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Facts & Findings

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Social Networks under an obligation! Freedom of expression under threat?

The Network Enforcement Act in Practice: Stocktaking and Recommendations for Action

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- Starting point: The fight against hate speech on the internet and the obligations to be met by social network providers are central objectives of the Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG) that was enacted in 2017.
- Reactions: The objectives of the NetzDG are generally welcomed. However, the detailed anatomy of the legislation has been criticised in many quarters. One major reproach is that the NetzDG violates the fundamental right of expression by what is called 'chilling effects and over-blocking'.
- NetzDG reports: The first mandatory reports from social network providers prove the practical importance of the NetzDG. However, deletion rates hardly support the fear of general over-blocking, if at all.
- Prospects: The regulatory approach should be readjusted and advanced with a sense of proportion – a close coordination with the EU regulatory proposals is required. Specifically, the guidelines for complaint management have to be supplemented. The sanctions regime should address the issue of deleted legitimate content. Users are to be protected more effectively, in particular through a right to have unjustly deleted content 'reinstated'.

Contents

I. Introduction

The opinion-forming process is recognised as being of paramount importance for an open civil society. In the age of digitalisation, numerous and diverse new forms of information and communication are opening up for opinion forming which transcend and change the established forms of classical mass media such as the press and broadcasting. Social networks in particular are opening up a new (type of) space for the formation and reinforcement of opinions.[1] One characteristic feature of social networks is that users can easily communicate with anyone, and, what is more, about anyone. This opens up the possibility of defaming individuals or institutions and of massively disseminating untrue facts.[2]

The effect on persons confronted with such behaviour including criminal offences, e.g. by uttering or disseminating criminal content is much more serious than a "traditional" insult in a face-to-face manner. In view of the fact that content on the Internet can be found and accessed without any limits in time or space, this kind of behaviour and the offences it leads to are accompanied by a characteristically broad and deep impact.

An insult on the Internet is more serious than a face-to-face insult.

At the same time, law enforcement against infringers is impeded by considerable factual and legal difficulties: On the one hand, many users access social networks anonymously or by using a pseudonym. On the other hand, according to the legal situation in force until 2017, no general claims could be raised against platform operators to disclose information about the inventory data of users who made an offending statement on platforms (such as social networks). This was because platform operators were not authorised (without consent) to disclose relevant personal data.[3]

II. Regulatory Approach of the NetzDG

Against this background, the federal legislator passed the *Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken* (Act to Improve Legal Enforcement in Social Networks - NetzDG)[4] in 2017 and emphasized: "Providers of social networks have a responsibility for supporting a culture of debate in the society which they have to live up to."[5] To that effect, the NetzDG has introduced a right to demand information from platform operators in the event of violations of certain personal rights.[6] § 14 (3) of the Telemedia Act (*Telemediengesetz*, TMG) now reads as follows: "The service provider may (...), in individual cases, disclose information about his existing inventory data, provided that this is necessary for the enforcement of civil law claims regarding absolutely protected rights that have been violated by illegal contents covered under § 1 (3) [NetzDG]". The scope of the right to information has thus been extended.[7]

Above all, the NetzDG requires social network providers to assume greater responsibility in the combat against criminal content – this is the focus of the following analysis. The NetzDG obliges social network providers to observe a compliance system which is related to systemic failure in dealing with criminal content. Through the NetzDG, the legislator is thus making an expedient effort to ensure a network-compliant regulation.[8]

The NetzDG lays down various obligations for social network providers.

1. Obligations for Social Network Providers

The NetzDG lays down various obligations for social network providers. These providers are legally defined under § 1 (1) sentence 1 NetzDG as "telemedia service providers who, with the intention of making a profit, operate platforms on the Internet to enable users to share any content with other users or make it available to the public (social networks)". According to § 1 (1) sentence 2 NetzDG, platforms offering journalistically and editorially designed services for which the service provider is responsible", are not considered as social networks. Similarly, according to § 1 (1) sentence 3 NetzDG, platforms intended for individual communication or the dissemination of specific content are excluded from the scope of the law. The obligations established in §§ 2, 3 NetzDG do not apply to social networks with less than two million registered users in Germany (§ 1 (2) NetzDG).[9] Notwithstanding these limitations, the legal definition, according to its wording, does not only cover "classic" social networks but a variety of other services (such as YouTube).[10] At the same time, the legal definitions and criteria raise considerable delimitation difficulties. This applies in particular to the relationship between individual and mass communication (see, for example, the classification of Facebook Messenger).[11] For example, it should be clarified whether and to what extent so-called *Over The Top* (OTT) services are covered by the law's scope of application. This is because such OTT services (like WhatsApp or Skype) – in contrast to classic telecommunications services – can be used not only for individual communication.[12]

a) Complaint Management

The core of the NetzDG is dedicated to complaint management (§ 3 NetzDG). According to § 3 (1) sentence 1 NetzDG, the provider of a social network must maintain an effective and transparent mechanism for dealing with complaints about illegal content. For this purpose, the network operator must provide users with an easily recognisable, directly accessible and permanently available procedure for the communication of complaints (§ 3 (1) sentence 2 NetzDG).

An easily recognisable, directly accessible and permanently available procedure for the user constitutes the core of the Act.

Content is classified as "unlawful" if it constitutes one of the criminal offences listed in § 1 (3) NetzDG (e.g. insulting content according to § 185 StGB). According to the explanatory memorandum to the law, a culpable offence is not a prerequisite[13], but the intent of the user making the statement is certainly a prerequisite. However, the provider usually cannot independently establish such intent on the part of the (infringing) user, but can only assume it.[14] Irrespective of this, the following shall be included: "content owned by a social network (...) as well as content of others, i.e. content that has been posted by users without the social network having adopted the content as its own".[15]

Providers of a social network must immediately take note of a complaint about suspected illegal content – and examine the complaint (§ 3 (2) No. 1 NetzDG). Providers must remove or block access to an obviously unlawful content within 24 hours of receiving the complaint (§ 3 (2) No. 2 1. half-sentence NetzDG). These requirements shall not apply if the social network and the competent law enforcement authority have agreed upon a longer period of time for the deletion or blocking of obviously illegal content (§3 (2) No. 2 half-sentence 2 NetzDG).

According to the Legal Committee, the fact of obviously illegal content applies "if the illegality can be identified without in-depth examination, i.e. by trained personnel, usually immediately, but in any case within 24 hours and with reasonable effort. If doubts remain thereafter in fact or in law, no obvious infringement will be established (...)."[16]

Other illegal content must be removed or blocked immediately, usually within seven days (§ 3 (2) No. 3 NetzDG). This seven-day period may be exceeded if the decision on the unlawfulness of the content depends on the untruthfulness of a factual claim or relies recognisably on other factual circumstances (§ 3 (2) No. 3 lit. a NetzDG), or if the social network delegates the decision on illegality within seven days of receiving a complaint to a body of regulated self-regulation recognised in accordance with § 3 (6) to (8) NetzDG – i.e. to an independent and qualified verification and complaints body supported by social network providers or institutions, and submits to their decision.[17]

In order to protect the individual user, the NetzDG stipulates that the user concerned shall be informed if any of his or her content has been deleted or blocked (§ 3 Abs. 2 No. 5 NetzDG) or in the cases of § 3 (2) No. 3 lit. a NetzDG, the user may (i.e. does not have to) be given the opportunity to comment.[18] Furthermore, the user may also be entitled to contractual claims arising from the utilization agreement concluded with the social network provider.[19]

b) Mandatory Reporting

Pursuant to § 2 NetzDG, social network providers are subject to an extensive biannual reporting obligation on how they deal with complaints about illegal content (including procedures, criteria, number, organisational and personnel resources and reaction time.) A prerequisite for mandatory reporting is that the social network provider receives more than 100 complaints per calendar year.

Having received more than 100 complaints per calendar year, social network providers are subject to a biannual reporting obligation on how they deal with complaints.

c) Authorized Recipient

Pursuant to § 5 (1) sentence 1 NetzDG, providers of social networks must nominate a person authorized to receive requests for information in Germany and draw attention to this person on their platforms in an easily recognizable and directly accessible manner.[20] Furthermore, a domestic authorized recipient for receiving information requests from a domestic law enforcement authority shall be nominated. This authorised recipient is obliged to respond to such requests for information within 48 hours of their receipt.

d) Fines

Violations of certain obligations defined in §§ 2 to 4 NetzDG are subject to a fine (§ 4 NetzDG). Fines of up to 50 million Euros may be imposed. However, the imposition of fines is not linked to the reaction to a definite complaint, but sanctions a systemic failure to block or delete illegal content (§ 4 (1) No. 2 to 6 NetzDG). The blocking or deletion of legal content (linked to systemic failure) is not subject to sanctions.[21]

2. Compatibility with Union Law and Constitutional Law

The NetzDG has been controversially discussed before and after its adoption, especially with regard to European Union law and constitutional law.[23]

a) Union Law

In the legal literature, the NetzDG's conformity with Union law regarding the freedom of services (Art. 56 TFEU) – above all – the eCommerce Directive is questioned by various quarters.[24] This concerns especially a possible infringement of the country-of-origin principle codified in Art. 3 (2) e Commerce Directive, as well as Art. 4 eCommerce Directive.[25] It is argued that the setting of rigid deadlines is not compatible with Art. 14 (1) stipulating an immediate reaction upon notification.[26] According to this view, the NetzDG has been described as a "calculated Member State initiative in the area of politically acceptable provocation".[27] The opposing view considers that the NetzDG is in conformity with the eCommerce Directive.[28] The issue of conformity with European (?) Union law could certainly be defused by a corresponding amendment to the eCommerce Directive (see below under V.).

b) Constitutional Law

The obligations provided for in the NetzDG raise a number of constitutional questions, too.

aa) Formal Constitutionality

The NetzDG's formal constitutionality alone is a controversial issue. One view in the literature is based on the assumption that the Länder are responsible. Therefore, reference is made to the Länder's competence to regulate mass communication and to a competence ancillary to the broadcasting law ("Annexkompetenz).[29] In contrast, the opposing view affirms a federal competence with reference to business law (Art. 74 (1) No. 11 GG), public welfare, (Art. 74 (1) No. 7 GG) and criminal law (Art. 74 (1) No. 1 GG).[30] The NetzDG is interpreted primarily in terms of "civil law" and classified as the framing of compliance regulations.[31] The objection raised against this opinion is that not every regulation of proper business organisations is automatically capable of establishing federal competence.[32]

bb) Material Constitutionality

The issue of material constitutionality especially was and still is the focus of discussions about the NetzDG. In this respect, doubts are being raised whether the NetzDG respects the principle of legal certainty (for example with regard to "obviously unlawful content" or the provisions on fines)[33], the principle of distance from the state by involving a higher federal authority that is subject to instructions (Federal Office of Justice)[34], the principle of equal treatment[35], occupational freedom[36] and, in particular, the fundamental rights of communication.

The NetzDG is still being debated under the aspects of European Union law and constitutional law.

However, the legitimacy of the objectives of the NetzDG is hardly questioned, and rightly so.[37] It is correctly pointed out that "[social] networks nowadays play an essential role in public debates and (may) influence the mood in the country. Currently, the societal discourse in social [networks] reveals a massive change towards an aggressive, insulting and hateful culture of debate. However, the Internet is not a legal vacuum where hate crime may be spread.[38] The NetzDG is aimed at "improving law enforcement in social networks in order to remove objectively punishable contents without delay, including sedition, insult, defamation or disturbance of the public peace by feigning the commission of crimes".[39] In this respect and especially with regard to deletion figures, the law may prove to be a suitable and probably necessary instrument against mainly severe forms of hate criminality.[40]

(1) *Chilling Effects* and *Over-blocking*

Taking into account the multidimensional conflict(s) of fundamental rights in question – experts almost unanimously doubt whether the law is compatible with the freedom of communication; this applies in particular to the adequacy of complaint management.[41] The central point of criticism is the risk of emerging deterrent effects (*chilling effects*) and the excessive removal of legitimate content (over-blocking) at the expense of freedom of opinion, which is guaranteed as a fundamental and constitutional right.[42] This concern must indeed be taken seriously because the imposition of fines (up to 50 million Euros) is linked to the blocking or deletion of illegal content, but not to the non-deletion or non-blocking of legal content.[43] This can create an inherently stronger incentive for deletion than for non-deletion of reported content.[44] The extended deadline for "simple" illegal content will hardly provide a strong counterbalance to this[45] since seven days is a very short period for legal review.

It should be noted, however, that the risk of over-blocking manifests itself in the law only to a limited extent, if at all. Offences leading to a fine are linked to systemic failure only, but not to the erroneous deletion or blocking in the individual case.[46] Although the problem of being bound by a time limit is partly mitigated by the option of regulated self-regulation opened up by the law[47], the involvement of the parties (especially the complainant and the user) is, however, not provided for.[48] Anyhow, it is assumed that there may be a noticeable "self-censorship" on the part of users.[49] It should also be considered that providers of social networks may have an economic incentive to refrain from excessive deletion or blocking (see on the first biannual reports of providers under III.).[50]

(2) Social Networks as "Provisional Judges"

Furthermore, it was claimed, particularly in the legislative process, that social networks are assigned an additional substantial influence relevant to opinion-forming due to their obligation to delete and block unlawful content.[51] This could enable social networks to exert a considerable influence on communication on their platforms and become "provisional judges", as it were. This is because social networks as private providers must – on the basis and by standards of the NetzDG - evaluate the content under the aspect of criminal law, ascertain true and untrue facts and (moreover) distinguish them from opinions, and they have to distinguish obviously illegal from "simply" illegal content.[52]

Although this finding is correct at the starting point, the prominent position of private providers is by no means a novelty brought about by the NetzDG.[53] Platform operators have been obliged to check (also legally) and, if necessary, delete or block content reported to them in order to maintain the liability privilege in the course of intermediary liability (notice and take down or notice and stay down).[54] In the event of violated personal rights on rating portals, case law has given platforms a "moderator" role of the portal between the infringer and the injured party.[55]

As a result, even the NetzDG does not transfer to social networks any competence equivalent to that one of a judge for the (criminal) assessment of user content.[56] Nevertheless, every platform operator must ensure and exercise reasonable control over the content that can be retrieved on his platform.

The details of this responsibility result from the legal frameworks, which, apart from the NetzDG, so far, have also included the liability of "Störerhaftung" (Breach of Duty of Care).[57] Finally, it is correct that the position of users established in the NetzDG is, in fact, relatively weak; it is criticised that there is no obligation to hear the affected users.[58]

III. Previous Practice of the NetzDG

Initial press reports, publicity-effective complaints about deletions and the increase of personnel of social network providers suggested that a considerable amount of objectionable content was deleted or blocked upon the enactment of the NetzDG).[59] However, the Federal Office of Justice received comparatively few complaints (526) in the first half of 2018 – far fewer than feared or expected.[60]

Reliable statements on the number of complaints and the extent of deletions on social networks can now be obtained from the first obligatory biannual reports delivered by providers in accordance with §§ 2, 6 (1) NetzDG, which have been available since the end of July 2018 and are related to the first half of 2018.[61] According to these statements, Twitter received a total of 264,818 complaints from users while YouTube received 214,827 complaints from users or complaint bodies in the first half of 2018. Facebook - the central addressee in the legislative process – received (only) 886 complaints citing 1,704 specific contents. It is presumed that the relatively low number of complaints on Facebook is owing to the more complicated procedures for lodging complaints as well as the alternative possibility of reporting violations against Facebook's "community standards".[62] It is said that the latter reports have been delivered approximately 60,000 times in the first half of the year.[63] The Facebook "community standards" sanction certain content partially concurrent with the NetzDG. However, the differences between the standards and German law have become particularly clear in recent times when Mark Zuckerberg refused to delete Holocaust denials from Facebook.[64]

On Facebook, 218 of the complaints (approx. 25 per cent) resulted in a deletion or blocking of content; Twitter took action in 28,645 cases (approx. 11 per cent) and YouTube removed 58,297 items of content (approx. 27 per cent) on the basis of the NetzDG. Not surprisingly, the above figures are interpreted differently. While the extent of deletions is sometimes used as an evidence for over-blocking[65], others see the exact opposite confirmed [66]. The Federal Ministry of Justice and Consumer Protection (BMJV) had no findings in support of over-blocking, at least not by the end of March 2018.[67]

Initial deletion figures came out in July 2018. As expected, they are interpreted differently.

The quoted deletion rates of between 11 per cent and 27 per cent are probably only of limited use in underpinning concerns about general over-blocking. However, the published figures impressively illustrate the considerable number of complaints and cancellations – and thus the existence and significance of the phenomenon targeted by NetzDG. The reports also underline – as the BMJV has also emphasised – that the NetzDG leads to an improvement of complaint options, deletions and so-called content moderation as well as to a general (increased) investment in the fight against criminal content.[68]

IV. Discussion on the Amendment of the NetzDG

In view of the above-mentioned controversies, it is hardly surprising that there are discussions about an amendment to the NetzDG after less than a year following the entry into force – for which the first reports required by § 2 NetzDG could act as a catalyst.

1. Politics

The coalition agreement, too declares that the NetzDG should be amended.

Chancellor Angela Merkel did not rule out changes to the NetzDG as early as in February 2018.[69] The governing parties then concurrently declared in their coalition agreement: "The Network Enforcement Act is a correct and important step in the fight against hate crime and criminal statements in social networks. We will continue to ensure the protection of freedom of opinion and the personal rights of victims of hate crime and criminal statements. We will carefully evaluate the reports to be issued by platform operators and use them as an opportunity to further develop the Network Enforcement Act, especially with regard to voluntary self-regulation."[70] Along this line, Nadine Schön, deputy chairperson of the CDU/CSU parliamentary group, has emphasized – also and especially with regard to the deletion of obviously illegal content within 24 hours: "In principle, nothing is carved in stone".[71] Elisabeth Winkelmeier-Becker, legal policy spokesperson of the CDU/CSU parliamentary group in the Bundestag until 2019, adds: "the contractual rights of users, for example to complain about unauthorized deletions and blocking, as well as the instrument of voluntary self-regulation shall be strengthened."[72] Another pronouncement comes from Johannes Fecher, the legal policy spokesperson of the SPD parliamentary group in the Bundestag: "(...) [With regard to the NetzDG] there is no need for change. We will examine whether a right to demand the reinstatement of unjustly deleted content needs to be added."[73]

On the part of the opposition, various amendments have already been tabled in the Bundestag. While the AfD wants to see the NetzDG completely abolished[74], the FDP demands that the core elements of the NetzDG are repealed, i.e. the reporting obligation and complaint management (§§2 to 4). Only the definition of social networks and the obligation to appoint an authorised person for domestic service should be retained or extended, and the right to information should be limited to cases of "a serious violation of personal rights through criminal content."[75] Two MPs of the FDP parliamentary group have filed an appeal with the Administrative Court of Cologne seeking an incidental revision of NetzDG. [76] It is possible that the Administrative Court of Cologne will refer the NetzDG to the Federal Constitutional Court (abstract review of standards) or the ECJ (preliminary ruling procedure). DIE LINKE demands not only the repeal of extended information rights, but in particular the cancellation of § 3 (2) NetzDG. This would mean that providers of social networks have to maintain merely an effective and transparent procedure for dealing with complaints about illegal content.[77] BÜNDNIS 90/DIE GRÜNEN, on the other hand take a fundamentally positive view of the NetzDG and – with reference to their own initiative in the legislative process – are seeking (only) selective improvements.[78] Among other things, it is criticised that the deletion periods are too short and the user has no right to claim the reinstatement of deleted legitimate content.[79]

2. Literature

In the literature of jurisprudence, there are numerous suggestions for supplementing the NetzDG, a selection of which will be presented below. In order to counter the main points of material criticism (i.e. *chilling effects* and *over-blocking*), it is proposed to introduce more comprehensive binding guidelines for complaint management[80]; organisational and procedural measures were required to prevent excessive intervention.[81] In addition, it is also demanded that the incorrect treatment of legal content should be sanctioned (as well) in order to end the 'one-sided' consideration of illegal content by the NetzDG. [82] To strengthen the position

of the user, it is proposed to extend the obligation to provide information; this would mean especially to publish the decisions of providers in anonymised form.[83] With the same objective in mind, consideration is being given to improving interim legal protection against decisions by the providers.[84] Furthermore, it is planned to strengthen voluntary self-regulation or at least to improve the official procedure.[85] Following on from this, instead of an examination by the providers, it is proposed to introduce an examination by the State Media Authorities or by a (newly established) commission, by clearing houses or self-regulatory bodies which are independent of the providers in terms of organisation, facts and personnel and, if necessary, are subject to recognition and control by the State Media Authorities.[86]

V. Alternative Regulatory Approaches outside the NetzDG

Alternatively or cumulatively, further regulatory approaches aimed at the diversity of opinion in the digital age are being discussed which go fundamentally beyond the approach of the NetzDG and can only be touched upon here.

In particular, there is a call for providing the enforcement authorities with adequate staff and equipment in order to be able to counter the generally recognized enforcement deficit without using the providers of social networks.[87] In addition, it is proposed to improve options of civil proceedings with regard to interim legal protection by means of a "law enforcement portal" in favour of the victim.[88] Finally, it is considered to restrict the use of Social and/or Political Bots or at least to demand their labelling and to introduce a regulated use of algorithms (as far as services are relevant to opinion-forming).[89] Finally, it is considered to introduce a general clause in the Interstate Broadcasting Treaty (or in a follow-up treaty) in order to safeguard diversity.[90] Another open question is whether and to what extent social network providers will employ artificial intelligence applications to delete content in the future.[91]

There are further regulatory proposals at both European and federal level to guarantee freedom of expression in the digital age.

In March 2018 the European Commission recommended that – on a voluntary basis – measures should be taken to combat illegal content.[92] Subsequently, the European Commission had presented more far-reaching proposals with regard to fake news and digital disinformation. Special mention should be made of the proposal to draw up a Union-wide code of conduct for online platforms[93]. In early August the European Commission (apparently) moved away from a legal framework based on voluntary action. According to the EU's Commissioner for the Security Union, Sir Julian King, an obligation to immediately remove certain content (in particular terrorist content) and to use upload-filters is being examined.[94] This could also involve a revision of the eCommerce Directive (which could entail a change in the EU legal assessment framework for the NetzDG).[95] A draft law to this effect was announced for mid-September 2018. Irrespective of the concrete form it takes, it is thus becoming apparent that the regulatory approach of the NetzDG is generally meeting with increasing approval.

This trend is also illustrated by the draft law to combat information manipulation initiated by the French President Emmanuel Macron.

The proposal includes – in times of election campaigns – further transparency requirements and a judicial review of reported content within 48 hours.[96]

The most recent German legislative initiative in this context is the draft State Media Treaty that was proposed by the *Länder* as an enhanced version of the Interstate Broadcasting Treaty. The working draft also provides for (more) extensive regulation of intermediaries (such as social networks or search engines).[97]

VI. Recommendations for Action

The Legal Affairs Committee of the German Bundestag has announced it will deal with the NetzDG again after the summer break in 2018. It will have to be borne in mind that the formal constitutional and – depending on a possible amendment of the eCommerce Directive – the Union's objections against the NetzDG are severe and cannot easily be dispelled by selective amendments.[98]

Irrespective of this – and especially in view of the legitimate objectives of the NetzDG – several material supplements to the NetzDG should be considered in order to take account of the legal and, above all, material constitutional concerns (at least) at national level:

- The regulatory concept of complaint management should be reviewed. In particular, the sanctions regime should not unilaterally focus on dealing with illegal content. It is rather advisable to take a neutral approach to the question of whether procedures are in place to block or delete illegal content *and* to ensure that legal content is not deleted or blocked.

- As a flanking measure, the protection of users, in particular, could and should be strengthened: On the one hand, users should be given a (clarifying) right to claim the 'reinstatement' of erroneously deleted content. On the other hand, such a claim should be secured in conjunction with effective interim legal protection.

Reform proposals: The protection of users should be strengthened. Terms like "social network" are to be specified more clearly.

- From a technical legal point of view, the term "social network" – and thus the personal scope of application of the law – needs to be clarified more precisely. This requirement applies also and especially when contrasted with individual communication or with regard to opinion-forming services.99 For example, it should be clarified whether and to what extent so-called Over The Top (OTT) services are covered by the scope of application. This is because such OTT services (like WhatsApp or Skype) – in contrast to classic telecommunications services – can be used not only for individual communication.

- NetzDG reports of all social networks have to be evaluated carefully and in a contextualized manner. The deletion figures that have been reported so far should neither be prematurely interpreted as an indication of over-blocking nor of mass crimes committed in social networks. The figures reported by Facebook suggest a considerable significance of the platforms' own "community standards". Their formulation and permissibility – as well as the contractual rights of users in general – must be considered separately.

With the introduction of the NetzDG, Germany has taken on a pioneering role in combatting hate speech. However, it must be a cause for concern that in several countries the German approach has been cited as a general evidence of over-regulating the media and/or the process of opinion-forming.[100] Of course, such an image does not do justice to the NetzDG. Nevertheless, this perception of the law should not be neglected in the course of an amendment.

1 Statt vieler etwa Machill Das neue Gesicht der Öffentlichkeit, 2013. Zur damit verbundenen Kanalisierung (und Steuerung) von Meinung siehe nur Paal/Hennemann, FAZ v. 25.5.2016, S. 6 und dies, JZ 2017, 641 m. w. N.

2 Siehe nur Joint Research Centre der Europäische Kommission (Martens u. a.), The digital transformation of news media and the rise of disinformation and fake news, 2018, https://ec.europa.eu/jrc/sites/jrcsh/files/jrc111529.pdf [letzter Aufruf: 6.11.2018].

3 Siehe BGH NJW 2014, 2651 – Ärztebewertungsportal I.

4 Zum Gesetzgebungsverfahren etwa Liesching, in: Spindler/Schmitz/Liesching, TMG, 2. Aufl. 2018, § 1 NetzDG Rn. 1 ff.

5 Begr. NetzDG-E, BT-Drs. 18/12356, S. 9. Siehe auch die rechtspolitischen Positionspapiere der CDU/CSU-Fraktion „Diskussion statt Diffamierung – Aktionsplan zur Sicherung eines freiheitlich-demokratischen Diskurses in sozialen Medien" (24.1.2017) und der Fraktion Bündnis90/Die Grünen „Verantwortung, Freiheit und Recht im Netz" (13.1.2017).

6 Statt vieler Spindler GRUR 2018, 365, 372.

7 Zur (Un-)Vereinbarkeit des Ergänzungsvorschlags mit der Datenschutz-Grundverordnung Spindler, BITKOM Gutachten, 2017, S. 23 ff.

8 So Eifert, zit. nach Siefert MMR-Aktuell 2018, 406181.

9 Zur Definition des Nutzers siehe Begr. NetzDG-E, BT-Drs. 18/12356, S. 16.

10 Hierzu Feldmann K&R 2017, 292, 295 f. sowie Guggenberger ZRP 2017, 98, 98. Der Gesetzentwurf (BT-Drs. 18/12356, S. 2) geht von „höchstens zehn" sozialen Netzwerken aus.

11 Siehe Spindler GRUR 2018, 365, 367 f. sowie die (wohl) erste Entscheidung zum NetzDG LG Frankfurt BeckRS 2018, 9632 (hierzu Haisch/Engels GRUR-Prax 2018, 338) betreffend den Facebook Messenger.

12 Siehe hierzu LG Frankfurt BeckRS 2018, 9632.

13 Begr. NetzDG-E, BT-Drs. 18/12356, S. 20.

14 Siehe nur Guggenberger ZRP 2017, 98, 98 f.

15 Begr. NetzDG-E, BT-Drs. 18/12356, S. 19.

16 Begr. Rechtsausschuss, BT-Drs. 18/13013, S. 20.

17 Siehe hierzu nur Spindler GRUR 2018, 365, 370 f.

18 Vgl. Begr. NetzDG-E, BT-Drs. 18/12356, S. 21.

19 Zu der begrenzten Sanktionswirkung solcher Ansprüche Spindler GRUR 2018, 365, 367.

20 Zur (Un-)Vereinbarkeit mit dem Herkunftslandprinzip siehe nur Spindler GRUR 2018, 365, 372.

21 Näher Guggenberger ZRP 2017, 98, 99 f.

22 Vgl. ferner in Bezug auf Art. 19 Internationaler Pakt für bürgerliche und politische Rechte www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1-2017.pdf [letzter Aufruf: 6.11.2018].

23 Die Begr. zum NetzDG-E (BT-Drs. 18/12356, S. 11 ff., 19 f.) setzt sich ausführlich mit Verfassungs- und Unionsrechtskonformität auseinander und bejaht (wenig überraschend) beides.

24 Siehe zur Diskussion Liesching, in: Spindler/Schmitz/Liesching, TMG, 2. Aufl. 2018, § 1 NetzDG Rn. 13 ff. m. w. N.

25 Statt vieler Spindler GRUR 2018, 365, 367 ff.

26 FDP, BT-Drs. 19/204, S. 8.

27 So Eifert, zit. nach Siefert MMR-Aktuell 2018, 406181.

28 Schwartmann, Stellungnahme zum NetzDG-E (19.6.2017), S. 6 f; ders. GRUR-Prax, 317, 318 f. Siehe auch Höch K&R 2017, 289, 291 und Kubiciel jurisPR-StrafR/2017 Anm. 1.

29 Siehe zur Diskussion Liesching, in: Spindler/Schmitz/Liesching, TMG, 2. Aufl. 2018, § 1 NetzDG Rn. 10 ff. m. w. N. Siehe auch FDP, BT-Drs. 19/204, S. 8.

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31 Peifer AfP 2018, 14, 22; Schiff MMR 2018, 366, 366 f.

32 Spindler GRUR 2018, 365, 366.

33 Siehe nur Liesching MMR 2018, 26, 27. Hiergegen etwa Schiff MMR 2018, 366, 371.

34 Ladeur/Gostomzyk K&R 2017, 390, 393.

35 Siehe nur Liesching, in: Spindler/Schmitz/Liesching, TMG, 2. Aufl. 2018, § 1 NetzDG Rn. 35 ff.

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37 Zur Debatte etwa Müller-Franken AfP 2018 1, 1 und 3.

38 Begr. NetzDG-E, BT-Drs. 18/12356, S. 18.

39 Begr. NetzDG-E, BT-Drs. 18/12356, S. 9.

40 Zur Geeignetheit siehe etwa Wissenschaftlicher Dienst des Deutschen Bundestags, WD 10 – 3000 – 037/17, S. 11; zur Diskussion um die Erforderlichkeit siehe nur Müller-Franken AfP 2018, 1, 10. Siehe ebenso Schiff MMR 2018, 366, 370.

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43 Eine verfassungskonforme (erweiternde) Auslegung empfiehlt Schiff MMR 2018, 366, 369.

44 Siehe auch Papier NJW 2017, 3025, 3030.

45 In diesem Sinne Begr. NetzDG-E, BT-Drs. 18/12356, S. 21.

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57 Die Störerhaftung nach Maßgabe von §§ 862, 1004 BGB führt zu einer akzessorischen, eigenen Form von Verantwortlichkeit neben derjenigen von Täterschaft und Teilnahme; die verschuldungsunabhängige Haftungsfigur der Störerhaftung ist beschränkt auf Beseitigungs- und Unterlassungsansprüche.

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86 Gersdorf MMR 2017, 439; Müller-Franken, AfP 2018, 1, 10.

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89 Zu alledem Paal/Hennemann JZ 2017, 641, 651 m. w. N.

90 Hierzu Paal/Hennemann JZ 2017, 641, 652 sowie Paal, Gutachten Landesmedienanstalt Nordrhein-Westfalen, 2018.

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