May 2016

Comments of the Government of the Federal Republic of Germany on the "Comparative Study on Blocking, Filtering and Take-Down of Illegal Internet Content" by the "Swiss Institute of Comparative Law"

I. General Remarks:

The Federal Government attaches great importance to the protection of the freedom of the internet in Europe and beyond. Freedom of the internet is an essential prerequisite for democratic activity, interaction and participation of civil society in all countries today. While taking into account that effective measures and regulations for the prevention of abuse of the internet for criminal purposes are necessary, such legitimate considerations have to respect the overall importance of internet freedom and the rights deriving from it, such as the rights of freedom of expression and information.

The Federal Government has carefully studied the excerpt relating to Germany in the above-mentioned study (dated 21 July 2015) and comes to the conclusion that it does not always seem to adequately reflect the situation in Germany.

For instance, it states in several places that there is no legal basis for measures of blocking, filtering and taking down illegal internet content in Germany (e.g. p. 256, 257, 260, 271, 274). This does not take into account the law of the German Länder, e.g. the "Jugendmedienschutz-Staatsvertrag" and the "Rundfunkstaatsvertrag". In addition, a clearer distinction between measures against illegal content (see law of the Länder) and content violating IP law would be helpful.

With regard to the often used term "case law", and taking into account that Germany is a civil law jurisdiction, it seems to be advisable not to use the term "case law" from common law jurisdictions for decisions of German Courts. German Courts will decide in cases of disturbance liability on the basis of Section 1004 of the Civil Code (BGB) by filling out its vague legal concept.

Regarding the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Point 1.3., p. 258), the cited convention was ratified by Germany on 18 November 2015.

II. Selected specific comments:

Point 2.1. of the excerpt

It might be recommendable to integrate the most recent legal opinion of the Advocate General of the European Court of Justice regarding this case (dated 16 March 2016).

Point 2.2.3. of the excerpt (Criminal law)

German criminal law allows for the deprivation and destruction of publication media:
Section 74d of the German Criminal Code says the following: Written materials (for definition see Section 11 para. 3 of the German Criminal Code) of a content every intentional dissemination of which with knowledge of the content would fulfil the elements of a criminal provision, shall be subject to a deprivation order if at least one copy was disseminated through an unlawful act or was intended for such dissemination.

According to Section 11 para. 3 of the German Criminal Code, any data storage media are equivalent to written materials. Those media which are held by an internet service provider when offering its service (e.g. homepages) are also covered by this codification, as Section 11 para. 3 does not make any exception. As the report also mentioned, the German Federal Court of Justice emphasised that the hard disks of a server from which digitised photographs are uploaded to the internet are data storage media within the scope of Section 11 para. 3 of the German Criminal Code.[1] The same applies for other digital media (e.g. videos).

Dissemination is subject to the restrictions of Section 74d para. 2 of the German Criminal Code. It requires that the copies concerned are in the possession of persons involved in their dissemination or preparation. Involvement does not require that relevant persons be perpetrators or accomplices in the crime. It is sufficient that there is a narrow connection between these persons and the dissemination of the material. According to Section 74d para. 4 of the German Criminal Code, dissemination within this meaning shall also mean providing access to data storage media (Section 11 para. 3 of the German Criminal Code) by other means. Section 74d para. 2 only covers the dissemination of the hard copy (e.g. CD-ROM), not the distribution of the content. Providing public access to the content is covered by Section 74d para. 4 of the German Criminal Code.[2] Therefore, depending on the circumstances of the case, the internet service providers may be deemed to be involved in the dissemination of the illegal content, because they publish the content on the internet.

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[1] BGH, decision of 27. 6.2001 – 1 StR 66/01 –, BGHSt 47, page 55-62, margin number 28.
[2] MüKoStGB/Joecks StGB § 74d Rn. 10: “Entscheidend ist die Verbreitung der Substanz nach, nicht nur im Hinblick auf den Inhalt. Daher wird das öffentliche Zugänglichmachen allein des Inhalts erst über Abs. 4 oder Sonderregelungen erfasst.“

Finally, the cited court decision of Hamburg Regional Court (decision of 2.9.2013 – 629 Qs 34/13, footnote 113 of the Comparative Study) is not comparable to those cases which are addressed in the report. This decision does not concern illegal content published by an internet service provider, but data of a lawyer who published special documents concerning an ongoing criminal case on his homepage. But the published material in that case was not material whose dissemination would fulfil the elements of a criminal provision. So the preconditions of Section 74d para. 1 of the German Criminal Code were not met in this case of the Regional Court.[3] Therefore in that special case a deprivation order was not permitted.

Point 4 of the excerpt (Internet Complaint Office)

For clarification, the Internet Complaint Office should be described as a "single non-governmental contact point for internet users to report illegal and harmful content and activities online (particularly content related to youth media protection)" (rather than just a "website"). The Complaint Office is part of the German Safer Internet Centre which was initiated under the Safer Internet Programme of the European Union. The contact points within the Safer Internet network are an important tool in the fight against illegal internet content. The self-control mechanism on which the functioning of the Internet Complaint Office relies has proven its value in practice.

Point 5.1 of the excerpt:

It is established by the ECHR that its case law fulfils the requirement of "prescribed by law" (see e.g. Leyla Sahin v. TUR; D Buck v. Deutschland No. 41604/98).

[3] NJW 2013, S. 3458 ff., S. 3460, Punkt 2.a. – „Es handelt sich bei den Scans nicht um Schriften bzw. diesen gem. § 11 Absatz 3 StGB gleichgestellte Objekte, die einen solchen Inhalt haben, dass jede vorsätzliche Verbreitung in Kenntnis ihres Inhalts den Tatbestand eines Strafgesetzes verwirklichen würde."