WE ARE SHAPING THE INTERNET.
YESTERDAY.TODAY.BEYOND TOMORROW.

eco

STATEMENT

on the notification of the German draft act on adding an obligation to hand out information for research in the Network Enforcement Act (2021/45/D)

Brussels, 24 March 2021

On 28 of January, the Federal Republic of Germany submitted to the European Commission for notification a draft act to add an obligation to hand out information for scientific research in the Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG), filed under number 2021/45/D.

During the last years the German Federal Ministry of Justice and Consumer Protection (BMJV) has presented two draft acts to extend the NetzDG and to strengthen its application. In December 2019, the BMJV submitted a draft act on combating right-wing extremism and hate crime. A few weeks later, the BMJV published a draft act to amend the NetzDG. Both drafts are accompanied by significant adjustments in the area of reporting obligations and about the handling of illegal content as well as the integration of new procedures e.g. out-of-court-procedures for the review of deleted content. eco – Association of the Internet Industry has expressed significant concerns about the notification of both draft acts. The now submitted draft act was intended to add a further obligation to the social network operators to hand out information about the emergence, assessment and containment of illegal content on their platforms for scientific research.

The now submitted draft act for notification could not be discussed at national level with the involved network operators, the civil society and interested associations. eco would like to introduce its aspects in this way. In general, eco shares the demand of secured research on the detection, dissemination and containment of illegal content on the Internet. However, attention should be drawn to the following issues with regard to the notified draft act:

- **Information obligation leads to the disclosure of business secrets**
- **Disclosure of personal data due to the information obligation**
- **Country-of-origin principle not taken into account**
- **Current legal developments at EU level**

In general, there are considerable concerns about the new reform project of the NetzDG from the perspective of the concerned companies. The planned information obligation for social network operators to inform scientific researchers or research institutions about deleted or blocked content from the complaint process has as a result the interventions in property and data protection law. Likewise, the country-of-origin principle is ignored, as well as planned regulatory projects in this field at the European level. In order to prevent the Internal Market from becoming fragmented with respect to existing legislation, the EU Commission is called upon to observe this.

- **Information obligation leads to the disclosure of business secrets**

In accordance to Art. 5a (2) NetzDG scientific research institutes may request information from the social network operators on the use and concrete workings of automated procedures for detecting content to be removed or blocked, in particular the nature and extent of the technologies used and the purposes, criteria and parameters for programming such procedures.

The Federal Republic of Germany creates by Art. 5 (2) NetzDG an information obligation for social network operators that concerns sensitive data such as business secrets. The provision violates Art. 17 right of property of the Charter of Fundamental Rights of the European Union (2012/C 326/02). The right of property may be restricted for reasons of public interest, and in cases and under the conditions provided by law, subject to fair compensation. Intellectual property shall also be protected.

Automated procedures for detecting content on platforms are usually the social network operators' own developments. In other words, they are the intellectual property of the companies. Already in the draft act to amend the NetzDG a similar formulation in the course of extending the reporting obligations for social network operators has been criticized with reference to business secrets and intellectual property. With reference to established jurisdiction, a public interest to restrict the right of property cloud be assume to serve public security either defense, or to protect international relations, financial, monetary or economic policy.

In the reasons of the notified draft act the Federal Republic of Germany refers to a judgement of the German Federal Constitutional Court from May 2019 and the paramount importance of social networks for modern communication. The judgement was issued in connection to politically intended communication to the election campaign for the European Parliament. Taking into account the insights on digital election advertising, election interference and the accompanying discussions that have been achieved since then, the permanence of the judgement could be doubt. Finally, no public interest can be identified in this context, which would restrict the protection of intellectual property. The obligation to submit a security concept by the scientific institutions appears equally doubtful. A security concept is not a suitable measure to protect business secrets or intellectual property of the economy.

- **Disclosure of personal data due to the information obligation**

Based on Art. 5a (2) NetzDG, the operators of social networks are obliged to disclose information about deleted or blocked content from the complaint procedure. For disclosing information, the following personal data may be released to the researchers: distributed content in case they contain personal data (e.g. as names), complaints about illegal content in case they contain personal data (e.g. name of complainant, name of third parties, name of uploader), user names that

distributed the content and information about possible interaction of the users involved.

In the further course of the provision, the legislator requires a description of the technical and organizational measures for the protection of personal data by a security concept of the scientific researchers. Such a protective measure cloud generally welcome, although it has not been conclusively clarified whether the disclosure of user-specific information - i.e. personal data - complies with the requirements of the General Data Protection Regulation (GDPR). The Federal Republic of Germany refers to Article 9 of GDPR but the exception isn´t described in detail. In order to ensure a legally secure application of the new provision, the Federal Republic of Germany must take improvements in this context.

The scientific researchers are obliged to use anonyms or pseudonyms of the personal data, if this would not risk the research purpose. However, the German legislator does not specify the circumstances in which anonyms or pseudonym of personal data would pose a risk. In order to avoid possible misuse, the reasons for anonymization or pseudonymization of personal data should be specified in more detail. An addition to the existing rule the Federal Republic of Germany should clarify in which situations a risk to the research purpose could be assumed and how a balance of interests between the research purpose and the protection of personal data can be achieved e.g. partial anonymization of the personal data.

- **Country-of-origin principle not taken into account**

In the previous reforms of the NetzDG, the violation of the country-of-origin principle has been criticized many times. This criticism is still valid today. With the additional information obligation of the operators of social networks towards scientific researchers or research institutions, the country of origin principle of Art. 3 and Rec. 22 of the E-Commerce Directive is once again disregarded.

The German legislator ignores the fact that the exception to the country-of-origin-principle provided in the E-Commerce Directive does not allow a general or blanket answer for national measures that affect a wide range of service providers. The existing exception was created in order to assess and resolve individual cases. If the German example sets a precedent this could, in consequence, lead to a fragmentation in the Internal Market.

- **Current legal developments at EU level**

By the notified drat act the Federal Republic of Germany is attempting a further regulatory unilateral effort in Europe. Example of similar or conflicting efforts at the European level relate to the proposed draft of the Digital Services Act, the Code of Conduct on countering illegal hate speech and the measures followed by the EU Democracy Action Plan.

During the last few years, the European Commission has always pointed out that a uniform legal approach will be the best solution. For example Decision of the European Commission to the French legislative procedure for combating hate-based content or the German legislative procedure for combating right-wing extremism and hate crime. In December 2020, the European Commission published its draft for the Digital Services Act including revised liability requirements. In Addition, the European Commission has published the European Democracy Action Plan.

The Federal Republic of Germany does not consider the principle of loyal cooperation set out in Art. 4 (3) of the Treaty of the European Union (2010/C83/01). With the Treaty, the Member States have the obligation to support and respect each other in order to carry out the tasks of the European Treaties. The European Commission should raise the concerns and submit the complaints regarding the draft act submitted for notification. Finally, any expansion of the NetzDG contributes to a legal disintegration of the Internal Market.

- **Conclusion**

eco is committed to the fight against illegal content and supports the fight against illegal content online. We also welcome the scientific processing of illegal content online, although it should be pointed out that this processing should be legally secure for social network operators and take into account central questions such as compliance with data protection.

As already described at the beginning, the notified draft act has not been discussed at national level with interested stakeholders. From the point of view of the companies concerned, there is a need of improvements in numerous areas of the draft, also in order to adequately take into account the requirements of European law.

With the introduction of the NetzDG in 2017, the legislator promised an evaluation of the law and its effects. Two draft acts to complement and amend the NetzDG were presented in the past one and a half years, the promised evaluation of the law was presented last summer. Some recommendations of the evaluation have already been implemented with the preceding reforms. The notified draft act to add an information obligation for the operators of social networks towards scientific researchers is not based on a recommendation.

The recent draft act to amend the NetzDG disregards various European legal provisions, such as the right of property, the GDPR and the country-of-origin principle laid down in the E-Commerce Directive. The EU Commission has proposed several measures to tackle illegal content in the internet with the Digital Services Act and the Action Plan for Democracy. From the European perspective, it is

unacceptable that the Federal Republic of Germany uses an exception in the E-Commerce Directive as a permanent solution to handle potentially illegal content.

The draft act must also be critically examined in the light of European fundamental rights. According to the assessment of the operators of social networks, the obligation to edit information to scientific researchers creates a legal basis for the disclosure of business secrets - in some cases intellectual property - of the companies. This would be a significant violation of Art. 17 of the Charter of Fundamental Rights of the European Union. Taking into account the applicable fines laid down in the NetzDG, the Federal Republic of Germany should ensure that the notified draft act is designed in a legally secure as well as proportionate manner and taking into account applicable legal provisions.

About eco

With more than 1,100 member companies, eco is the largest Internet industry association in Europe. Since 1995, eco has been instrumental in shaping the Internet, fostering new technologies, forming framework conditions, and representing the interests of members in politics and international committees. The focal points of the association are the reliability and strengthening of digital infrastructure, IT security, trust, and ethically-oriented digitalisation. That is why eco advocates for a free, technology-neutral, and high-performance Internet.