

## NetzDG — a solution for online hate speech or a threat to free speech?

By Christian Honey

On January 1<sup>st</sup> 2018, a new law came into effect in Germany, with a monstrosity of a German title: the *Netzwerkdurchsetzungsgesetz* (NetzDG). This *Internet Enforcement Act*, to give a rough translation, was put forward in early 2017 by then minister of justice Heiko Maas — currently German foreign minister. The law is intended to address a supposed shortcoming in the enforcement of German internet law: existing laws, such as the *Telemediengesetz* or *Telemedia Act*, oblige social network providers to delete illegal content once they were made aware of them. However, according to Mr. Maas the main social network providers had failed to fulfil that duty.

Under German law, a range of public speech acts are illegal: certain insults, incitement to commit criminal acts (e.g. murder), incitement to hatred (e.g. against an ethnic minority), publicly denying the holocaust or using symbols and phrases of unconstitutional organisations (e.g. the Hitler salute) among others. Though the dissemination of fake news by journalists is in and of itself not punishable under German law, journalistic reporting can be illegal if it is deemed to intentionally infringe on the general right to privacy (*allgemeines Persönlichkeitsrecht*). Examples encompass cases of slander, defamation or personal insults. This „protection of honour“ extends to public authorities, legislative, political, administrative and religious bodies.

### Fines up to 50 million Euros

Now, under the NetzDG, the mere perception of such infringements could be sufficient to remove provocative but perfectly legal speech from the public eye. Operators of social networks with more than 2 Million subscribers are now obliged to delete "obviously punishable" posts within 24 hours after they were made aware of them. In less obvious cases the providers can use up to seven days to classify a reported post as illegal (or not) and then act accordingly. Moreover, social network providers must offer a comprehensive complaint management system to its users in order to implement the requirements of the NetzDG. They must also name a "domestic representative", i.e. a person to whom the authorities and those affected by illegal speech can turn to. And they are required to compile biannual reports about their complaint management practice. Social networks that fail to comply with these requirements face fines of up to 50 Million Euros.

During the months that lead up to the ratification of the NetzDG in parliament, considerable protest was leveled against the planned law. Critics feared serious consequences for the freedom of expression. Among those who warned about the potential ramifications were journalists associations such as *Reporters Without Borders* and the German federation of journalists *DJV*, but also business organisations, such as the *German Trade Association (HDE)* and lawyers' associations such as the *Deutscher Anwalt-Verein*.

"The NetzDG does not only affect private individuals, but also the freedom of the press," says Christian Mihr, managing director of the German branch of *Reporters Without Borders*, one of the signatories. "It poses the particular danger that journalistic reports deemed to be untrue

or offensive by a certain group of people are going to be reported on a massive scale and to be subsequently deleted from the networks, even if the facts are correct."

### **Doubt could be decisive**

On the 5<sup>th</sup> of April 2017 a collection of 28 organisations, including those mentioned above, published a *Declaration for the Freedom of Expression*, a document summarizing the main points of criticism: „The threat of high fines in connection with excessively short reaction periods increases the risk that platform operators may, in case of doubt, decide to the detriment of freedom of expression and to delete or block content that resides in the grey area of free speech. Moreover, the examination of the punishability or illegality of content regularly requires a close examination of the context and the intention of an utterance. This task must continue to be assumed by the courts.”

On the 1<sup>st</sup> of June 2017 the UN *Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* David Kaye also raised concerns about the compatibility of the NetzDG with international law. Citing Article 19 of the the Universal Declaration of Human Rights Kaye wrote: „The provisions imposing high fines for non-compliance with the obligations set out in the bill raise concerns, as these obligations as mentioned above may represent undue interference with the right to freedom of expression and privacy. The high fines raise proportionality concerns and may prompt social networks to remove content that may be lawful.”

A few days later, on the 12<sup>th</sup> of June, the scientific service to the German parliament published a report that called the NetzDG potentially unconstitutional. The Bundestag’s legal experts wrote: "The threat of a fine is [...] considered to constitute a chilling effect that may lead to legitimate statements being deleted for fear of sanctions."

### **Ironic tweet blocked**

Despite this wide range of criticism, the law was eventually passed by parliament with minor changes on the 30<sup>th</sup> of June 2017 and came into full effect on the 1st of January 2018. As if to prove the validity of the concerns, on that very day an obviously ironic tweet by German standup-comedian Sophie Passmann was blocked by Twitter with reference to the NetzDG. Only days later the account of the satirical magazine Titanic was affected. In a satirical tweet, the magazines editorial staff had put xenophobic words into mouth of right wing MEP Beatrix von Storch (AfD). A couple of hours later the magazines Twitter account was blocked. "Apparently, we violated the Twitter rules," says Tim Wolff, editor-in-chief of the magazine. "To get back access to our account, we were asked to delete the tweet." Instead, the editors reminded the Twitter support team that *Titanic* is a satirical magazin. Still, it took four more days until the account was activated again. Ironically, even an insulting tweet from a couple of years earlier by Heiko Maas himself was removed on the 8<sup>th</sup> of January.

Being private companies, decisions to delete have always been entirely in the hands of the social media platforms themselves. According to the NetzDG, social media providers have the opportunity join a body of regulated self-regulation with specialized auditors who can consult complex cases. However, they would have to fund such institutions themselves. And should they ever pass an "obvious" case to such an institution, and thereby miss the 24 hours

deadline, they could still incur a fine. So, from an economic point of view, it makes more sense simply to delete cases that are not obvious.

Still, Tim Wolff does not fundamentally reject the intention of the law. It is right to fight real hate speech, he says. However, in his view, the NetzDG does more harm than good, because the providers work under such high time pressure and with the threat of high penalties. "If someone makes a criminal statement, the public prosecutor should take action, not Twitter," says Wolff.

### **Police are badly equipped**

Indeed, even before the NetzDG social networks had been anything but lawless spaces in Germany. Today still, anyone can initiate criminal proceedings against a social network if it does not delete criminal content or the accounts of users who post such content. However, the German police is badly equipped to deal with criminal behavior on the internet, at least when it comes to speech acts. Most state police web sites do not even offer specialized sections for reporting illegal online activity. Implementing an easy and quick mechanism for referring social media posts to the courts would require specialized prosecutors and an overhaul of the technology used to process such referrals. In comparison, the NetzDG was a cheap and simple means for Mr. Maas to gain political capital.

Many law experts consider the NetzDG to be unconstitutional. Among them is Marc Liesching, Professor of Media Law and Media Theory at the HTWK Leipzig. "It is the responsibility of the state to enforce criminal law," says Liesching. "I consider the prediction confirmed, that social media platforms now tend to "overblock" he says. Yet, it would be hard to prove this observation in court: even if a post is reported according to NetzDG, it remains entirely unclear whether it was also blocked with reference to the NetzDG or due to community standards. Users have no means to find out, meaning that social media providers can always revert to the community standards in case their decisions are questioned. So, what can the affected citizens do?

In principle, anyone, who believes that their freedom of expression has been unduly restricted, can appeal directly to the German Constitutional Court. However, in the case of the NetzDG the law's "addressees" are not the citizens but the social networks themselves. Private individuals would therefore almost certainly be referred to the normal legal process. And here, a case would have to be very unusual to make its way through the tiers of the whole judicial system up to the German Constitutional Court. An unlikely scenario.

The social networks themselves could also sue the NetzDG before the Constitutional Court – but they would have to do so within the first year after the law came into effect, i.e. until the end of September 2018. Whether they will pursue this avenue is another question. After all, the NetzDG now offers a bulletproof excuse for reckless deletion.