

# FOLLOW-UP TO THE COMPARATIVE STUDY ON “BLOCKING, FILTERING AND TAKE-DOWN OF ILLEGAL INTERNET CONTENT”<sup>1</sup>

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## GERMANY

### 1. Introduction

While the 2015 report’s<sup>2</sup> analysis that there is **no specific (or direct) law** for measures of blocking, filtering and taking down illegal internet content in Germany still stands, a new law has substantially impacted both the national legislation on content-related measures and the discourse on them. The most important legal development regarding the blocking, filtering and taking down of illegal internet content in Germany in the period 2015-2018 was the entry into force, on 1 October 2017 (with key provisions in force only from 1 January 2018), of the **Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act, NetzDG)**.<sup>3</sup> The law incentivises telemedia services providers (social networks) to increasingly introduce measures of blocking, filtering and take-down of illegal content. It thus has only (but nevertheless a substantial) indirect impact on content on social networks and the way that filtering decisions are discussed in practice.<sup>4</sup>

Further developments in the treatment of access providers were introduced in the German legal order by judgments by the Federal Court of Justice (BGH) and by a new amendment to the **Telemedia Act (Telemediengesetz, TMG)**. The BGH confirmed, inter alia, that a *Störer* is anyone who contributes willingly and causally to a damage of protected legal interest and violates adequate **duties of care**. The BGH interpreted a newly worded **§ 7 (4) TMG** as a codified disturbance liability (**Störerhaftung**), when no alternative redress options were available for IP rights holders.<sup>5</sup>

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<sup>1</sup> This report covers developments in legislative framework and practice up until 30 April 2019.

<sup>2</sup> Swiss Institute of Comparative Law, <sup>[1]</sup>Blocking, Filtering and Take-down of Illegal Internet Content, Lausanne, Avis 14-067, 20 December 2015, section on Germany, 261-289, <https://www.coe.int/en/web/freedom-expression/study-filtering-blocking-and-take-down-of-illegal-content-on-the-internet> (hereinafter: “2015 report”). N.B.: When sources in footnotes have not changed, this report uses footnotes included in the 2015 report to ensure continuity. This report also contains summaries of sections of the 2015 report.

<sup>3</sup> Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG)/Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act), [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG\\_engl.pdf](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf).

<sup>4</sup> See infra, section 2.

<sup>5</sup> See infra, section 3.

The 2015 report's sections on **procedural aspects** of blocking, filtering and take-downs of illegal content, on **general internet monitoring**, and on the assessment of the national legal situation in light of the jurisprudence of the European Court of Human Rights (**ECtHR**) can remain largely without update.<sup>6</sup>

## 2. The Network Enforcement Act (NetzDG)

### 2.1. Key provisions in light of freedom of expression<sup>7</sup>

The key normative development in Germany since the last report that impacts blocking, filtering and take-down practices has been the adoption of the Network Enforcement Act. While an evaluation<sup>8</sup> of the European Commission's Code of Conduct on countering illegal online hate speech showed that IT companies removed 70% of hate speech notified to them within 24 hours, the German legislator saw the "debate culture on the net" to be "aggressive, hurtful and often hateful". In order to **better enforce laws in social networks** and as companies continue to delete "too few prohibited pieces of content," a new law to introduce "legal compliance rules of social networks" was considered necessary.<sup>9</sup>

Motivated by perceived failures of self-regulatory attempts to keep networks free from unlawful content, including hate speech,<sup>10</sup> the law applies to **profit-making telemedia services providers** that 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 (social networks)". Platforms offering journalistic or editorial content are not social networks within the meaning of the act, nor are platforms which are designed to enable individual communication or which are content-specific. Social network providers are only obliged to follow the NetzDG if they have at least two million registered users in Germany.<sup>11</sup>

The law includes a reporting obligation (§ 2 NetzDG) and the obligation to maintain an effective and transparent procedure for handling **complaints** (§ 3 NetzDG). The procedure must ensure that the lawfulness of a comment, with reference to certain provisions of the Strafgesetzbuch (German Criminal Code), is checked immediately (§ 1 (3) NetzDG) and that the network "removes or blocks access to content

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<sup>6</sup> See infra, section 4-6.

<sup>7</sup> This section draws from Matthias C. Kettemann, Balanced Briefing Materials for Multistakeholder Discussions: Network Enforcement Act, German Internet Governance Forum, 27 November 2018, Berlin (in German: [https://www.intgovforum-deutschland.org/uploads/2/6/8/1/26813832/igf-d\\_balanced\\_briefing\\_netzdg\\_%5Bd%5D.pdf](https://www.intgovforum-deutschland.org/uploads/2/6/8/1/26813832/igf-d_balanced_briefing_netzdg_%5Bd%5D.pdf)).

<sup>8</sup> European Commission, Countering illegal hate speech online – Commission initiative shows continued improvement, further platforms join, Brussels, 19 January 2018, [http://europa.eu/rapid/press-release-IP-18-261\\_en.htm](http://europa.eu/rapid/press-release-IP-18-261_en.htm).

<sup>9</sup> Proposal by the German government for the NetzDG, Gesetzesentwurf<sup>[1]</sup> der Bundesregierung, Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG), 1.

<sup>10</sup> According to the FAQs to the NetzDG: "Criminally punishable content is still not being deleted in sufficient quantities. In January/February 2017, the youth protection organisation "jugendschutz.net" monitored the deletion activities of social networks and concluded that user-flagged hate crime is still not dealt with quickly and effectively enough. While YouTube now deletes criminal content in 90% of cases, Facebook managed only 39%. At Twitter, only 1% of user reports resulted in deletion." (NetzDG, Questions and Answers, [https://www.bmjv.de/SharedDocs/FAQ/EN/NetzDG/NetzDG.html;jsessionid=427BBBA74BE4ABD36AA7D70BE1720B87.2\\_cid324](https://www.bmjv.de/SharedDocs/FAQ/EN/NetzDG/NetzDG.html;jsessionid=427BBBA74BE4ABD36AA7D70BE1720B87.2_cid324)).

<sup>11</sup> This means that smaller networks, professional networks, special-interest communities, online gaming platforms, one-to-one and one-to-many communication services and shopping websites are not covered by the new law.

that is **manifestly unlawful within 24 hours** of receiving the complaint” and all other (not manifestly) unlawful content “generally [...] within 7 days of receiving the complaint” (§ 3 (2) (2) and (3) NetzDG). § 4 NetzDG provides for regulatory fines in cases of violations of NetzDG provisions and § 5 obliges social networks to name a person in Germany authorised to be serviced with legal documents in court proceedings.

The NetzDG was adopted against the advice of most<sup>12</sup> (but not all<sup>13</sup>) experts, including the UN Special Rapporteur on Freedom of Expression,<sup>14</sup> and most civil society organizations,<sup>15</sup> in a fast-tracked legislative process before summer 2017. It entered into force on 1 October 2017 with key provisions in force from 1 January 2018.<sup>16</sup>

One key new duty that the law provides for a **reporting obligation** for social network providers that receive more than 100 complaints per calendar year about unlawful content (§ 2 (1)). The report must be in German, published twice a year, and include, inter alia, information on procedures for handling complaints, the number of complaints, the number of complaints that resulted in the deletion or blocking of the content, and the time between complaints being received and unlawful content being deleted or blocked (§ 2 (2)). In the **first reporting period**, Twitter<sup>17</sup> received around 264,000 complaints regarding content (of which 10% was blocked), YouTube<sup>18</sup> around 215,000 (blocking 27%) and Facebook<sup>19</sup> 1,704 (blocking 20%).<sup>20</sup> Therefore, supporters argue, there was obviously a need for the law. Critics, however, point to an evaluation<sup>21</sup> of the European Commission’s Code of Conduct on countering illegal online hate speech, which shows that, in the EU Member States, IT companies removed 70% of hate speech within 24 hours even without recourse to a NetzDG-like law.

All social network providers have to maintain “**effective and transparent procedure for handling complaints about unlawful content**” and supply users “with an easily recognisable, directly accessible and permanently available procedure for submitting complaints about unlawful content” (§ 3 (1)). In particular, as per § 3 (2), the procedures must ensure that the provider “takes immediate note of the complaint and checks whether the content reported in the complaint is unlawful and subject to removal or whether access to the content must be blocked”.

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<sup>12</sup> Cf. the references contained in *Peukert*, MMR 2018, 572, note 2, in particular *Guggenberger*, ZRP (2017), 98; *Nolte*, ZUM (2017), 552.

<sup>13</sup> Cf. *Schwartmann*, GRUR-Prax 2017, 317, 319; *Schiff*, MMR 2018, 366 ff.; *Magen*, VVDStRL 77 (2018), 67ff; *Roßnagel et al*, Das Netzwerkdurchsetzungsgesetz, *Forum Privatheit Policy Paper* (2018).

<sup>14</sup> Letter of the Special Rapporteur for freedom of opinion and expression to the German Ambassador at the United Nations in Geneva, OL DEU 1/2017.

<sup>15</sup> *Beckedahl*, Breites Bündnis stellt sich mit Deklaration für die Meinungsfreiheit gegen Hate-Speech-Gesetz, 11 April 2017, [Netzpolitik.org](http://Netzpolitik.org).

<sup>16</sup> Seen, for a concise overview, *Schulz*, *Regulating Intermediaries to Protect Privacy Online – the Case of the German NetzDG*, HIIG Discussion Paper Series 2018-01.

<sup>17</sup> Twitter, *Netzwerkdurchsetzungsgesetzbericht Januar-Juni 2018*, July 2018.

<sup>18</sup> Google, *Entfernungen von Inhalten aus YouTube auf der Grundlage des Netzwerkdurchsetzungsgesetzes*, July 2018.

<sup>19</sup> Facebook, *Netz-DG Transparenzbericht*, July 2018.

<sup>20</sup> *Beuth*, Netzwerkdurchsetzungsgesetz: Viele beschwerten sich über Hass, aber kaum etwas wird gesperrt, *Der Spiegel*, 27 July 2018.

<sup>21</sup> European Commission, *Countering illegal hate speech online – Commission initiative shows continued improvement, further platforms join*, Brussels, 19 January 2018.

The provider must remove or block access to “**manifestly unlawful**” content **within 24 hours** of receiving the complaint and to ‘**simply**’ unlawful content “**generally [...] within 7 days** of receiving the complaint” (§ 3 (2) (2) and (3)). In certain cases, the 7-day deadline can be extended when the decision on lawfulness depends on whether a factual allegation is true or false or if the social network refers the matter to a “recognised institution of regulated self-governance”, which is understood as an institution funded by social networks and approved by the Federal Office of Justice, and agrees to accept the decision of that institution. § 1 (3) lists the content that is “unlawful” within the meaning of the law. The definition encompasses several offenses under the German Criminal Code, including dissemination of propaganda material promoting unconstitutional organisations, incitement to hatred, defamation of religions and insult.<sup>22</sup>

The NetzDG also establishes a **right to disclosure**, implemented in §§ 14 and 15 TMG. Anyone whose personality rights are violated by the criminal offences covered by the new act can, as a rule, demand that the social network, after seeking a court order, disclose the details of the person that committed the alleged offence.

Social network providers systematically breaching obligations contained in the NetzDG, such as the obligation to remove unlawful content, can be punished with a **regulatory fine of up to 50 million euros**.<sup>23</sup> The administrative offence may be sanctioned even if they are not committed in the Federal Republic of Germany. The responsible authority is the Federal Office of Justice, which is directly subordinated to the Ministry of Justice.

These timeframes and the internal procedure for removing content have been the main points of **critique** in terms of freedom of expression that have been leveraged against the law by German commentators.<sup>24</sup> Both interfere with freedom of expression and sit uncomfortably with the 2018 Council of Europe Recommendation on roles and responsibilities of internet intermediaries.<sup>25</sup> The Recommendation encourages states to obtain “an order by a judicial authority or other independent administrative

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<sup>22</sup> This is the full list of prohibited (illegal) content (‘section’ refers to the StGB, Germany’s criminal code): Section 86 (Dissemination of propaganda material of unconstitutional organisations), Section 86a (Using symbols of unconstitutional organisations), Section 89a (Preparation of a serious violent offence endangering the state), Section 91 (Encouraging the commission of a serious violent offence endangering the state), Section 100a (Treasonous forgery), Section 111 (Public incitement to crime), Section 126 (Breach of the public peace by threatening to commit offences), Section 129 (Forming criminal organisations), Section 129a (Forming terrorist organisations), Section 129b (Criminal and terrorist organisations abroad), Section 130 (Incitement to hatred), Section 131 (Dissemination of depictions of violence), Section 140 (Rewarding and approving of offences), Section 166 (Defamation of religions, religious and ideological associations), Section 184b (Distribution, acquisition and possession of child pornography) in conjunction with section 184d (Distribution of pornographic performances by broadcasting, media services or telecommunications services), Sections 185 to 187 (Insult, malicious gossip, defamation), Section 201a (Violation of intimate privacy by taking photographs), Section 241 (Threatening the commission of a felony), and Section 269 (Forgery of data intended to provide proof).

<sup>23</sup> Cf. the Regulatory Fining Guidelines under the NetzDG, [https://www.bmjv.de/SharedDocs/Downloads/DE/Themen/Fokusthemen/NetzDG\\_Bu%C3%9Fgeldleitlinien\\_engl.pdf?blob=publicationFile&v=2](https://www.bmjv.de/SharedDocs/Downloads/DE/Themen/Fokusthemen/NetzDG_Bu%C3%9Fgeldleitlinien_engl.pdf?blob=publicationFile&v=2).

<sup>24</sup> For a critical approach, see *Peukert*, MMR 2018, 572, note 2, in particular *Guggenberger*, ZRP (2017), 98; *Nolte*, ZUM (2017), 552. For a positive assessment, see *Schwartmann*, GRUR-Prax 2017, 317, 319; *Schiff*, MMR 2018, 366 ff.; *Magen*, VVDStRL 77 (2018), 67ff; *Roßnagel* et al, Das Netzwerkdurchsetzungsgesetz, *Forum Privatheit Policy Paper* (2018).

<sup>25</sup> Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, adopted by the Committee of Ministers on 7 March 2018.

authority, whose decisions are subject to judicial review, when demanding intermediaries to restrict access to content.” By providing a list of offenses under the German Criminal Code according to which content must be removed or blocked, the German authorities are de facto demanding that intermediaries restrict access to content but do not provide for the necessary time for a legal challenge or appeal procedure. The Recommendation recognises as exceptions only “content that is illegal irrespective of context, such as content involving child sexual abuse material” and “cases where expedited measures are required in accordance with the conditions prescribed in Article 10 of the Convention”.<sup>26</sup>

Additionally, the Recommendation recommends (in 1.3.3.) that when “internet intermediaries restrict access to third-party content based on a State order, State authorities should ensure that effective redress mechanisms are made available and adhere to applicable procedural safeguards.” While the NetzDG does not provide for specific state orders, it can be seen as a **general ‘order’** for intermediaries to restrict access to certain content. However, there is no corresponding put-back mechanism in place. The NetzDG encourages increased general monitoring, since companies are obliged to delete certain illegal content within very limited timeframes. Under European law, national laws that in effect provide for de facto monitoring duties ex ante to stop the reappearance of ‘copies’ of the incriminated content are in violation of the liability exemptions for host providers contained under the E-Commerce Directive.<sup>27</sup> In an Austrian case, the Court of Justice of the EU (ECJ) has been asked to clarify what constitutes a copy and whether internet platforms must ensure that the same or effectively similar content is not uploaded.<sup>28</sup>

Forcing intermediaries to delete prima facie **‘illegal’ content** can be problematic under Article 10 of the Convention. The ECtHR generally gives freedom of expression a very high priority. Under established case law of the ECtHR, “freedom of expression constitutes one of the essential foundations for a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment”.<sup>29</sup> Even opinions that can “offend, shock or disturb”<sup>30</sup> are protected. In the cases *Yıldırım v. Turkey*<sup>31</sup> and *Cengiz and Others v. Turkey*<sup>32</sup> this approach was applied to the internet. As the Strasbourg court recalls in *Cengiz*, “the internet has now become one of the principal means by which individuals exercise their right to

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<sup>26</sup> Cf. Art. 10 (2) of the Convention: “The exercise of these freedoms [...] 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.”

<sup>27</sup> Cf. CJEU, *McFadden vs. Sony* (15 September 2016), C-484/14 (duties of access providers); CJEU, *SABAM v. Netlog NV* (16 February 2012), C-360/10 and *Scarlet v. SABAM* (24 November 2011) (no general monitoring duties for providers), C-70/10 and *L'Oréal/ebay* (12 July 2011), C-324/09 (some preventive duties for ‘non-active’ providers do not violate EU law).

<sup>28</sup> OGH, 6Ob116/17b, 25 October 2017, K&R 2018,144 – ‚miese Volksverräterin II‘: The questions run as follows: “1. Is it contrary to Article 15 [E-Commerce Directive] to order a host provider, which has not immediately removed unlawful information, not only to remove this illegal information within the meaning of Article 14 (1) (a) of the Directive, but also other information identical in terms of its wording [wortgleich]: a. worldwide? b. in the respective Member State? c. of the respective user worldwide? d. of the respective user in the respective Member State? 2. As far as question 1 was answered in the negative: Does this also apply to the information identical in terms of the content [sinngleich]? 3. Does this also apply to information identical in terms of content [sinngleich] as soon as the operator becomes aware of this fact?”

<sup>29</sup> ECtHR, *Stoll v. Switzerland* (10 December 2007), application No. 69698/01., para. 101.

<sup>30</sup> ECtHR, *Handyside v. UK* (7 December 1976), application No. 5493/72, para. 49.

<sup>31</sup> ECtHR, *Yıldırım v. Turkey* (18 December 2012), application No. 3111/10.

<sup>32</sup> ECtHR, *Cengiz and Others v. Turkey*, judgment of 1 December 2015, applications nos. 48226/10 and 14027/11.

freedom to receive and impart information and ideas, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest.”<sup>33</sup>

On the other hand, freedom of expression does not extend to statements and representations **prohibited under international law**.<sup>34</sup> These include calls for genocide, terrorism, serious discrimination in the form of violent hate speech and sexual exploitation of minors. Here intermediaries are obliged to become active on their own with the deletion of corresponding content under the ECtHR’s *Delfi* jurisprudence.<sup>35</sup> However, the list provided by the German legislator goes beyond statements and representations prohibited under *international law*.

Demanding a **pre-emptive filtering** system would alter the internet’s functionality and violate freedom of expression. In *Delfi v. Estonia*, the ECtHR decided that, with regard to the rights and interests of others and to society as a whole, state parties were allowed under certain conditions to hold intermediaries (in this case - an internet news portal) liable<sup>36</sup> and demand a certain form of de facto live screening of content to filter for obvious cases of illegality.

The *Delfi* conditions include that a commercial news portal is at issue; that the company did not immediately delete the incriminated comments (the company did so up to six weeks after their publication); that comments were clearly illegal by being, for instance, qualified as hate speech; and that the portal allowed the authors to remain anonymous. However, under the ECtHR’s approach to the intermediary liability regime, intermediaries fulfill the role of assessing, prima facie, whether a post is merely offensive (and then waiting for a “notice” or deleting on their own volition) or “in itself” already illegal (and to be deleted immediately). In *MTE and Index.hu ZRT v. Hungary* (2016), the ECtHR endorsed its approach, emphasizing that the “notice-and-takedown” procedures remained legitimate and sufficient unless the comments themselves were clearly unlawful.<sup>37</sup> In *Pihl v. Sweden* (2017)<sup>38</sup> the Court confirmed that the nature of the statement, the context, the size and commercial nature of the platform, their procedures for removing incriminated comments, the speed of the reaction, the possibility of direct liability of the actual author and the (financial) consequences of the national decision for the platform are relevant to the decision of whether human rights have been violated by non-removal.

In the NetzDG the size of the intermediary, the procedures for removing content and the difference between not manifestly and *manifestly* unlawful content is relevant. However, the *Delfi* template cannot be readily applied as it has introduced a category of content – ‘clearly illegal’ – which intermediaries need to delete immediately. The NetzDG thus provides for longer timeframes than the *Delfi* line of cases. However, the possible financial consequences for companies for failure to (systematically) delete illegal content are much higher than in *Delfi*.

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<sup>33</sup> Ibid., paras. 49.

<sup>34</sup> Cf. for this and the arguments of the following sections Matthias C. Kettemann and Wolfgang Benedek, Freedom of Expression Online, in Mart Susi (ed.), Human Rights, Digital Society and the Law: A Research Companion (Routledge 2019).

<sup>35</sup> ECtHR, *Delfi AS v. Estonia* (16 June 2015), application No. 64569/09.

<sup>36</sup> Ibid.

<sup>37</sup> ECtHR, *MTE and Index.hu ZRT v. Hungary* (2 February 2016), application No. 22947/13.

<sup>38</sup> ECtHR (3<sup>rd</sup> section), *Pihl v. Sweden* (7 February 2017), application No. 74742/14.

The NetzDG thus appears to interfere with the right to freedom of expression as protected by the Convention and by German constitutional law, in particular the Basic Law (Grundgesetz; GG).<sup>39</sup> In terms of constitutional law, supporters argue that the NetzDG does not pose new *illegitimate* interference with **Article 5 para. 1 GG (freedom of expression)**, as the NetzDG refers explicitly to *criminal* content, which is not protected by freedom of expression as protected in the Constitution. However, overblocking is likely to happen in light of the ‘affordances’ and incentive structure of the NetzDG. As Wolfgang Schulz puts it, the NetzDG “creates incentives for a rational intermediary to act in a way that makes it likely that freedom of speech suffers”.<sup>40</sup>

Critics argue that NetzDG **materially violates German constitutional law** by disproportionately interfering with the freedom of expression, the media freedoms and the freedom to conduct one’s business of social network providers. The substantial monitoring obligations and tight deletion/blocking schedules are viewed as disproportionate in light of Art 5 (1) GG. The NetzDG, critics say, also violates Art. 3 GG (equality before the law) because it treats social network providers differently than other media services providers and even among social network providers, regulation depends on how many users they have. This, critics find, amounts to discrimination. Supporters argue that using private actors to enforce public rules is a well-established legislative approach.

Three **applications** for the complete or partial **annulment** of the NetzDG are pending at the Bundestag from 2017.<sup>41</sup> They base their criticism inter alia on the speed of the parliamentary process, the dangers of overblocking, the one-sided nature of proceedings linked to deletions (where only companies have a standing as addressees of sanctions, but not individuals concerned). In 2018, the Green Party<sup>42</sup> added a fourth application in which it built on the critique discussed above to demand reinstatement procedures (put-back), proposals for the auditing and certification of complaints management systems of social networks and more user-friendly reporting standards and procedures.

In terms of **European law**, supporters argue that the NetzDG does not violate the free movement of services (Art 56. Treaty on the Functioning of the EU). It is an exception based on fundamental public policy interests. Certain interferences with **freedoms of movement** are necessary to fight against serious crime. This is generally respected under European law. Critics posit, rather, that the NetzDG interferes with the free movement of services. The obligation to name a domestic authorised recipient also seems to be problematic in light of **Art. 3 of the E-Commerce Directive (ECD)** and to hamper the freedom of establishment as laid down in the EU treaties. Supporters argue that social network providers within the EU fall under the exception of Art. 3 (4) a (i) of the ECD (legislation necessary to safeguard public policy). Furthermore, pursuant to Article 14 (3) of the ECD, Member States are allowed to establish “procedures

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<sup>39</sup> See Article 5 of the Basic Law on freedom of expression: “(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.”

<sup>40</sup> Schulz, *Regulating Intermediaries to Protect Privacy Online – the Case of the German NetzDG*, HIIG Discussion Paper Series 2018-01, 9.

<sup>41</sup> Entwurf eines Gesetzes zur Aufhebung des Netzwerkdurchsetzungsgesetzes v. 20.11.2017, BT-Drs. 19/81 (AfD); Entwurf eines Gesetzes zur Stärkung der Bürgerrechte (Bürgerrechtstärkungs-Gesetz – BüStärG) v. 8.12.2017, BT-Drs. 19/204 (FDP); Entwurf eines Gesetzes zur Teilaufhebung des Netzwerkdurchsetzungsgesetzes v. 11.12.2017, BT-Drs. 19/218 (DIE LINKE).

<sup>42</sup> Netzwerkdurchsetzungsgesetz weiterentwickeln – Nutzerrechte stärken, Meinungsfreiheit in sozialen Netzwerken sicherstellen v. 22.11.2018, BT-Drs. Drucksache 19/5950 (Bündnis 90 – Die Grünen).

governing the removal or disabling of access to information." Critics argue that Art. 3 of the ECD contains rules regarding the internal market and that the NetzDG violates the country of origin principle. Supporters point to Art. 14 ECD which contains a liability exception for hosting providers. They lose their privilege only if they do not react "expeditiously" once notified. Member states can substantiate the time frame within reason. Critics say that the purpose of the directive is to harmonize cross-border service provision in Europe and that different national time-frames run counter to this purpose.

## 2.2. Jurisprudence

On a number of occasions German courts have considered cases arising from deletions by social media companies (especially Facebook) under the NetzDG in 2018. In a 24 August 2018 decision the Higher Regional Court (OLG) Munich<sup>43</sup> decided that a contract between a user and Facebook is a contract "sui generis." Facebook's Declaration of Rights and Duties forms part of the **terms of service** (Allgemeine Geschäftsbedingungen, AGBs). These are (partially) invalid, insofar they substantially disadvantage the user contrary to good faith ("entgegen den Geboten von **Treu und Glauben** unangemessen benachteiligt"). In taking decisions on deleting content, Facebook has to take into account the right to freedom of expression (Art 5 (1) (1) GG). Allowing only Facebook to choose whether or not to delete content violates § 241 (2) German Civil Code (BGB), which demands "**mutual respect** for the rights and interests of both parties."<sup>44</sup> As Facebook is a "**public market place**" for information and opinion-sharing,<sup>45</sup> it has to ensure – via the construct of the "mittelbare Drittwirkung der Grundrechte" (indirect application to third parties of the fundamental rights protection guarantees) – that "zulässige Meinungsäußerungen" (admissible opinions) are not deleted.<sup>46</sup> The court recalled that the Federal Constitutional Court, BVerfG, found the GG to have established an "**objective order**" of **fundamental rights** which influences private law.<sup>47</sup> While companies have a right to police their platforms ("**virtuelles Hausrecht**"<sup>48</sup>), they cannot simply delete admissible content in an arbitrary manner and without giving remedies to the concerned parties.<sup>49</sup>

Applying the same approach to a more problematic statement, the OLG Dresden, in a decision of 8 August 2018,<sup>50</sup> concluded that social networks can prohibit hate speech that does not yet amount to a criminally punishable content pursuant to § 1 (2) NetzDG, as long as deletion is not performed arbitrarily and users are not barred from the service without recourse. Facebook as a "**quasi-monopoly**" has developed, the court argued, a private company offering a private space to share a "**public communicative space**". A

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<sup>43</sup> Higher Regional Court, Munich (OLG München), decision of 24 August 2018 (Beschluss vom 24.8.2018 – 18 W 1294/18 (LG München II), MMR 2018, 753, BeckRS 2018, 20659, NJW 2018, 3115, LSK 2018, 20659 (Ls.), MDR 2918, 1362).

<sup>44</sup> See also LG Frankfurt/M., decision of 14 May 2018, (Beschluss vom 14.5.2018 – 2-03 O 182/18 [= MMR 2018, 545]).

<sup>45</sup> OLG Frankfurt/M., judgment of 10 August 2017 (U. v. 10.8.2017 – 16 U 255/16 [= MMR 2018, 474]), at 28.

<sup>46</sup> Similarly, OLG München, decision of 17 July 2018 (Beschluss vom 17.7.2018 – 18 W 858/18 (LG München I)), BeckRS 2018, 17447, GRUR-Prax 2018, 477 (comments by Paetrick Sakowski), LSK 2018, 17447 (Ls.), MDR 2018, 1302.

<sup>47</sup> Cf. BVerfGE 73, 261, at 25; BVerfGE 7, 198, at 26.

<sup>48</sup> Cf. LG Bonn, judgment of 16 November 1999 (U. v. 16.11.1999 – 10 O 457/99 [= MMR 2000, 109]). However, intermediaries must have the right to delete uploaded content in order to avoid liability.

<sup>49</sup> Cf. LG Frankfurt/M., decision of 14 May 2018 (B. v. 14.5.2018 – 2-03 O 182/18 [= MMR 2018, 545]); LG Frankfurt/M., order of 19 July 2018 (B. v. 19.7.2018 – 2-03 O 265/18; LG Frankfurt/M., B. v. 23.7.2018 – 2-03 O 238/18); LG Frankfurt/M., decision of 7 August 2018 (B. v. 7.8.2018 – 2-03 O 285/189).

<sup>50</sup> OLG Dresden, decision of 8 August 2018 (Beschluss vom 8.8.2018 – 4 W 577/18 (LG Görlitz), MMR 2018, 756 BeckRS 2018, 18249, NJ 2018, 427, NJW 2018, 3111, LSK 2018, 18249 (Ls.), CR 2018, 590, WRP 2018, 1209).



private company, the court continued, that “takes over from the state to such a degree the framework of public communication” must also have the “concomittant duties the state as a provider of essential services used to have” (“Aufgaben der Daseinsvorsorge”). On the other hand, no social network must incur the danger of liability for user comments under the NetzDG or as a *Störer* (§§ 823 (1), 1004 (1) (2) BGB) and may take measures to stop the presence of hate speech even if it is not criminally punishable speech.<sup>51</sup>

### 3. Legal framework regarding blocking, filtering and take-down of illegal internet content

#### 3.1. Statutory legal basis for a claim

Other sources of legal obligations that indirectly impact blocking, filtering and take-down decisions by internet service providers are, as the 2015 report described, the Telemedia Act (TMG)<sup>52</sup> (with civil liability for Internet Service Providers), § 97 German Copyright Act (*Urhebergesetz, UrhG*),<sup>53</sup> §§ 14 *et seq.* German Trademark Act (*Markengesetz, MarkenG*)<sup>54</sup> and § 8 German Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb, UWG*)<sup>55</sup>. Regarding minors, the Interstate Treaty on Broadcasting and Telemedia (*Staatsvertrag für Rundfunk und Telemedien, RStV*)<sup>56</sup> and the Interstate Treaty on the Protection of Minors in the Media (*Jugendmedienschutzstaatsvertrag, JMStV*)<sup>57</sup> remain relevant.<sup>58</sup>

Developments regarding the legal situation for measures of blocking, filtering and take-down of illegal internet content have happened both by the adoption of the NetzDG and through amendments to the TMG. § 3 (2) (1) NetzDG obliges social networks to introduce procedures ensuring that they “take immediate note of the complaint and check whether the content reported in the complaint is unlawful and subject to removal or whether access to the content must be blocked.” This obligation has to be read in light of § 10 TMG, which obliges telemedia services providers to immediately block access or remove illegal content upon taking note of it. Even before the NetzDG anyone who had their personality rights violated could demand, based on a civil claim, that a telemedia services provider disclose the name of the person committing the offense. In the new wording, anyone whose personality rights were violated by an offence falling under the new law can demand that the social network concerned disclose who committed the offence. Under the new paras. 3-5 of § 14TMG operators of social networks are authorised to disclose the subscriber information of the infringer to the injured party after a court order on the permissibility of

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<sup>51</sup> Similarly, LG Frankfurt/M., order of 10 September 2018 (Beschluss vom 10.9.2018 – 2-03 O 310/18, MMR 2018, 770, BeckRS 2018, 21919, GRUR-Prax 2018, 478).

<sup>52</sup> §§ 7-10 German Telemedia Act (*Telemediengesetz, TMG*), available at <http://www.gesetze-im-Internet.de/tmg/index.html>.

<sup>53</sup> § 97 (1) German Copyright Act (*Urhebergesetz, UrhG*); available at <http://www.gesetze-im-Internet.de/urhg/index.html>.

<sup>54</sup> § 14 (4) (1) and (2), § 15 (4) (1) and (2) German Trademark Act (*Markengesetz, MarkenG*); available at <http://www.gesetze-im-Internet.de/markeng/index.html>.

<sup>55</sup> § 8 para. 1 ss. 1, 2 German Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb, UWG*), available at [http://www.gesetze-im-Internet.de/uwg\\_2004/index.html](http://www.gesetze-im-Internet.de/uwg_2004/index.html).

<sup>56</sup> § 59 (3) (1)-(2) and § 59 (4) Interstate Treaty on Broadcasting and Telemedia (*Staatsvertrag für Rundfunk und Telemedien, RStV*).

<sup>57</sup> German Commission for the Protection of Minors in the Media (*Kommission für Jugendmedienschutz, KJM*), Control procedures, available at <http://www.kjm-online.de/en/telemedia/control-procedures.html>.

<sup>58</sup> See 2015 report, 1.2.

such disclosure has been obtained.<sup>59</sup>

### 3.2. Disturbance liability

The 2015 report referred to two higher regional court (OLG) cases that had addressed the issue of *Störerhaftung* recently and had both **denied the respective access provider's responsibility**.<sup>60</sup> In late 2015, the BGH shed some light on its approach to the liability of access providers for third party content. As the 2015 report explained, the German *Störerhaftung* (disturbance liability) approach is not dogmatically well constructed but is used by courts to come to equitable solutions and avoid lacunae in the system of legal remedies.<sup>61</sup> In the BGH, I ZR 174/14 case an access provider was asked to disable access to a Russian-based filesharing platform. In the I ZR 3/14 procedure, the internet service provided collections of hyperlinks to share hosts that contained illegally downloadable protected works.

In both cases, the BGH confirmed that a *Störer* is anyone who contributes willingly and causally to the damaging (by someone else) of protected legal interest and, in so doing, violates adequate **duties of care** ("zumutbare Prüfpflichten").<sup>62</sup> Access providers may not be obliged to actively search for criminally punishable content they give access to.<sup>63</sup> They are, in any case, the subsidiary addressee of injunctions to be forced into action only when the actual host cannot be reached and legal protection would otherwise fail. However, in cases on operators of WLANs, the German courts added a new dimension to the concept of *Störerhaftung*.

### 3.3. WLAN operators

The 2015 report extensively discussed the liability of WLAN operators, particularly with regard to WLAN in hotels and coffee shops. The report correctly pointed out that courts have treated **WLAN operators as access providers**, as they were granting their guests access to the Internet via their WLAN.<sup>64</sup> In reaction to jurisprudential conflicts between previous liability rules contained in the TMG, and the ECJ 2016 ruling in *McFadden*<sup>65</sup>, the German legislator passed an **amendment to the TMG** limiting the liability of WLAN operators, which became effective in October 2017.

§ 8 (1) (2) of the TMG now excludes the liability of WLAN operators unless they voluntarily collaborate in committing unlawful acts. § 7 (4) (1), however, allows for injunctions against WLAN operators to block

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<sup>59</sup> Cf. § 14 TMG: "(3) Furthermore, the service provider may in individual cases disclose information about subscriber data within its possession, insofar as this is necessary for the enforcement of civil law claims arising from the violation of absolutely protected rights by unlawful content as defined in section 1 subsection (3) of the Network Enforcement Act.

(4) Before information is disclosed in accordance with subsection (3), a court order on the permissibility of such disclosure shall be obtained; this shall be requested by the injured party. Jurisdiction for issuing any such order shall lie with the regional court, regardless of the value of the claim. [...]"

<sup>60</sup> Higher Regional Court (OLG) Hamburg, judgment of 21 November 2013 – 5 U 68/10; OLG Köln, judgment of 18 July 2014 – 6 U 192/11 (*Goldesel*).

<sup>61</sup> Sascha Krämer, BGH: Access-Provider sind störende Nichtstörer, 16 February 2016, CR Online, <https://www.cr-online.de/blog/2016/02/16/bgh-access-provider-sind-stoerende-nichtstoerer>.

<sup>62</sup> BGH, I ZR 174/14, at 21.

<sup>63</sup> BGH, I ZR 174/14, Rz. 26 f.

<sup>64</sup> BGH, I ZR 121/08 (*Sommer unseres Lebens*); Regional Court (*Landgericht*, LG) Frankfurt a.M., judgment of 18 August 2010 – 2-06 S 19/09; LG Hamburg, judgment of 25 November 2010 – 310 O 433/10.

<sup>65</sup> CJEU, judgment of 15 September 2016, C-484-14 – *McFadden/Sony Music Entertainment*.

access to certain sites. The exact obligations of WLAN providers were developed by the BGH in the 2018 *Dead Island* case.<sup>66</sup> The BGH decided that the operator of a Tor exit node can no longer be considered a *Störer* under § 8 (1) (2) TMG with regard to the IP rights violations committed by users of his connection, but can be the **addressee of injunctions** under § 7 (4) TMG, if there are no other options available for the aggrieved party. In effect, this amounts to a legally codified *Störerhaftung* with regard to IP-related claims against telemedia services providers.

### 3.4. Hyperlinks

In a 2017 case, the BGH also clarified the responsibilities of search engine providers in light of the *Svensson* and *GS Media* cases,<sup>67</sup> and followed-up on its jurisprudence on links.<sup>68</sup> Since the ECJ's 2014 *Svensson*<sup>69</sup> decision we have known that **setting a link is not by itself an act relevant under IP law**. In *GS Media*,<sup>70</sup> the ECJ supplemented this principle by establishing a reversible assumption, namely if linked content has been made public without the consent of the copyright holder, it depends essentially on whether the link-setter knew or should have known about the illegality. If the link is provided in a commercial context, knowledge of illegality is presumed. This presumption, the BGH argued in *Vorschaubilder III*, does not hold true for search engines because of the special nature of Internet search services for the functioning of the Internet. A search provider cannot be expected to verify that images found by using its algorithms have been lawfully posted.

## 4. Procedural Aspects

As in 2015, **no specific procedural rules on blocking, filtering or taking down illegal internet content at the federal level** exist. As outlined in section 2.1 of this report, the NetzDG has, however, introduced certain administrative procedures for installing fines and ensuing appeal procedures.

## 5. General monitoring of the internet

The legal assessment of the 2015 report regarding the role of the **Federal Criminal Police Office (Bundeskriminalamt, BKA)** acting as a **Central Authority for Event-unrelated Research in Data Networks (Zentralstelle für anlassunabhängige Recherchen in Datennetzen, ZaRD)** has not changed. It is still the competent authority for monitoring internet content. Its principal responsibility remains, however, **to detect criminal offences**. The **Internet Complaint Office (Internet-Beschwerdestelle)** continues to function 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).

## 6. Assessment as to compatibility with the case law of the European Court of Human Rights

The assessment of the 2015 report still holds, however in 2018 German courts started to develop nuanced

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<sup>66</sup> BGH, judgment of 26 July 2018 - I ZR 64/17 - *Dead Island*.

<sup>67</sup> BGH, judgment of 21 September 2017 – I ZR 11/16 – *Vorschaubilder III*).

<sup>68</sup> BGH, judgment of 18 June 2015 - I ZR 74/14, BGHZ 206, 103, at 24 f. - Haftung für Hyperlinks.

<sup>69</sup> ECJ, judgment of 13 February 2014 – C-466/12, *Svensson/Retriever Sverige*.

<sup>70</sup> ECJ, judgment of 8 September 2016 - C-160/15 *GS Media/Sanoma et al.*, at 32-34.

jurisprudence on the NetzDG.<sup>71</sup> In that jurisprudence, they regularly cite ECtHR case law. It is particularly interesting to note that limits to prohibiting hate speech (in light of freedom of expression) which are applicable to private parties providing important communicative networks are judged under the principles of Strasbourg's jurisprudence. **Prohibitions of hate speech are allowed** when rights of others are substantially implicated.<sup>72</sup> In that the German courts have recognized the importance of an interpretational concordance between the right to freedom of expression and private life, when hateful speech is concerned.<sup>73</sup> This has led courts to allow social network providers to prohibit, after a non-arbitrary internal process, certain statements that do not contribute to a forum where all users can enjoy their rights, even when these statements have not yet reached the level of prohibited content and may engage the providers' direct liability.

## 7. Summary

The NetzDG influences filtering practices of social networks, and the public discourse on the importance of blocking and filtering in cases of criminally punishable content. The law incentivises telemedia services providers (social networks) to increasingly introduce these measures. The NetzDG is also evidence of a larger trend, in German legislation as in international normative approaches, to treat internet intermediaries as multifaceted platforms uniting elements of host/access providers and providers of online communicative spaces that are important for exercising freedom of expression. The more important they are, the more duties become incumbent upon them. Legal developments in Germany over the reporting period have confirmed, for instance, that intermediaries cannot arbitrarily suspend users and that their terms of service can be measured against national fundamental rights guarantees.<sup>74</sup> While two BGH judgments and a change to the Telemedia Act clarified the uniquely German concept of disturbance liability, the future of the NetzDG is uncertain in light of four applications in the Bundestag to change the law.

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<sup>71</sup> See above, section 2.2.

<sup>72</sup> Recently: ECtHR, *Magyar Tartalomszolgáltatók Egyesülete u. Index.hu Zrt/Hungary* (hate speech in comment section of Internet service provider); *Delfi/Estonia* (hate speech in Internet news portals).

<sup>73</sup> See above, section 2.2.

<sup>74</sup> Jamila Venturini et al., *Terms of service and human rights: an analysis of online platform contracts* (Rio de Janeiro, 2016).