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STATEMENT

on the notification of the German draft act on amending the Network Enforcement Act (2020/174/D)

Brussels, 22nd May 2020

On 30th of March 2020, the Federal Republic of Germany submitted to the European Commission for notification a draft act to amend the Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG), filed under number 2020/174/D.

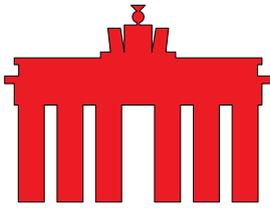
The German Federal Ministry of Justice and Consumer Protection (Bundesministerium des Justiz und für Verbraucherschutz, BMJV) presented a first draft of the act in January 2020. The draft was intended to strengthen the existing regulations to increase user-friendliness in the complaint procedure and the reporting obligations of social network operators. In addition, the draft act also contains regulations to create out-of-court procedures for disputes between social network operators, complainants and users, as well as provisions for the proportional transposition of the European Audiovisual Media Services Directive ((EU) 2018/1808) into national law.

In February 2020, eco – Association of the Internet Industry expressed several concerns regarding the first draft act. In general, it is questionable whether it makes sense for the legal basis under discussion to be revised in two separate legislative procedures within a few weeks of each other. This makes it even more difficult to assess the interaction of both procedures and the consequences for the social network operators. As a result of the amendments, the draft act causes considerable legal uncertainties for the operators of social networks. Finally, the draft act anticipates current legal developments at European level.

While the draft act was revised in some aspects prior to the submission for notification, attention should be drawn to the following issues criticized by eco with regard to the notified draft act:

- The disregard of the liability regime under the E-Commerce Directive
- The establishment of out-of-court procedures
- The unequal treatment of social network operators and video-sharing platform services
- The national implementation of regulations in contradiction to the requirements of the Audiovisual Media Services Directive
- The country-of-origin principle not taken into account
- Current legal developments at EU level

In summary, essential points of the proposed legislation raise considerable questions concerning the Charter of Fundamental Rights of the European Union (2012/C326/02) and the compatibility with European law, such as the E-Commerce Directive (2000/31/EC) and the Audiovisual Media Services Directive (AVMSD), which require critical consideration.



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Disregard of the liability regime under the E-Commerce Directive

The planned amendment of Section 2 (2) NetzDG gives the impression that social network operators are obliged to use an automatic content recognition system and automated filtering. This development contradicts further requirements of European law, in particular the existing liability regime. According to Art. 14 E-Commerce Directive, service providers are obliged to act if it can be ascertained that a user has published illegal content. However, the NetzDG obliges service providers to act without any suspicion.

In addition, according to European law, service providers are not obliged to proactively search for illegal content. The NetzDG, on the other hand, implies such an obligation for social network operators and obliges them to release content and user data without any concrete encroachment. Therefore, the NetzDG violates Art. 15 E-Commerce Directive.

Establishment of out-of-court procedures

Section 3b NetzDG creates the obligation for the social network operators to introduce out-of-court procedures. In the so-called “counter response procedure”, blocked or deleted content resulting from the existing complaint procedure should be reviewed again on the request of the publishing user or the complainant.

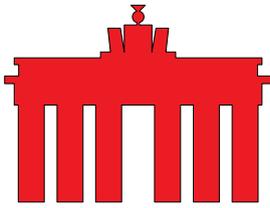
The proportionality of the obligation to introduce counter response procedures appears questionable. Art. 14 (3) E-Commerce Directive leaves to Member States the possibility “of establishing procedures governing the removal or disabling of access to information”. However, these regulations are not to impair the functioning of the Single Market.

Unequal treatment of social network operators and video-sharing platforms services

The draft act submitted for notification creates different legal provisions for social network operators (Section 1 to 3c NetzDG) and for video-sharing platform services (Section 3d to 3f NetzDG) as defined by the AVMSD for the handling of allegedly illegal content. In the light of the E-Commerce Directive, the legitimacy of the differentiation appears questionable. Both market participants are service providers as defined by the E-Commerce Directive. In conclusion, unequal treatment seems not to be permissible.

National implementation of regulations in contradiction to the requirements of the AVMSD

Section 3e NetzDG clarifies which provisions of the NetzDG apply to video-sharing platform services. The legislator also prescribes that video-sharing platform services are subject to supervision by the Federal Office of Justice in Germany. The Federal Office of Justice has been established as a federal authority in accordance of Article 87 (3) of German constitution (Grundgesetz, GG). The autonomy of the authority presupposed in Article 87 (3) GG refers to the autonomous organizational structure of the institution and not to the autonomy or independence of its capacity to act. Furthermore, the Federal Office of Justice is not a legal entity. In its position as federal authority, it is subordinate to the BMJV



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and the government. The supervisory structure designed for video-sharing platform services violates the AVMSD requirements.

In accordance to Art. 28b (5) AVMSD, the Member States are responsible for maintaining the appropriateness of the measures of a national authority covered by Art. 28b (3). The Directive also points out that the national authority should act legally independently of and functionally separately from the government. The legal distance between the government and the national authority required by the AVMSD is not maintained with the supervisory structure created in the NetzDG. With the partial implementation of the AVMSD into national law in course of the amendments of the NetzDG, the legislator intends to create a supervisory structure of video-sharing platform services which violates the requirements of the European Directive.

Country-of-origin principle not taken into account

Doubts regarding the conflict of the NetzDG with European law cannot be resolved with this draft act. Rather, the draft act will further strengthen the existing doubts. The newly-created reporting obligation does not respect the country-of-origin-principle under Art. 3 and Rec. 22 of the E-Commerce Directive.

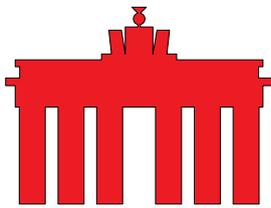
The German legislator ignores the fact that the exception to the country-of-origin-principle provided in the E-Commerce Directive does not allow a general or blanket answer for national measures which affect a wide range of service providers. The existing exception was created in order to assess and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

Current legal developments at EU level

Subsequent to the draft act on combating right-wing extremism and hate crime, the Federal Republic of Germany is attempting a further unilateral regulatory effort in Europe. Examples of similar or conflicting efforts at the European level relate to the proposed E-Evidence Regulation, the Terrorist Content Online Regulation, the announced Digital Services Act and the Code of Conduct on countering illegal hate speech.

Even before the notification of the current German draft act to the EU Commission, the latter commented on the notification of the French legislative procedure for combating hate-based content on the Internet. In its response, the Commission stressed that it is seeking a uniform legal approach within the EU framework of the Digital Services Act. Ultimately, the Commission was asking the French Republic to suspend the national legislative procedure (C(2019) 8585 final of 22nd November 2019).

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/C 83/01). 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 concern and submit complaints regarding the draft act submitted for notification. The reasons why the Federal Republic of Germany has submitted two drafts for the extension and revision of the NetzDG



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within a short period of time, instead of becoming involved in the European legislative process, remain unclear.

Conclusion

eco is repetitive committed to the fight against illegal content and supports the fight against illegal content online.

The draft act submitted for notification has been revised after criticism from the companies and associations concerned, but the revisions are not sufficient to dispel the concerns regarding the draft act. As a result, numerous amendments conflict with established requirements of European law.

With the introduction of the NetzDG in 2017, the legislator had already promised an evaluation of the law and its effects. In the case of the draft act on amending the NetzDG, a second draft act was submitted for notification within a short time, although an evaluation about the effects of the original introduction of the NetzDG is still not available. Through the draft act, the legislator is transferring further obligations to social network operators.

Even in the recent amendment of the NetzDG, the country-of-origin principle is still disregarded. It is no longer acceptable that the German legislator introduces what was designed an exception for individual cases to become a permanent solution to deal with potentially illegal content. Similarly, the disregard of the existing liability regime (Art. 14 and 15 of the E-Commerce Directive) is questionable and requires a critical inspection by the EU Commission.

Moreover, the submitted draft act conflicts with general principles of human and fundamental rights of the European Union. The obligations for social network operators created by the NetzDG affect the right to a fair trial of every person, as guaranteed by Art. 6 of the European Convention on Human Rights. The large-scale scope of obligations will again be expanded through the submitted draft act. In parallel, social network operators are faced with heavy fines for possible breaches of duty. As a result, there is a risk that the higher fines will impair freedom of opinion and information under Art. 11 of the Charter of Fundamental Rights of the European Union (2012/C 326(02), as well as being a violation of the freedom to conduct a business under Art. 16 leg cit.

About eco

eco – Association of the Internet Industry e. V. is an advocate for and promoter of all companies that create economic value with or on the Internet. The association represents more than 1,100 member companies. These include ISPs (Internet Service Providers), carriers, hardware and software suppliers, content and service providers, and communication companies. eco is the largest national Internet Service Provider association in Europe.