

## Recommendations on the German bill “Improving Law Enforcement on Social Networks” (NetzDG)

European Digital Rights ([EDRI](#)) is an association of [civil and human rights organisations](#) from across Europe. We defend rights and freedoms in the digital environment.

Information technology has a revolutionary impact on our society. It has boosted freedom of expression and democracy but has also led to new approaches to surveillance and is increasingly used to impose restrictions on fundamental rights.

On 27 March, the Federal Republic of Germany sent to the European Commission a draft of a law that would change the way social networks deal with online content that has been accused of being a breach of their terms of service and/or being illegal.

This law contravenes Article 14 of the E-Commerce Directive (2000/31/EC) which provides a liability exception for online intermediaries, when they act expeditiously to remove illegal content, according to a notice-take-down procedure. The German draft law instead, provides disproportionate fines for social networks that do not delete within 24 hours “*clearly violating content*” or within a week “*violating content*”. There is no indication of how a decision is to be made on what “clearly violating content” or “violating content” might be. It is also far from clear what characteristics would be used to definitively class a service as being a social network. As a result, it is easy to see how the fear of high fines will bring platforms to delete and block any content that appears to generate a risk of being punished under this new law. This, of course, would seriously hinder the fundamental right to freedom of expression and opinion. Indeed, the entirely predictable impact of the law, if enacted, would be a breach of key European Court of Human Rights case law in this area:

*Freedom of expression constitutes **one of the essential foundations of such a society**, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness **without which there is no “democratic society”**. Handyside vs UK, European Court of Human Rights case 5493/72), paragraph 49 (emphasis added)*

This law would not be only a problem from a human rights perspective, but also from a market perspective. Rules like this would create even more uncertainty for all the European social networks that would face new, different laws for every Member State, moving away from the idea of a European Digital Single Market. Regulating the Internet as if it consisted only of Facebook or Google will create an internet that consists only of Facebook and Google.

EDRi recommends abandoning the draft law. It would set a dangerous precedent, on both a European and global perspective. EDRi is not alone in this call. The UN Rapporteur on Freedom of Opinion and Expression David Kaye<sup>1</sup>, other civil society organisations<sup>2</sup>, industry<sup>3</sup>, academia<sup>4</sup> and even the legal services of the Bundestag<sup>5</sup> have raised serious concerns about this bill.

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1 <http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1-2017.pdf>

2 E.g. <https://digitalegesellschaft.de/2017/04/allianz-meinungsfreiheit/>  
<https://edri.org/eu-action-needed-german-netzdg-draft-threatens-freedomofexpression/>  
<https://edri.org/reckless-social-media-law-threatens-freedom-expression-germany/>  
<https://www.article19.org/resources.php/resource/38723/en/germany:-draft-bill-on-social-networks-raises-serious-free-expression-concerns>  
<https://cpj.org/blog/2017/04/proposed-german-legislation-threatens-broad-intern.php>  
<https://cdt.org/blog/german-proposal-threatens-censorship-on-wide-array-of-online-services/>

3 E.g. <http://www.ccianet.org/2017/05/european-civil-society-and-technology-industry-associations-ask-european-commission-to-act-on-german-hate-speech-law/>

4 <https://www.uni-goettingen.de/en/305793.html>

5 <https://edri.org/german-social-media-law-sharp-criticism-from-leading-legal-expert/>

5 <https://www.bundestag.de/blob/510514/eefb7cf92dee88ec74ce8e796e9bc25c/wd-10-037-17-pdf-data.pdf>

## I. Digital rights concerns

### Art. 1 - Scope

#### 1.1 The definition of Social Network is too wide

- *The NetzDG applies to telemedia providers who operate commercial platforms that allow users to exchange or share any kind of content with other users or make such content accessible to other users ("Social Network"). [...]*

The first problem comes with the scope of the draft law. The indication of what is a social network is very wide and generates **legal uncertainty**.

According to this definition, lots of online services could fall under the umbrella of "social network". In fact, private messenger platforms like Whatsapp, Facebook Messenger, Skype, Viber, Line, Telegram, e-mails themselves (and the list could go on further) let users upload text, pictures, files and video and make these contents accessible to other users. This would mean that these companies would have to analyse all our private messages, **with a profound impact on users' privacy and freedom of expression and opinion**, among other rights and freedoms.

Finally, this provision is not compatible with Article 14 of the E-Commerce Directive that provides an exception to the intermediary liability for all the internet services providers that are liable only if they do not act promptly after a notice. This law creates new, vertical obligations meaning that neither there is an imperfectly overlap between the laws governing the possibly illegal material and the companies covered by the two instruments.

This overlaps a relatively clear horizontal framework with a national vertical instrument whose scope regarding the companies and the types of illegality covered is significantly less clear.

#### 1.2 The indication of 2 million users is not sufficient

- *The operator of a Social Network is not obliged pursuant to Sect. 2 and 3 if the number of its users is under 2 million.*

Although the German legislator added the prerequisite of 2 million users in order to narrow the number of platforms that will fall under the new law, there is **an unacceptable level of uncertainty**.

The reference to the number of users can't be considered a credible way to identify relevant social networks.

First of all, the previous version of the draft provided that the users had to be registered while the new version sent to the European Commission no longer has **the word "registered"**. This means

that even the definition of users is far too precise. Many businesses use Facebook as their web presence, which people can visit without being a registered user. Who is a user of a social network if no registration is required? How should the number of users be counted? Could a user be someone who reads public tweets and posts on Facebook without being logged in? In this case, it would be more a viewer than a user, as for journalistic websites. A viewer can only read content but he/she can't interact with it leaving a comment or sharing it through the web. A viewer can't use content.

It is not clear why the word "registered" has been deleted since this decision brings more uncertainty than before, unless that was the intention, of course.

Secondly, is this limit **assuming that these users are active users?** Because it's not always the case. There could be a social network with 10 million registered users but only 100,000 active users and it would be treated like the one with 2 million registered users. Such services do not require payment, which means that they have huge numbers of dormant accounts or accounts of dead people.<sup>6</sup>

Let's think about a social network like MySpace that, after some golden years has fallen apart. It is likely that the major part of its registered users did not delete their accounts. The direct consequence of this provision is that networks with vastly fewer than two million active, registered users will be covered, contrary to the drafters' own proportionality assessment, such as it is.

Thirdly, many people have different accounts on the same social network and there are many social networks who suffer the presence of bots, which are fake accounts run by software. Recent research<sup>7</sup> found out that 9% to 15% of Twitter accounts are actually bots. For Twitter this corresponds to 48 million users.

Finally, if the way to identify a German user is the IP address, how should the companies count users who log-in through a VPN?

### 1.3 The German Criminal Code has to be updated

*Violating content under Sect. 1 para. 1 is content that violates Sect. 86, 86a, 89a, 90, 90a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b, 184d, 185 to 187, 241 or 269 of the German Criminal Code ("Violating Content").*

The definition of violating content refers to the content that violates several norms of the German Criminal Code.

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<sup>6</sup> See <http://www.newsweek.com/dead-facebook-users-will-outnumber-living-2098-434682>

<sup>7</sup> <http://www.cbsnews.com/news/48-million-twitter-accounts-bots-university-of-southern-california-study/>

As highlighted by EDRi-member Article 19's analysis of the bill<sup>8</sup>, many of these norms contravene International Human Rights law. In particular, they still punish defamation under criminal law instead of civil law and, as affirmed by the Human Rights Committee, imprisonment is never an appropriate penalty for defamation.

## Art. 2 - Reporting

Article 2 contains an attempt at good reporting provisions. Requiring a quarterly report on the activities implemented by social networks to prevent violating actions is a provision that would enhance transparency, consumer trust and a public-private collaboration, if it were to work in the way imagined by the drafters. However, it appears far more likely that the vast majority of deletions will be classified as "community guideline" breaches as that option avoids accusing a user of a criminal offence and avoids a recognition that the platform hosted criminal content.

Moreover, the bill contains no similar transparency reporting obligations on public authorities or "trusted reporters".

## Art. 3 - Handling Complaints about Violation Content

### 3.2 Still, legal uncertainty

*(2) The procedure shall procure that the operator of the Social Network*

1. [...]
2. *deletes or blocks content that is a clear [offensichtlich] violation within 24 hours upon receipt, unless the operator has agreed to a longer period of time with the competent law enforcement authority;*
3. *delete or block any Violating Content within 7 days upon receipt of the complaint;*
4. [...]
5. *without undue delay [unverzüglich], inform claimant and the user about any decision and provide them with reasoning and*
6. *delete or block any copies of the Violating Content on the platform without undue delay*

The German legislator did not give any indication on how to recognise a "clear violation". Moreover, it asks social networks to remove content within 24 hours when they find a "clear violation". This could lead to at least two opposite consequences:

1. Social networks will diligently argue, where appropriate, that in their opinion there is no clear violation.

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<sup>8</sup> <https://www.article19.org/resources.php/resource/38723/en/germany:-draft-bill-on-social-networks-raises-serious-free-expression-concerns>

2. For the fear of a fine, they will treat everything as a clear violation without appropriate analysis.

In both cases, the risk of over-compliance and arbitrary censorship is high since the fines can go up to 5 million Euro. Specially for those social networks that are not online giants (eg. Facebook, Google, Youtube, etc.), it will be easier to delete risky content on the basis of terms of service instead of spending hundreds of thousands Euro in training and hiring specialised staff (who, after all of that investment, still offer no guarantees of protection from the law). This, of course, will eliminate the possibility of new European social networks that would like to enter the market, hindering competition.

Even if an obligation of information to the user who sees his/her content deleted is provided, there is no provision of a right of appealing this decision. This is unacceptable and contravenes the fundamental right of an “effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”<sup>9</sup>. Furthermore, it would be a major step towards the privatisation of justice, ruled by private companies, that is not acceptable in a State that is democratic and respects the rule of law principle. In addition, as provided for by art. 3(2)6, the social network would be obliged to delete the content and any copy on the platform (i.e. it would be obliged to have content filters). This means that even if the user had posted a legal content, that content will be gone forever. This has a profound effect on freedom of expression and opinion.

## Art. 6 – Transition Provisions

*The report pursuant to Sect. 2 is due for the first time regarding the second annual quarter after the NetzDG enters into force.*

*The procedures pursuant to Sect. 3 shall be implemented within 3 months after the NetzDG enters into force.*

*The representative pursuant to Sect. 5 must be appointed within one month after the NetzDG enters into force.*

The timing to comply with this law is simply implausible, except for internet giants, yet again discriminating against European companies. As stated above, regulating the Internet as if it consisted only of Facebook or Google will create an internet that consists only of Facebook and Google.

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<sup>9</sup> Art. 8, Universal Declaration of Human Rights

## II. Single market concerns

Despite Germany's claim that the "draft has no significant impact on international trade", EDRi argues that these new rules will hinder competition between EU and US-based companies (among others).

As highlighted in this paper, the only chance for complying with the law is to have the economic capacity to hire and train the staff, and only the very big companies can afford that kind of effort<sup>10</sup>. This will impede new European businesses to enter the market, leaving a small number of US companies to deal with our data and content forever, based partly on fears of the law and partly imposing US mores and reflecting domestic US political concerns.

As pointed out by EDRi-member DigitaleGessellschaft<sup>11</sup>, there is also an incompatibility between the German bill and the E-Commerce Directive that would weaken the Digital Single Market.

First, this draft is addressed only to specific online service providers. This choice is in contrast with the aim of the E-Commerce Directive that with art. 14 regulates their liability for the content uploaded by users in a more predictable, horizontal way.

Second, the bill is not compatible with art. 3.2 E-Commerce Directive. The draft does not differentiate between domestic and EU companies. It says that, if it fulfils the requirements provided, the company will have to respect the new law. But Art. 3.2 E-Commerce Directive says that "Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State"<sup>12</sup>. The exceptions of Art. 3.4 do not apply because the prosecution of criminal offences, the protection of minors, the fight against incitement can be considered an exception to art. 3.2 only when there is no other way to solve these problems.

It seems more than the German government decided to pass the ball to social networks instead of finding the right solution for addressing crime online.

In conclusion, this law would be an obstacle for those Member States that legitimately would like to offer their services in Germany.

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<sup>10</sup> <http://www.bbc.com/news/technology-39793175>

<sup>11</sup> [https://digitalegesellschaft.de/wp-content/uploads/2017/04/Stellungnahme\\_TRIS\\_NetzDG\\_DigiGes.pdf](https://digitalegesellschaft.de/wp-content/uploads/2017/04/Stellungnahme_TRIS_NetzDG_DigiGes.pdf)

<sup>12</sup> Art. 3.2, E-commerce Directive, [2000/31/EC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0031)

### III. Key recommendations

EDRi recommends the rejection of the German Bill. We appreciate the efforts of the German government to request for more mandatory reporting and more transparency by the Social Networks. However, these alone will not solve the current problems faced.

As it is, this law would be a danger for users' rights, such as freedom of expression and opinion and the right to privacy, and a dangerous precedent for other Member States. It would also hinder competition between European and foreign businesses.