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OPINION

on the draft bill to amend the German Network Enforcement Act (NetzDG)

Berlin, 17th February 2020

On 28th January 2020, the German Federal Ministry of Justice and Consumer Protection (BMJV) published a further draft bill for the amendment of the German Network Enforcement Act (NetzDG) and put it out into the public domain for discussion. The aim of the present draft is to increase user-friendliness in the complaints procedure, to strengthen the information content or the comparability of transparency reports, and to create regulations for out-of-court settlement of disputes. The amendments to the NetzDG are also intended to transpose Directive 2010/13/EU on audiovisual media services into national law. Hereafter, this opinion will refer to the draft bill as the newNetzDG.

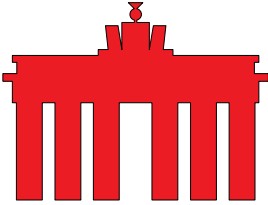
eco – Association of the Internet Industry has critically evaluated the original NetzDG from the outset and, in the revision now presented, sees no solutions offered for the problems and concerns it has previously identified. Questions arise as to what concrete practical experience the BMJV is basing the reform on. Although a legal evaluation of the NetzDG was commissioned last year and a survey of social network operators was carried out in December 2019, it is still unclear as to which concrete and verifiable practical experience the amendments proposed in the draft bill are based upon.

I. General Comments

eco has intensively monitored and been engaged in the introduction and further development of the NetzDG, and actively contributed to the debate on its content. With the presented draft bill, the BMJV is endeavoring to improve the NetzDG from the point of view of both the legislator and users.

What is specifically planned is the strengthening of user-friendliness in the complaint process, improved comparability of the transparency reports, and the creation of possibilities for out-of-court settlement of disputes. In eco's opinion, the proposed changes would lead above all to a considerable expansion of the existing obligations for operators of social networks. Here, a fundamental discussion is needed as to whether what were formerly state tasks – such as the identification and classification of persons who make unlawful content available on the Internet (hereinafter referred to as uploaders), as well as victims – should in future actually lie to an even greater extent with private companies.

The following points should be taken into account in the deliberations on the proposed draft bill to amend the NetzDG:



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- The expansion of the existing obligations for operators of social networks must be critically evaluated. It was only in December 2019 that the responsible ministry, the BMJV, published the draft bill for an Act to Combat Right-Wing Extremism and Hate Crime, thereby proposing comprehensive amendments to the German Telemedia Act (TMG) and the NetzDG, among others. The draft envisages extensive powers for the criminal investigation and prosecution authorities. On account of its far-reaching powers, the draft bill has been heavily criticized from the standpoint of privacy, constitutional, and European law requirements. The concrete outcome of this reform bill cannot be conclusively assessed at present.
- At the same time, the adoption of this reform bill can be presumed from a related formulation in the amendment of Art. 1 newNetzDG in the present draft, where a reference is made to Art. 3a newNetzDG, which neither appears in the present legal text nor in the existing NetzDG.
- Although the proposed draft bill for the amendment of the NetzDG provides for extensive changes, these are accompanied in many places by considerable legal uncertainties for the operators of social networks.
- Finally, we would like to point out that Germany is acting on its own in terms of regulation, both with the NetzDG, and with its planned revision laid out in the current draft, in spite of the fact that the EU Commission is considering a corresponding legal act at European level. In this context, reference should be made to the EU Commission's opinion of 22 November 2019 (C (2019 8595 final)), which deals with the French legislative procedure for combatting hate content on the Internet, which has been presented for consultation. The EU Commission has asked France to postpone its legislative initiative, as the Commission would like to take action itself and take the initiative for a European legal act.

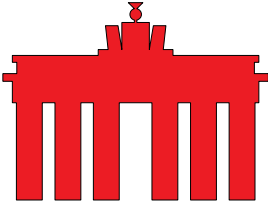
II. Assessment of the draft bill

- **Strengthen the comparability of the transparency obligations (Art. 2 newNetzDG)**

With the revision of the existing legal framework, the legislator intends to increase the information content and the comparability of the transparency reports in accordance with Art. 2 (2) newNetzDG.

Information on automated content recognition methods

The legislator wants to oblige the operators of social networks to provide information on the use of automated content recognition procedures in the future. The information required includes the type, scope, and functionality of the procedure used. According to current knowledge, there are no valid information on the accuracy of automated content recognition processes. As a consequence, the use of automated procedures cannot be considered successful. In addition, there is a need for further discussion of the information content that the legislator intends to generate from these statements. It is also important to remember that detailed information on the type and functioning of automated processes in particular presents the companies concerned with major challenges. Under certain circumstances, there is a risk that social network operators may disclose applicable trade secrets with the information on the type and functioning of automated processes. eco doubts that such a far-reaching intervention in the operational business activities of social network operators is necessary.



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Details of the complaint process

According to Art. 2(2)(3) newNetzDG, the operators of social networks should in future make representations regarding the complaint process. In accordance with the wording of the law, the following descriptions should be included in particular;

- information on the transmission of complaints,
- designation of the decision criteria for the evaluated contents of the complaint and,
- descriptions of the examination procedures.

Although the legislator explains its intention to obtain more detailed information on the application of the NetzDG and the community standards applicable within the network in the explanatory memorandum, it remains unclear what conclusions are to be drawn from these findings.

Findings on the classification of uploaders and victims of illegal content

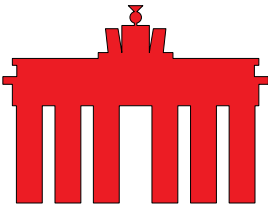
In the future, according to Art. 2(2)(12) & Art. 2(2)(13) newNetzDG, social network operators should collect and classify more detailed information on uploaders and the alleged victims of illegal content and present it in more detail within the scope of the reporting obligation. eco considers the demand of the BMJV to be questionable. First of all, there is a need for further discussion as to whether the operators of social networks obtain sufficient and reliable findings for classifying various “groups of victims and offenders” on the basis of the complaint procedure alone. Furthermore, it must be clarified whether it is or should be the actual task and duty of social network operators to classify and evaluate “groups of offenders and victims” of illegal content. The identification and classification of “victims and offenders” is to be assigned to the sovereign sphere of responsibility of the state and must also be critically questioned due to its particular sensitivity. The fact that such a sensitive task should be rolled out to social network operators in a similar way to the obligation to report under Art. 3a newNetzDG should be rejected in principle.

Requirement of a written justification in case of significant deviations during the reporting period

Finally, the BMJV is planning to introduce an obligation to provide written justification if there are significant deviations/changes between two transparency reports. First of all, one point of criticism is that the legislator does not specify what is meant by a significant change. The planned legal provision obliges social network operators to provide information that is internal to the company and may be classified as negative in the course of the reporting obligation. However, under certain circumstances, negative and self-incriminating information may justify and entail action by the German Federal Office of Justice (BfJ). The proposed amendment must be rejected in light of both this and the currently unclear impact assessment.

• Strengthening of the user-friendliness of the complaints process (Art. 3 newNetzDG)

Within the framework of Art. 3 newNetzDG, the requirements for the processing and handling of complaints for social network operators are specified in more detail. The BMJV



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foresees the existing complaint process being made more user-friendly in order to be able to take more targeted action against illegal content in the future. eco would like to point out here that, in 2019, only an average of 24.14 percent of all complaints received on Facebook, Twitter, and YouTube actually resulted in the deletion or blocking of content in accordance with the NetzDG. A detailed analysis shows that more than 1.6 million complaints from users and complaint bodies did not lead to any action being taken by social network operators. The Complaints Office operated by eco has had similar experiences. The [2019 annual report](#) of the eco Complaints Office shows that only 17.2% percent of all reports (excluding spam) were classified as justified and resulted in the deletion or blocking of the content. Therefore, when creating simplified access and a facilitated complaints procedure, it is important to ensure that no potential for abusive behavior is created through the complaints function, for example in the event of personal differences.

Requirements for the complaint process

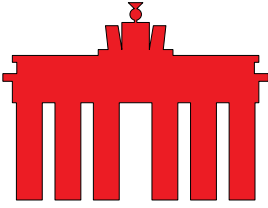
In order to oblige the operators of social networks to set up a user-friendly complaint process, an amendment to Art. 3 (1) newNetzDG is planned. eco is critical of the fact that no legal definition is created within the piece of draft legislation for the added term “easy-to-use... procedure.” The requirements of easy operability will only be characterized in more detail in the course of the explanatory memorandum. The legislator should ensure the greatest possible legal certainty for social network operators and supplement the existing legal framework with a legal definition.

Avoiding double reporting to criminal investigation and law enforcement agencies

In addition, numerous additional requirements for the complaints procedure are provided for in Section 3(2) newNetzDG; no. 5 (c) of which is intended to create a duty of information for the social network operator, on the basis of which the network operator will inform the complainant, among other things, about the possibility of filing a criminal complaint. In the experience of the eco Complaints Office, the legislator's efforts should aim to ensure effective criminal investigation and prosecution of illegal content. The obligation to inform may increase the risk of double reporting (here: by the complainant and the operator of a social network) of identical content to the competent authorities. In eco's opinion, the risk of double reports should be reduced as much as possible to ensure effective criminal investigation and prosecution.

Requirements for institutions of regulated self-regulation

The requirements and conditions for the operation of a facility of regulated self-regulation will in future be standardized above all by Art. 3 (6 -11) newNetzDG. On the basis of Paragraph 7, the BfJ can issue a time-limited recognition decision for a regulated self-regulation facility. eco rejects the time limit on the recognition decision by the BfJ. Although the legislature declares its intention that each recognition decision should be valid for at least five years, it is doubtful whether medium-term planning security is sufficient to create an incentive for the establishment of an institution of regulated self-regulation. According to Paragraph 8, the operator of an institution of regulated self-regulation is obliged to inform the BfJ of changes in circumstances relevant to recognition. Both the context of the text of the Act and the explanatory memorandum to the text of the Act leave open which circumstances are deemed to be relevant for recognition. Must financial, personnel, or organizational circumstances be taken into account in this context? And if so, what should be the scope of the changes? The BMJV should not leave the institutions of regulated self-



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regulation in the dark about such a central issue and should, at the very least, make appropriate amendments in the explanatory memorandum.

- **Establishment of procedures for objections and dispute settlement (Art. 3b and Art. 3c newNetzDG)**

With Art. 3b and Art. 3c newNetzDG, the BMJV intends to create procedures for the settlement of disputes about content previously reported by a complainant. Art. 3b newNetzDG obliges operators to set up a procedure to process objections as part of the complaint process. The objection entitles the complainant and the uploader to a review of the preceding decision on previously reported content. Art. 3c newNetzDG allows for the possibility of establishing and operating arbitration bodies.

Provision of an objection procedure

With the obligation to provide a procedure to process objections, social network operators will need additional financial, organizational, and personnel resources. First of all, it should be noted that social network operators have made considerable investments in recent years in setting up and optimizing the existing complaint processes. The fact that now, in addition to the notification obligation discussed in December, further requirements for social network operators are being formulated is to be rejected. Instead of formulating more and more duties at the expense of social network operators in the course of the revision, the legislator's efforts should aim at establishing and equipping the authorities for criminal investigation and law enforcement in such a way that effective prosecution is ensured.

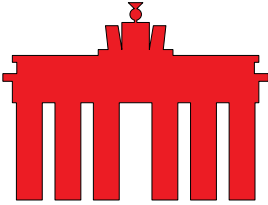
In addition, operators of social networks are to be given the possibility of involving an arbitration body organized under private law. The establishment or integration of arbitration bodies requires further financial investments by the operators of social networks, which eco considers critical. In this context, it is important to remember that the complaint process with all the obligations, voluntary measures, etc. discussed in recent months (here: revision of the complaint process, adjustments to the regulated self-regulation, reporting obligation according to Art. 3a newNetzDG, objections, arbitration body) will increase in complexity. At the same time, the actual prospects of success of all these proposals remain completely unilluminated.

Legal uncertainty from the objection procedure

According to the assessment of eco, the deliberations on Art. 3b(2) newNetzDG were not concluded and in the current stage of discussion are leading to considerable legal uncertainty for the operators of social networks. Firstly, the fundamental question should be raised as to whether the operators of social networks are in fact suitable agents to be able to bring about a neutral decision in contentious cases. In principle, such a decision should be triggered by an external and independent post or in the best case by the courts.

In addition, it is problematic that making use of the objection procedure requires no justification on the part of the complainant or uploader. A procedure for making an objection should in no respect offer potential for the abuse of the rights granted. eco therefore proposes that the making of an objection by the uploader or the complainant should be coupled with a written justification.

Creation of a put-back procedure



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Equally, in conjunction with this, there is a need for clarification as to whether the complaints procedure as defined in Art. 3 newNetzDG and the objection procedure as defined in Art. 3b newNetzDG can be carried out within the 10-week retention period in Art. 3 (2)(4) newNetzDG. In this context, whether the use of put-back procedures are in fact necessary and helpful should be debated. In principle, it follows that if a piece of content is deleted by the operator of a social network, this should count as permanently destroyed at the expiration of the 10-week retention period. Recovery of the deleted content is then technically no longer possible. Should the lawmaker actually require the use of put-back procedures in future, unambiguous and legally-secure framework conditions for the operators of social networks should be created.

- **Country-of-Origin principle (Art. 3e newNetzDG)**

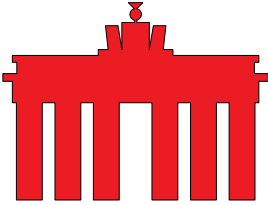
With the draft bill, amendments are proposed on the basis of the AVMS Directive. Alongside the large social networks, video-sharing platforms are in future also to be taken into the scope of application of the NetzDG. Depending on the size of the video-sharing platform and the country where it is headquartered, these are to be subject to different obligations according to the NetzDG. Essentially, this results in a differentiation and different rules depending on the principles of country of origin and *lex loci solutionis*. According to the explanatory memorandum, this differentiation should represent the implementation of areas coordinated according to Art. 28b AVMSD and those not. This approach would result in the stipulations of the NetzDG (obligation to delete (Art. 3), obligation to notify (Art. 3a) and obligation to report (Art. 2)) not being applicable to user-generated videos with content defined as criminal in Articles 111, 130, 131, 140, 166, and 184b of the German Criminal Code in the case of a video-sharing platform which is headquartered not in Germany, but in another EU Member State. The consequences of such a differentiation need to be taken into account.

eco assesses critically the chosen division into the principles of country of origin and *lex loci solutionis*. With the approach proposed, the development of an efficiently-designed complaint procedure with long-term impact will be made more difficult. In this context, it is debatable whether such complex legal provisions are conducive to user-friendliness. To what extent this differentiation and different rules according to the principles of country of origin and *lex loci solutionis* is sensible and expedient is questionable. At this point, it is again clear that the legislator should avoid complex national unilateral action, and should become actively involved in the process initiated at European level – and therefore harmonized in its impact – for the development of an appropriate legal framework.

III. Summary

Overall, the draft bill proposed by the BMJV is to be assessed critically, because it is not suitable to alleviate the existing problems and concerns that have arisen since the NetzDG came into effect. While the legislative initiative may aim at an objective worthy of support, namely increasing the user-friendliness, the draft will in many places – e.g. in the prerequisites for the complaints procedure, decision-relevant changes in the establishment of regulated self-regulation, or details on the automated content recognition process – nonetheless cause considerable legal uncertainty for the operators of social networks.

Also, the legislator leaves important questions regarding the protection of victims and anonymization unanswered for individual steps of the complaints procedure. In the course of the complaints procedure, it is intended that the uploader be informed of the complaint received. In this context, the legislator should safeguard the protection of the victim and



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find secure and trustworthy standards for the anonymization of personal data in the complaints procedure.

With regard to the provision of a put-back procedure and the measures for the classification of uploaders and victims of illegal content, there is a need for further discussion. Equally, it is questionable whether the proposed provisions on the principle of the country of origin analogous to the AVMSD will, in practice, result in an increase of user-friendliness or whether this will not rather lead to greater uncertainty regarding the complaint instrument on the user side. Finally, it should again be mentioned that the EU Commission, in its position statement on the introduction of a French law to combat hate-based content, announced its own activities and presaged the rapid adoption of corresponding EU legal regulations. A corresponding level of legislative restraint on the part of the Federal Republic of Germany would therefore be desirable.

About eco:

With over 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. eco's key topics are the reliability and strengthening of digital infrastructure, IT security, and trust, ethics, and self-regulation. That is why eco advocates for a free, technologically-neutral, and high-performance Internet.