defamation of the State and its symbols⁴². Still, broad definitions of Hate Speech are regarded as problematic, as well as the ban on blasphemy⁴³.

Germany is one of the thirteen countries in Europe who still have blasphemy legislation, which many find overly restrictive of Freedom of Speech⁴⁴. This position on blasphemy is for example not shared by the French, despite their willingness to copy much of the NetzDG. This

³⁸ “Putin Signs 'Fake News,' 'Internet Insults' Bills into Law”, *The Moscow Times*, 18 March 2019, available at: <https://www.themoscowtimes.com/2019/03/18/putin-signs-fake-news-internet-insults-bills-into-law-a64850>.

³⁹ J. MCHANGAMA, J. FISS, “The Digital Berlin Wall: How Germany (Accidentally) Created a Prototype for Global Online Censorship” *Justitia*, November 2019, available at http://justitia-int.org/wp-content/uploads/2019/11/Analyse_The-Digital-Berlin-Wall-How-Germany-Accidentally-Created-a-Prototype-for-Global-Online-Censorship.pdf.

⁴⁰ Article 19, “Germany: The Act to Improve Enforcement of the Law in Social Networks”, August 2017, available at <https://www.article19.org/wp-content/uploads/2017/09/170901-Legal-Analysis-German-NetzDG-Act.pdf>.

⁴¹ StGB, §90.

⁴² StGB, §90b.

⁴³ StGB, §166.

⁴⁴ S. GORMAN, “Blasphemy is a crime not only in Pakistan, but Europe too”, *France 24*, 31 October 2018, available at <https://www.france24.com/en/20181031-blasphemy-middle-east-asia-bibi-europe-law-religion-ireland>.

was recently highlighted in the case of Mila⁴⁵. The young girl, targeted by hateful comments from Muslim men regarding her sexuality, had responded with blasphemous videos criticizing Islam. Her story went viral after she was the victim of hundreds of death threats. President Macron stated the following: “The law is clear, we have a right to blasphemy, to criticize and caricature religions.”⁴⁶ A general ban on blasphemy indeed appears to be overly restrictive of freedom of speech and incompatible with international law, as will be detailed in the next chapter. But these criticisms are only incidentally directed towards the NetzDG, as the legal provisions in question already existed in the German Criminal Code prior to its inception.

Section 5. Harm to Competition and the Single Market

Critics have widely disagreed with Germany’s claim that the NetzDG would have “no significant impact on international trade”⁴⁷.

First, the act may have significant impact on competition. Compliance with the law’s obligations requires dedicated infrastructure, as well as to hire and train staff, which is only feasible for companies that generate a significant amount of revenue. This, combined with the numerical threshold of 2 million users of the Act’s scope of application, could disincentivize growth for smaller companies, which may not afford the kind of expense mandated by the NetzDG⁴⁸. The social networks’ market is currently under American domination, and this type of additional expense may impede new European alternatives from emerging⁴⁹. Furthermore, the regulation of competition is under the exclusive competence of the EU, and Article 117 of the TFEU obliges Member States to consult the EU Commission before taking action that affects competition, which the German government failed to do prior to the adoption of the

⁴⁵ P. BRETEAU, “Affaire Mila : comprendre le débat sur le blasphème, qui n’est pas un délit en France”, *Le Monde*, 30 January 2020, available at https://www.lemonde.fr/les-decodeurs/article/2020/01/30/affaire-mila-comprendre-le-debat-sur-le-blaspheme-qui-n-est-pas-un-delit-en-france_6027819_4355770.html.

⁴⁶ K. WILLISHER, “Blasphemy “is no crime”, says Macron amid French girl’s anti-Islam row”, *The Guardian*, 12 February 2020, available at <https://www.theguardian.com/world/2020/feb/12/macron-wades-into-french-girls-anti-islam-row-saying-blasphemy-is-no-crime-mila>.

⁴⁷ European Digital Rights (EDRi), “Recommendations on the German bill: Improving Law Enforcement on Social Networks (NetzDG)”, 20 June 2017, available at https://edri.org/files/consultations/tris_netzdg_edricontribution_20170620.pdf, p. 7.

⁴⁸ E. DOUEK, “Germany’s Bold Gambit to Prevent Online Hate Crimes and Fake News Takes Effect”, *Lawfare*, 31 October 2017, available at <https://www.lawfareblog.com/germanys-bold-gambit-prevent-online-hate-crimes-and-fake-news-takes-effect>.

⁴⁹ European Digital Rights (EDRi), “Recommendations on the German bill: Improving Law Enforcement on Social Networks (NetzDG)”, *op. cit.*

NetzDG⁵⁰.

Besides the potential effect on competition, the NetzDG indisputably creates a restriction on the freedom to provide services⁵¹, by generating a novel regulatory obstacle for companies that operate in Germany. This type of obstacle requires justification by Member States: they must demonstrate that the restricting measure is indistinctly applicable, objectively necessary, and justified by imperative reasons to the public interest, while not exceeding what is necessary to achieve the aims pursued⁵². It may be doubted that the act does not exceed what is necessary to fight hate speech and fake news.

The NetzDG unquestionably represents a backwards step regarding single market integration. The ubiquitous nature of digital services makes their regulation worth harmonizing, arguably more so than any other category of services.

Section 6. Streisand Effect

The Streisand effect refers to situations where an attempt to censor information has the unintended consequence of promoting it instead. Since the occurrence that gave the effect its name⁵³, the prevalence of the phenomenon has largely increased as a result of the global nature of the internet⁵⁴.

The very day the NetzDG came into effect, Beatrix von Storch, a member of the German Eurosceptic nationalist AfD party, accused the Cologne police of “appeasing barbaric, gang-raping Muslim hordes of men”⁵⁵ through posts on Facebook and Twitter. That content was deleted in under 24 hours, as requested by the act, and ended up gaining tremendous visibility as a result. Several complaints have had the same effect and it is worrisome that authors of

⁵⁰ V. CLAUSSEN, “Fighting hate speech and fake news. The Network Enforcement Act (NetzDG) in Germany in the context of European legislation”, *Media Laws*, 24 October 2018, available at <http://www.medialaws.eu/wp-content/uploads/2019/05/6.-Clausen.pdf>, p. 131.

⁵¹ TFEU, Article 56.

⁵² ECJ, 25 July 1991, (*Säger v. Dennemeyer*), C-76/90, § 15.

⁵³ T.C., “What is the Streisand Effect?”, *The Economist*, 16 April 2013, available at <https://www.economist.com/the-economist-explains/2013/04/15/what-is-the-streisand-effect>.

⁵⁴ S.C. JANSEN, B. MARTIN, “The Streisand Effect and the Censorship Backfire”, *International Journal of Communication*, 2015, available at <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=2890&context=lhapapers>, p. 6.

⁵⁵ G. HAMMAN, “Der Storch-Effekt”, *Zeit Online*, 9 January 2018, available at <https://www.zeit.de/digital/2018-01/netzdg-meinungsfreiheit-internet-soziale-medien-debatte>.

deliberately controversial statements are able to gain increased exposure that they would not have otherwise enjoyed by complaining over censorship. The AfD party has repeatedly attempted to denounce some form of conspiracy by the establishment to silence its voice using the NetzDG.

Chapter 3. Freedom of Expression Legal Standards

Freedom of expression (that encompasses freedom of speech) is rightly considered to be both a necessary condition for democracy, and a reliable indicator to assess how democratic a country truly is⁵⁶. But no individual right is absolute, no matter how fundamental. What happens when an individual uses his democratic right to freedom of speech to harm democracy itself? Should States favor an individual's right to express his opinion over another individual's right to equality and non-discrimination?

This chapter will present the most important legal norms related to freedom of speech under international and European law. The concepts of hate speech as a legal standard, and of fake news, will also be discussed, as the two categories of expression targeted by the NetzDG. Finally, an examination of the relevant case law will help determine how much flexibility states are afforded when it comes to regulating expression.

Section 1. Freedom of Expression in International Law

The right to freedom of expression is recognized and protected by Article 19 of the Universal Declaration of Human Rights (UDHR)⁵⁷ in the following terms:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Article 19 of the International Covenant on Civil and Political Rights (ICCPR)⁵⁸ is the

⁵⁶ F. KRENC, « La liberté d'expression vaut pour les propos qui « heurtent, choquent ou inquiètent ». Mais encore ? », *Rev. trim. dr. h.*, 2016, vol 106, pp. 312-313.

⁵⁷ Article 19 of the Universal Declaration of Human Rights, 10 December 1948.

⁵⁸ Article 19 of the International Covenant on Civil and Political Rights, 16 December 1966.

other relevant source of International Law regarding Freedom of Speech:

“1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 3 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the right or reputations of others; (b) For the protection of national security or of public order, or of public health or morals.”

The UDHR has no binding effect on States strictly speaking, as it was adopted by a Resolution of the UN General Assembly. However, most of its provisions are widely considered to have acquired legal force through customary law since its adoption⁵⁹. As for the ICCPR, it is a multilateral treaty with 167 parties that include Germany: it has legal force.

These two provisions are complementary. Their scope is very broad, and valuable emphasis is put on the irrelevance of frontiers and of the media used. They unquestionably apply fully to speech on social media.

Section 2. Freedom of Expression in European Law

Under European law, the relevant provision is Article 10 of the European Convention on Human Rights (ECHR).

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the

⁵⁹ H. HANNUM, “The UDHR in National and International Law”, *Health and Human Rights*, 1998, vol. 3, no. 2, p. 145, available at www.jstor.org/stable/4065305.

licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”⁶⁰

The binding effect of the ECHR on Member States was the object of a fierce controversy that was finally settled when the Court of Justice of the European Union (CJEU) ruled against the accession of the Charter to the status of secondary European Law⁶¹, to avoid the EU being «*subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR*»⁶². Although provisions of the ECHR do not have legal force in the EU as such, their influence is undeniable: the Union has committed to the respect of fundamental rights through Article 6.2 of the Treaty on European Union⁶³. Furthermore, the ECJ acknowledged that the ECHR provides “*guidelines that should be followed*” and that it is “*bound to draw inspiration*”.⁶⁴

The Charter of Fundamental Rights of the European Union provides a second legal source. It is very similar in substance to Article 10 of the ECHR but has full legal force since it acquired the status of primary EU law in 2009 following the Lisbon Treaty.

Section 3. Fake News

The internet has become an essential part of the way people inform themselves, particularly so in Germany. A 2020 poll⁶⁵ showed that a clear majority of Germans (70%) use

⁶⁰ European Convention on Human Rights, signed in Rome on 4 November 1950, Article 10.

⁶¹ CJEU, 18 December 2014, (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms), Opinion 2/13.

⁶² Opinion 2/13, § 181.

⁶³ Treaty on European Union, Signed in Maastricht on February 7, 1991, Article 6.2.

⁶⁴ ECJ, 14 May 1974, (Nold v Commission), C-4/73, § 13.

⁶⁵ N. NEWMAN and others, Reuters Institute Digital News Report 2020, p. 71, available at https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR_2020_FINAL.pdf.

the internet to do so. The internet has, for the first time ever, overtaken television as the main source of news. This is especially true for the younger generation: 64% of the 18-24 age group rely on online media as the main source of information, which is mostly found on social media through the sharing of news articles. Realizing the influence of social media platforms like Twitter on the formation of public opinion, political campaigns have started investing accordingly, to the point where online presence has become one of the most effective predictors of candidates' success.

In that context, the reliability of online information is more crucial than ever. The recurrent spread of false information, whether manipulative or humoristic, has given birth to the notion of “fake news”. The definition of “fake news” is subject to debate. The word has made a recent appearance in dictionaries and is for example defined in the Cambridge dictionary as “*false stories that appear to be news, spread on the internet or using other media, usually created to influence political views or as a joke*”⁶⁶. As for a legal definition, the topic has been the focus of entire publications⁶⁷. Two core components of the concept have been identified: prior knowledge of the author of the falsity of the information, and an intention to manipulate.

The problem with such a definition is that the intent of an author is sometimes impossible to determine, especially on the internet. It is also not always relevant: considerable harm may be caused by the spreading of false information, regardless of the author's intent. To respond to the need for a broader approach and put an end to the misuse of the term “fake news”, the term “disinformation” is now being favored instead⁶⁸.

The NetzDG uses neither of these terms but targets intentional defamation, treasonous forgery, and forgery of data by reference to the German criminal code. These categories encompass most instances of disinformation. Liability of social networks, as introduced by the NetzDG, is perceived by the author to be better equipped to fight disinformation than to

⁶⁶ “fake news” as defined in the Cambridge English Dictionary, May 2020.

⁶⁷ R. LING, E. TANDOC, Z. WEI LIM, “Defining Fake News”, *Digital Journalism*, 2018, vol. 6, pp. 137-153, available at <https://www.tandfonline.com/doi/full/10.1080/21670811.2017.1360143?scroll=top&needAccess=true>.

⁶⁸ E. Marique, A. Strowel, « La régulation des fake news et avis factices sur les plateformes », *Revue internationale de droit économique*, de Boeck, March 2019, p. 386, available at <https://www.cairn.info/revue-internationale-de-droiteconomique-2019-3-page-383.htm> ;

sanction instances of hate speech. It is indeed much easier for a social network to objectively assess the veracity of information than the hateful nature of a post on social media. There is less room for appreciation, which makes delegating judicial power to a private company less problematic. Furthermore, identifying false information can be difficult for regular consumers, so they cannot be held liable for its sharing or spreading. Requiring social media platforms to remove this type of illegal content is thus more appropriate.

Section 4. Hate Speech

Despite the proliferation of “hate speech laws”, the term is not defined under international or European law, nor is it easily definable. The legitimacy of the concept as a legal criterion is often disputed, on the basis that criminalizing something as subjective as hatred amounts to condemning emotions and feelings⁶⁹. Most authors however agree that the proliferation of hateful speech targeting ethnic, religious, and cultural minorities, as well as other vulnerable groups, is a problem of a scale that cannot be ignored⁷⁰ and requires legislative action. The balance between hate and controversial opinions, no matter their legitimacy or lack thereof, is delicate. This ambiguity is reflected in case law and preparatory works.

The United Nations acknowledge that free speech includes the expression of opinions that others may find deeply offensive. The Human Rights Committee, a body of experts whose mission it is to verify States’ compliance with the ICCPR, has emphasized that even discriminatory expression may be encompassed⁷¹. However, Article 20 of the ICCPR imposes an obligation on states to prohibit by law “*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*”⁷².

Similarly, the right to freedom of expression was recognized by the ECtHR in the famous “Handyside” case, to extend to “*‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population*”⁷³. But more recently the same Court held in the “Delfi”

⁶⁹ A. BROWN., “What is Hate Speech? Part 1: The myth of hate”, *Law and Philosophy*, 2017, p. 419.

⁷⁰ F. TULKENS., “La liberté d’expression et le discours de haine”, *Revue de la faculté de droit de l’université de Liège*, Bruxelles, Larcier, 2015, p.478.

⁷¹ Human Rights Committee, “General Comment n° 34 - Article 19: Freedoms of opinion and expression”, 12 September 2011, § 11, available at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

⁷² Article 20 of the International Covenant on Civil and Political Rights, 16 December 1966, available at [ohchr.org](https://www.ohchr.org).

⁷³ ECtHR, 7 December 1976, (Handyside v. United Kingdom), app. no. 5493/72, § 49.

case that an Estonian news portal could be held liable for offensive comments left underneath an article⁷⁴.

These seemingly contrasting decisions go to show how blurry the line can be between criticism, controversial opinion, and illegal hate speech. This uncertainty is reflected in the rights and obligations of States in their reaction to the phenomenon. What type of speech must, may or may not be tolerated by States under international/European human rights law? These are the three categories that will be examined⁷⁵.

- Speech that **must** be prohibited. States must prohibit through legal means the most severe forms of hate speech because of the exceptional harm that may be caused.

1. “Direct and public incitement to genocide”⁷⁶

2. “*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*”⁷⁷. That prohibition must however be proportionate, in accordance with Article 19(2) of the ICCPR.

3. “*(...) all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form (...)*”⁷⁸. That prohibition is similar but broader than the one contained in Article 20 of the ICCPR. The Rabat plan of action⁷⁹ provides recommendation for the implementation of this article, including a detailed test to determine how to assess whether a speaker may be considered to incite violent or discriminatory acts.

- Speech that States **may** prohibit: this category is the subject of Article 19 of the ICPPR. It details in its 3rd paragraph some of the conditions under which the right to Freedom

⁷⁴ ECtHR (Grand Chamber), 16 June 2015, (*Delfi v. Estonia*), app. no. 64569/09.

⁷⁵ See Article 19, “Hate Speech Explained: A Toolkit”, December 2015, available at <https://www.article19.org/resources/hate-speech-explained-a-toolkit/>.

⁷⁶ The Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998, Article 6.

⁷⁷ International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, Article 20.

⁷⁸ International Convention on the Elimination of All Forms of Racial Discrimination, adopted on 21 December 1965, Article 4.

⁷⁹ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, adopted on 5 October, 2012.

of Expression may be limited. Any limitation must be:

1. Provided for by law: legislative means should be clear and precise enough to allow individuals to reliably regulate their behavior accordingly.
2. Motivated by a legitimate aim. Legitimate aims are listed exhaustively as either the respect of rights or reputations of others, the protection of national security or public order, or public health or morals.
3. Conforming to the strict tests of necessity and proportionality⁸⁰. Legislative measures must respond to a specific threat, the existence of which a State must be able to demonstrate. The State must also be able to establish a connection between the expression and the threat, the effectiveness of the measures adopted and prove that the measures in question were superior to less restrictive alternatives.

Most of the content targeted by the German Criminal Code and thus by the NetzDG falls under this category of speech that may be prohibited.

- **Legal** speech (although potentially hateful): speech may be offensive, even discriminatory, but not meet the thresholds required for prohibition. This is the speech the ECHR committed to protect in the “Handyside” judgement, and that should be encompassed in freedom of speech according to the UN Human Rights Committee. The prevalence of offensive or discriminatory speech may be the symptom of underlying issues, and States should be encouraged to work towards solving them; but that will not be accomplished by prohibiting the manifestation of the symptoms. Counter-speech and open discourse should instead be encouraged. Blasphemy falls under this category.

Chapter 4. Conformity with Standards of Human Rights Law

Aside from the more conceptual criticisms of the model championed by the NetzDG that emanated from various parts of civil society, prominent voices such as non-governmental

⁸⁰ Rabat Plan of Action, § 22.

organizations Human Rights Watch⁸¹ and Article 19⁸² have claimed that the act constitutes an outright violation of Germany's obligations under international and European law to protect free speech.

In response to these claims, legal scholars have examined the NetzDG's conformity with International, European, and German constitutional law. The latter will be excluded as it falls outside the scope of this work. The following will instead concentrate on the legal standards reviewed in the previous chapter.

Restrictions on fundamental rights imposed by States must meet strict criteria to comply with international and European law. The interpretation of the ECtHR will be the focus, as cases are more numerous and judgments more precise, but the test detailed in Article 19 (2) of the ICCPR resembles the requirements of Article 10 ECHR closely.

For a public measure to be considered a derogation to a fundamental right, it must be "affecting" for individuals⁸³. The NetzDG unquestionably meets that criterion: the possibility for a user's publications to be deleted may be considered to "affect" him, just like the obligation for service providers to monitor those publications "affects" them. Both providers and users of social networks are affected by the NetzDG to some degree in the exercise of their right to freedom of expression. Such a derogation may however be justified, under Article 10 (2) ECHR, if it meets the requirements of the following "three-part test":

Section 1. Principle of Legality

The derogation must be provided for by law, be adequately accessible, and sufficiently precise for individuals to regulate their conduct⁸⁴.

The first element of this requirement stems from the idea that a restriction to freedom of expression may only emanate from a democratically elected body. The NetzDG holds the

⁸¹ Human Rights Watch, "Germany: Flawed Social Media Law: NetzDG is wrong response to online abuse", 14 February 2018, available at <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law>.

⁸² Article 19, "Germany: The Act to Improve Enforcement of the Law in Social Networks", *op.cit*, p.4.

⁸³ W. SCHABAS, "The European Convention on Human Rights, a Commentary", *Oxford Commentaries on International Law*, September 2015, p.32.

⁸⁴ ECtHR, 25 March 1985, (*Barthold v. Germany*), app. no. 8734/79, § 45.

status of primary legislation; it was adopted by the federal state of Germany. So, it fulfills this condition.

The second element is essentially a reiteration of the principle of legal certainty. This principle is vital to the rule of law and considered a General principle of EU Law by the CJEU since the 1960s⁸⁵. It implies that any law must be precise enough to allow all those subject to it to regulate their conduct. This is especially crucial for laws that create restrictions on fundamental rights. The importance of this condition in the context of freedom of expression is also affirmed under international law, through Article 19 (3) of the ICCPR: any restriction must be provided for by clear and precise legislative means. The NetzDG lacks prevision and clarity in multiple aspects:

- In **defining “social networks”**, the NetzDG fails to meet the required precision. *“Internet platforms which are designed to enable users to share any content with other users or to make such content available to the public”*⁸⁶ potentially creates a scope of application that exceeds social networks. Sharing or making content available to the public is the purpose of many websites not considered social networks: blogs, sites that offer customer reviews, e-learning platforms could be considered to meet that criterion, despite not being intended targets of the act. Even messenger services such as WhatsApp, Facebook Messenger or Skype allow their users to upload and share content with other users. The German legislator attempted to rectify this in a later draft by introducing an additional exemption: *“The same shall apply to platforms which are designed to enable individual communication or the dissemination of specific content”*. But this exemption still fails to exclude service providers that the act does not aim to target, i.e. cloud providers⁸⁷.

The act is clearly intended to apply to large social networks like Facebook and Twitter, but its definition of social networks fails at reflecting this objective. So, it creates potential uncertainty for internet companies who enable the sharing of content but are not typically considered social networks. One additional legitimate concern regards the

⁸⁵ D. CHALMERS, “European Union law: text and materials”, Cambridge University Press, 2016, p. 454.

⁸⁶ NetzDG, Section 1.1.

⁸⁷ G. SPINDLER, “Internet Intermediary liability Reloaded – The New German Act on Responsibility of Social Networks and its (In-) Compatibility with European Law”, *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 2017, available at <https://www.jipitec.eu/issues/jipitec-8-2-2017/4567>, p. 173.

concept of “making content available”, and whether it intends to cover hyperlinking⁸⁸.

- The act exempts social networks with fewer than **two million registered users in Germany**, but the absence of technical standards to determine what constitutes a registered user could also give rise to uncertainty⁸⁹. The use of social networks usually being free of charge, the proliferation of inactive accounts, accounts of deceased people⁹⁰, and bots⁹¹ means that a website could have significantly more registered users than people using it. It is also common for people to have several accounts, for businesses to use social media as a marketing tool, and even for people to create social media accounts for their pets: the number of registered users is ineffective at predicting how many people use the platform in reality. For example, a social network like Myspace that has fallen out of favor might easily have more than two million registered users while being barely used by any of them. For that reason, the threshold of two million registered users appears ineffective at targeting the platforms that the NetzDG intends to target. A further problem is that determining which users can be considered “in Germany” by using IP addresses may become increasingly difficult as VPN services grow in popularity. An estimated 26% of all internet users worldwide use a VPN⁹².

Besides the impracticability of the “two million users” criterion, it raises questions of equality. It is obviously intended to protect smaller businesses while holding large companies accountable, but the choice of an arbitrary numerical threshold creates a disproportionate burden for companies that barely exceed the threshold. Why should there be such a difference between a platform with 1.9 million users, and 2.1 million? Prohibitions of discrimination are omnipresent in European law⁹³, and apply to companies and natural persons evenly⁹⁴. The formulation of the NetzDG’s scope of application, combined with the arbitrary threshold, indicate that the act is specifically

⁸⁸ Article 19, *Op.cit.*, p.12.

⁸⁹ European Digital Rights (EDRI), “Recommendations on the German bill: Improving Law Enforcement on Social Networks (NetzDG)”, 20 June 2017, p. 3, available at https://edri.org/files/consultations/tris_netzdg_edricontribution_20170620.pdf.

⁹⁰ A. CUTHBERTSON, “Dead Facebook Users will Outnumber the Living by 2098”, *Tech and Science*, 3 August 2016, available at <https://www.newsweek.com/dead-facebook-users-will-outnumber-living-2098-434682>.

⁹¹ O. VAROL and others, “Online Human-Bot Interactions: Detection, Estimation, and Characterization”, 8 March 2017, available at <https://arxiv.org/abs/1703.03107>.

⁹² M. CALVELLO, “50 Internet Statistics That Will Make You Reconsider Your Security”, *Learning Hub*, 21 April 2020, available at <https://learn.g2.com/vpn-statistics>.

⁹³ TFEU, Art. 18, 36, 37, 45 II, 49, 56, 63.

⁹⁴ TFEU, Art. 54.

designed to target Facebook, Twitter, and YouTube. This has been decried as a violation of the principle of equality⁹⁵, and is also at odds with the E-commerce Directive, which does not discriminate on the basis of companies' sizes⁹⁶.

- Section 3 of the NetzDG differentiates between **unlawful content**, which social networks must delete within one week, and **obvious unlawful content**, which must be deleted within 24 hours of its publishing. Anecdotally, the act contains a terminological error: content itself cannot be unlawful, only the act of distributing it may be criminally reprehensible⁹⁷.

The more important issue however lies in differentiating the two categories. The legislator provides the following criterion to assess the obvious nature of unlawful content: content must be considered obviously unlawful when “no deepened assessment is required”⁹⁸. This appears especially vague when taking into consideration the fact that the assessment will not be conducted by legal professionals. The danger of this lack of legal certainty lies in the type of reaction it incentivizes: social networks might systematically treat reported content as obviously unlawful and take it down without proper analysis, to avoid the risk of fines.

The NetzDG requires social networks to maintain an “effective and transparent procedure for handling complaints about unlawful content”. It does not however specify how to assess the effectiveness and the transparency of the procedure.

The lackluster definition of “social networks”, the absence of technical standards to determine what constitutes a registered user, the vagueness of the criteria to differentiate between unlawful and obvious unlawful content, and the lacking details on the complaint procedure all contribute to creating significant legal uncertainty around the NetzDG. The fact that Heiko Maas, the instigator of the law himself, saw one of his

⁹⁵ V. CLAUSSEN, “Fighting hate speech and fake news. The Network Enforcement Act (NetzDG) in Germany in the context of European legislation”, *Media Laws*, 24 October 2018, available at <http://www.medialaws.eu/wp-content/uploads/2019/05/6.-Claussen.pdf>, p. 131.

⁹⁶ G. SPINDLER, “Internet Intermediary liability Reloaded – The New German Act on Responsibility of Social Networks and its (In-) Compatibility with European Law”, *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 2017, available at <https://www.jipitec.eu/issues/jipitec-8-2-2017/4567>, p. 175.

⁹⁷ V. CLAUSSEN, *op.cit.*, p. 123.

⁹⁸ NetzDG Draft, *op.cit.* p. 24.

tweets deleted following a NetzDG complaint, goes to show it does not allow individuals to regulate their conduct accurately.

Section 2. Legitimate Aim

The second requirement for any derogation to the right to freedom of expression is to pursue a legitimate aim. Article 10 (2) ECHR provides an exhaustive list of legitimate aims: “*freedom of national security, territorial integrity or public safety, protection of health or morals, prevention of disorder or crime, protection of the reputation or rights of others, prevention of the disclosure of information received in confidence or maintenance of the authority and impartiality of the judiciary.*”

This list is very broad, and the ECtHR has decided very few cases on the basis of the illegitimacy of the aim pursued⁹⁹. One of the rare exceptions to the leniency of the Court in assessing this condition can be found in *Casado Coca v. Spain*¹⁰⁰. The NetzDG pursues every single one of the aims listed as legitimate. There is little doubt the ECtHR would consider that the NetzDG pursues legitimate aims. However, on the international level, the UN Special Rapporteur on Freedom of Expression Frank LaRue warned against “vague and unspecified notions of national security being used to justify restrictions to freedom of expression”¹⁰¹.

Section 3. Necessity Test

The last part of the test is the “necessity test”: the derogating measure must be necessary in a democratic society. Contracting States have some margin for appreciation¹⁰² in the assessment of that necessity. This acknowledges the heterogeneity of values between them that may justify different treatment. The Court has recognized that the national authorities may be better placed than the international judge to assess the necessity of some restrictions, especially

⁹⁹ T. MENDEL, “Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights”, *Center for Law and Democracy*, available at <https://rm.coe.int/16806f5bb3>, p.38.

¹⁰⁰ ECtHR, 24 February 1994, (*Casado Coca v. Spain*), app. no. 15450/89, § 46.

¹⁰¹ Human Rights Council, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue” 17 April 2013, § 58, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf.

¹⁰² ECtHR, 7 December 1976, (*Handyside v. United Kingdom*), no. 5493/72, § 48.

to political speech¹⁰³. However, a “pressing social need”¹⁰⁴ is required, and it must be “convincingly established”¹⁰⁵ by the contracting State:

“The Court has noted that, whilst the adjective “necessary”, within the meaning of Article 10 (2), is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable” and that it implies the existence of a “pressing social need”¹⁰⁶”

There is indeed a case to be made for the existence of a pressing social need for the NetzDG. Fighting illegal online speech is considered a priority by many other States and by the European Commission, and the social need may have been especially pressing in Germany, owing to the recent influx of migrants and the rise in popularity of extremist groups. But this requirement is not sufficient on its own to demonstrate necessity. The test under Article 10 ECHR implicitly requires, like Article 19 ICCPR¹⁰⁷, that the measure should be proportionate to the aims pursued:

“(…) the Court must determine whether the reasons adduced by the national authorities to justify the interference were ‘relevant and sufficient’ and whether the measure taken was ‘proportionate to the legitimate aims pursued’”¹⁰⁸.

The general obligation to remove content introduced by the NetzDG, although motivated by noble aims, appears disproportionate. It is particularly problematic that it applies to extremely various types of content, including political speech, which the ECtHR has vowed to confer special protection to¹⁰⁹, while also proclaiming that such speech could be restricted under very few conditions.

Some authors have advocated for the adoption of the more classic proportionality test

¹⁰³ ECtHR, 13 July 2012, (*Mouvement raëlien suisse v. Switzerland*, app. no. 16354/06, § 63.

¹⁰⁴ Council of Europe Publishing, “Freedom of Expression in Europe – Case law concerning article 10 of the ECHR”, 2007, available at [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18\(2007\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18(2007).pdf), p. 9.

¹⁰⁵ ECtHR, 22 May 1990, (*Autronic AG. v. Switzerland*), app. no. 12726/87, § 61.

¹⁰⁶ ECtHR, 26 April 1979, (*Sunday Times v. United Kingdom*), app. no. 6538/74, § 59.

¹⁰⁷ Electronic Frontier Foundation and others, “Necessary and Proportionate: International Principles on the Application of Human Rights Law to Communications Surveillance”, May 2014, available at <https://www.ohchr.org/Documents/Issues/Privacy/ElectronicFrontierFoundation.pdf>, p.20.

¹⁰⁸ ECtHR, 17 December 2004, (*Cumpăna and Mazăre v. Romania*), app. no. 33348/96, § 90.

¹⁰⁹ ECtHR, 7 February 2012, (*Axel Springer v. Germany*), app. no. 39954/08, § 54.

to determine the conformity of a derogation to a fundamental right with the Charter¹¹⁰. This version of the proportionality test includes a “suitability test” and a “less restrictive means test” but has not been adopted by the ECtHR. An application of the less restrictive means test would have most likely led to the adoption of a different solution than a general obligation, imposed on private companies, to remove various categories of content.

Section 4. Blasphemy Law

Some of the categories of speech targeted by the NetzDG, by reference to the German Criminal Code, should not be illegal according to the standards of the ICCPR and of the ECHR. So, requiring private companies to remove such content compels them to ignore, to some extent, their responsibility to respect the right to freedom of expression¹¹¹. The provision on defamation of religions has by far been the most controversial.

It targets “*defamation of religions, religious and ideological associations in a manner that is capable of disturbing the public peace*” (§166 GCC). Blasphemy laws are generally not in conformity with international freedom of expression standards. Human rights law aims to protect people, not belief systems. This stance is shared by institutions that include the UN Human Rights Committee¹¹², the Council of Europe¹¹³, and the European Union¹¹⁴.

Blasphemy laws may, under international law, only be justified in the circumstances envisaged in Article 20(2) of the ICCPR. This requires an intent from the speaker to advocate hatred against persons, to “*incite to discrimination, hostility or violence*”¹¹⁵. Section 166 of the GCC requires no such intent: in fact it requires no intent at all. Instead, the criterion used is the potential for the expression to breach public peace. Criminalizing expression on the grounds that people might react to it with violence, regardless of merits or intent, blatantly contradicts

¹¹⁰ J. GERARDS, “How to improve the necessity test of the European Court of Human Rights, *International Journal of Constitutional Law*, Volume 11, April 2013, p. 472.

¹¹¹ See Human Rights Council, “Guiding Principles on Business and Human Rights”, available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, p. 13.

¹¹² Human Rights Committee, “General Comment N° 34 - Article 19: Freedoms of opinion and expression”, *op. cit.*, § 48.

¹¹³ Council of Europe Parliamentary Assembly, “Recommendation 1805: Blasphemy, religious insults, and hate speech against persons on grounds of their religion”, 29 June 2007, available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17569&lang=en>, § 4.

¹¹⁴ Council of the European Union, “EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief”, 24 June 2013, available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137585.pdf, § 32 b).

¹¹⁵ International Covenant on Civil and Political Rights, 16 December 1966, Article 20.

the principles upheld by the ICCPR.

However sensitive the religious landscape in Germany may be, shielding believers from offense does not constitute a legitimate aim to limit freedom of expression¹¹⁶. Following a campaign to end blasphemy laws in Europe¹¹⁷, several countries have opted to repeal theirs in recent years¹¹⁸. Germany has however not yet opted to follow suit, and through the NetzDG, compels private companies to censor content that should be legal under international law.

In conclusion, the NetzDG's arguably edges toward a violation of standards of human rights law. Its main flaw is the legal uncertainty that it creates in defining its scope of application, which does not allow individuals to regulate their conduct. The act clearly pursues a legitimate objective, but assessing the proportionality of the solution that it implements involves a balancing test. The author believes the NetzDG to be disproportionate in that regard, but acknowledges that this assessment is context dependent and partially subjective. Finally, the enforcement of a blasphemy law by means of the NetzDG may be considered to violate human rights law, but is not a novelty owed to the German act.

Chapter 5. E-commerce Directive

Aside from the freedom of expression standards, the NetzDG must also comply with more recent and specific European legislation. The E-commerce Directive (ECD) was adopted in 2000 with the aim to *“remove obstacles to cross-border online services in the EU and provide legal certainty to business and citizens”*¹¹⁹. It contains, among other things, a regime of liability for intermediary service providers, of which several provisions raise questions regarding the NetzDG. This chapter will begin with a general presentation of the directive then analyze the act's compliance with individual articles.

¹¹⁶ As under Article 19 (3) ICCPR.

¹¹⁷ “End Blasphemy Laws” campaign, see <https://end-blasphemy-laws.org/>.

¹¹⁸ The UK, Iceland, Norway and Malta since 2015.

¹¹⁹ O. CASTENDYK, E. DOMMERING, A. SCHEUER, “European Media Law”, *Kluwer Law International*, 2008, p. 1083.

Section 1. Service Provider Liability

The directive differentiates between three types of service providers and establishes rules regarding their liability for information that is transmitted using their service. The idea behind this differentiation is that the accountability of digital platforms should depend on whether they exercise control over the content or merely provide a platform.

- The first category, **“mere conduit” providers**, are strictly limited to the transmission of information. They do not initiate or intervene in determining the content or the receiver of the transmission. Most messaging services would fall under these categories. These service providers are not, under the directive, liable for the content they transmit¹²⁰. WhatsApp, for example, is not responsible for illegal content that could be transmitted using its services.
- If a service provided by an intermediary consists of transmitting information in a communication network, and that information is stored *“automatically, intermediately and temporarily”*¹²¹, liability can be excluded as a **“caching” provider** under certain conditions.
- Finally, **“hosting” providers** are characterized by the hosting of information that is provided by the recipient of the service. This usually takes the form of a platform for content published by users, designed for sharing with other users. Social Networks, like those targeted by the NetzDG, fall under this category because the information they store lacks the temporary nature required for them to be considered “caching” providers. The liability of hosting providers may also be excluded under certain conditions, but these are understandably stricter than what is required for other types of providers¹²²:

For hosting providers, illegal content must be removed or blocked as soon as the intermediary is aware of its illegal nature. The exemption from liability only applies for services whose role towards the content is passive and reduced to a technical aspect.

¹²⁰ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (ECD), 8 June 2000, Article 12.

¹²¹ ECD, Article 13.

¹²² ECD, Article 14.

Social Networks that do nothing but publish content at the request of their users may be considered to play such a role.

These provisions on service provider liability (Articles 12-15) are fully harmonizing¹²³. This means that Member States have no leeway in their interpretation and transposition, unless where the directive explicitly states that they do.

Section 2. Article 3: Country of Origin Principle

Issues of territoriality invariably accompany attempts to legislate the cyberspace. Article 3 of the ECD addresses this, by establishing the **country of origin principle** in its first paragraph¹²⁴. It establishes that service providers fall under the jurisdiction of the country in which they are established. The second paragraph prohibits Member States from restricting service provider freedoms established in other Member States. This principle was the subject of controversy among legal scholars who questioned its compatibility with principles of conflict of laws¹²⁵, but the rationale behind it is clearly laid out in Article 3. Supervision at the origin of the activity aims to improve trust between Member States and guarantee the freedom to provide services with superior legal certainty¹²⁶. The country of origin principle may be qualified as one of the cornerstones of the directive¹²⁷. The following will be focused on whether Section 4.3 of the NetzDG derogates from this principle by providing sanctions for offenses even if they are not committed in Germany.

The only criterion for the applicability of the NetzDG on the provider of a social network service is the presence of 2 million registered users in Germany, regardless of where the company providing the service is established. The scope of the country of origin principle in the ECD extends to the “coordinated field”, defined under Article 2 (h) as “*requirements laid down in Member States’ legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or*

¹²³ G. SPINDLER, “Internet Intermediary liability Reloaded – The New German Act on Responsibility of Social Networks and its (In-) Compatibility with European Law”, *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 2017, available at <https://www.jipitec.eu/issues/jipitec-8-2-2017/4567>, p. 171.

¹²⁴ ECD, Article 3.1.

¹²⁵ See M. HELLNER, “The Country of Origin Principle in the E-commerce Directive: A Conflict with Conflict of Laws?”, *RGSL working papers*, 2003.

¹²⁶ E-commerce Directive, Recital 22.

¹²⁷ G. SPINDLER, *op. cit.*, p.168.

specifically designed for them". The coordinated field clearly covers the obligations imposed by the NetzDG on service providers.

The German government has argued that the NetzDG does not conflict with the country of origin principle by invoking the exception provided in Article 3 (4) of the directive¹²⁸:

"Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

....

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

The exception aims to allow procedures to occur against a "given information society service" should circumstances require it. The German government contends that the NetzDG aligns itself with this objective by only targeting a few social networks, that have proved to provide platforms for illegal speech in the past. However, the NetzDG targets a whole group of social networks. Its application depends primarily on the number of users in Germany, not on the level of threat that is posed to public policy. This contrasts clearly with the intent of Article 3(4) of the directive, which is to allow exceptional derogations in cases where it appears strictly necessary to target one specific provider.

¹²⁸ NetzDG draft, *op.cit.*, p. 13, 14.

The incompatibility between the NetzDG and Article 3 of the ECD is further highlighted by Article 3(4) b).

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,*
- notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.”*

It requires from the Member State that intends to take measures to delay them until it has asked the host Member State to act, and to notify it as well as the EU Commission of the measures it intends to take. It appears clear from this requirement that the *ratio legis* behind the exception is to provide an exceptional remedy for exceptional situations. It must be based on a case-by-case analysis to examine necessity and proportionality. For a Member State to impose sanctions on whole categories of service providers based outside its borders is a general solution, not a specific one. It cannot be interpreted to fit the criteria for the application of Article 3(4).

Article 3(5) allows derogations from the conditions of Article 3(4) b) in the case of urgency. The German government has argued that the issues of hate speech and fake news require urgent action¹²⁹. These issues have however existed for decades and it is debatable whether the German government can form a solid case for urgency¹³⁰. The issue of fake news has recently been highlighted by the 2016 U.S. elections, and the issue of hate speech by the proliferation of anti-migrant speech in Germany, but these matters were already at stake for several years. They have unquestionably become more prevalent, but it is disputable that this

¹²⁹ NetzDG draft, *op.cit.*, p 14.

¹³⁰ G. SPINDLER, *Op. cit.*, p. 170.

increase amounts to “urgency”, and constitutes sufficient grounds to justify an exception to the country of origin principle.

It has been demonstrated in this Section that the NetzDG violates Article 3(2) of the ECD. The attempt by the German government to justify this with the exception laid down in Article 3(4) disregards that the exception was unambiguously aimed at specific and exceptional situations and cannot justify a general law that applies to an unclearly defined category of providers. Lastly, the case for urgency appears insufficient since the issues that the NetzDG aims to solve have existed for more than a decade.

Section 3. Article 14: Hosting Providers

Article 14 of the directive applies to the Social networks targeted by the NetzDG, as they meet the criteria for “hosting providers”. It requires that “*the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information*”¹³¹. The obligations imposed by the NetzDG differ from those imposed by the directive in two aspects:

- Instead of requiring to “act expeditiously”, Section 3.2 of the NetzDG compels the removal or blocking of content with 24hrs or 7 days of receiving a complaint.
- Under the NetzDG, the starting point for the purpose of calculating the delay is the reception of the complaint. Article 14 of the ECD only refers to the obtention of the “knowledge”. These criteria differ substantially.

The term “expeditiously” is quite vague. It allows for flexibility since the directive does not specify how it should be understood. However, the leeway that this grants Member States does not allow them to implement fixed deadlines.¹³² By imposing 24hrs or 7-day deadlines through Section 3.2 of the NetzDG, the German legislator has carried out a legal interpretation of Article 14 of the ECD. But the interpretation of the notion “expeditiously”, and of the directive as a whole, is not a competence for national legislators. Article 267(a) of the Treaty

¹³¹ ECD, Article 14 (1) b).

¹³² G. SPINDLER, *Op. cit.*, p. 169.

on the Functioning of the European Union (TFEU) entrusts the exclusivity of the interpretation of EU secondary law to the CJEU. The same stance was also taken by the German Federal Supreme Court when ruling on the interpretation of Article 14(1) ECD¹³³. A harmonized interpretation of the notion would be most compatible with the intention of the directive to fully harmonize liability of intermediaries, and would benefit legal certainty within the digital sphere. Therefore, the German legislator's interpretation of the term "expeditiously" appears to overstep its competence, and to be incompatible with the flexibility intended by Article 14 of the directive.

Secondly, the difference between using the "reception of the complaint" (as in the NetzDG) and "the knowledge of the information" (as in Article 14 of the directive) to calculate the acceptable delay for deletion or blocking of content is more significant than it may seem. The *ratio legis* of using the obtention of "knowledge" as a benchmark is to make human knowledge a prerequisite for liability¹³⁴ within the scope of the directive. The idea is that service providers should not be liable for illegal content that no human has had the opportunity to review. The existence of a digital complaint in a database should not be sufficient to engage the liability of a service provider, under the criterion of the directive.

Furthermore, the notion of "knowledge" as in Article 14(1) of the ECD refers to knowledge of the illicit character of the content¹³⁵, not merely knowledge of the existence of the content. Establishing this illicit character requires a legal assessment to be conducted. When a social network receives a complaint, it cannot be expected to instantaneously review its content and assess its legality – yet, the 24hrs or 7 day period that it is afforded, begins to run from the moment that the complaint is received.

Lastly, the NetzDG only refers to "complaints", without differentiating general complaints from specific ones. Any complaint may trigger an obligation to act. The receipt of a complaint is insufficient in guaranteeing that "knowledge" is acquired by the service provider. The NetzDG should require for a complaint to contain specific information if it is to trigger an obligation to act. This reasoning is consistent with the acknowledgment by the CJEU that "*notifications of allegedly illegal activities or information may turn out to be insufficiently*

¹³³ BGH (Bundesgerichtshof – German Federal Court of Justice), 4 July 2013, I ZR 39/12, § 19.

¹³⁴ CJEU, 12 July 2011, (L'Oreal v. Ebay), C-324/09, § 113.

¹³⁵ G. SPINDLER, *Op.cit.*, p. 173.

precise or inadequately substantiated”¹³⁶.

Article 14 of the ECD is fully harmonising. Yet, the NetzDG appears to deviate by interpreting several key notions in its own way:

“Expeditiously”:

- The NetzDG replaces the obligation to remove or block illicit content “expeditiously” with fixed 24hrs or 7-day delays, thereby overstepping the competence of the German legislator by interpreting EU secondary legislation.

“Knowledge”

- The act conflates the reception of a complaint with the notion of “knowledge”, at the expense of the intent of the directive to make human knowledge a prerequisite for liability.
- It ignores that “knowledge” in the sense of Article 14 of the directive requires knowledge of the illegal nature of information, not merely knowledge of its existence.
- It requires no level of specificity from complaints. Any complaint is susceptible to trigger an obligation to act from the service provider, regardless of the lack of information it may contain.

Section 4. Article 15: General Obligation to Monitor

Article 15 of the directive contains a prohibition for Member States to impose on providers a **general obligation to monitor**, when providing the services covered in Articles 12-14. This refers to any general obligation to “*monitor the information they transmit or store*”, or to “*actively seek facts or circumstances indicating illegal activity*”¹³⁷. It is however explicitly authorized for Member States to establish obligations for providers to “*inform competent public authorities of alleged illegal activities undertaken*”¹³⁸. Instead of obligations to monitor, the directive encourages Member States to conclude voluntary agreements with

¹³⁶ CJEU, 12 July 2011, (L’Oreal v. Ebay), C-324/09, § 122.

¹³⁷ ECD, Article 15 a).

¹³⁸ ECD, Article 15 b).

intermediaries¹³⁹. It promotes the use of soft law, and this is the solution that several Member States have opted for (e.g. the Netherlands and the UK)¹⁴⁰, by adopting voluntary codes of conduct for internet service providers. Germany had followed the same path before judging it insufficient and opting for a hard law approach with the adoption of the NetzDG.

The interpretation of the notion of “**general obligation to monitor**” is the key to determining whether the NetzDG complies with Article 15 of the ECD. Member States are not, under the directive, precluded from imposing injunctions to monitor in specific cases, to prevent particular infringements. For example, measures designed to enable the enforcement of a plaintiff’s copyrights fall outside the scope of Article 15¹⁴¹. Obligations to monitor are permitted if they are **specific** rather than general¹⁴².

Recital 48 of the directive also allows Member States to require from providers to apply “**duties of care**”. They are vaguely defined as duties “*which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities*”¹⁴³. It is unclear what this entails precisely, and what differentiates duties of care with general obligations to monitor¹⁴⁴. The obligations that the NetzDG imposes on social networks in Germany are indeed specified by national law, but they apply to broad categories of speech and assessing whether these obligations can “reasonably be expected from them” is highly subjective.

The assessment of the NetzDG’s compliance with Article 15 of ECD depends on the interpretation of the nature of the obligations that it creates for providers. If it is considered to entail merely a specific obligation to monitor fake news and hate speech, it is permitted under Recital 47 of the directive. Similarly, it is authorized by Recital 48 if it is regarded as a simple clarification of the social networks’ duties of care. However, the author believes that the NetzDG, because it creates an obligation to assess the legality of content by reference to the

¹³⁹ ECD, Recital 40.

¹⁴⁰ T. MADIEGA, *op. cit.*, p. 3.

¹⁴¹ T. MADIEGA, “Reform of the EU liability regime for online intermediaries”, *European Parliamentary Research Service*, May 2020, available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA\(2020\)649404_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404_EN.pdf), p. 6.

¹⁴² ECD, Recital 47.

¹⁴³ ECD, Recital 48.

¹⁴⁴ A. KUCZERAWY, “To Monitor or Not to Monitor? The Uncertain Future of Article 15 of the E-Commerce Directive”, *KU Leuven CiTiP*, 2019, available at <https://www.law.kuleuven.be/citip/blog/to-monitor-or-not-to-monitor-the-uncertain-future-of-article-15-of-the-e-commerce-directive/>.

German Criminal Code, and to delete any allegedly illegal speech within strict time frames, cannot be interpreted as specific nor as a simple duty of care. Meeting the deadlines can hardly be achieved without resorting to some form of general monitoring system: Facebook currently employs at least 1200 moderators in Germany, who work in “deletion centers” in Essen and Berlin, to review flagged content. German moderators make up for almost 20% of its global moderation team¹⁴⁵. An infrastructure of such magnitude evokes a general monitoring system.

The existing case law on general monitoring tends to support this assessment. The CJEU has put consistent emphasis on the specificity of monitoring requirements. For example, it has ruled that a court injunction could impose that a service provider block its users’ access to a particular website that features content in breach of copyright law¹⁴⁶. More recently, it ruled that Facebook could be ordered to find and delete all comments identical to an original defamatory comment¹⁴⁷. This requires proactive monitoring, but is limited to an individual infringement. In contrast, the *Scarlet v Sabam*¹⁴⁸ and *Sabam v. Netlog*¹⁴⁹ cases revolved around the broader requirement of the implementation of a filtering system to prevent copyright infringements. The Court ruled that this type of requirement, whether imposed on an internet service provider (Scarlet) or a social network (Netlog), amounted to an obligation of general monitoring and was illegal pursuant Article 15. The requirements of the NetzDG appear broader yet in its scope, and its strict deadlines are likely to indirectly require a comparable filtering system. For these reasons, it appears doubtful that the NetzDG would withstand judicial scrutiny in this regard.

Section 5. Conclusion

There exists a natural tension between the E-commerce Directive and the NetzDG. One aims to promote and secure the digital single market by providing legal certainty for service providers, whereas the other attempts to suppress hate speech and fake news by holding social networks accountable. The provisions on liability for intermediaries in the ECD are fully harmonizing, and it was a challenging, if not impossible task for the German legislator not to

¹⁴⁵ P. OLTERMANN, “Tough New German Law Puts Tech Firms and Free Speech in Spotlight”, *The Guardian*, 5 January 2018, available at <https://www.theguardian.com/world/2018/jan/05/tough-new-german-law-puts-tech-firms-and-free-speech-in-spotlight>.

¹⁴⁶ CJEU, 27 March 2014, (UPC Telekabel Wien), C-314/12.

¹⁴⁷ CJEU, 3 October 2019, (Glawischnig-Pieczek v. Facebook), C-18/18.

¹⁴⁸ CJEU, 24 November 2011, (Scarlet v. Sabam), C-70/10.

¹⁴⁹ CJEU, 12 February 2012, (Sabam v. Netlog), C-360/10.

overstep its competence while drafting a law as ambitious as the NetzDG.

One might argue, however, that the ECD is approaching its 20th birthday, and that the internet today is nothing like it was 20 years ago. The standards then established are no longer perfectly adapted at addressing current challenges. Social networks have evolved from the fragile businesses that needed shielding from liability; they have become some of the most valuable and powerful companies in the world. Meanwhile, the need to repress hate speech and fake news on their platforms has grown exponentially. However valid these claims may appear; it is not for national legislators to remedy perceived deficiencies of secondary EU legislation. But the emergence of multiple NetzDG-inspired laws in several member States is a clear sign to the EU Commission that action is required, to salvage the harmonization of the digital market that was established with the ECD. This call to action appears to have been heard: the Commission has announced the adoption of a new Digital Services Act in Q4 2020¹⁵⁰, which will update the ECD. The NetzDG undoubtedly played a large role in incentivizing this initiative.

Chapter 6. The NetzDG in Practice

2.5 years after the NetzDG came into force, it appears appropriate to benefit from hindsight in assessing how the initial concerns surrounding the NetzDG materialized. How did social networks adapt to the new obligations imposed on them? Were similar measures implemented across all social networks? Did the hefty fines incentivize overzealousness in the deletion of content? Was the expression of German citizens disproportionately censored? And most importantly, can the NetzDG be described as a successful attempt at tackling hate speech and fake news?

This chapter will first examine the complaint procedures implemented by the main targets of the NetzDG, their compliance to the bi-annual reporting obligation, and attempt to

¹⁵⁰ European Commission, “Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Commission Work Programme 2020”, Brussels, 29 January 2020, p.4, available at https://eur-lex.europa.eu/resource.html?uri=cellar%3A7ae642ea-4340-11ea-b81b-01aa75ed71a1.0002.02/DOC_1&format=PDF.

assess the results of the first rounds of reports. It will be focused on Facebook and Twitter as two of the largest and best-known social networks that the act applies to. Finally, the recent case law surrounding the NetzDG will be analyzed.

Section 1. Complaint Procedures

Section 3 of the NetzDG requires the implementation of an “*effective and transparent procedure for handling complaints about unlawful content*”. Each social network has implemented its own complaint procedure, and there are notable differences between them. Filing a NetzDG complaint is only possible with a German IP address. The use of a VPN allowed the author to circumvent this constraint and attempt to file complaints on both Facebook and Twitter.

- a) Facebook: every user has access to a feedback option next to Facebook posts. This leads by default towards a standard community guidelines complaint form, which is identical to what can be found in any other country. A complaint filed in this way will not be considered a NetzDG complaint, and the decision of the deletion of the piece of content will be based on the community guidelines rather than the provisions of the German Criminal Code.

Please select a problem to continue

 You can report the post after selecting a problem.

Nudity	Violence	Harassment
Suicide or Self-Injury	False News	Spam
Unauthorized Sales	Hate Speech	
Terrorism	Q Something Else	

Fig. 1. Facebook's Standard Reporting Form

If the user wishes to file a NetzDG complaint instead, it requires a specific search in the Facebook Help Center, where a reporting form can be found:

NetzDG Reporting Form

Fill out this form to report content on Facebook that you believe is unlawful under Germany's Network Enforcement Act ("NetzDG"). Please note that this form is only for reports involving violations of the German Criminal Code listed in NetzDG. Allegations of illegality are a serious matter, and you may wish to seek guidance from an attorney or regulatory body.

Please note that content that is unlawful under the German Criminal Code may also go against Facebook's Community Standards. To report content as a Community Standards violation instead of under NetzDG, use the **Report** link that appears in the dropdown menu near the content itself. You can find more information on our Community Standards in the [Help Center](#).

Please note that Facebook may be required to provide the contents of your report, including your personal information, to parties that have obtained an appropriate court order or as part of another legal process.

☒ I understand and I wish to continue

Are you reporting on behalf of an official authority under NetzDG?

☐ Yes

☒ No

Are you reporting on behalf of a client?

☐ Yes

☒ No

Your name (name and surname)

Quentin Fontaine

Fig. 2. Facebook's NetzDG Reporting Form

The NetzDG reporting form is well hidden, and its use is discouraged in multiple ways. The user is immediately warned that any false statement he makes in his complaint may be punishable by law, despite this not being the case for statements between private parties¹⁵¹. While this might be useful in reducing the number of illegitimate complaints, it could also discourage users from reporting potentially unlawful content¹⁵². The form also requests a host of information, including the plaintiff's name, address, occupation, the URL, of the allegedly illegal content and a material description of it. The plaintiff is finally required to pinpoint the relevant provision of the GCC.

Filing a Facebook NetzDG complaint requires the user to be aware that it is a possibility, to search for it in the Facebook Help Center, to be willing to share personal information, and to spend a few minutes answering detailed questions. The contrast is obvious: a standard Facebook complaint does not require any specific identification or information. It can be filed almost instantly, directly from a user's news feed. A 2019 study attempted to quantify that difference and found that filing a Facebook NetzDG complaint took an estimated 257 seconds, compared to 15 seconds for a community

¹⁵¹ A. HELDT, "Reading Between the Lines and the Numbers: An Analysis of the First NetzDG Reports", *Internet Policy Review*, vol. 8 (2), available at <https://policyreview.info/articles/analysis/reading-between-lines-and-numbers-analysis-first-netzdg-reports>.

¹⁵² *Ibid.*

guidelines report¹⁵³.

- b) Twitter: the NetzDG complaint mechanism has been integrated in the standard reporting form. This form is identical to what may be found in other countries, except for the added option of a NetzDG complaint. After selecting that option, the only further information required from the user is the provision of the GCC which the piece of content allegedly violated. Filing a NetzDG complaint on Twitter only takes 38 seconds¹⁵⁴.

Fig. 3. Twitter's Standard Reporting Form

Section 2. Transparency Reports Figures

Section 2.1 of the NetzDG compels social networks which receive more than 100 complaints per year to produce half-yearly transparency reports. Facebook and Twitter released their first report 6 months after the act came into force, then continued on a bi-annual basis; below are some of the results of the first 3 periods:

¹⁵³ B. WAGNER and others, "Regulating Transparency? Facebook, Twitter and the German Network Enforcement Act", *FAT* '20: Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency*, January 2020, available at <https://dl.acm.org/doi/abs/10.1145/3351095.3372856>, p. 5.

¹⁵⁴ *Ibid.*, p. 5.

	Facebook											
	Q1-Q2 2018				Q3-Q4 2018				Q1-Q2 2019			
	By compl aints bodies	Action taken	By users	Action taken	By complai nts bodies	Action taken	By users	Action taken	By complai nts bodies	Action taken	By users	Action taken
Complaints & action	113	45	773	492	92	57	408	320	123	103	551	338
Reports per Million Users	0.35	0.14	2.45	1.56	0.29	0.18	1.29	1.01	3.84	3.21	17.2	10.5

	Twitter											
	Q1-Q2 2018				Q3-Q4 2018				Q1-Q2 2019			
	By compl aints bodies	Action taken	By users	Action taken	By complai nts bodies	Action taken	By users	Action taken	By complai nts bodies	Action taken	By users	Action taken
Complaints & action	20754	1533	244064	27112	20140	1161	236322	22004	26376	1950	472970	44752
Reports per Million Users	5461	403	64227	7134	5300	305	32190	5790	6941	513	124465	11776

Fig. 4. Number of complaints and removals by Facebook and Twitter¹⁵⁵

- a) Facebook: the complaint procedure implemented by Facebook was used very little: fewer than 1000 complaints during the first semester, and that number has mostly further decreased since. The company claims to have dedicated a large amount of resources to complying with the NetzDG by hiring 65 full-time staffers for the handling of complaints¹⁵⁶. These staffers are unlikely to have been overly busy, considering the low number of reported cases. This has allowed them to rule on most cases within 24hrs (76.4% in the first semester)¹⁵⁷, while regularly seeking external legal counsel prior to their decision¹⁵⁸. The 24hrs constraint that many worried would prove excessively short,

¹⁵⁵ B. WAGNER and others, “Regulating Transparency? Facebook, Twitter and the German Network Enforcement Act”, *op. cit.*, p. 7.

¹⁵⁶ Facebook, “NetzDG Transparency Report”, July 2018, available at https://fbnewsroomus.files.wordpress.com/2018/07/facebook_netzdg_july_2018_english-1.pdf.

¹⁵⁷ *Ibid.*, p. 6.

¹⁵⁸ *Ibid.*, p. 5.

even for the deletion of obviously illegal content, has appeared manageable. Overall, the NetzDG appears to have affected Facebook's handling of content very little. In the first 6 months of 2018, out of the 886 complaints, Facebook blocked 74 publications for inciting to hatred under the NetzDG. In the meantime, globally, it had removed six million pieces of content for the same reasons, under its own community standards¹⁵⁹.

In conclusion, Facebook appears to be wriggling around compliance with the NetzDG. It heavily prioritizes its community standards reports over the NetzDG complaints, by making them much more accessible to users. There is however no clear evidence that this results in worse outcomes regarding the deletion of hate speech, because of the large degree of overlap between the two regulations. Facebook's community standards are even stricter than the NetzDG in some respects. For instance, Facebook bans nudity, which is not covered by any of the provisions of the GCC referenced by the NetzDG¹⁶⁰.

- b) Twitter: the company claims to have hired 50 full-time staffers for the review of NetzDG complaints. It has received more than 260,000 reports in the first semester following the adoption of the act, and that number almost doubled in the third. Despite this, Twitter has outperformed all other social networks in terms of speed; ruling over 93.8% of complaints within 24hrs¹⁶¹. This raises questions regarding some of the means that Twitter must be using to regulate content. This number of complaints cannot be manually processed by its 50 staffers, so many speculate that the company uses machine learning to support human reviewers¹⁶². It is not mandatory under the NetzDG's transparency requirements for the company to disclose which technological tools it uses, and Twitter has chosen not to. This is potentially problematic, as researchers agree on the current limitations of machine learning to detect anything but the more obvious instances of hate speech¹⁶³. This concern is amplified by the remarkably low removal rates that Twitter has repeatedly reported. They are by far the lowest of any platform: only 10.8% of reported content was taken down during the first semester, a number

¹⁵⁹ W. ECHIKSON, O. KNODT, "Germany's NetzDG, a Key Test for Combatting Online Hate", *CEPS*, No. 2018/09, November 2018, available at http://wp.ceps.eu/wp-content/uploads/2018/11/RR%20No2018-09_Germany's%20NetzDG.pdf, p. 10.

¹⁶⁰ *Ibid.*, p. 12.

¹⁶¹ Twitter, "NetzDG transparency report", July 2018, available at <https://transparency.twitter.com/en/countries/de.html>.

¹⁶² A. HELDT, "Reading Between the Lines and the Numbers: An Analysis of the First NetzDG Reports", *op. cit.*

¹⁶³ T. GRONDÄHL and others, "All You Need is Love: Evading Hate Speech Detection", 2018, available at <https://arxiv.org/pdf/1808.09115.pdf>, p. 3.

which has remained steady since. There is no evidence that Twitter, despite complying with the obligations of the NetzDG in a much more exemplary fashion than Facebook, is doing a better job at removing unlawful content.

There are several conclusions that one can draw from these figures:

- The number of complaints is indicative of only one thing: how the NetzDG reporting mechanism was implemented, and how it compares to standard community guidelines reports in terms of speed and accessibility. The discrepancy in the number of complaints between Facebook and Twitter is extreme, especially when considering the fact that Facebook has almost 10 times more users in Germany¹⁶⁴ and receives more complaints about content globally. But it is solely attributable to the aforementioned factors, and does not accurately reveal the prevalence of unlawful speech on the platform.
- Prioritization of Community Guidelines: Both companies have adopted the same two-step review process when dealing with NetzDG complaints: reported content first faces scrutiny based on community guidelines¹⁶⁵. If a piece of content is deemed to have violated these standards, it is then deleted or blocked throughout the platform internationally. The content is only checked for violations of the GCC if it is found not to have infringed upon community guidelines. If it is then taken down on the grounds of the NetzDG, it is deleted or blocked in Germany but remains available everywhere else. This prioritization of internal community guidelines over NetzDG complaints allows social network companies to delete content globally in most cases, instead of deleting it locally and potentially having to reassess its lawfulness in other countries afterwards. This procedure is more efficient but skews the results of the transparency reports, as well as calling into question the concrete added value of the NetzDG.
- Twitter has undoubtedly proved more exemplary than Facebook in its compliance with the NetzDG. However, compliance is not synonymous with appropriate deletion of unlawful content. The data instead show that a smaller proportion of complaints result in deletion of content on Twitter than on Facebook, yet most of the discourse has been

¹⁶⁴ B. WAGNER and others, “Regulating Transparency? Facebook, Twitter and the German Network Enforcement Act”, *op. cit.*

¹⁶⁵ A. HELDT, “Reading Between the Lines and the Numbers: An Analysis of the First NetzDG Reports”, *op. cit.*

centered around strict compliance with the requirements of the NetzDG, rather than the achievement of its primary aim: eliminating unlawful speech.

Section 3. NetzDG Case Law

In July 2019, Germany's Bundesamt für Justiz (Federal Office of Justice) accused Facebook of “skewing the facts” in its transparency reports, and fined the company for €2 million¹⁶⁶. The Federal Office of Justice argued that the report is misleading, as it only contains a fraction of the complaints because the procedure implemented by Facebook is designed to discourage users from using it, thereby artificially lowering the numbers in the transparency report: *“The Federal Office of Justice understands that a considerable number of reports are made via the widely known standard channels (on the basis of Facebook’s Community Standards), and that the account given in the published report is therefore incomplete”*¹⁶⁷. Facebook has filed an objection to the fine, arguing in an emailed statement¹⁶⁸ that it was confident that its reports complied with the law, attributing the problem to areas in which the NetzDG “lacks clarity”.

The *ratio legis* of Section 2 of the NetzDG is to allow the Federal Office of Justice to effectively watch over the measures adopted by platforms to regulate content and evaluate their effectiveness. The reporting choices made by Facebook hinder this supervision: if the data on the amount of unlawful expression does not accurately reflect reality, evaluating Facebook’s actions is made impossible. Relevant comparisons with other social networks are also prevented. Facebook was not fined on the grounds that its complaints procedure was too difficult to access or designed to discourage users from submitting complaints (Section 3 of the NetzDG), but for a violation of transparency requirements by submitting incomplete reports (Section 2.1 and 2.2 §7). Facebook argues that it has disclosed the number of NetzDG complaints that it has received, as imposed by Section 2 of the act. In response, the Federal Office of Justice should clarify what it considers a satisfactory transparency report, and indicate

¹⁶⁶ Bundesamt für Justiz, “Federal office of Justice issues claim against Facebook”, available at https://www.bundesjustizamt.de/DE/Presse/Archiv/2019/20190702_EN.html.

¹⁶⁷ *Ibid.*

¹⁶⁸ T. ESCRIT, “Germany Fines Facebook for Under-reporting Complaints”, *Reuters technology news*, 2 July 2019, available at <https://www.reuters.com/article/us-facebook-germany-fine/germany-fines-facebook-for-under-reporting-complaints-idUSKCN1TX1IC>.

which type of complaints it expects to be disclosed. Four potential answers have been suggested¹⁶⁹:

1. Only complaints made through the NetzDG reporting form (in which case Facebook has not defaulted);
2. Complaints that refer to the NetzDG, regardless of how they were submitted;
3. Complaints which explicitly allege the illegality of a piece of content;
4. All complaints about potentially illegal content, regardless of whether the user mentions the legal aspect or the NetzDG.

The answer to this question entails significant consequences for platforms. N°4 would likely require more numerous and legally qualified staffers, since social networks would essentially need to review all complaints under both their community standards and the NetzDG, regardless of the reporting mechanism chosen by the user¹⁷⁰. However, Facebook and Twitter's design choices may have some impact on that interpretation. Twitter's implementation discourages the most extensive interpretation by placing the options of a community guidelines report or a NetzDG complaint side by side. This puts it in a position to claim that the users were presented a clear choice, and voluntarily opted out of the NetzDG option. Consequently, it makes more sense for Twitter not to be required to disclose those reports. By contrast, Facebook puts itself at risk of an extensive interpretation, as it may be argued that their users only favor community guidelines reports as a result of the NetzDG form being insufficiently accessible. For these reasons, it has been hypothesized that a well-designed reporting mechanism may effectively reduce the potential scope of the NetzDG¹⁷¹.

Irrespective of the outcome, this case demonstrates that the transparency requirements in the NetzDG are insufficiently clear. It is this lack of clarity that has allowed social networks to operate under the premise of the primacy of their global community standards over national

¹⁶⁹ B. WAGNER and others, "Regulating Transparency? Facebook, Twitter and the German Network Enforcement Act", *op. cit.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

law. While this allows for superior procedural effectiveness in the deletion of illegal content, it does so at the expense of transparency and accountability, and goes against the *ratio legis* of the NetzDG. The precedent set by this case may extend outside of Germany, as a growing number of national regulators adopt similar new legislations on platforms and appear to draw inspiration from the NetzDG.

A further issue of interpretation that has sparked debate is the room for maneuver that social networks must be afforded when deleting content. Are they allowed to delete content that is lawful in Germany, based on their community guidelines or their own definition of hate speech? Facebook has been the target of multiple lawsuits since the adoption of the NetzDG, which have yielded contradictory judgments¹⁷².

The Dresden Court of Appeal ruled in a first judgment¹⁷³ that Facebook could delete hate speech and potentially block a user's account, even if the content did not violate German law. A few weeks later, the Munich Court of Appeal ruled that Facebook deleting posts that are legal in Germany constituted a violation of the freedom of expression enshrined in Article 5 of the German Constitution¹⁷⁴. Soon after, the Frankfurt Regional Court reiterated that Facebook was authorized to block a user based on its own definition of hate speech¹⁷⁵, only to be contradicted again by the Offenburg Regional Court that ruled against the right for social networks to delete legal content¹⁷⁶. Many more cases are open and there is to this day no consensus on whether Facebook's freedom to manage its platform, or its users' freedom of speech, should prevail. Although German courts are not bound by precedent and their decisions highly context-dependent, these judgments put Facebook and the other social networks in a situation of uncertainty: failing to remove unlawful content exposes them to potential fines, whereas removing lawful content puts them at risk of being sued.

Section 4. Evaluation and Suggestions

We will attempt to answer the questions posed at the start of this chapter.

¹⁷² W. ECHIKSON, O. KNODT, "Germany's NetzDG, a Key Test for Combatting Online Hate", *op.cit.*, p. 11.

¹⁷³ OLG Dresden, 8 August 2018, 4 W 577/18.

¹⁷⁴ OLG München 27 August 2018, 18 W 1294/18.

¹⁷⁵ LG Frankfurt 10 September 2018, 2-03 O 310/18.

¹⁷⁶ LG Offenburg 26 September 2018, 2 O 310/18.

1. How did social networks adapt to the new obligations imposed on them? Were similar measures implemented across all social networks?

All major platforms similarly opted to prioritize the enforcement of their community standards over the NetzDG, to the point where commentators humorously described the act as a “community guidelines enforcement law”¹⁷⁷. This offers social networks obvious advantages in terms of effectiveness, as platforms that host content available internationally, but appears fundamentally at odds with the *ratio legis* of the NetzDG. The German legislator is yet to clarify its transparency expectations, and to describe more accurately the interplay that is to occur between community guidelines and the law.

However, a major conceptual difference appeared between Facebook and Twitter’s adjustments to Section 3 of the law’s requirements (with Google broadly aligning itself with Twitter’s methods). Twitter integrated the option of a NetzDG complaint in its ordinary reporting form, making it easily accessible. Facebook, on the contrary, created a separate procedure accessible only through its help center, and designed it with the intent of disincentivizing its use. The importance of a user-friendly procedure was emphasized, as this was shown to be the main factor influencing the number of NetzDG complaints across different social networks. Such design choices in the implementation may even impact the scope of the reporting requirements imposed on platforms: disclosing only NetzDG complaints is much more defensible if both means of complaints are equally easily accessible to users. For the German legislator to impose a standardized reporting format has been suggested as a means to potentially improve legal certainty and allow more relevant comparisons between the results of social networks¹⁷⁸.

Despite the €2 million fine received in July 2019, Facebook has not fundamentally adapted its complaints procedure nor its transparency practices. The outcome of this case will likely be crucial in determining the extent of social networks’ obligations.

2. Did the hefty fines incentivize overzealousness in the deletion of content? Was the expression of German citizens disproportionately censored? Can the NetzDG be described as a successful attempt at tackling hate speech and fake news?

¹⁷⁷ H. TWOREK, “An analysis of Germany’s NetzDG Law”, *op.cit.*, p. 7.

¹⁷⁸ *Ibid.*, p. 8.

Removal rates tend to fluctuate around 10% for Twitter and 20% for Facebook, which does not seem to indicate massive censorship. Nevertheless, this data published in transparency reports has failed to change minds about the legitimacy and proportionality of the restrictions to freedom of expression imposed by the NetzDG. The reports merely disclose the number of complaints, the rate, and the speed of deletion. These metrics are ineffective at determining how much lawful expression was deleted and how much unlawful expression remained available. There is also no reliable global data to compare these numbers with, to establish whether the rates in Germany differ substantially from the rest of the world and approximate how much of that can be attributed to the NetzDG. Assessing how much unlawful speech (if any) the NetzDG is responsible for eradicating is equally impossible given the reliance on the platforms themselves to differentiate lawful and unlawful speech.

There is however one of the initial concerns that the first semesters of the NetzDG appear to have invalidated: platforms have been able to rule on most cases within 24hrs; although one can only speculate as to how Twitter's 50 staffers managed this feat considering the hundreds of thousands of complaints they had to deal with. Despite consistently ruling on more than 90% of its complaints within 24hrs¹⁷⁹, Google has called for the replacement of the fixed 24hrs deadline applicable to obviously unlawful content with the criterion of "without undue delay"¹⁸⁰. This would appear appropriate to the author, and would help bring the NetzDG closer to the E-commerce Directive¹⁸¹, which opts for the term "expeditiously".

Despite the criticisms about its conception and the doubts surrounding its consequences, there is one aspect of the NetzDG that has received almost unanimous support: most authors agree that the transparency requirements represent an important step towards social networks' accountability¹⁸². Still, some changes have been suggested to enable a more accurate assessment of how effective the law has proved in fighting hate speech and fake news. These include reducing the emphasis on raw numbers, in favor of more details on the training of staff and the availability of internal appeal's mechanisms. The German Green Party has

¹⁷⁹ Google, "Removals Under the Network Enforcement Law", July 2018, available at <https://transparencyreport.google.com/netzdg/overview?hl=en>.

¹⁸⁰ W. ECHIKSON, O. KNODT, "Germany's NetzDG, a Key Test for Combatting Online Hate", *op.cit.*, p. 12.

¹⁸¹ See Chapter 5, Section 3.

¹⁸² H. TWOREK, "An analysis of Germany's NetzDG Law", *op.cit.*, p. 7.

recommended the creation of a “Clearing House”¹⁸³ for the publishing of complaints of users dissatisfied with the handling of their NetzDG cases, to help measure the act’s effects on freedom of expression. The Green Party further advocated for the creation of a procedure for uploaders to seek the reinstatement of content that they believe wrongfully deleted under the NetzDG. These proposals appear adequate and would ensure better respect of the adversarial principle.

It is currently impossible to tell the degree to which freedom of expression was sacrificed in the implementation of the NetzDG, and equally hazardous to claim that it has successfully incentivized the deletion of unlawful speech. Based on the evidence gathered, it appears that the impact of the NetzDG has been rather limited on both fronts. There is little reason to believe that disproportionate censorship has occurred, but equally little reason to believe that vast amounts of hate speech and fake news owe their deletion to the act.

Chapter 7. Impact on European Law and Future Developments

The NetzDG may have had underwhelming practical impact on social networks’ practices so far, but it has definitely managed to shake up the European legal landscape.

It is evident that the EU is better positioned than individual Member States to address the issues surrounding the supervision of social networks: the E-commerce Directive is indeed founded on the premise that the digital internal market should be regulated homogeneously. Under former Justice Commissioner Vera Jourova in 2016, acknowledging the problems of hate speech and disinformation, the European Commission opted for a soft-law approach, by creating a Code of Conduct¹⁸⁴ hand in hand with the platforms themselves. All major social networks signed the non-binding agreement and committed to more transparency and increased efficiency in reviewing user complaints. However, the initiatives of the German, and more recently of the French legislators, indicate that the soft-law approach that she advocated for does not fully satisfy Member States. By undermining the harmonization established with the ECD, they put significant pressure on the EU Commission to act. This pressure was

¹⁸³ German Bundestag, 19th legislative period, “Further develop the Network Enforcement Act”, 22 November 2018, available at <http://dip21.bundestag.de/dip21/btd/19/059/1905950.pdf>.

¹⁸⁴ European Commission, “Code of conduct on countering illegal hate speech online”, 30 June 2016, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

acknowledged by former Justice Commissioner Vera Jourova, despite her maintaining that the Code of Conduct was functioning well and that she was still “*in favor of continuing this method*”¹⁸⁵.

Section 1. Avia Law

Germany’s example has recently been followed by another major European country: France notified a draft bill for the Avia Law to the EU Commission in August 2019¹⁸⁶. It imposes on hosting providers to remove categories of “manifestly unlawful content” within 24hrs of the receipt of complaints, and to adopt a series of transparency requirements. It is addressed at large internet platforms such as Facebook, YouTube, and Twitter, but the precise scope of application will be determined by a later decree and be based on a user threshold. It clearly draws inspiration from the NetzDG. France invoked emergency and expressed its wishes to adopt the law swiftly, citing “*the regular coverage of the subject in the news recently*”¹⁸⁷. The Czech Republic sent out a detailed opinion in response¹⁸⁸, expressing concerns which the Commission echoed by asking to postpone the adoption of the law¹⁸⁹. The reasons put forward were the risk of violations of Article 3, 14, and 15 of the E-commerce Directive¹⁹⁰.

This tends to confirm the assessment of the NetzDG detailed in the previous chapters: the law’s incompatibility with the E-commerce Directive is hardly disputable. Germany would likely have received a similar response, had it not omitted to notify the law before its adoption. It is worth noting that the Commission has not voiced explicit opposition toward the NetzDG, despite warning France that an almost identical proposal would violate the ECD. This may be interpreted to constitute an acknowledgment of the insufficiency of its current approach. Despite the European reluctance, France did not back down initially, but its Constitutional

¹⁸⁵ C. STUPP, “Jourova: Never Say Never to EU Hate Speech Law”, *Euractiv*, 19 January 2018, available at <https://www.euractiv.com/section/data-protection/interview/jourova-never-say-never-to-eu-hate-speech-law/>.

¹⁸⁶ France to EU Commission, “Law aimed at combating hate content on the internet”, Notification 2019/412/F, 21 August 2019.

¹⁸⁷ *Ibid.*

¹⁸⁸ C. BERTHÉLÉMY, “French Avia law declared unconstitutional: what does this teach us at EU level?” *EDRi*, 24 June 2020, available at <https://edri.org/tag/avia-law/>.

¹⁸⁹ I. BURI, “The new French hate-speech law: a very slippery slope for freedom of expression”, *KU Leuven CiTiP*, 9 June 2020, available at <https://www.law.kuleuven.be/citip/blog/the-new-french-hate-speech-law/>.

¹⁹⁰ *Ibid.*

Council declared the Avia Law unconstitutional on 18 June 2020¹⁹¹, judging that it created disproportionate restrictions to freedom of expression.

Section 2. Digital Services Act

Likely stimulated partly by the NetzDG, the EU Commission has announced its intention to introduce a new **Digital Services Act** (DSA) in Q4 2020¹⁹², which will aim to address the current deficiencies of the ECD. There is still little information available as to its future content. In its communication on the Act¹⁹³, the Commission acknowledges that *“technologies and business models have brought many opportunities in the daily life of European citizens, they have also created new risks to citizens and society at large, exposing them to a new range of illegal goods, activities or content”*. The risks mentioned likely include hate speech and disinformation on social media. The DSA will be aimed at addressing such risks while maintaining the core principles of the ECD, and *“allowing digital businesses to grow”*.

This will be accomplished via two pillars:

- *“clear rules framing the responsibilities of digital services to address the risks faced by their users (...)”*, which will include transparency obligations to enable the supervision of platforms.
- *“ex ante rules covering large online platforms acting as gatekeepers (...)”*¹⁹⁴, with an emphasis on the Single Market remaining competitive.

The DSA seems to be primarily market-driven, highlighting the importance of competition and innovation. This is consistent with the EU’s traditional approach of internet regulation, but may prove inadequate¹⁹⁵. It appears that the EU interprets the internal market to

¹⁹¹ C. BERTHÉLÉMY, *op. cit.*

¹⁹² European Commission, “Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Commission Work Programme 2020”, Brussels, 29 January 2020, p.4, available at https://eur-lex.europa.eu/resource.html?uri=cellar%3A7ae642ea-4340-11ea-b81b-01aa75ed71a1.0002.02/DOC_1&format=PDF.

¹⁹³ European Commission, “The Digital Services Act Package”, 22 June 2020, available at <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>.

¹⁹⁴ *Ibid.*

¹⁹⁵ I. LAMBRECHT, “An Act waiting to happen: national responses to online hate speech laws ahead of the EU’s Digital Services Act”, *KU Leuven CiTiP*, 7 July 2020, available at <https://www.law.kuleuven.be/citip/blog/an-act-waiting-to-happen/>.

be at the center of gravity of the issue, while the German and French legislators consider online hate speech and disinformation to be first and foremost a matter of public safety. These elements of the future DSA are not yet final however; the Commission has initiated a public consultation¹⁹⁶, through which everyone is invited to contribute.

The NetzDG has undoubtedly played a large part in incentivizing the reform of the ECD through the adoption of the DSA. Due to the scarcity of the information available, one can only speculate on what it will entail for the NetzDG and other Member States looking to impose new rules on platforms. However, it is worth noting that the Commission has requested that the French legislator postpone adopting the Avia Law until the DSA enters into force¹⁹⁷. This indicates that it will have significant impact on it. The same is undoubtedly true for the NetzDG as well since the two are close twins. Many answers will thus be provided by year-end, and a larger degree of European harmonization might be restored.

Section 3. NetzDG Amendments and Future Reform

On 18 June 2020, the same day that the Avia Law was declared unconstitutional, the German Parliament voted a reform which extends social networks' obligations under the NetzDG. Aside from deleting unlawful content, platforms must also file a report directly to the Federal Criminal Police Office (BKA) every time a complaint is submitted by a user. The report must include user data, IP addresses and port numbers, to enable reliable identification of the author of the content and allow for effective prosecution¹⁹⁸.

This amendment has created a host of new data protection concerns. The user data will be transferred to the BKA as soon as the platform decides on deletion, without requiring the intervention of any legitimate authority. Social networks are not only put in charge of establishing the unlawfulness of expression, they must now also transfer user data to law enforcement authorities based on their interpretation of provisions of the German Criminal Code. An amendment was proposed by the Greens to remedy this, under which the user's data would initially remain stored by the platform. It would only be disclosed to the authorities if

¹⁹⁶ European Commission, "Digital Services Act Package: open public consultation", available at https://ec.europa.eu/eusurvey/runner/Digital_Services_Act.

¹⁹⁷ I. BURI, "The new French hate-speech law: a very slippery slope for freedom of expression", *op.cit.*

¹⁹⁸ German Bundestag, "Law against right-wing extremism and hate crime passed", 18 June 2020, available at <https://www.bundestag.de/dokumente/textarchiv/2020/kw25-de-rechtsextremismus-701104>.

they decided to investigate, after they reviewed the content¹⁹⁹. This proposal was however rejected. The reform additionally provides that users may object to the deletion of their content within two weeks. According to the opposition, this does not adequately protect users' privacy rights, as they are harmed as soon as suspicion is established by the platform²⁰⁰.

In parallel with these amendments, a wider reform of the NetzDG is in the works. It is aimed at addressing some of the issues highlighted by the first three years of enforcement of the law. The reform will pursue four main objectives²⁰¹:

- Strengthening user rights: by imposing the implementation of some form of appeals procedure. Users whose content gets deleted will be able to request a review of the decision.
- Making complaint procedures more user-friendly: this appears to be implicitly targeted at Facebook. The reform will aim to clarify reporting channels, improve their ease of use and the recognizability the reporting routes.
- Simplifying enforcement: the amendments recently passed contributed to this objective. The purpose is to regulate data disclosure to simplify the obtention of the identity of the offender.
- Increasing the informative value of transparency reports: the changes will attempt to address some of the criticisms laid out in the previous chapter. Transparency reports will have to include information on so-called counter-presentation procedures (equivalent to appeals procedures), and report on the automated tools used to find and delete unlawful content. This appears to value transparency in the use of AI-based monitoring specifically.

The German legislator evidently took notice of the widespread criticisms of the

¹⁹⁹ P. GRÜLL, "German hate speech law criticized for allowing backdoor data collection", *Euractiv*, 19 June 2020, available at <https://www.euractiv.com/section/data-protection/news/german-online-hate-speech-reform-criticised-for-allowing-backdoor-data-collection/>.

²⁰⁰ *Ibid.*

²⁰¹ German Federal Ministry of Justice and Consumer Protection, "Further development of the Network Enforcement Act", 1 April 2020, available at https://www.bmjbv.de/SharedDocs/Artikel/DE/2020/040120_NetzDG.html.

NetzDG. It appears committed to improving the enforceability of the law and refining transparency requirements. Though the legitimate concerns around data protection still need to be addressed, the new amendments and upcoming reform are likely to improve the efficiency of the NetzDG. However, there remains an unknown factor in the imminent Digital Services Act. It is not impossible that it will exclude certain aspects of the NetzDG and require further adjustments. For this reason, it would be wise for Germany to postpone the adoption of any major reform.

ASSESSMENT AND CONCLUSION

This paper set out to assess the NetzDG’s compliance with higher legal norms, in an attempt to determine whether its archetype constituted a suitable model for future speech regulation in European Union law. Like most of the existing literature on the subject, it has been predominantly fault-finding. These harsh criticisms will now be put into perspective.

Freedom of Expression

The analysis of the NetzDG’s compliance with higher legal standards began with the fundamental rights aspect. It focused on the interpretation of Article 10 of the ECHR. The conditions for a state to validly impose a derogation to the right to freedom of expression are that it must (1) be provided for by law, (2) pursue a legitimate aim, and (3) be necessary in a democratic society²⁰².

This paper found the law to lack clarity in its scope of application. The lackluster definition of “social networks”, the absence of technical standards to determine what constitutes a registered user, and the vagueness of the criteria to differentiate between unlawful and obvious unlawful content all contribute to creating significant legal uncertainty around the NetzDG (1). While the aim pursued by the NetzDG is clearly legitimate (2), the necessity test (3) requires an assessment of proportionality, which often enables equally valid, conflicting interpretations. We tend to regard the NetzDG as theoretically disproportionate, but acknowledge the partly subjective nature of this assessment. Deciding how to balance equally important fundamental rights depends partly on a State’s political situation, and on its cultural and historical values. These may differ even between neighboring countries, as illustrated by the contrasting example of France, in which the Avia Law was judged too restrictive of freedom of speech and unconstitutional.

However, the conservation of a blasphemy provision in the German Criminal Code constitutes a less equivocal violation of freedom of expression, under both European and international human rights legal standards. The NetzDG compels social networks to enforce

²⁰² European Convention on Human Rights, Article 10.

this problematic provision of the German Criminal Code.

Compliance with freedom of expression standards matters less for its impact on Germany than for the assessment of the NetzDG's archetype as a whole. Germany is indeed founded on solid democratic values, and benefits from constitutional guarantees that a law like the NetzDG cannot realistically jeopardize. This is however much less true for other countries which have largely replicated the law, while taking the opportunity to restrict "anti-government speech"²⁰³. It is a legitimate concern that the NetzDG paves the way for authoritarianism by providing a positive example: the Russian government has defended controversial measures by claiming it was merely following in the footsteps of Germany.

Intermediary Liability

Compliance with the E-commerce Directive constitutes the basis for the most solid legal arguments against the NetzDG. The first of these arguments involves the country of origin principle contained in Article 3, according to which providers fall under the jurisdiction of the country in which they are established. The NetzDG blatantly contradicts this by applying to social networks with more than 2 million users in Germany, regardless of the place of establishment. The potential exceptions to the principle appear inapplicable as the law is neither an exceptional derogation that targets a specific provider, nor is motivated by urgency. The violation of Article 3 is meaningful as it constitutes one of the cornerstones of the directive.

It was also demonstrated that the law interprets certain key notions enshrined in Article 14 of the Directive in its own way, ignoring that the provision is fully harmonizing. Such interpretation is consequently under the exclusive competence of the CJEU, and should not be conducted by national legislators. Lastly, compliance with Article 15 is also up for debate. It prohibits Member States from imposing a general obligation to monitor. The assessment depends on whether it is possible to meet the strict time frames imposed by the NetzDG without a form of general monitoring, which is questionable.

There is no doubt that the NetzDG violates the E-commerce Directive, as it currently exists.

²⁰³ "Putin Signs 'Fake News,' 'Internet Insults' Bills into Law", *The Moscow Times*, *op. cit.*

Practical Effects

The concerns for over-removal, and the promotion of unlawful content in a backlash against censorship (the so-called Streisand Effect), were rational. The analysis of the transparency reports shows that they did not materialize. This is largely attributable to the minimal enforcement of the law: a single fine was reportedly imposed. The little enforcement that occurred revolved around transparency, not about decisions of deletion themselves. No report of any NetzDG fine regarding the failure to delete unlawful content or the mishandling of individual cases was found. This is precisely the type of fine that might have incentivized over-removal of content. Had the NetzDG truly transformed the practices of social networks through stricter enforcement of fines, perhaps over-removal would have ensued, with potential for backlash; but it did not. However, this fact does not constitute proof that the core mechanism of the NetzDG is healthy, it merely shows that limited enforcement results in limited consequences, regardless of the merits of the law itself. The evidence is thus still inconclusive in this regard.

The examination of Facebook and Twitter's enactment of the NetzDG's requirements showed the importance of design of the complaint procedures. It established that the available data is largely skewed by contrasts between both social networks in their implementation, and does not provide conclusive evidence of the law's success at reducing hate speech and disinformation. Consequently, we found that reporting requirements needed refinement and would benefit from certain additions. For example, the implementation and public availability of appeals procedures for users who believe that a claim was handled wrongfully would help alleviate freedom of speech concerns.

According to the latest announcement by the German government, an upcoming reform of the NetzDG will focus precisely on these issues: clarifying complaints procedures, facilitating enforcement, and strengthening transparency requirements.

Soft Law or Hard Law?

In light of all the flaws that were highlighted, and of the law's limited effectiveness so far, it is worth questioning the necessity for hard law. Many of these flaws are inherent to hard legal action, and the soft law approach that the EU initially advocated for presents multiple

advantages.

First, the act aims to target a few specific social networks, yet a national law cannot be addressed explicitly at Facebook, Twitter, and Google: this would constitute direct discrimination. So, the NetzDG resorts to indirect discrimination, by awkwardly defining its scope of application and setting an arbitrary threshold of 2 million users. However, this solution brings about its own set of problems: it still arguably violates higher legal norms, and produces legal uncertainty. Voluntary agreements offer a way to circumvent those obstacles and impose obligations on these social networks specifically, as long as they consent to it. Secondly, the NetzDG aims to impose more stringent obligations than previously on these platforms. However, these exceed what a State may impose under the E-commerce Directive. Soft law also offers a way to elude this difficulty: social networks may be subjected to stricter obligations on a voluntary basis.

However, a soft law approach also presents obvious drawbacks: it is subject to platforms' agreement, relies on their good faith, and lacks hard law's compelling force.

Recent events have shown that these drawbacks may be less meaningful than it appears. The reason for that is connected to social networks' business model. They generate income through targeted advertising. Consequently, they depend on other companies' willingness to purchase ads from them²⁰⁴, which requires maintaining a broad user base and positive public opinion. Public opinion has become increasingly volatile, especially regarding issues of hate speech and disinformation. This was recently highlighted across the Atlantic in the wake of George Floyd protests. After critics claimed that Facebook was insufficiently policing hate speech on the platform, it was the target of a boycott campaign baptized #StopHateForProfit. Almost a hundred advertisers, from Unilever to Coca Cola, ceased all advertisement on the platform until serious commitments were made. In a matter of days, Facebook's market value had plummeted by \$82.3 billion, and Mark Zuckerberg's personal fortune was down \$7.2 billion²⁰⁵. Facebook quickly conceded and agreed to several commitments. The cost of hiring

²⁰⁴ J. KEELEY, "How Do Social Networks Make Money?", *MakeUseOf*, 22 June 2020, available at <https://www.makeuseof.com/tag/how-do-social-networks-make-money-case-wondering/>.

²⁰⁵ S. DATOO, "Zuckerberg Loses \$7 Billion as Firms Boycott Facebook Ads", *Bloomberg*, 27 June 2020, available at <https://www.bloomberg.com/news/articles/2020-06-27/mark-zuckerberg-loses-7-billion-as-companies-drop-facebook-ads>.

60 staffers and paying a few NetzDG fines at worse, appears insignificant in comparison to what a boycott may achieve. It is increasingly crucial for social networks to appear exemplary in the eyes of the public in their fight against hate speech and disinformation, which involves not refusing to take part in voluntary agreements. Their credibility and income depend on it. The most sensible course of action for social networks, even from a purely economic standpoint, is to accept the inevitability of increased accountability.

Shifting public opinion appears capable of affecting platforms far more effectively than any legislative effort. In our view, this renders the need for hard law doubtful. It also reinforces the importance of a future focus on transparency for future regulations, to present users with an accurate and understandable view of how the social networks that they use regulate content.

Final Assessment

The NetzDG arguably fails to meet international human rights standards regarding freedom of expression, while providing a negative regulatory example for countries with weaker democratic foundations than Germany.

It most likely violates multiple provisions of the E-commerce Directive, and compromises the harmonization of the regulation of digital services established with the ECD.

Two and a half years after coming into force, there is no evidence of significant impact on the prevalence of hate speech and disinformation on social media platforms in Germany. It is not clear that the hard law approach has proved more effective than the alternative voluntary agreements.

Paradoxically in view of this seemingly calamitous assessment, the answer to the initial research question will be partially positive. Online speech regulation is undoubtedly heading the direction of increasing the accountability of social media platforms, and the NetzDG constitutes a giant first step in that direction.

Legal concerns must be put into perspective: valid as they may be, they remain subordinated to the broader political goals pursued. If the political sphere agrees on the necessity for more accountability of social networks, the law will eventually be adapted to

match these aims. This was illustrated by the absence of backlash from the EU Commission to the NetzDG, which implicitly acknowledges that European action was overdue. The German initiative has already influenced the development of EU online speech regulation in a major way, by incentivizing an update to the ECD in the form of the upcoming Digital Services Act.

The NetzDG will perhaps not provide a model for EU regulation, but will definitely serve as a prototype. Future legislative efforts will not, in our estimation, imitate all of its components. They should not define their scope of application based on a platform's number of users in a specific Member State, nor require that social networks interpret and apply provisions of national criminal law. However, the transparency aspect of the NetzDG gathered almost unanimous support and will provide a sound foundation upon which to build future regulations.

BIBLIOGRAPHY

Legislation

International Law

Universal Declaration of Human Rights, Paris, 10 December 1948, Article 19 ;

International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 ;

International Covenant on Civil and Political Rights, New York, 16 December 1966 ;

The Rome Statute of the International Criminal Court, Rome, 17 July 1998, Article 6.

European Law

European Convention on Human Rights, signed in Rome on 4 November 1950, Article 10 ;

Treaty on European Union, Maastricht, 7 February 1991 ;

Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-commerce Directive), 8 June 2000.

German Law

Strafgesetzbuch (StGB), 15 May 1871 ;

Law on Improving Law Enforcement in Social Networks (Network Enforcement Law - NetzDG), 1 September 2017 ;

Network Enforcement Act Regulatory Fining Guidelines (Guidelines on setting regulatory fines within the scope of NetzDG), 22 March 2018.

French Law

Loi du 24 juin 2020 visant à lutter contre les contenus haineux sur internet (loi Avia).

Belgian Law

Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, M.B., 8 août 1981 ;

Loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la

seconde guerre mondiale, *M.B.*, 30 mars 1995.

United States Law

Communication Decency Act (CDA), 8 February 1996.

Case Law

Court of Justice of the European Union

CJEU, 14 May 1974, (*Nold v Commission*), C-4/73 ;

CJEU, 25 July 1991, (*Säger v. Dennemeyer*), C-76/90 ;

CJEU, 12 July 2011, (*L’Oreal v. Ebay*), C-324/09 ;

CJEU, 24 November 2011, (*Scarlet v. Sabam*), C-70/10 ;

CJEU, 12 February 2012, (*Sabam v. Netlog*), C-360/10 ;

CJEU, 27 March 2014, (*UPC Telekabel Wien*), C-314/12 ;

CJEU, 18 December 2014, (*Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedom*), Opinion 2/13 ;

CJEU, 3 October 2019, (*Glawischnig-Pieczek v. Facebook*), C-18/18.

European Court of Human Rights

ECtHR, 7 December 1976, (*Handyside v. United Kingdom*), app. no. 5493/72 ;

ECtHR, 26 April 1979, (*Sunday Times v. United Kingdom*), app. no. 6538/74 ;

ECtHR, 25 March 1985, (*Barthold v. Germany*), app. no. 8734/79 ;

ECtHR, 22 May 1990, (*Autronic AG. v. Switzerland*), app. no. 12726/87 ;

ECtHR, 24 February 1994, (*Casado Coca v. Spain*), app. no. 15450/89 ;

ECtHR, 17 December 2004, (*Cumpăna and Mazăre v. Romania*), app. no. 33348/96 ;

ECtHR, 7 February 2012, (*Axel Springer v. Germany*), app. no. 39954/08 ;

ECtHR, 13 July 2012, (*Mouvement raëlien suisse v. Switzerland*), app. no. 16354/06 ;

ECtHR (Grand Chamber), 16 June 2015, (*Delfi v. Estonia*), no. 64569/09.

German National Courts

BGH (Bundesgerichtshof – German Federal Court of Justice), 4 July 2013, I ZR 39/12 ;

OLG Dresden, 8 August 2018, 4 W 577/18 ;

OLG München 27 August 2018, 18 W 1294/18 ;

LG Frankfurt 10 September 2018, 2-03 O 310/18 ;

LG Offenburg 26 September 2018, 2 O 310/18.

Doctrine

BARNETT, L., “Incendiary speech and social media”, *Texas tech law review*, 1 January 2012, available at <https://scholarship.law.ufl.edu/facultypub/154/>, pp. 147-164 ;

BERTHÉLÉMY, C., “French Avia law declared unconstitutional: what does this teach us at EU level?” *EDRi*, 24 June 2020, available at <https://edri.org/tag/avia-law/> ;

BROWN, A., “What is Hate Speech? Part 1: The myth of hate”, *Law and Philosophy*, 2017, pp. 419-468 ;

BROWN, A., “What is hate speech? Part 2: Family resemblances”, *Law and Philosophy*, 2017, pp. 561-613;

BURI, I., “The new French hate-speech law: a very slippery slope for freedom of expression”, *KU Leuven CiTiP*, 9 June 2020, available at <https://www.law.kuleuven.be/citip/blog/the-new-french-hate-speech-law/> ;

CASTENDYK, O., DOMMERING, E., SCHEUER, A., “European Media Law”, *Kluwer Law International*, 2008 ;

CHARLMERS, D., “European Union Law: Text and Materials”, *Cambridge University Press*, 2016 ;

CLAUSSEN, V., “Fighting hate speech and fake news: The Network Enforcement Act (NetzDG) in Germany in the context of European legislation”, *Media Laws*, 24 October 2018, pp. 110-136, available at <http://www.medialaws.eu/wp-content/uploads/2019/05/6.-Claussen.pdf> ;

ECHIKSON, W., KNODT, O., “Germany’s NetzDG, a Key Test for Combatting Online Hate”, *CEPS*, No. 2018/09, November 2018, available at http://wp.ceps.eu/wp-content/uploads/2018/11/RR%20No2018-09_Germany's%20NetzDG.pdf ;

GERARDS, J., “How to improve the necessity test of the European Court of Human Rights”, *International Journal of Constitutional Law*, Volume 11, April 2013, pp. 466-490 ;

GRONDÄHL, T. and others, “All You Need is Love: Evading Hate Speech Detection”, 2018, available at <https://arxiv.org/pdf/1808.09115.pdf> ;

HANNUM, H., “The UDHR in National and International Law”, *Health and Human Rights*, 1998, vol. 3, no. 2, pp. 144-158, available at www.jstor.org/stable/4065305 ;

HELDT, A., “Reading Between the Lines and the Numbers: An Analysis of the First NetzDG Reports”, *Internet Policy Review*, vol. 8 (2), available at <https://policyreview.info/articles/analysis/reading-between-lines-and-numbers-analysis-first-netzdg-reports> ;

HELLNER, M., “The Country of Origin Principle in the E-commerce Directive: A Conflict with Conflict of Laws?”, *RGSL working papers*, 2003 ;

JANSEN, S.C., MARTIN, B., “The Streisand Effect and the Censorship Backfire”, *International Journal of Communication*, 2015, available at <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=2890&context=lhapapers> ;

KRENC, F., « La liberté d’expression vaut pour les propos qui « heurtent, choquent ou inquiètent ». Mais encore ? », *Rev. trim. dr. h.*, 2016, vol. 106, pp. 311-350 ;

KUCZERAWY, A., “To Monitor or Not to Monitor? The Uncertain Future of Article 15 of the E-Commerce Directive”, *KU Leuven CiTiP*, 2019, available at <https://www.law.kuleuven.be/citip/blog/to-monitor-or-not-to-monitor-the-uncertain-future-of-article-15-of-the-e-commerce-directive/> ;

LAMBRECHT, I., “An Act waiting to happen: national responses to online hate speech laws ahead of the EU’s Digital Services Act”, *KU Leuven CiTiP*, 7 July 2020, available at <https://www.law.kuleuven.be/citip/blog/an-act-waiting-to-happen/> ;

LING, R., TANDOC, E., WEI LIM, Z., “Defining Fake News”, *Digital Journalism*, 2018, vol. 6, pp. 137-153, available at <https://www.tandfonline.com/doi/full/10.1080/21670811.2017.1360143?scroll=top&needAccess=true> ;

MADIEGA, T., “Reform of the EU liability regime for online intermediaries”, *European Parliamentary Research Service*, May 2020, available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA\(2020\)6494_04_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)6494_04_EN.pdf) ;

MARIQUE, E., STROWEL, A., « La régulation des fake news et avis factices sur les plateformes », *Revue internationale de droit économique*, de Boeck, March 2019, pp. 383-398, available at <https://www.cairn.info/revue-internationale-de-droiteconomique-2019-3-page-383.htm> ;

MAZZARA, M. and others, “Social Networks and Collective Intelligence: A Return to the Agora”, *Newcastle University*, June 2012, available at https://www.researchgate.net/publication/258374381_Social_Networks_and_Collective_Intelligence_A_Return_to_the_Agora ;

MENDEL, T., “Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights”, *Center for Law and Democracy*, available at <https://rm.coe.int/16806f5bb3> ;

O'HARA, K., STEVENS, D., “Echo Chambers and Online Radicalism: Assessing the Internet's Complicity in Violent Extremism”, *Policy & Internet*, April 2015, available at https://www.researchgate.net/publication/275281614_Echo_Chambers_and_Online_Radicalism_Assessing_the_Internet%27s_Complicity_in_Violent_Extremism_The_Internet%27s_Complicity_in_Violent_Extremism ;

SCHABAS, W., “The European Convention on Human Rights, a Commentary”, *Oxford Commentaries on International Law*, September 2015 ;

SPINDLER, G., “Internet Intermediary liability Reloaded – The New German Act on Responsibility of Social Networks and its (In-) Compatibility with European Law”, *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 2017, pp. 166-179 available at <https://www.jipitec.eu/issues/jipitec-8-2-2017/4567> ;

TULKENS, F., « La liberté d'expression et le discours de haine », *Revue de la faculté de droit de l'université de Liège*, Bruxelles, Larcier, 2015, pp. 478-499 ;

TWOREK, H., “An analysis of Germany's NetzDG Law”, *Transatlantic Working Group*, 15 April 2019, available at https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf ;

WATHELET, M., « Contentieux européen », *Collection de la faculté de droit de l'université de Liège*, Larcier, 2014.

Reports, Opinions and Assessments

Article 19, “Hate Speech Explained: A Toolkit”, December 2015, available at <https://www.article19.org/resources/hate-speech-explained-a-toolkit/> ;

Article 19, “Germany: The Act to Improve Enforcement of the Law in Social Networks”, August 2017, available at <https://www.article19.org/wp-content/uploads/2017/09/170901-Legal-Analysis-German-NetzDG-Act.pdf> ;

Bundesamt für Justiz, “Federal office of Justice issues claim against Facebook”, available at https://www.bundesjustizamt.de/DE/Presse/Archiv/2019/20190702_EN.html ;

Council of Europe Parliamentary Assembly, “Recommendation 1805: Blasphemy, religious insults, and hate speech against persons on grounds of their religion”, 29 June 2007, available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17569&lang=en> ;

Council of Europe Publishing, “Freedom of Expression in Europe – Case law concerning article 10 of the ECHR”, 2007, available at [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18\(2007\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18(2007).pdf) ;

Council of the European Union, “EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief”, 24 June 2013, available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137585.pdf ;

Electronic Frontier Foundation and others, “Necessary and Proportionate: International Principles on the Application of Human Rights Law to Communications Surveillance”, May 2014, available at <https://www.ohchr.org/Documents/Issues/Privacy/ElectronicFrontierFoundation.pdf> ;

European Commission, “Code of conduct on countering illegal hate speech online”, 30 June 2016, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en ;

European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee and the Committee of the Regions - Commission Work Programme 2020”, Brussels, 29 January 2020, available at https://eur-lex.europa.eu/resource.html?uri=cellar%3A7ae642ea-4340-11ea-b81b-01aa75ed71a1.0002.02/DOC_1&format=PDF ;

European Commission, “Digital Services Act Package: open public consultation”, available at https://ec.europa.eu/eusurvey/runner/Digital_Services_Act ;

European Commission, “The Digital Services Act Package”, 22 June 2020, available at <https://ec.europa.eu/digital-single-market/en/digital-services-act-package> ;

European Digital Rights (EDRi), “Recommendations on the German bill: Improving Law Enforcement on Social Networks (NetzDG)”, 20 June 2017, available at https://edri.org/files/consultations/tris_netzdg_edricontribution_20170620.pdf ;

Facebook, “NetzDG Transparency Report”, July 2018, available at https://fbnewsroomus.files.wordpress.com/2018/07/facebook_netzdg_july_2018_english-1.pdf ;

France to EU Commission, “Law aimed at combating hate content on the internet”, Notification 2019/412/F, 21 August 2019 ;

Freedom House, “2019 Report on Freedom on the Internet”, 2019, available at <https://freedomhouse.org/report/freedom-net/2019/crisis-social-media> ;

German Bundestag, 19th legislative period, “Further develop the Network Enforcement Act”, 22 November 2018, available at <http://dip21.bundestag.de/dip21/btd/19/059/1905950.pdf> ;

German Bundestag, “Law against right-wing extremism and hate crime passed”, 18 June 2020, available at <https://www.bundestag.de/dokumente/textarchiv/2020/kw25-de-rechtsextremismus-701104> ;

German Federal Government, “Draft law to improve law enforcement in social networks” (NetzDG draft), available at

https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_NetzDG.pdf?__blob=publicationFile&v=2 ;

German Ministry of Justice and Consumer Protection, "Deletion of illegal hate posts on Facebook, YouTube and Twitter: results of monitoring complaints mechanisms for youth-related services", 26 September 2016, available at https://www.bmjbv.de/SharedDocs/Downloads/DE/News/Artikel/09262016_Testergebnisse_jugendschutz_net_Hasskriminalitaet.pdf?__blob=publicationFile&v=1 ;

German Ministry of Justice and Consumer Protection, "Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken", 5 April 2017, available at https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_NetzDG.pdf?__blob=publicationFile&v=2 ;

German Federal Ministry of Justice and Consumer Protection, "Further development of the Network Enforcement Act", 1 April 2020, available at https://www.bmjbv.de/SharedDocs/Artikel/DE/2020/040120_NetzDG.html ;

German Ministry of Justice and Consumer Protection, "Results paper of the task force "Umgang mit rechtswidrigen Hassbotschaften im Internet": proposed ways to combat internet hate speech", 15 December 2015, available at https://www.bmjbv.de/SharedDocs/Downloads/DE/News/Artikel/12152015_TaskForceErgebnispapier.pdf?__blob=publicationFile&v=2 ;

Google, "Removals Under the Network Enforcement Law", July 2018, available at <https://transparencyreport.google.com/netzdg/overview?hl=en> ;

Human Rights Committee, "General Comment N° 34 - Article 19: Freedoms of opinion and expression", 12 September 2011, available at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> ;

Human Rights Council, "Guiding Principles on Business and Human Rights", available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf ;

Human Rights Council, "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence", 5 October, 2012, available at https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf ;

Human Rights Council, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue" 17 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf ;

Human Rights Watch, "Germany: Flawed Social Media Law: NetzDG is wrong response to online abuse", 14 February 2018, available at <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law> ;

Jugendschutz.net, Assessment: "Löschung Rechtswidriger Hassbeiträge Bei Facebook, YouTube Und Twitter: Ergebnisse Des Monitorings von Beschwerdemechanismen

Jugendaffiner Dienste”, 14 March 2017, available at https://www.bmjv.de/SharedDocs/Downloads/DE/News/Artikel/03142017_Monitoring_jugendschutz.net.pdf ;

Jugendschutz.net, “Monitoring Des Beschwerdemanagements von Social-Media-Plattformen Bei Hassbotschaften,”, June 2017, available at https://www.jugendschutz.net/fileadmin/download/pdf/17-06_Monitoring_Beschwerdemanagement_Social-Media-Plattformen_Hintergruende.pdf ;

Twitter, “NetzDG transparency report”, July 2018, available at <https://transparency.twitter.com/en/countries/de.html>.

Press Articles and Miscellaneous

BRETEAU, P., “Affaire Mila : comprendre le débat sur le blasphème, qui n’est pas un délit en France”, *Le Monde*, 30 January 2020, available at https://www.lemonde.fr/les-decodeurs/article/2020/01/30/affaire-mila-comprendre-le-debat-sur-le-blaspheme-qui-n-est-pas-un-delit-en-france_6027819_4355770.html (consulted on 2 June 2020) ;

BUERMEYER, U. and others, “Declaration on Freedom of expression”, available at <http://deklaration-fuer-meinungsfreiheit.de/en/> (consulted on 30 April 2020) ;

CALVELLO, M., “50 Internet Statistics That Will Make You Reconsider Your Security”, *Learning Hub*, 21 April 2020, available at <https://learn.g2.com/vpn-statistics> (consulted on 3 July 2020) ;

CUMMINS, K. and others, “Proposed German Legislation Threatens Free Expression Around the World”, *Global Network Initiative*, 20 April 2017, available at <http://globalnetworkinitiative.org/proposed-german-legislation-threatens-free-expression-around-the-world/> (consulted on 30 April 2020) ;

CUTHBERTSON, A., “Dead Facebook Users will Outnumber the Living by 2098”, *Tech and Science*, 3 August 2016, available at <https://www.newsweek.com/dead-facebook-users-will-outnumber-living-2098-434682> (consulted on 3 July 2020) ;

DATOO, S., “Zuckerberg Loses \$7 Billion as Firms Boycott Facebook Ads”, *Bloomberg*, 27 June 2020, available at <https://www.bloomberg.com/news/articles/2020-06-27/mark-zuckerberg-loses-7-billion-as-companies-drop-facebook-ads> (consulted on 23 June 2020) ;

DOUEK, E., “Germany’s Bold Gambit to Prevent Online Hate Crimes and Fake News Takes Effect”, *Lawfare*, 31 October 2017, available at <https://www.lawfareblog.com/germanys-bold-gambit-prevent-online-hate-crimes-and-fake-news-takes-effect> (consulted on 23 June 2020) ;

ESCRIT, T., “Germany Fines Facebook for Under-reporting Complaints”, *Reuters technology news*, 2 July 2019, available at <https://www.reuters.com/article/us-facebook-germany-fine/germany-fines-facebook-for-under-reporting-complaints-idUSKCN1TX1IC> (consulted on 11 June 2020) ;

GORMAN, S., “Blasphemy is a crime not only in Pakistan, but Europe too”, *France 24*, 31 October 2018, available at <https://www.france24.com/en/20181031-blasphemy-middle-east-asia-bibi-europe-law-religion-ireland> (consulted on 2 June 2020) ;

GRÜLL, P., “German hate speech law criticized for allowing backdoor data collection”, *Euractiv*, 19 June 2020, available at <https://www.euractiv.com/section/data-protection/news/german-online-hate-speech-reform-criticised-for-allowing-backdoor-data-collection/> (consulted on 26 July 2020) ;

HAMMAN, G., “Der Storch-Effekt”, *Zeit Online*, 9 January 2018, available at <https://www.zeit.de/digital/2018-01/netzdg-meinungsfreiheit-internet-soziale-medien-debatte> (consulted on 2 June 2020) ;

KEELEY, J., “How Do Social Networks Make Money?”, *MakeUseOf*, 22 June 2020, available at <https://www.makeuseof.com/tag/how-do-social-networks-make-money-case-wondering/> (consulted on 23 July 2020) ;

LAM, A., “87% of Germans Approve of Social Media Regulation Law”, *Dalia Research*, 17 April 2018, available at <https://daliaresearch.com/blog/blog-germans-approve-of-social-media-regulation-law/> (consulted on 30 April 2020) ;

MCHANGAMA, J., FISS, J., “Germany’s online crackdowns inspires world’s dictators”, *Foreign Policy*, 6 November 2019, available at <https://foreignpolicy.com/2019/11/06/germany-online-crackdowns-inspired-the-worlds-dictators-russia-venezuela-india/> (consulted on 2 June 2020) ;

MCHANGAMA, J., FISS, J., “The Digital Berlin Wall: How Germany (Accidentally) Created a Prototype for Global Online Censorship” *Justitia*, November 2019, available at http://justitia-int.org/wp-content/uploads/2019/11/Analyse_The-Digital-Berlin-Wall-How-Germany-Accidentally-Created-a-Prototype-for-Global-Online-Censorship.pdf (consulted on 2 June 2020) ;

NEWMAN, N. and others, “Reuters Institute Digital News Report 2020”, p. 71, available at https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR_2020_FINAL.pdf (consulted on 2 June 2020) ;

OLTERMANN, P., “Tough New German Law Puts Tech Firms and Free Speech in Spotlight”, *The Guardian*, 5 January 2018, available at <https://www.theguardian.com/world/2018/jan/05/tough-new-german-law-puts-tech-firms-and-free-speech-in-spotlight> (consulted on 12 July 2020) ;

STUPP, C., “Jourova: Never Say Never to EU Hate Speech Law”, *Euractiv*, 19 January 2018, available at <https://www.euractiv.com/section/data-protection/interview/jourova-never-say-never-to-eu-hate-speech-law/> (consulted on 21 July 2020) ;

T.C., “What is the Streisand Effect?”, *The Economist*, 16 April 2013, available at <https://www.economist.com/the-economist-explains/2013/04/15/what-is-the-streisand-effect> (consulted on 2 June 2020) ;

URBAND, T., “Germany start enforcing new “Hate Speech” Law: initial reactions to the

Network Enforcement Act”, *Media Writes*, 19 January 2018, available at <https://mediawrites.law/germany-starts-enforcing-controversial-hate-speech-law-initial-reactions-to-the-network-enforcement-act/> (consulted on 20 May 2020) ;

VAROL, O. and others, “Online Human-Bot Interactions: Detection, Estimation, and Characterization”, 8 March 2017, available at <https://arxiv.org/abs/1703.03107>. (consulted on 2 July 2020) ;

WILLSHER, K., “Blasphemy “is no crime”, says Macron amid French girl’s anti-Islam row”, *The Guardian*, 12 February 2020, <https://www.theguardian.com/world/2020/feb/12/macron-wades-into-french-girls-anti-islam-row-saying-blasphemy-is-no-crime-mila/> (consulted on 2 June 2020) ;

X, “Maas Defends Law Against Hate on the Internet”, *Der Spiegel*, 4 January 2018, available at <https://www.spiegel.de/netzwelt/netzpolitik/netzdg-heiko-maas-verteidigt-netzwerkdurchsetzungsgesetz-gegen-kritik-a-1186118.html> (consulted on 30 April 2020) ;

X, “Putin Signs 'Fake News,' 'Internet Insults' Bills into Law”, *The Moscow Times*, 18 March 2019, available at: <https://www.themoscowtimes.com/2019/03/18/putin-signs-fake-news-internet-insults-bills-into-law-a64850> (consulted on 2 June 2020).

